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**Review of progress made in the promotion and  
implementation of the right to development**

## **Second revised text of the draft of the convention on the right to development, with commentaries\***

*Chair-Rapporteur: Zamir Akram (Pakistan)*

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\* The present document is being issued without formal editing. It was prepared by Mihir Kanade on behalf of the Expert Drafting Group, and has been reviewed by the Expert Drafting Group and the Chair-Rapporteur of the Working Group on the Right to Development.



## Introduction

1. In its resolution 51/7, the Human Rights Council requested the Chair-Rapporteur to submit a second revised draft convention to the Working Group at its twenty-fourth session for intergovernmental negotiation and, following that process, to submit the final draft text of the convention on the right to development to the Human Rights Council.
2. In the same resolution, the Human Rights Council requested the High Commissioner to engage experts for their continued provision of necessary advice, input and expertise to the Chair-Rapporteur of the Working Group in the fulfilment of his mandate and the preparation of the second revised draft of the convention on the right to development, to facilitate the participation of the experts in the twenty-fourth session of the Working Group and to provide advice with a view to contributing to discussions on the elaboration of a draft convention on the right to development, as part of the implementation and realization of the right to development.
3. At the request of the Chair-Rapporteur of the Intergovernmental Working Group on the Right to Development, the Office of the United Nations High Commissioner for Human Rights convened a meeting of the drafting group of experts, which was held from 19-20 September 2022 in Geneva. The members of the drafting group were Diane Desierto (Philippines), Koen de Feyter (Belgium), Mihir Kanade (India), who acted as Chair-Rapporteur of the meeting, Margarette May Macaulay (Jamaica) and Makane Moïse Mbengue (Senegal).
4. During the meeting, the drafting group considered all comments and textual suggestions made during and received after the twenty-third session of the Working Group. The Chair-Rapporteur of the Working Group attended the meeting and shared his observations on the comments and textual suggestions and provided further guidance to the drafting group.
5. On the last day of the in-person meeting, on 20 September 2022, the drafting group adopted the draft text ad referendum. On 4 October 2022, Mr. Kanade submitted on behalf of the drafting group the second revised text of the draft convention on the right to development together with commentaries to the Chair-Rapporteur of the Working Group.
6. The Chair-Rapporteur of the Working Group subsequently reviewed and endorsed the second revised text of the draft convention on the right to development.
7. The second revised draft convention reflects the deliberations of the Expert Drafting Group (EDG) on the submissions from States, agencies and other specialized bodies within the United Nations, international organizations, and civil society organizations. All submissions were extensively considered and deliberated on by the EDG before revisions were undertaken. The Secretariat of the WGRD prepared the compilation of comments and textual suggestions on the draft convention on the right to development (A/HRC/WG.2/24/CRP.1). The second revised draft convention contextualized such submissions in light of international law and international law jurisprudence, as well as the treaty practices, interpretive elaboration and commentaries as well as decisions of other treaty mechanisms interpreting human rights treaties, within the United Nations human rights system. Every attempt has been made to ensure that any substantive revisions are strictly grounded on, or consistent with, international law and applicable international law jurisprudence.
8. As with the first revised draft, the EDG's deliberations with respect to elaboration of the second revised draft were guided by the following three considerations.
  - (a) Proposed revisions or amendments that strengthened and improved the text, consistently with international law, were accepted. Recommendations that ultimately weakened the text due to inconsistency with international law, or by introducing further challenges to the effective implementation of the draft Convention, were cautiously reviewed and scrutinized by the EDG.
  - (b) Proposed revisions that simply repeated or duplicated provisions in the draft Convention were not accepted. Any proposed revisions that would be contrary to existing international

law or would potentially result to a conflict or outright breach of existing international law were avoided.

(c) Proposed revisions that sought contextual elaboration of the draft Convention text were noted for possible inclusion in the commentaries to the second revised draft convention. Only suggestions that were relevant to the context of the provision concerned were accepted.

9. The following text contains the second revised draft Convention on the Right to Development with commentaries, prepared by Dr. Mihir Kanade, on behalf of the EDG. Each provision highlights the changes made to the first revised draft that was considered by the WGRD during its twenty-third session. The commentaries below each provision are organized into two distinct sections. The first section reflects the consideration by the EDG of the modifications on each provision suggested by respondents during and pursuant to the twenty-third session of the WGRD. The second section provides the legal commentary to the text of each provision as revised and reflected in this document.

10. As with the zero draft and the first revised draft, this second revised draft convention is characterized by several important features. As a starting point, every possible attempt has been made to base the language of the preamble and the text on existing international legal instruments, including human rights treaties and relevant declarations and resolutions adopted by States. Useful reference has also been made in this respect to comments and recommendations made by human rights treaty bodies, jurisprudence of international and regional courts, various reports of the International Law Commission and interpretative guidance provided by experts. No concepts, norms, rights or obligations have been created *de novo*.

11. The content as well as structure of this draft convention, including several of the substantive provisions, draw significantly from the Universal Declaration of Human Rights (UDHR) and the nine “core human rights treaties”,<sup>1</sup> viz. International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), International Convention on Elimination of All Forms of Racial Discrimination (CERD), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and Convention on the Rights Persons with Disabilities (CRPD). In particular, the draft convention benefits significantly from the scheme of the CRPD, including its final provisions.

12. At the same time, this draft convention does not compartmentalize itself into strict models of treaty styles.<sup>2</sup> As will be evident from the commentaries below, the specific nature of the right to development necessitates deriving the most appropriate features from different templates. Thus, while the draft convention draws on standard human rights treaty models that focus on human beings as the right-holders and States as corresponding duty-bearers, it also appropriately incorporates inter-State reciprocal obligations found in standard statist-type treaties. Similarly, the draft convention borrows significantly from features of framework conventions that typically focus on laying down principles, rights and general obligations and not so much on the details of regulation which can be developed subsequently in a phased manner through a Conference of the States Parties.<sup>3</sup> Indeed, for the most part, the draft convention restates existing norms and principles of international law in the specific context of the right to development while establishing a Conference of the States Parties to

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<sup>1</sup> OHCHR, *The Core International Human Rights Instruments and their Monitoring Bodies*, available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

<sup>2</sup> For an overview of the types and structures of existing treaties, see: Koen de Feyter, *Type and Structure of a Legally Binding Instrument on the Right to Development*, Research Group on Law and Development, University of Antwerp, 2019.

<sup>3</sup> For an in-depth discussion on how a pure framework convention on the right to development could be structured, see *Ibid.* Also see, Koen de Feyter, *Towards a Framework Convention on the Right to Development*, International Policy Analysis, Friedrich Ebert Stiftung, 2013.

permit future development as needed. There are no benchmarks or quantifiable targets pertaining to development that are incorporated in this draft convention.

13. This draft convention also builds on the United Nations Declaration on the Right to Development, 1986 (DRTD).<sup>4</sup> Every attempt has been made to adhere to its content and language. Only modifications necessary for adapting from a declaration to a legally binding instrument have been incorporated. Like the DRTD, and for reasons explained in the commentaries below, no one-size-fits-all definition of “development” is provided in the substantive provisions. However, the process of development and its attributes have been described in the preamble in a similar fashion as the DRTD.

14. The scheme of this draft convention benefits significantly from those portions of the 2010 Report of the high-level task force on the implementation of the right to development which are uncontroversial and universally accepted.<sup>5</sup> While not alluding to or incorporating the highly debated “right to development criteria and operational sub-criteria” drafted by the task force, this draft convention adopts the three levels of obligations on States related to the realization of the right to development which the task force identified as: (a) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction; (b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (c) States acting collectively in global and regional partnerships.<sup>6</sup> At the same time, this draft convention also adopts the contemporary three-pronged typology of obligations on States to respect, protect and fulfil human rights. In addition, this draft convention reaffirms existing obligations of international organizations and legal persons under international law.

15. This draft convention is divided into five parts, apart from the preamble. The preamble adopts a logical flow to its paragraphs informed by the evolutive trajectory of the right to development leading up to this draft convention. Part I comprises three opening provisions addressing the purpose of the convention, definitions for specific terms used and general principles that should guide the implementation of obligations by the duty-bearers. Part II focuses on the right to development itself and its right-holders. The four provisions therein comprise the content of the right and its relationship with the right to self-determination, other human rights, as well as with the general duty of everyone to respect human rights under international law. Part III then focuses on duties and duty-bearers. It does not create new obligations and only reiterates those already existing under international law. It begins with general obligations of States Parties and international organizations and then proceeds with provisions covering various important dimensions of the obligation to respect, protect and fulfil the right to development across all the three levels identified by the high-level task force. It pays special attention to the duty to cooperate. It also addresses specific aspects relevant to the realization of the right to development such as the prohibition of coercive measures, specific or remedial measures, equality between men and women, the contexts of indigenous peoples, measures to prevent and combat corruption, prohibition of limitations, impact assessments, statistics and data collection, international peace and security, sustainable development, and harmonious interpretation with other international agreements. Part IV sets up a *sui generis* mechanism for implementation of this draft convention by establishing two treaty bodies viz. the Conference of the States Parties and a subsidiary Implementation Mechanism comprising experts. Part V contains the final provisions.

16. The *sui generis* structure of the treaty bodies established in this draft convention departs from the traditional compliance, monitoring and enforcement mechanisms adopted vis-à-vis current core human rights treaties based on several important factors enumerated in the commentaries below. At the same time, it draws from best practices adopted in these human rights treaties as well as in treaties from other special regimes. In sync with the duty to cooperate underpinning the right to development, this *sui generis* mechanism is based on a cooperative model rather than an adversarial one. Most importantly, it takes into account the existence and continued relevance of the WGRTD, established by the erstwhile Commission on Human Rights in 1998 which continues to play an indispensable role in the

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<sup>4</sup> A/RES/41/128, adopted on 4 December 1986.

<sup>5</sup> A/HRC/15/WG.2/TF/2/Add.2 and Corr.1

<sup>6</sup> Ibid, annex, paragraph 1.

promotion of the right to development under the auspices of the Human Rights Council.<sup>7</sup> It also takes into account the establishment of the expert mechanism by the Human Rights Council through resolution A/HRC/42/L.36 adopted on 27 September 2019 “to provide the Council with thematic expertise on the right to development in searching for, identifying and sharing with best practices among Member States and to promote the implementation of the right to development worldwide”.<sup>8</sup> The structure is informed by the need to avoid duplication with existing human rights treaty and Charter based bodies as well as the multiple reporting obligations that States Parties already have, and to ensure best utilization of available secretarial and financial resources to support the new treaty bodies.

17. Both the Conference of the States Parties as well as the implementation mechanism envisaged under this draft convention pay special attention to the consideration of obstacles faced by the States Parties to the realization of the right to development, including those resulting from conduct of other States or international organizations, whether parties to the convention or not. The generation of comprehensive information on the obstacles that States Parties face, especially those emanating externally, is a significant value-added over existing mechanisms under other treaty bodies and avoids duplication. It also catalyses awareness of factors necessary for informed international cooperation to realize the right to development for all. These are also the reasons behind mandating the implementation mechanism, amongst other things, to review requests by rights holders to comment on situations in which their right to development has been adversely affected by the failure of States, whether parties or not, to comply with their duty to cooperate as reaffirmed and recognized under the draft convention. There is no complaints mechanism for individuals or groups included in the draft convention for reasons explained in the commentaries, without foreclosing the possibility of willing States Parties establishing one through an optional protocol at a subsequent stage. An inter-State dispute resolution procedure before the International Court of Justice (ICJ) is incorporated, however, this is subject to agreement between the parties to the dispute. No compulsory jurisdiction is vested in the ICJ under this draft convention for reasons outlined in the commentaries.

18. Taking into account the direct impact that several international organizations have on the right to development, the draft convention permits any international organization to also become a party. This includes regional organizations – especially, regional integration organizations – as well. However, for reasons explained in the commentaries, international organizations are not permitted to possess and exercise voting rights in the Conference of the States Parties.

19. Finally, the title for this legally binding instrument has been suggested as the “Convention on the Right to Development” following the titles of the seven core human rights treaties other than the ICCPR and the ICESCR. However, States may also consider naming the instrument as the “International Covenant on the Right to Development” drawing inspiration from the ICCPR and the ICESCR and to consciously elevate its status to the “international bill of human rights”.<sup>9</sup> This would not be without legal basis following Resolution 52/136 of 12 December 1997 adopted by the United Nations General Assembly (UNGA) affirming the appropriateness of inclusion of the DRTD in the international bill of human rights.<sup>10</sup>

<sup>7</sup> See article 2(c) and the commentary thereto. For details regarding the mandate and programme of this working group, see:

<https://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx>

<sup>8</sup> A/HRC/42/L.36, adopted on 27 September 2019, paragraph 29.

<sup>9</sup> OHCHR, *The International Bill of Human Rights*, Fact Sheet No.2 (Rev.1), available at <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

<sup>10</sup> See commentary to draft preambular paragraph (q).

## Second Revised Text of the Draft Convention on the Right to Development

### Draft convention on the right to development

#### *Commentary*

##### *A. Consideration of suggestions received:*

1. The title of the proposed legally binding instrument suggested by the EDG in the zero draft was “Convention on the Right to Development” following the titles of the seven core human rights treaties other than the ICCPR and the ICESCR. However, an alternative title – “International Covenant on the Right to Development” – drawing inspiration from the ICCPR and the ICESCR was also suggested by the EDG drawing inspiration from the ICCPR and the ICESCR and to consciously elevate its status to the “international bill of human rights”.<sup>11</sup>

2. In response to the zero draft, the Special Envoy of the UNSG on Disability and Accessibility suggested that the title of “International Covenant on the Right to Development” be preferred. A similar suggestion was made by All Win Network. The EDG discussed the relative preference of titles while elaborating the first revised draft and, on balance, recommended the title of “Convention on the Right to Development” while taking note of the alternative suggestion in the commentaries to the zero draft.

3. However, both during the twenty-third session of the Working Group as well as in written submissions received thereafter, many respondents strongly recommended titling the instrument as “International Covenant on the Right to Development”. These included Pakistan, South Africa, Iran, Panama, the Special Envoy of the UN Secretary-General on Disability and Accessibility, APG 23 on behalf of CINGO, and CETIM. In view thereof, and in view of the commentaries below, while the editorial rules of the United Nations documentation system do not permit an alternative title to be included in the text, the EDG proposes that Member States may consider both titles as alternatives, with a recommendation in favour of the title “International Covenant on the Right to Development”.

##### *B. Legal commentary on the text:*

1. As noted in the commentaries to the zero draft, the recommendation of naming the instrument as the “International Covenant on the Right to Development” has legal basis following Resolution 52/136 of 12 December 1997 adopted by the United Nations General Assembly (UNGA) affirming the appropriateness of inclusion of the DRTD in the international bill of human rights.<sup>12</sup> Although not entirely unanimous,<sup>13</sup> the resolution records the position of an overwhelming majority of States that the DRTD has a place in the same league as the UDHR, ICCPR and the ICESCR. It may be noted that although, in law, there is no difference between a “Convention” and a “Covenant”, in the practice of States related to human rights treaties, the latter term has thus far been reserved only for the ICCPR and the ICESCR in recognition of their special importance as part of the International Bill of Human Rights, whereas the other core human rights treaties have been titled as “Conventions”.

2. An alternative perspective, as indicated in the commentaries to the first revised draft, is that the title be maintained in the form of a “Convention” because the title “Covenant” may diminish the significance of subsequent modern human rights treaty developments that take the form of a “Convention”. However, the EDG recognizes that naming this instrument as a “Covenant” simply emphasizes its place within the “international bill of human rights” rather than diminish the status of other core human rights treaties. The EDG has continued to title the instrument as “draft convention on the right to development” in view of the editorial rules of the United Nations document management system which do not permit an alternative title to be suggested in the text above. However, the EDG reiterates its recommendation to prefer

<sup>11</sup> OHCHR, *The International Bill of Human Rights*, Fact Sheet No.2 (Rev.1), available at <https://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

<sup>12</sup> See commentary to draft preambular paragraph (q).

<sup>13</sup> The resolution was adopted with 129 States in favour to 12 against, with 32 abstentions. See record at <https://www.un.org/press/en/1997/19971212.GA9380.html>

the title “International Covenant on the Right to Development” in view of the normative justification above and submissions from various respondents.

## Preamble

### *The States Parties to the present Convention,*

#### *Commentary*

##### *A. Consideration of suggestions received:*

1. The preamble in the zero draft was structured to reflect three parts in the following order. Paragraphs one to eight of the zero draft captured the motivations for the convention. Paragraphs nine to twenty chronologically traced the evolutive trajectory of the right to development, including through legal instruments at international and regional levels. Paragraphs twenty-one to twenty-six reflected the objectives that the convention seeks to achieve.

2. Several respondents at the 21<sup>st</sup> session of the WGRTD, and Pakistan and the Catholic Inspired NGOs in their written submissions, recommended that the preamble should begin with the legal instruments at international and regional levels that trace the evolutive trajectory of the right to development, beginning with the Charter of the United Nations, as is the practice with the other core human rights treaties. While there were strong reasons meriting retention of the preamble as structured in the zero draft, the EDG accepted the recommendations in the interest of synergy with the core human rights treaties, and as such, the preambular paragraphs in the first revised draft were reorganized accordingly. This second revised draft retains the same structure.

3. During the 23<sup>rd</sup> session of the WGRTD as well as in the written submissions, there were several suggestions for incorporating new paragraphs in the preamble. On the other hand, Pakistan and the Russian Federation suggested that the number of recitals be reduced. With respect to the suggestions for new recitals, the EDG has considered relevant suggestions at appropriate places below bearing in mind the guiding questions noted in the introduction. As regards the second suggestion, the EDG acknowledges that shorter preambles can help reach consensus quicker. However, for reasons explained in the commentaries below, the EDG also considers each of the preambular paragraphs in the first revised draft to be important. As such, the EDG, while remaining receptive to suggestions for improvement to the text, also exercised caution in adding new or removing existing recitals.

##### *B. Legal Commentary on the text:*

1. As noted in the commentaries to the zero draft, the preamble of a legal instrument has been described as a “celebration of its text” – it “situates the text by providing a short biography of the one who is being celebrated, evoking the humble but honourable origins, the lofty ideals present even in infancy, the struggles, hardships and disappointments on the way to present status”.<sup>14</sup> The long evolutive trajectory of the right to development finally leading up to this draft convention has indeed witnessed all these stages which must be adequately reflected in this preamble. Of course, from a more technical perspective, this preamble, as any other, must fundamentally describe the purposes and considerations that States Parties ought to present as having taken into account while concluding it, including the foundation of their relevant past, present, and future relations.<sup>15</sup> The preamble of this draft convention aims to accomplish these objectives. Every paragraph included is an indispensable invitee to the celebration of the text of this draft convention on the right to development.

<sup>14</sup> Martti Koskenniemi, “The Preamble of the Universal Declaration of Human Rights”, in Gudmundur Alfredsson and Asbjorn Eide (eds.), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, The Hague, Martinus Nijhoff Publishers, 1999, at p.27.

<sup>15</sup> For an overview of the functions of a Preamble, see: Makane Moïse Mbengue, “The Notion of Preamble”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, online edition, Oxford University Press, 2009.

2. The preamble has been structured to reflect three parts in the following order. Paragraphs one to twelve chronologically trace the evolutive trajectory of the right to development, including through legal instruments at international and regional levels. Paragraphs thirteen to twenty-one capture the motivations for the convention. Paragraphs twenty-two to twenty-seven reflect the objectives that the convention seeks to achieve.

**Guided by all the purposes and principles of the Charter of the United Nations, especially those relating to the achievement of international cooperation in solving international problems of an economic, social, cultural, environmental or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction of any kind,**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation and Iran suggested that the word “all” be removed from the phrase “guided by all the purposes and principles”. As justification, the Russian Federation commented that it does not feel the need for its inclusion. It pointed out that the different international human rights treaties do not use the word “all” whenever the purposes and principles of the Charter of the United Nations are referenced. It further suggested that if the word “all” is retained, then the list that follows be deleted.

2. The EDG agrees with the suggestion for removing the word “all” solely for the reason that its inclusion is redundant, and its exclusion does not diminish the consideration that States are guided by each of the purposes and principles of the Charter of the United Nations. The special emphasis on international cooperation in solving international problems is at the heart of the Charter of the United Nations and obligations of States recognized thereunder. For reasons explained in the legal commentaries below, the emphasis has been retained.

3. The Russian Federation also recommended the deletion of the word “environmental”. It observed that “reference to environmental problems is not correct here, given the particular nature of the Right to Development as a stand-alone right. We believe that we should bring this into line with the Declaration of the Right to Development”. The EDG notes that the word “environmental” was included in the first revised draft pursuant to suggestions received. As the commentaries thereto acknowledged, this preambular paragraph is a direct reference to article 1(3) of the Charter of the United Nations, which does not employ the word “environment”. Indeed, “environment” and its derivatives are absent in the entire Charter of the United Nations since the environmental movement grew at the global stage only in the 1970s. Similarly, the concept of sustainable development to address environmental problems was adopted at the global level only in 1987 by the Brundtland Commission, one year after the adoption of the DRTD. As such, neither the Charter of the United Nations nor the DRTD had the prevailing circumstances for inclusion of “environment” in their respective texts. However, considering that the mandate of the United Nations to promote sustainable development is now read into article 1(3), the EDG had accepted the recommendation to incorporate “environmental” in the first revised draft. Progressive development in international law also supports the view that international cooperation in solving environmental problems is read into in the purposes of the Charter of the United Nations. For instance, the Stockholm Declaration,<sup>16</sup> the Convention on Biological Diversity,<sup>17</sup> as well as the United Nations Framework Convention on Climate Change,<sup>18</sup> stipulate that “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.<sup>19</sup> The United Nations General Assembly, in its

<sup>16</sup> Principle 21

<sup>17</sup> Principle 3

<sup>18</sup> Preambular paragraph 8

<sup>19</sup> See also article 5 of CBD titled “Cooperation” stipulating that “Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”

resolution establishing the United Nations Environmental Programme, recognized that “environmental problems of broad international significance fall within the competence of the United Nations system”,<sup>20</sup> and further that “international co-operative programmes in the field of the environment must be undertaken with due respect for the sovereign rights of States and in conformity with the Charter of the United Nations and principles of international law”.<sup>21</sup> Additionally, the 2030 Agenda for Sustainable Development acknowledges that States are “guided by the purposes and principles of the Charter of the United Nations, including full respect for international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome. It is informed by other instruments such as the Declaration on the Right to Development.”<sup>22</sup> As such, the EDG recommends retaining the word “environmental” in this paragraph.

*B. Legal Commentary on the text:*

1. Preambular paragraph 1 commences the first part of the draft preamble that chronologically traces the evolutive trajectory of the right to development, including through legal instruments at international and regional levels. All core human rights treaties commence their respective preambular references to legal instruments with the Charter of the United Nations as relevant to them. This paragraph therefore sets the stage for tracing obligations pertaining to the realization of the right to development to the Charter of the United Nations.

2. Draft preambular paragraph 1 notes that States Parties, in adopting this convention, are guided by the purposes and principles of the Charter of the United Nations, and in particular, those pertaining to international cooperation. It reflects one of the fundamental “purposes” for the establishment of the United Nations as incorporated in article 1(3) of its Charter viz. achievement of international cooperation.<sup>23</sup> The DRTD begins its preamble with an almost identical paragraph. A similar high location of this paragraph in the draft preambular section on trajectory of the right to development not only highlights the central importance of international cooperation to the realization of the right, but also that its roots lie in the very institutional objective of the United Nations.

3. The inclusion of the word “environmental” after “cultural” has been explained in the section above. The other sole modification from the language of the Charter and the DRTD is that the words “without distinction as to race, sex, language or religion” employed therein have been replaced by the words “without distinction of any kind” to better accommodate the other grounds of discrimination that have been acknowledged with the evolution of human rights law.<sup>24</sup> This is similar to the approach of paragraph (b) of the preamble to the CRPD.<sup>25</sup>

***Recalling the obligation of States under articles 1 (3), 55 and 56 of the Charter of the United Nations to take joint and separate action in cooperation with the Organization for the promotion of higher standards of living, full employment and conditions of economic and social progress and development; solutions of international economic, social, health and related problems; international cultural and educational cooperation;***

<sup>20</sup> UNGA Resolution 2997(XXVII), Preambular paragraph 3.

<sup>21</sup> Ibid, preambular paragraph 4. See also, preambular paragraph 7, emphasizing that “problems of the environment constitute a new and important area for international cooperation and that the complexity and interdependence of such problems require new approaches”.

<sup>22</sup> United Nations General Assembly Resolution 70/1, *Transforming our world: the Agenda 2030 for Sustainable Development*, A/RES/70/1, 21 October 2015, at para. 10.

<sup>23</sup> Article 1(3) of the Charter stipulates, amongst the purposes of the United Nations, “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>24</sup> See draft article 8 and the commentary thereto.

<sup>25</sup> Preambular paragraph (b) of the CRPD: “Recognizing that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind”.

**and universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion [of any kind],**

*Commentary:*

*A. Consideration of suggestions received:*

1. Panama suggested that the word “full employment” be replaced by “decent work”. CETIM recommended adding the word “decent” before “full employment”. Similar suggestion was also made prior to the elaboration of the first revised draft. As noted in the commentaries thereto, the EDG recommended retaining the language as it is.

2. The EDG again deliberated upon the suggestions from Panama and CETIM and while acknowledging the rationale behind incorporating “decent work” in the recital, concluded that the objective of this preambular paragraph is to “recall” the obligations enshrined in articles 55 and 56 of the Charter of the United Nations, and as such, the use of its precise language is important so as to be true to what the Charter actually says. To avoid paraphrasing, editorializing, or omitting important obligations recognized therein, the EDG recommends retaining the language as it is found in the Charter of the United Nations.

3. Panama and Uruguay recommended that the words “as to race, sex, language or religion” be deleted and replaced by the words “of any kind” to bring it in sync with the text of preambular paragraph 1. The EDG agrees with this suggestion.

*B. Legal Commentary on the text:*

1. Draft preambular paragraph 2 is the logical progression from the preceding paragraph, in that, it refers now directly to the substantive provisions of the Charter of the United Nations that oblige States to cooperate internationally, in addition to taking separate action to promote several of the objectives inherent to the right to development.<sup>26</sup> This paragraph combines articles 55 and 56 of the Charter of the United Nations and uses their precise language. It establishes the legal basis for viewing the draft convention and its implementation as flowing from the duty of States to cooperate for promoting conditions of “development”,<sup>27</sup> which term is described in draft preambular paragraph 16.

2. For reasons explained above, the sole modification from the language of article 55(c) of the Charter is replacement of the words “without distinction as to race, sex, language or religion” to “without distinction of any kind”.

***Reaffirming that, under the provisions of the Universal Declaration of Human Rights [and recalling that, under its provisions,] everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized, and that everyone, as a member of society, is entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for her or his dignity and the free development of her or his personality,***

*Commentary*

<sup>26</sup> An added benefit of highlighting that the duty of international cooperation is a Charter obligation is to reinforce its superior normative hierarchy in international law flowing from article 103 of the Charter, which stipulates that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

<sup>27</sup> Article 55(a) of the Charter obliges the United Nations to *promote* “higher standards of living, full employment, and *conditions of economic and social progress and development*”. It has been meritoriously argued that the UNGA Resolution A/RES/41/128 of 4 December 1986 adopting the DRTD did not enshrine any new rights but rather comprised an authoritative interpretation by Member States of article 55(a) of the Charter (hence making the DRTD binding). See, United Nations Commission on Human Rights, *The Legal Nature of the Right to Development and Its Binding Nature*, Study conducted by Shadrack Gutto, E/CN.4/Sub.2/2004/16, 1 June 2004, paras. 39–40. Also see, Patrick Macklem, “Global Poverty and the Right to Development in International Law”, *International Law Journal of London*, 1(1): 1–76, Mihir Kanade, *The Multilateral Trading System and Human Rights: A Governance Space Theory on Linkages*, London, Routledge, 2018, p. 210–211.

*A. Consideration of suggestions received:*

1. Panama recommended that the text be modified as follows: “*Reaffirming that, under the provisions of the Universal Declaration of Human Rights [and recalling that, under its provisions,] everyone is entitled to a social and international order [...]*”. The EDG agreed with the suggestion that a more general reaffirmation of the UDHR would strengthen the paragraph and its import.

2. The Caribbean Court of Justice recommended replacing the words “national effort” with “regional effort”. While the EDG agrees with the importance of regional efforts, it has taken a position in draft article 2 that defines “international organizations” that the word “international” includes “regional”. As such, the reference in this draft preambular paragraph to “international cooperation” includes efforts at the regional level. More importantly, since this paragraph is aimed at “reaffirming” the stipulations in the UDHR, it is important that the precise language of article 22, which employs the words “national effort and international cooperation” be retained.

*B. Legal Commentary on the text:*

1. Draft preambular paragraph 3 progresses from the Charter of the United Nations to the next important human rights instrument – the UDHR. It combines articles 28 and 22 thereof (in that sequence) noting first the entitlement of everyone to an enabling social and international order for realization of human rights, and then their entitlement to realization specifically of economic, social and cultural rights through a combination of national effort and international cooperation. The establishment of national and international enabling environment through national action and international cooperation, as the draft convention makes evident in the provisions to follow, is at the heart of efforts to realize the right to development.

***Recalling the provisions of all [international] human rights treaties, as well as other international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,***

*Commentary:**A. Consideration of suggestions received:*

1. The Russian Federation recommended that the words “all human rights treaties” be replaced with “relevant international human rights treaties” since not all States are parties to all human rights treaties. Similarly, the Russian Federation also suggested replacing the word “other international instruments” with “other relevant international instruments” and deleting references to the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. The EDG accepts the insertion of the word “international” since the human rights treaties recalled in this preambular paragraph are more appropriately related to those adopted at the international level. However, the EDG does not recommend replacing the word “all” with “relevant” with reference to treaties or inserting the word “relevant” with reference to other instruments. As was noted in the commentaries to the zero draft, the use of the word “recalling” rather than “reaffirming” is a pragmatic choice that takes into account that not all States are parties to all human rights treaties or may have voted in favour of these declarations.

2. Panama recommended splitting the paragraph into two – one explicitly enumerating six of the nine core human rights treaties (the Convention Against Torture, International Convention for the Protection of All Persons from Enforced Disappearance, and the International Convention on Migrant Workers were not included), and the other enumerating a number of declarations adopted at the global level. The EDG recalls that a similar suggestion was made by Brazil prior to the elaboration of the first revised draft. The commentaries thereto explain the reason why the EDG recommended not splitting the paragraph into two. Additionally, Panama recommended, similar to Brazil’s suggestion in the previous round, the inclusion of additional Declarations in the second part of this paragraph. Paraguay recommended that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions be included after the reference to other international

instruments. CETIM suggested that there ought to be a reference to standards adopted at the International Labour Organization.

3. As regards this second revised draft convention, the EDG is again of the view that this paragraph distinctly separates out hard law (e.g. human rights treaties), from softer norms (e.g. international instruments), without the need for splitting it into two or of elaborating each human rights treaty or each international instrument. The reference to “all human rights treaties” is aimed at accommodating also the ILO Conventions, as indicated in the commentaries to the zero draft. This is also pragmatic in light of concerns raised by Pakistan and the Russian Federation with respect to the length of the preamble in general. The rationale for specifically incorporating the two Declarations mentioned in the text are explained in the commentaries below.

*B. Legal Commentaries on the text:*

1. Paragraph 4 of the draft preamble, in the same vein as preambular paragraph (d) of the CRPD, recalls provisions of all the international human rights treaties without specifically listing them all.<sup>28</sup> The paragraph specifically avoids referring to only the nine “core” human rights treaties in order to accommodate other relevant instruments such as those adopted under the International Labour Organization. It also recalls the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>29</sup> considering its universal endorsement as the focal human rights instrument on the subject, the specific incorporation of the right to development therein,<sup>30</sup> and article 17 of this draft convention. Finally, the paragraph also recalls the provisions of the landmark United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted by the UNGA in September 2018, considering its significance.<sup>31</sup> The use of the word “recalling” rather than “reaffirming” is a pragmatic choice that takes into account that not all States are parties to all human rights treaties or may have voted in favour of these declarations.

***Reaffirming the Declaration on the Right to Development,***

*Commentary*

*A. Consideration of suggestions received:*

1. There were no suggestions received for modification of the text of this paragraph. As such, there are no changes.

*B. Legal commentary on the text:*

1. This draft preambular paragraph reaffirms the DRTD, commencing the series of next few paragraphs which relate directly to the right to development.

***Recalling the reaffirmation of the right to development in several international declarations, resolutions and agendas, including the Rio Declaration on Environment and Development, the Vienna Declaration and Programme of Action, the Programme of Action of the International Conference on Population and Development, the Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, the Beijing Declaration and Platform for Action, the Rome Declaration on World Food Security, adopted at the World Food Summit, the United Nations Millennium Declaration, the Durban Declaration and Programme of Action, the Monterrey Consensus of the International Conference on Financing for Development, the Declaration of Principles and Plan of Action, adopted at the World Summit on the Information Society, the Tunis Agenda for the Information Society, the 2005 World Summit Outcome, the United Nations Declaration on the Rights of Indigenous Peoples, the outcome document of the high-level plenary meeting of the General Assembly on the Millennium Development Goals, the Istanbul Programme of Action for the Least Developed Countries for the Decade 2011–2020, the***

<sup>28</sup> See also first preambular paragraph of the ICMW.

<sup>29</sup> United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007.

<sup>30</sup> *Ibid.*, preambular paragraph 6 and article 23.

<sup>31</sup> A/RES/73/165

outcome documents of the thirteenth session of the United Nations Conference on Trade and Development, held in 2012, the outcome document of the United Nations Conference on Sustainable Development entitled “The future we want”, the quadrennial comprehensive policy review of operational activities for development of the United Nations system, the SIDS Accelerated Modalities of Action (SAMOA) Pathway, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, the 2030 Agenda for Sustainable Development ~~and the Sustainable Development Goals~~, the Paris Agreement on climate change, the Sendai Framework for Disaster Risk Reduction 2015–2030, the New Urban Agenda, adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), and the outcome documents of the fourteenth session of the United Nations Conference on Trade and Development,

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested that although it agrees with the text of this paragraph, it is more appropriate in a resolution of the United Nations General Assembly than a legally binding instrument. The EDG notes that, on the one hand, the objective of this paragraph is to list the important declarations, resolutions and agendas adopted by States at the international level that specifically reaffirm the right to development to place a spotlight on the evolution of this right. On the other hand, this paragraph also serves another important purpose related to the very need for this legally binding instrument. It is connected with the final two preambular paragraphs which note the concern that, despite the adoption of numerous resolutions, declarations and agendas, the right to development has not yet been effectively operationalized, and that States are therefore convinced that a comprehensive and integral international convention to promote and secure the realization of the right to development, through appropriate and enabling national and international action, is now essential. The EDG also notes that the core human rights treaties regularly reference relevant declarations, resolutions and agendas in their preambles.<sup>32</sup> As such, referencing the aforementioned instruments in this preambular paragraph is only in line with existing practice. Convinced by its appropriateness, the EDG, therefore, recommends retention of this paragraph since it adds value to the preamble and the treaty.

2. Panama suggested that the words “Sustainable Development Goals” be deleted after the reference to the 2030 Agenda for Sustainable Development. The EDG agrees with this recommendation since the reference is redundant.

3. Iran suggested adding the 1968 Proclamation of Tehran to the list. This proclamation, however, does not reference the right to development. For reasons mentioned above, the EDG therefore does not recommend the suggested insertion.

*B. Legal commentary on the text:*

1. After reaffirming the DRTD itself, this draft preambular paragraph then moves to the other international resolutions, declarations and agendas that reaffirm the right to development by incorporation. These are listed chronologically. Inclusion of the right to development in each of these documents sequentially has played a significant role in its evolution and in gradually cementing its place within the corpus of human rights norms. A generic statement to the effect of “recalling the reaffirmation of the right to development in several international declarations, resolutions and agendas”, without listing them specifically, would not do justice to the objective of highlighting this evolution.

**Reaffirming the objective of making the right to development a reality for everyone, as set out in the Millennium Declaration,**

*Commentary:*

*A. Consideration of suggestions received:*

<sup>32</sup> For instance, see preambular paragraphs 4, 5 and 12 of CERD; preambular paragraph 15 of CEDAW; preambular paragraph 4 of CPED; preambular paragraphs 2 and 3 of ICMW; preambular paragraph 5 of CAT; preambular paragraph f of CRPD.

1. Panama suggested that this paragraph be deleted since the Millennium Declaration is outdated in view of the adoption of the 2030 Agenda for Sustainable Development. The EDG notes that the reference to the Millennium Declaration is connected with the trajectory of the evolution of the right to development. This Declaration marked a pivotal moment for the right to development since one of its explicit objectives was “making the right to development a reality for everyone”. Additionally, in the context of the preamble, it highlights the very need for adoption of this convention by indicating that the right to development has not become a reality for everyone in the more than two decades following the Millennium Declaration. Finally, the EDG notes that the 2030 Agenda comprising the SDGs does replace the MDGs, and as such, it may be accurate to state that the MDGs have become outdated. However, the same cannot be said about the Millennium Declaration itself, which in fact did not contain the MDGs. The Millennium Declaration continues to be an important instrument. Indeed, the 2030 Agenda states that it is “grounded” in the Millennium Declaration.<sup>33</sup>

2. The Russian Federation also recommended deletion of this and some other paragraphs on the ground that they are more appropriate in a resolution rather than a legally binding instrument. For reasons discussed in the commentaries to the previous preambular paragraph, the EDG does not recommend this deletion.

*B. Legal commentary on the text:*

1. This paragraph of the draft preamble specifically makes a note of the Millennium Declaration of 2000 from which later emanated the Millennium Development Goals (MDGs). One of the stated objectives of this Declaration was “making the right to development a reality for everyone”.<sup>34</sup> This fact by itself justifies the inclusion of this paragraph since it is closely connected with the effort to highlight in the preamble the trajectory of the evolution of the right to development. At the same time, it is connected with the final two paragraphs of the preamble, which as noted in the commentaries above, highlight that despite the adoption of the numerous declarations and resolutions, the right to development has not yet been operationalized and hence the need for this convention. Finally, as noted above, the 2030 Agenda states that it is grounded in the Millennium Declaration.<sup>35</sup> The draft paragraph is identical to paragraph 6 of the annual resolution on the right to development adopted by the UNGA in December 2018.<sup>36</sup>

**Recalling the multitude of resolutions adopted by the General Assembly, the Commission on Human Rights and the Human Rights Council on the right to development,**

*Commentary:*

*A. Consideration of suggestions received:*

1. Brazil suggested that this paragraph be deleted since many resolutions on the right to development by the General Assembly, the Commission on Human Rights and the Human Rights Council were not adopted unanimously. The EDG notes that lack of unanimity in adoption of resolutions is not by itself a factor in determining the appropriateness of a reference thereto in a preamble of a treaty. Indeed, none of the core human rights treaties that are regularly recalled in other instruments enjoy universal ratification. Additionally, the EDG highlights that the word “recalling” has been consciously used in this paragraph, rather than “reaffirming”, to accommodate the fact that some States might have voted against these resolutions. As such, the EDG recommends retaining the paragraph as it is.

2. The Russian Federation suggested deleting this paragraph suggesting that it is more appropriate for a resolution than a treaty. For the same reasons as spelt out in the analysis of the previous paragraphs, the EDG recommends retaining this paragraph as it stands.

*B. Legal commentary on the text:*

<sup>33</sup> A/RES/70/1, paragraph 10.

<sup>34</sup> A/RES/55/2, paragraph 11.

<sup>35</sup> A/RES/70/1, paragraph 10.

<sup>36</sup> A/RES/73/166

1. This paragraph of the draft preamble recalls all the resolutions adopted specifically on the right to development annually by the General Assembly, the Human Rights Council and its predecessor, the Commission on Human Rights. These are far too many to list, and in any case considering that these are regular annual features, listing them does not serve the same objective as listing other international documents that principally address other topics but still reaffirm the right to development.<sup>37</sup> The importance of this paragraph is connected with tracing the trajectory of the evolution of the right to development as well as to the fact that despite these resolutions, the right to development has not yet been fully operationalized and hence the need for the treaty.

**Recalling also, in particular, General Assembly resolutions 48/141 of 20 December 1993, in which the Assembly established the Office of the United Nations High Commissioner for Human Rights, with a mandate to promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for that purpose, 52/136 of 12 December 1997, in which the Assembly affirmed that the inclusion of the Declaration on the Right to Development in the International Bill of Human Rights would be an appropriate means of celebrating the fiftieth anniversary of the Universal Declaration of Human Rights, and 60/251 of 15 March 2006, in which the Assembly established the Human Rights Council, deciding that its work should be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, including the right to development,**

*Commentary:*

*A. Consideration of suggestions received:*

1. The only suggestion received was from the Russian Federation, which, recommended deletion of this paragraph for the same reasons as noted above. The EDG notes that the objective of this paragraph is to highlight the three landmark resolutions of the United Nations General Assembly that have played a vital role in the evolution of the right to development. Indeed, this paragraph falls in the section of the preamble that deals with the trajectory of the right to development. As such, the EDG recommends its retention since a reference to these resolutions adds value to the preamble and the treaty.

*B. Legal commentary on the text:*

1. This draft preambular paragraph specifically highlights three landmark resolutions adopted by the United Nations General Assembly that have played pivotal roles in the evolution of the right to development. The first is resolution 48/141 of 7 January 1994 establishing the Office of the United Nations High Commissioner for Human Rights that prominently includes a mandate 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.<sup>38</sup> The second is Resolution 52/136 of 12 December 1997 affirming the appropriateness of inclusion of the DRTD in the International Bill of Human Rights.<sup>39</sup> Although not unanimous,<sup>40</sup> the resolution records the position of an overwhelming majority of States that the DRTD has a place in the same league as the UDHR, ICCPR and the ICESCR. The third is Resolution 60/251 of 15 March 2006 adopted by the United Nations General Assembly establishing the United Nations Human Rights Council which also specifically contains a right to development mandate.<sup>41</sup>

**Taking note of the regional human rights instruments and the subsequent practices relating thereto that specifically recognize and reaffirm the right to development, including the African Charter on Human and Peoples' Rights, the Inter-American**

<sup>37</sup> See draft preambular paragraph (n).

<sup>38</sup> A/RES/48/141, paragraph 4(c). See also preambular paragraphs 3 and 4, as well as paragraph 3(c) in the operative part.

<sup>39</sup> A/RES/52/136, paragraph 17.

<sup>40</sup> The resolution was adopted with 129 States in favour to 12 against, with 32 abstentions. See record at <https://www.un.org/press/en/1997/19971212.GA9380.html>

<sup>41</sup> A/RES/60/251, paragraph 4.

**Democratic Charter, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Arab Charter on Human Rights, the Human Rights Declaration of the Association of Southeast Asian Nations, the American Declaration on the Rights of Indigenous Peoples, and the Abu Dhabi Declaration on the Right to Development,**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation recommended deletion of this paragraph for the same reasons as noted in the previous paragraphs. The EDG, based on the analysis above, again recommends retaining this paragraph.
2. Iran recommended adding the word “relevant” before “regional human rights instruments”. The EDG considers that this does not strengthen the paragraph or modify what it seeks to imply in any way.
3. Panama recommended adding the American Convention on Human Rights in this paragraph. The EDG notes that this preambular paragraph is aimed at listing those regional instruments that “specifically recognize and reaffirm the right to development”. Since the American Convention does not do so explicitly, it is more appropriate in the following preambular paragraph.
4. The Holy See and APG23 (on behalf of CINGO) recommended replacing the words “taking note of” with “bearing in mind”, but for different reasons. The Holy See suggested this modification on the ground that these instruments are of a regional and not a global nature. APG23, on the other hand, suggested the modification to make its language stronger. The EDG notes that the zero draft had employed the words “bearing in mind”. However, this was replaced with “taking note of” in the first revised draft considering the recommendation made by China, in particular. There was no explicit explanation provided for this suggestion by China, however, the EDG presumed an element of discomfiture in some States outside of the regional mechanisms “bearing in mind” regional instruments as a consideration or motivation for the adoption of this legally binding instrument. As noted earlier, the words “taking note of” have not been employed in the preambles of any of the core human rights treaties. However, in this case, the presumed discomfiture is understandable and, as such, the words “taking note of” were incorporated. For these reasons, the EDG recommends retaining the paragraph as it is.

*B. Legal commentary on the text:*

1. This paragraph of the draft preamble moves from the international instruments at the United Nations level to the regional instruments, and specifically highlights those that explicitly recognize and reaffirm the right to development. These are the African Charter on Human and Peoples’ Rights of 1981,<sup>42</sup> the Arab Charter on Human Rights of 2004,<sup>43</sup> and the Association of Southeast Asian Nations Human Rights Declaration of 2012.<sup>44</sup> It also separately notes the Abu Dhabi Declaration on the Right to Development of 2016 adopted by the Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation.<sup>45</sup> Additionally, the Inter-American Democratic Charter adopted by the Organization of American States has been included which in its article 6 stipulates that “It is the right and responsibility of all citizens to participate in decisions relating to their own development”. Similarly, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, wherein, the right to development is explicitly recognized in preambular paragraph 6 thereof, has been added.<sup>46</sup>

<sup>42</sup> Article 22

<sup>43</sup> Article 37

<sup>44</sup> Articles 35-37

<sup>45</sup> The Independent Permanent Human Rights Commission of the Organization of Islamic Cooperation is an expert body with advisory capacity on matters related to human rights. The Organization of Islamic States has 57 member States across different regions. See in general, <https://www.oic-iphrc.org/en/right-to-development>

<sup>46</sup> Preambular paragraph 6 thereof is as follows: “Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both

Finally, the American Declaration on the Rights of Indigenous Peoples which references the right to development in several places has been incorporated. These regional instruments are listed chronologically.

2. In addition to the instruments, the words “subsequent practices related thereto” have been incorporated. Their significance is related to the Vienna Convention on the Law of Treaties (VCLT) which stipulates that for the purpose of interpretation of treaties, along with its context, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” shall also be taken into account.<sup>47</sup>

***Taking note also of the obligations of States pertaining to integral development in the Charter of the Organization of American States, and to progressive development in the American Convention on Human Rights,***

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of this paragraph. For reasons mentioned above, while considering similar suggestion, the EDG recommends retaining this paragraph.

*B. Legal commentary on the text:*

1. In continuation of reference to the regional systems, this paragraph singles out the Inter-American system of human rights for mention. An overwhelming majority of States in the region have continually reaffirmed the right to development at the international level. However, the right to development is not specifically referenced in any regional human rights instrument in the Americas. At the same time, the Charter of the Organization of American States of 1948 extensively incorporates obligations on States pertaining to “integral development”.<sup>48</sup> Similarly, the Inter-American Convention on Human Rights of 1969 incorporates obligations pertaining to “progressive development”.<sup>49</sup> The draft preambular paragraph has been drafted in a plain manner as only “taking note of” these “obligations of States” (rather than framing it in the language of rights) pertaining to “integral development” and “progressive development”. The use of words “taking note of” is a pragmatic choice in view of the fact that these are regional instruments to which many States outside of this region are not parties.

***Taking into consideration the various international instruments adopted for realizing sustainable development, including in particular the 2030 Agenda for Sustainable Development, which affirm that sustainable development must be achieved in [all] its three dimensions, namely [including] economic, social and environmental, in a balanced and integrated manner and in harmony with nature,***

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of this paragraph. For reasons mentioned above, the EDG recommends retaining this paragraph.

2. Iran suggested that the words “taking into account different national realities, capacities and levels of development and respecting national policies and priorities” be added at the end of the paragraph based on language drawn from the 2030 Agenda. The EDG considered this suggestion but recommends retaining the paragraph as it is to avoid verbosity, especially since these qualifications are in-built in the 2030 Agenda which is already referenced in the paragraph.

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world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the *right of its peoples to development*, self-determination, and the free disposal of their wealth and natural resources”.

<sup>47</sup> Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155: 331–52, article 31(3)(b).

<sup>48</sup> Chapter VII entitled “integral development”, including its articles 30 to 52, resonate almost entirely with the right to development and this draft convention.

<sup>49</sup> Article 26

3. The EDG also recommends replacing the word “namely” with “including” in line with parallel changes made to draft article 3(g) based on the suggestion to this effect from the Holy See.

*B. Legal commentary on the text:*

1. This draft preambular paragraph concludes the second part of the preamble related to evolutive trajectory of the right to development with a reference specifically to sustainable development and the 2030 Agenda. There is consensus that sustainable development encompasses three general policy areas which must be achieved in a balanced and integrated manner: social development, economic development and environmental protection.<sup>50</sup> In addition, sustainable development must also be achieved in “harmony with nature”.<sup>51</sup> The three dimensions of sustainable development, and particularly the social development dimension of the concept, includes human rights, and as such, it is impossible to have sustainable development if it undermines human rights.<sup>52</sup> This draft preambular paragraph merely considers the various instruments affirming sustainable development with the objective of laying the stage for the symbiotic relationship between the right to development and sustainable development to unfold subsequently in draft articles 3(g) and 23.

**Acknowledging that the realization of the right to development is a common concern of humankind,**

*Commentary:*

*A. Consideration of suggestions received:*

1. There were no suggestions for modification of the text received for the second revision.

*B. Legal commentary on the text:*

1. This draft preambular paragraph sets into motion the second part of the preamble that deals with the motivations for the convention. It acknowledges upfront that the realization of the right to development is a “common concern of humankind”. This description seeks to establish from the outset that the realization of the right “is not only a concern of the primarily responsible State exercising jurisdiction, but of the international community as a whole, that is, of all States and non-State actors that together make up humanity”.<sup>53</sup>

2. “Common concern of humankind”, as a norm distinct from the notion of “common heritage of mankind”,<sup>54</sup> is firmly established in international law,<sup>55</sup> and in particular, environmental law.<sup>56</sup> It is incorporated in the 1992 Convention on Biological Diversity which

<sup>50</sup> A/RES/S-19/2. See also the preamble and paragraph 2 of the 2030 Agenda, A/RES/70/1.

<sup>51</sup> 2030 Agenda, A/RES/70/1, preamble, paragraph 9, and SDG 12.8. For a fuller explanation of the concept of “harmony with nature” and its evolution within the United Nations system, see: <http://www.harmonywithnatureun.org/>

<sup>52</sup> A/RES/66/288, paragraphs 8, 9.

<sup>53</sup> Koen de Feyter, *Towards a Framework Convention on the Right to Development*, at p.12.

<sup>54</sup> Prue Taylor, “Common Heritage of Mankind and Common Concern of Humankind” in Michael Faure (ed.) *Elgar Encyclopedia of Environmental Law*, 2018, pp.302-322. Also see, Dinah Shelton, “Common Concern of Humanity” in Koen de Feyter (ed.) *Globalization and Common Responsibilities of States*, London, Routledge, 2017, pp. 38-44, at p.39, explaining that while “common heritage of mankind” refers to certain resources, such as those on or under the deep seabed, recognized as belonging to the common heritage of mankind by virtue of their location in commons areas, “common concerns” are different because they are not spatial, belonging to a specific area, but can occur within or outside sovereign territory.

<sup>55</sup> For an analysis, see: Friedrich Soltau, “Common Concern of Humankind” in Cinnamon Piñon Carlarne, Kevin R. Gray, Richard Tarasofsky (eds.) *The Oxford Handbook of International Climate Change Law*, Oxford, Oxford University Press, 2016, pp. 202–212; Chelsea Bowling, Elizabeth Pierson and Stephanie Ratte, “The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas”, 2017, available at [https://www.un.org/depts/los/biodiversity/prepcom\\_files/BowlingPiersonandRatte\\_Common\\_Concern.pdf](https://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf); Also generally see, ongoing research on the topic by the World Trade Institute, available at <https://www.wti.org/research/res/#open-75890-sustainability>

<sup>56</sup> Apart from the explicit references in environmental treaties discussed below, the language of “common concern” and its close variants is also found in other legal instruments. For instance, see

affirms “that the conservation of biological diversity is a common concern of humankind”.<sup>57</sup> It is also prominently referenced with relation to climate change in the 1992 United Nations Framework Convention on Climate Change,<sup>58</sup> as well as the 2015 Paris Agreement on Climate Change.<sup>59</sup> Several scholars have noted that human rights generally,<sup>60</sup> as well as specifically,<sup>61</sup> are also common concerns of humankind.

3. There are certain defining features underlying this notion. At a minimum, the issues involved are significant enough to merit consideration as concerns common to humankind,<sup>62</sup> and their nature is such that they “inevitably transcend the boundaries of a single State and require collective action in response; no single State can resolve the problems they pose or receive all the benefits they provide”.<sup>63</sup> Depicting an issue or goal as a common concern implies an agreement to recognise the very existence of a shared problem and a shared responsibility.<sup>64</sup> It thus serves as a justification for collective global action through international cooperation.<sup>65</sup> As has been noted, “the notion of common concern leads to the creation of a legal system whose rules impose duties on society as a whole and on each individual member of the community”.<sup>66</sup> At the same time, it is important to stress that the norm operates very much within the framework of respect for national sovereignty and not outside of it.<sup>67</sup> These features make the notion of “common concern of humankind” particularly applicable and appropriate for the right to development. Indeed, realizing the right to development entails duties for States not just internally, but also externally as well as collectively. These are clearly reflected in the draft provisions to follow. They also incorporate duties for legal persons, including international organizations, while maintaining a balance with national sovereignty.

**Concerned at the existence of serious obstacles to the realization of the right to development comprising, inter alia, poverty in all its forms and dimensions, including extreme poverty, hunger, inequality in all forms and manifestations within and across [among] countries, climate change, health emergencies and health crises, colonization,**

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preambular paragraph 3 of the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001, stipulating that “plant genetic resources for food and agriculture are a common concern of all countries”. Also see, UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, noting “the universal will and the common concern to safeguard the intangible cultural heritage of humanity”.

<sup>57</sup> Preambular paragraph 3.

<sup>58</sup> See preambular paragraph 1 acknowledging that “change in the Earth's climate and its adverse effects are a common concern of humankind”.

<sup>59</sup> See preambular paragraph 11 acknowledging that “climate change is a common concern of humankind”.

<sup>60</sup> Charles Beitz, “Human Rights as a Common Concern”, *The American Political Science Review*, Vol. 95, No.2, 2001, pp.269–282; Dinah Shelton, “Common Concern of Humanity”, at p.38, noting that “the development of human rights law to protect individuals beyond the context of armed conflict, and international criminal law, in which individuals are prosecuted for the most serious crimes against the international community, can also be seen as reflections of some common concerns of humanity”.

<sup>61</sup> Laura Horn, “The Implications of the Concept of Common Concern of Humankind on a Human Right to a Healthy Environment”, *Macquarie Journal of International and Comparative Environmental Law*, Vol. 1, No. 2, 2004, pp.233–268; Edith Brown Weiss, “The Coming Water Crisis: A Common Concern of Humankind”, *Transnational Environmental Law*, Vol. 1, No.1, 2012, pp.153–168.

<sup>62</sup> Friedrich Soltau, “Common Concern of Humankind”, at p.205, 207.

<sup>63</sup> Dinah Shelton, “Common Concern of Humanity”, at p.37.

<sup>64</sup> Thomas Cottier et.al, “The Principle of Common Concern and Climate Change”, *NCCR Trade Working Paper*, No 2014/18, June 2014, available at [https://www.wti.org/media/filer\\_public/0d/a9/0da93bab-02b6-49f3-a789-d8f4a0ab3982/cottier\\_et\\_al\\_common\\_concern\\_and\\_climate\\_change\\_archiv\\_final\\_0514.pdf](https://www.wti.org/media/filer_public/0d/a9/0da93bab-02b6-49f3-a789-d8f4a0ab3982/cottier_et_al_common_concern_and_climate_change_archiv_final_0514.pdf)

<sup>65</sup> Duncan French, “Common Concern, Common Heritage and Other Global(-ising) Concepts: Rhetorical Devices, Legal Principles or a Fundamental Challenge?”, in Michael Bowman, Peter Davies and Edward Goodwin (eds.) *Research Handbook on Biodiversity and Law*, Cheltenham, Edward Elgar Publishing, 2016, 334–360, at p.340.

<sup>66</sup> Dinah Shelton, “Common Concern of Humanity”, at p.41.

<sup>67</sup> Chelsea Bowling, Elizabeth Pierson and Stephanie Ratte, “The Common Concern of Humankind”; Dinah Shelton, “Common Concern of Humanity”, p.42; Frank Biermann, “‘Common Concerns of Humankind’ and National Sovereignty”, *Globalism: People, Profits and Progress*, Proceedings of the Thirteenth Annual Conference of the Canadian Council on International Law, 2002, p.158.

**neo-colonization, forced displacement, racism, discrimination, conflicts, foreign domination and occupation, aggression, threats against national sovereignty, national unity and territorial integrity, terrorism, crime, corruption, all forms of deprivation affecting the subsistence of peoples, and the denial of other human rights,**

*Commentary:*

*A. Consideration of suggestions received:*

1. This paragraph closely tracks the tenth preambular paragraph of the 1986 Declaration on the Right to Development, with some innovations. All the suggestions received with respect to this preambular paragraph were supportive. Numerous suggestions for further strengthening it were made. Panama recommended adding the words “digital divide”, “environmental crises”, “gender inequalities”, and “arms race”. South Africa recommended adding the words “inequitable international economic order”. Iran suggested inclusion of the words “unilateralism” and “coercive measures”. APG 23 on behalf of CINGO suggested incorporating the words “the unfair international trading system, unregulated finance, asymmetries of power in global governance and decision-making, unequal access to information and technology, external debts, and unilateral coercive measures”.

2. The EDG notes that numerous other suggestions for addition to the list of obstacles to the realization of the right to development were made prior to the elaboration of the first revised draft. The EDG, however, was hesitant in making the list verbose although it did make a few additions. The same hesitation of making the list even more verbose prevailed during the elaboration of this second revised draft. It may be noted at the outset that the preambular paragraph is aimed at being inclusive rather than exhaustive. This is reflected in the use of the words “*inter alia*”. Indeed, the obstacles to the realization of the right to development cannot be exhaustively listed and doing so would make the Convention unmanageably verbose. While it is true that many of the obstacles suggested by respondents for inclusion are not listed in the first revised draft, the usage of the words “*inter alia*” is aimed at ensuring that the paragraph still reasonably acknowledges the existence of other important obstacles. Additionally, the words “inequality in all forms and manifestations within and across countries” are broad enough to accommodate some of the specific obstacles listed in the suggestions received. Finally, some of the suggested elements have been specifically addressed in operative provisions. As such, the EDG recommends retaining the paragraph as it is with one minor modification. The modification relates to the suggestion by China to replace the word “across” with “among”, which the EDG accepted.

*B. Legal commentary on the text:*

1. After having acknowledged that realizing the right to development is a common concern of humankind in the previous paragraph, this draft preambular paragraph then notes the concern by States Parties at the existence of serious obstacles to achieving it. Textually, the paragraph combines preambular paragraphs 9 and 10 of the DRTD, while adding to the list, certain obstacles of vital importance to the current times such as poverty, inequality, climate change, health emergencies and health crises, corruption, and forced displacement.

***Emphasizing that the right to development[, which derives from the inherent dignity of all members of the human family,] is an inalienable human right of all human persons [individuals] and peoples, and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,***

*Commentary:*

*A. Consideration of suggestions received:*

1. During all rounds of discussions on the draft convention at the WGRTD as well as in written submissions, a number of States and civil society organizations recommended replacing the words “human persons” with “human beings” throughout the various provisions of the document. Alternatively, many recommended using the word “individuals”, as Panama did in its submissions for this second revised draft. The EDG had noted in the commentaries

to the zero as well as the first revised draft that the term “human person” was employed to reflect the language used in the DRTD. However, in view of the significant number of respondents requesting these modifications, the EDG agrees to use the alternative words “human beings” or “individuals” as syntactically appropriate throughout the text. It may be noted that most of the core human rights treaties use both “human beings” and “individuals”, although the latter term is employed more often. In this paragraph, the EDG recommends using the word “individuals”.

2. The Caribbean Court of Justice recommended that this preambular paragraph be moved above the previous paragraph. It suggested that this may promote readability since this paragraph is connected with preambular paragraph 13 which acknowledges that the realization of the right to development is a common concern of humankind. The EDG appreciated the merit of this suggestion but ultimately decided to retain it as the 15<sup>th</sup> preambular paragraph since moving it up will break the continuity with the 16<sup>th</sup> paragraph to follow.

3. The Holy See recommended that the preamble should contain a reference to the inherent dignity of all members of the human family as the foundation of the right to development. The EDG deliberated upon this suggestion and considering that references to the inherent dignity of all members of the human family are made in many of the core human rights treaties such as the ICCPR, ICESCR, CEDAW, CAT and CRPD, in their preambles, agreed to incorporate the proposal. However, instead of doing so by way of modification to draft preambular paragraph 22 as suggested by the Holy See, the EDG considers it more appropriate for inclusion in this preambular paragraph.

*B. Legal commentary on the text:*

1. This draft preambular paragraph draws from preambular paragraph 16 of the DRTD. However, it begins with the emphasis that the right to development is derived from the inherent dignity of all members of the human family. The words “inherent dignity of all members of the human family” are drawn from the preambles of the UDHR, ICCPR, ICESCR, CEDAW, CAT and CRPD. They reflect the centrality of the inherent dignity of all human beings from which all human rights, including the right to development, are derived.<sup>68</sup> Preambular paragraph 16 of the DRTD employs the word “confirming” at the beginning of the recital. This has been replaced with “emphasizing”, taking into account the passage of time since the initial need was felt to “confirm” that the right to development is an inalienable human right, and also considering the importance of now emphasizing that what follows in the paragraph has become firmly embedded in international law.

***Recognizing that development is a comprehensive civil, cultural, economic, environmental, political and social process that is aimed at the constant improvement of the well-being of the entire population and of all peoples and individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,***

*Commentary:*

*A. Consideration of suggestions received:*

1. Argentina took exception to the fact that the term “peoples” is not defined in the draft convention. It also raised concern regarding the term “entire population” in this paragraph. CETIM, on the other hand, countered the position of Argentina suggesting that the language was clear and that there was no ambiguity. The EDG firstly notes that the word “all peoples” was added to this paragraph in light of the specific suggestion made by the Grand Council of the Crees at the time of elaboration of the first revised text. It suggested to modify the words “well-being of the entire population and of all individuals” to “well-being of the entire population and of all peoples and individuals”. The EDG had accepted this recommendation, considering that peoples are self-standing right-holders of the right to development as defined in draft article 4 of this convention which is based on article 1 of the DRTD. With respect to the concern that the term “peoples” is not defined in the draft convention, the drafting committee notes that none of the international instruments that refer to peoples as right-

<sup>68</sup> See preambular paragraph 2 of CAT.

holders defines the term. For instance, the ICCPR and the ICESCR recognize the right of all peoples to self-determination without defining the term. The UNDRIP recognizes the rights of indigenous peoples, without defining it. Similarly, the African Charter on Human and Peoples Rights, comprises numerous rights guaranteed to peoples, but the term is not defined. This has not posed any problem for human rights treaty bodies or regional commissions and courts in Africa or the Americas from giving content to the term based on context-specific criteria. As such, the EDG sees no particular problem in not defining the term “peoples” in the draft convention. As regards the term “entire population”, it is drawn from the precise language of preambular paragraph 2 of the DRTD. It signifies that development is possible only when the well-being of the entire population is taken into account such that it leaves no one behind. The words “and of all peoples and individuals” that follow are not only because these are the central subjects of development but also because, as right-holders, peoples and individuals are entitled to “active, free, and meaningful participation in development” as the next part of the paragraph stipulates.

*B. Legal commentary on the text:*

1. As indicated in the introduction, like the DRTD, neither the preamble nor the substantive provisions of this draft convention *define* the term “development”. This draft preambular paragraph adopts the structure of the preamble to the DRTD which also only broadly *describes* “development”.<sup>69</sup> This is similar to the structure of the CRPD as well, which contains no definition of “disability”, but only a description thereof in the preamble.<sup>70</sup> In the case of the CRPD, negotiators found it unnecessary or even improper to formulaically define “disability” and recognized that it is “an evolving concept” and that “disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.<sup>71</sup> There are two principal reasons why the model of the DRTD and the CRPD have not been digressed from in this draft convention.

2. Firstly, the right to development, as incorporated in draft article 4, is human and people-centred, in that, it entails their right to participate in, contribute to, and enjoy development. This necessarily implies that the authorship of what development means lies entirely with the right-holders and will differ from context to context. Imposing a one-size-fits-all definition of development will defeat the very elements of participation in and contribution to development which comprise the foundation stones of the right to development. In other words, recognizing that all human persons and peoples have the right to development necessarily entails a rejection of a singular definition of development.

3. Secondly, it is not necessary to venture into defining development in the draft convention nor is it necessary to describe it in terms different than the DRTD. The description of development in the preamble of the DRTD is entirely in sync with contemporary ideas of development. Thus, development is described as a process, indicating that development must not be measured based only on *what* is achieved (the outcomes) but also on *how* it is achieved (the process).<sup>72</sup> The process itself is described as a “comprehensive civil, cultural, economic, environmental, political and social process”. The term “civil” is not present in the corresponding paragraph in the DRTD but has been added here to align it with the language of draft article 4 which elaborates on the right to development and incorporates the term

<sup>69</sup> The description of “development” in preambular paragraph 2 of the DRTD is in identical terms.

<sup>70</sup> See preambular paragraph (e) of the CRPD.

<sup>71</sup> *Ibid.*

<sup>72</sup> For an analysis of this feature of the right to development and its parallels with Amartya Sen’s elaboration of the “process” and “opportunity” aspects of freedoms inherent to his capability approach to development explored in his landmark book “Development as Freedom” (Oxford, Oxford University Press, 1999), see: Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development”, in Mihir Kanade and Shyami Puvimanasinghe (eds.), *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals, E-learning module by OHCHR, UPEACE, and UNU-IIGH*, 2018, available at <https://www.ohchr.org/Documents/Issues/Development/SR/AddisAbaba/MihirKanade.pdf>. Also see, United Nations General Assembly, *Study on the Current State of Implementation of the Right to Development Submitted by Mr. Arjun Sengupta, Independent Expert*, E/CN.4/1999/WG.18/2, paragraph. 36.

“civil” therein. The commentary thereto explains the inclusion of the word “civil”. Similarly, the word “environmental” is not present in the DRTD but was considered essential to be incorporated in this paragraph in view of the fact that environmental protection and sustainable development were embryonic at the time of the adoption of the DRTD and hence an absence of reference to it in the DRTD is unsurprising. As discussed more elaborately in the commentaries to follow, sustainable development emerged on the global policy agenda only in 1987 with the Brundtland Commission Report,<sup>73</sup> and was further solidified in terms of the relation between environmental protection and the right to development for the first time only in the 1992 Rio Declaration. Today, the understanding of development as including an environmental process that aims at the well-being of everyone is firmly embedded and, as such, must be included in this paragraph. The aim of this process is “the constant improvement of the well-being of the entire population and of all individuals”. “Constant improvement of the well-being” is in sync with contemporary understanding of development which rejects its measurement only in income or wealth terms and views its basic objective as enhancement of the lives we lead, that is, our well-being.<sup>74</sup> The improvement of the well-being must be of “the entire population and of all peoples and individuals”. This comprehensive coverage of all peoples and individuals is not only in sync with the right-holders of the right to development described in draft article 4 viz. every individual and all peoples, but the term “entire population” is also a reflection of the “leaving no one behind” principle enshrined in the 2030 Agenda for Sustainable Development.<sup>75</sup> The basis of such constant improvement of the well-being is the “active, free and meaningful participation in development” of individuals and peoples, and “in the fair distribution of benefits resulting therefrom”. These words describe a human and people-centred approach to development insisting on their participation in an active, free and meaningful manner,<sup>76</sup> as well as an insistence on equitable development, which reflects the “reaching the furthest behind the first” principle recognized prominently in the 2030 Agenda.<sup>77</sup> No particular necessity to tamper further with this holistic description of development in the DRTD arises in the context of this draft convention. It is important to highlight that this does not foreclose qualifying development as described here with new and specific dimensions as and when required, as for instance, is done with respect to “sustainable development” in draft articles 3(g) and 23.

***Acknowledging that development is understood not simply in terms of economic growth, but also as a means to [of] widening people’s choices to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples,***

*Commentary:*

*A. Consideration of suggestions received:*

1. The Caribbean Court of Justice recommended that the paragraph be modified as follows: “Acknowledging that development is understood not simply in terms of economic growth, but also as a [comprehensive economic, social, cultural, civil and political process and] a means to widening people’s choices [and promoting the constant improvement of their wellbeing] to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples [while facilitating active, free and meaningful participation in development and in the fair and equitable distribution of benefits resulting therefrom]. The suggestion was made so as to be consistent

<sup>73</sup> World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987.

<sup>74</sup> See, Amartya Sen, *ibid*; Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge, Cambridge University Press, 2000; For World Bank indicators of development beyond the economic, see <http://datatopics.worldbank.org/world-development-indicators/>. Also see in general, Mary Morgan and Maria Bach, “Measuring development: from the UN’s perspective”, *History of Political Economy*, Vol. 50, No.1, 2018, pp. 193-210.

<sup>75</sup> United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, Resolution A/RES/70/1, adopted on 25 September 2015, paragraphs 4, 48 and 72.

<sup>76</sup> This is also referred to as “participatory development” in policy and scholarly literature. For instance, see, Giles Mohan, “Participatory Development”, in Vandana Desai and Rob Potter (eds.), *The Companion to Development Studies*, London, Routledge, 2014, pp. 131-136.

<sup>77</sup> A/RES/70/1, paragraphs 4 and 74(e).

with the DRTD. The EDG notes that the additions recommended are separately covered in the previous preambular paragraph and as such no modifications are necessary here.

*B. Legal commentary on the text:*

1. This preambular paragraph reflects article 3 of the UNESCO Universal Declaration on Cultural Diversity adopted at the 31st Session of the General Conference of UNESCO on 2 November 2001. The said article titled “Cultural diversity as a factor in development” reads as follows: “Cultural diversity widens the range of options open to everyone; it is one of the roots of development, understood not simply in terms of economic growth, but also as a means to achieve a more satisfactory intellectual, emotional, moral and spiritual existence”. This paragraph reinforces the previous preambular paragraph with an additional emphasis on cultural identity and cultural diversity of peoples.

***Reaffirming the universality, indivisibility, interrelatedness, interdependence and mutually reinforcing nature of all civil, cultural, economic, political and social rights, including the right to development,***

*Commentary:*

*A. Consideration of suggestions received:*

1. The International Human Rights Association of American Minorities recommended adding the words “apartheid, crimes against humanity or genocide” in this paragraph. The EDG does not consider this suggestion as fitting the context of this preambular paragraph.

*B. Legal commentary on the text:*

1. This preambular paragraph is identical to paragraph 10 of the annual resolution on the right to development adopted by the UNGA in December 2018.<sup>78</sup> This paragraph reaffirms the relationship between all human rights, irrespective of their labels, including the right to development.

***Recognizing that the realization of the right to development constitutes an important end and an integral means of sustainable development, and that the right to development cannot be realized if development is not sustainable,***

*Commentary:*

*A. Consideration of suggestions received:*

1. There were no suggestions received for modification of this paragraph for the second revision.

*B. Legal commentary on the text:*

1. This draft preambular paragraph focuses specifically on the sustainability dimension of development. Clearly, the right to development cannot be realized if development is unsustainable. Sustainable development as a global objective has gained massive policy significance in the last three decades, ever since its famous articulation by the Brundtland Commission, in its 1987 report titled “Our Common Future”,<sup>79</sup> and has now become the dominant global imperative as incorporated in the 2030 Agenda.

2. This preambular paragraph entrenches the symbiotic relationship between the right to development and sustainable development – a relationship that had been famously recognized as long back as in 1992 by the Rio Declaration which stipulated in its third principle that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.<sup>80</sup> The interplay between the right to development and sustainable development can be explained as follows.

<sup>78</sup> A/RES/73/166.

<sup>79</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987). In this report, Sustainable Development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” See, para. 43.

<sup>80</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3–14 June 1992 (A/CONF.151/26 Vol. I), annex 1.*

The former gives proper shape, colour and texture to the latter by purposely stressing on the right and duty aspects of sustainable development.<sup>81</sup> By acknowledging that development is a human right which has clearly identified duty-bearers, the right to development underscores that the only way development can be sustainable is if it is itself treated as a right and not as a charity, and if it is realized in a manner where all human rights are treated as equally important and no human right is undermined.

3. The formulation of the first part of the draft paragraph draws inspiration from Amartya Sen's famous articulation that expansion (or enhancement) of our freedoms is both the main end and the principal means of development.<sup>82</sup> In the same vein, this paragraph recognizes that the realization of the right to development constitutes both an "important end and an integral means" of sustainable development. It further recognizes that the relationship exists in the other direction as well, that is, the right to development cannot be realized if development is not sustainable. The commentaries to draft articles 3(g) and 23 further elaborate on these features.

**Considering that peace and security at all levels is an essential element for the realization of the right to development and that such realization can, in turn, contribute to the establishment, maintenance and strengthening of peace and security at all levels,**

*Commentary:*

*A. Consideration of suggestions received:*

1. Panama recommended deletion of the words "and that such realization can, in turn, contribute to the establishment, maintenance and strengthening of peace and security at all levels". The EDG had considered a similar suggestion from Cuba in the previous revision and had decided to retain the paragraph as it is. The EDG considered that the relationship between peace and security on the one hand and the realization of the right to development on the other is not unidirectional. The instrumental role of the right to development in contributing to peace and security at all levels is significant enough to merit a spotlight. As such, the paragraph has been retained as it is.

2. Panama also recommended inserting a new preambular paragraph as follows: "Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples, and in particular those of the developing countries". The EDG does not recommend this insertion in the preamble since disarmament is addressed in a more direct and stronger manner in draft article 22(2).

*B. Legal commentary on the text:*

1. This preambular paragraph highlights the relation between the right to development and peace and security. It is directly related to preambular paragraph 11 and article 7 of the DRTD. It also corresponds with draft article 21 herein.

2. While the first part of this draft paragraph is identical to paragraph 11 of the preamble of the DRTD, the words "and that such realization can, in turn, contribute to the establishment, maintenance and strengthening of peace and security at all levels" have been added to highlight that the relationship between development and peace and security is mutually dependent and not just unidirectional.<sup>83</sup>

**Recognizing that ~~good governance, accountability and the rule of law~~ [the effective rule of law, good governance and accountability] at all levels, including the national and international levels, and the realization of the right to development are mutually reinforcing,**

<sup>81</sup> "Operationalizing the Right to Development in Achieving the Sustainable Development Goals", Thematic Study of the Expert Mechanism on the Right to Development, A/HRC/48/63, para.23.

<sup>82</sup> Amartya Sen, *Development as Freedom*, at p. 36 and 53.

<sup>83</sup> In the same vein, the 2030 Agenda acknowledges in its preamble, "there can be no sustainable development without peace and no peace without sustainable development".

*Commentary:**A. Consideration of suggestions received:*

1. The Russian Federation recommended either deleting this paragraph or modifying it as follows: “Recognizing that good governance, accountability and the rule of law [~~at all levels, including the national and international levels, and the realization of~~ are [important for realising] the right to development [~~are mutually reinforcing~~]. The EDG considered it important to stress that the effective rule of law, good governance and accountability are necessary for the realization of the right to development at all levels, especially the international level in addition to the national. Additionally, as the legal commentary below notes, it is important to highlight that the realization of the right to development can play an instrumental role in ensuring effective rule of law, good governance and accountability at all levels. As such, the EDG recommends retaining the paragraph with a slight modification that the words “good governance, accountability and the rule of law” be replaced with “the effective rule of law, good governance and accountability” to align the language with paragraph 35 of the 2030 Agenda.

*B. Legal commentary on the text:*

1. This preambular paragraph recognizes the well-established relation between the need for the effective rule of law, good governance and accountability at all levels, including the national and international levels, on the one hand and favourable impacts on the realization of the right to development on the other hand.<sup>84</sup> However, the draft paragraph also recognizes the relationship in the other direction; that realizing the right to development is also an essential element of ensuring effective rule of law, good governance and accountability. This formulation therefore also highlights that denial of the right to development through obstacles established at the international levels can limit the space necessary for States to ensure good governance, effective rule of law and accountability at the domestic levels.<sup>85</sup>

**Recognizing also that the ~~human person~~ [individual] and peoples are the central subjects of the development process, and that development policy should therefore make them the main participants and beneficiaries of development,**

*Commentary:**A. Consideration of suggestions received:*

1. Panama recommended modifying the word “human person” to “individual”. The EDG accepted this change.

2. The Holy See reiterated its recommendation made during the first revision to modify the provision as follows: “[the inherent dignity of all members of the human family is the foundation of freedom, justice and peace, that every] [~~the~~] human person [~~and peoples are~~ is therefore] the central subject[s] of the development process, and that development policy should [consequently ~~therefore~~] make[s] [~~them~~] [the human person] the main participant[s] and beneficiar[y] of development”. It took note of the explanation provided by the EDG in the commentaries to the first revised draft that since the core ideas of the proposal were already contained in the formulation taken directly from the DRTD, there was no need to reformulate the provision. Nevertheless, the Holy See reiterated that, in the preamble, it is appropriate to reaffirm those core principles at the heart of the right to development and that the paragraph should explicitly contain a reference to the dignity of the human person as the foundation of the right to development. The EDG deliberated upon this suggestion and, as noted in the commentaries to preambular paragraph 15 above, considered that while reference

<sup>84</sup> For instance, see: A/RES/73/166, paragraphs 10a, 32 and 33; A/RES/70/1, paragraphs 9 and 35; paragraph 7 of the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1, adopted on 30 November 2012; preambular paragraphs 9 and 23 of Human Rights Council Resolution A/HRC/RES/37/6 adopted on 22 March 2018 on the role of good governance in the promotion and protection of human rights. See also, OHCHR, *Frequently Asked Questions on the Right to Development*, Fact Sheet No. 37, 2016, available at [https://www.ohchr.org/Documents/Publications/FSheet37\\_RtD\\_EN.pdf](https://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf)

<sup>85</sup> For a detailed account of how “governance space” of a State can be limited by decisions taken at the level of global governance, see: Mihir Kanade, *Multilateral Trading System and Human Rights*.

to inherent dignity of all members of the human family is important, it is more appropriately incorporated in that paragraph.

*B. Legal commentary on the text:*

1. This draft preambular paragraphs commences the third part of the preamble corresponding to the objectives that are sought to be achieved through the convention. This paragraph and the next focus on the right-holders of the right to development – every human person and all peoples – as recognized both in article 1 of the DRTD as well as in the corresponding draft article 4 herein.

2. This draft paragraph draws from preambular paragraph 13 of the DRTD, except that while the latter only incorporates the human person as the central subject of development, this draft paragraph incorporates both the individual and peoples. The explanation for the inclusion of “peoples” is elaborated in the commentary to draft article 3(a).

**Recognizing further that all human persons [individuals] and peoples are entitled to a national and global [international] environment conducive to just, equitable and participatory development, centred on human persons and peoples, [on them and] respectful of all human rights,**

*Commentary:*

*A. Consideration of suggestions received:*

1. Panama recommended that the word “human persons” be replaced with “individuals” at both places in the paragraph as formulated in the first revision. In line with similar modifications throughout the text, the EDG agreed to replace the first reference in the paragraph to “human persons” with “individuals”. With respect to the second reference in the paragraph, the EDG considered that a repetition is not necessary and recommends a simplified version that states “centred on them and respectful of all human rights”.

2. Cuba recommended during the first revision to replace the word “global” with “international”. The EDG reconsidered this suggestion and agreed with the modification to bring the language in sync with articles 3(1) and 10 of the DRTD and other provisions in this draft convention where the word “international” is used instead of “global”.

*B. Legal commentary on the text:*

1. This draft preambular paragraph captures what the high-level task force on the implementation of the right to development defined as the “core norm” of the right to development.<sup>86</sup> Its focus is principally on the fact that realization of the right to development requires not just a favourable national but also a favourable international environment.

**Acknowledging that States have the primary responsibility, through cooperation, including engagement with civil society, for the creation of national and international conditions favourable to the realization of the right to development,**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation recommended deleting the words “through cooperation, including engagement with civil society”. The explanation provided was that under international law, States bear the core responsibility for realization of human rights. The EDG notes that the paragraph as formulated does not dilute this norm nor does it push the primary responsibility of States onto civil society. To the contrary, it reiterates that States bear the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development, but that they should exercise this responsibility through cooperation, which includes engagement with civil society. As such, the EDG recommends retaining the language as it is.

*B. Legal commentary on the text:*

<sup>86</sup> A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, paragraph 18 and annex, paragraph 1.

1. After having focused on the right-holders and their entitlement in the previous two paragraphs, the current draft preambular paragraph and the next now turn to States as the primary duty-bearers. Thus, while the previous paragraph recognized that all individuals and peoples are entitled to a national as well as international enabling environment for the realization of the right to development, this paragraph, acknowledges that the corresponding primary responsibility for this lies on States. It corresponds identically with paragraph 14 of the preamble of the DRTD as well as article 3(1) thereof.<sup>87</sup> The only difference is that the word “acknowledging” has been employed instead of “bearing in mind” to strengthen the paragraph. The phrase “including with civil society” is incorporated out of consideration for draft article 13(2) of this draft convention, which refers to such engagement with civil society in the context of the duty to cooperate.

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

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested that the paragraph be deleted in its entirety. By way of explanation, it stated that “We cannot support the statements that ‘every organ or society has a duty to respect the human rights of all’. Again, we believe that this paragraph contradicts the paragraph on the states having the primary responsibility for enjoyment of human rights. [...] it is quite unclear what is meant by “organ” or “society”. Therefore, we cannot support that paragraph and suggest to delete it”. The EDG notes that the phrase “organ of society” is drawn from the preamble of the UDHR as well as from the 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. The term refers to everyone that plays a role in society – public, private and civil society organizations as well as individuals – who have the duty to respect human rights. The commentaries to draft article 7 provide an exhaustive legal commentary on this. Suffice it to say here that while States bear the primary responsibility to respect, protect and fulfil all human rights (the entire range of human rights obligations), everyone has the minimum duty to respect human rights (only one of the range of obligations), that is, do no harm to human rights of others under international law. As such, this paragraph does not contradict the previous preambular paragraph relating to the primary duty of States; it merely complements it by recognizing that everyone, whether the State or private actors, has the duty to respect human rights. The EDG therefore does not recommend any modifications to this paragraph.

2. The Caribbean Court of Justice recommended adding the word “regional” between “national or international”. The EDG has noted already that the word “international”, as employed in this treaty and explained in its text, includes “regional”.

*B. Legal commentary on the text:*

1. This draft preambular paragraph is a recognition of the principle in existing international law that everyone – whether a State or an international organization or any other non-State actor – has the general duty to respect, that is do no harm, to human rights of others. The formulation of this paragraph resonates with terms employed in existing human rights instruments. “Every organ of society” is a specific term used in the preamble of the UDHR as well as in article 19 of the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms adopted unanimously without vote by the UNGA.<sup>88</sup> The terms “at the national or international level” highlight that the organs of society at both the domestic and international levels are covered, including international organizations. The rest of the draft preambular paragraph recognizing the duty to respect human rights is discussed in depth in the commentary to draft article 7.

**Concerned that, despite the adoption of numerous resolutions, declarations and agendas, the right to development has not yet been effectively operationalized,**

<sup>87</sup> Also see article 10 of the DRTD.

<sup>88</sup> A/RES/53/144 of 9 December 1998.

*Commentary:**A. Consideration of suggestions received:*

1. There were no suggestions received for modification of the text.

*B. Legal commentary on the text:*

1. After having elaborated upon the motivations for the draft convention, the evolutionary trajectory of the right to development and some of the objectives of this draft convention in the previous paragraphs, this draft preambular paragraph and the next finally provide the ‘ultimate’ objective for concluding this draft convention. This paragraph notes the concern of States Parties that despite what has been accomplished until now in relation to the right to development in international and regional instruments and documents of all stripes, it has not yet been effectively operationalized.<sup>89</sup>

**Convinced that a comprehensive and integral international convention to promote and secure the realization of the right to development, through appropriate and enabling national and international action, is essential.**

*Commentary:**A. Consideration of suggestions received:*

1. There were no suggestions received for modifying the text of this paragraph.
2. There were, however, a few suggestions made for adding new paragraphs. Panama recommended the following: “Emphasizing the need to integrate an age, disability and gender perspective in all aspects of the implementation and realization of the right to development”. The Centre for Human Rights, University of Pretoria, suggested the following addition: “Recognizing that human rights defenders are particularly targeted when challenging huge investment and development projects, taking into consideration particular vulnerabilities and heightened risks for certain groups of human rights defenders including women, indigenous and environmental human rights defenders, human rights defenders working in isolated and rural areas and human rights defenders engaged in the protection of land, and the obligation of States to protect human rights defenders against any harm”. APG23 on behalf of CINGO suggested the following two additions: “Recognizing that the full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination against women are priority objectives of the international community” and “Emphasizing that civil society actors, including human rights defenders, have an important and legitimate role in promoting the respect of human rights and the realization of the right to development”. The EDG remained conscious of the length of the preamble and some suggestions for reducing its length. Considering the specific provisions in the text of the treaty that directly refer to human rights defenders (draft articles 3(l) and 15) and women (draft article 16), it is recommended that there is no need to include the suggested paragraphs in the preamble. For the same reasons, and because articles 8, 13(4)(e), and 15 of the draft convention directly cover the suggested elements, the EDG considers that there is no need to further elongate the preamble.

*B. Legal commentary on the text:*

1. The final draft preambular paragraph concludes the preamble by noting that States Parties are “convinced” that this draft convention is now essential for promoting and securing the realization of the right to development through appropriate and enabling action at both national and international levels. This follows the formulation of the final preambular paragraphs in the ICMW and the CRPD.

**Have agreed as follows:**

<sup>89</sup> The need to “operationalize” the right to development has been reiterated numerous times by States. For the latest illustration, see the 2018 resolution of the UNGA on the right to development, A/RES/73/166, preambular paragraph 21, and paragraphs 2, 10(c) and (d) of the text. In addition, also note that the word “effective” is used 20 times in the aforesaid resolution.

## Part I

### Article 1

#### Object and purpose

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

*Commentary:*

*A. Consideration of suggestions received:*

1. At the outset, the EDG recalls that in the commentaries to the zero draft, it was noted that this provision does not by itself describe the right to development or obligations of specific duty-bearers. Rather, it is aimed at clearly articulating the purpose of the convention in idealistic terms so that the substantive provisions on rights and duties to follow can be interpreted in its light. It was also noted that the provision focuses on what the convention seeks to achieve vis-à-vis the right-holders, rather than how it seeks to do so. The suggestions received for reformulating or improving this draft article were considered by the EDG in light of the aforesaid.

2. Panama recommended replacing “human persons” with “individuals” and the EDG agreed with this suggestion.

3. During the oral discussions at the 23<sup>rd</sup> session of the WGRTD, the Russian Federation had suggested that the words “effective operationalization” and “full implementation” were perhaps synonymous and that the former may be deleted. The EDG provided the following explanation: “As the commentaries to the zero draft note, “Effective operationalization” reiterates the words used in the penultimate paragraph of the preamble and the rationale is justified in the commentaries thereto. However, the paragraph further seeks to ensure that the object and purpose is not limited to “effective operationalization” *irrespective of outcomes*. It also aims at “full implementation” of the right in terms of achieving results. In fact, the EDG deliberated upon these words during its first meeting in October 2019. It was felt that the object and purpose of the treaty should be articulated both in terms of the process of realizing the right to development and the actual outcomes that result therefrom. Hence, the use of words “effective operationalization” as well as “full implementation” of the right to development”. The Holy See, in its comments for the second revised draft, recommended that the term “operationalization” be replaced with “realization” since the former has a functional connotation while the latter better reflects the holistic achievement of the enjoyment of the right to development by all. The EDG has explained above that the term “operationalization” was consciously employed to focus on both the process and outcome aspects of the right to development. In light of the above, the EDG recommends retaining the language as it is.

4. From the comments received for this second revision, Iran suggested the following modification: promote and ensure the full [realization of the right to development]. The EDG does not recommend this insertion since it largely duplicates what follows in the paragraph.

5. The Caribbean Court of Justice supported a suggestion from the Centre for Human Rights, University of Pretoria, made during the previous round to add the words “through inter alia eradication of the barriers to the right including poverty, inequality, colonialism, imperialism, cultural and traditional norms inconsistent with international human rights standards” at the end of the provision. The Caribbean Court also recommended adding the word “corruption” to the list. The EDG notes that the recommendation, while accurate in its substantive content, has not been included considering that the provision focuses on what the convention seeks to achieve vis-à-vis the right-holders, rather than how it seeks to do so, which is extensively addressed in the draft articles to follow. These means of realizing the right to development not only cover eradication of barriers as suggested by the Centre for

Human Rights, University of Pretoria, and the Caribbean Court but also address measures to be undertaken by the duty-bearers that go beyond merely removal of obstacles.

*B. Legal commentary on the text:*

1. Draft article 1 sets out the object and purpose of the proposed convention. The importance of identifying the object and purpose of a treaty is encapsulated in the VCLT, which stipulates that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*”.<sup>90</sup> This requirement to take into account the object and purpose of a treaty reflects the teleological or functional approach to interpretation,<sup>91</sup> signifying that the terms of a treaty are to be interpreted in a way that advances the latter’s aims.<sup>92</sup> A further legal significance flows from article 19(c) of the VCLT which does not permit reservations to be formulated to a treaty if it is “incompatible with the object and purpose of the treaty”.<sup>93</sup>

2. The object and purpose of a treaty may be determined in various ways, most prominently, by resorting to its preamble,<sup>94</sup> and in some cases, also to its title.<sup>95</sup> Although rare, few treaties do explicitly and separately articulate their purpose as part of the substantive provisions.<sup>96</sup> Among the core human rights treaties, only the CRPD contains a separate article entitled “purpose”. Draft article 1 draws inspiration for its location and part of its formulation from article 1 of the CRPD and prefers the fuller title of “object and purpose” to align it with the language of VCLT.<sup>97</sup> It may be stressed that entitling the draft provision in this fashion does not necessarily exclude consideration of other means of determining the object and purpose, including the preamble and title of this draft convention.

3. There are at least two sound reasons why a convention on the right to development should also contain a separate article formulating its object and purpose rather than relying on the traditional method of deciphering it, especially from the preamble. Firstly, the preamble, in addition to serving as *indicia* of the intention of the parties to a treaty,<sup>98</sup> also serves to indicate the overall context within which the treaty is being established.<sup>99</sup> The wider the political, social and historical context for adoption of the treaty, the longer is likely to be the preamble, as is the case with the present draft. In such instances, it is challenging to distil the central

<sup>90</sup> Article 31.

<sup>91</sup> M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff Publishers, 2009, at p.427.

<sup>92</sup> O. Dörr, *Vienna Convention on the Law of Treaties*, Oliver Dörr and Kirsten Schmalenbach (eds.), Berlin, Springer, 2018, at p.584.

<sup>93</sup> See also: *Reservations to the Convention on Genocide, Advisory Opinion*, I.C.J. Reports 1951, p.15, at p.24.

<sup>94</sup> See for instance, *Asylum Case*, I.C.J. Reports 1950, p.266, at p.282; *Rights of US Nationals in Morocco* I.C.J. Reports 1952, p.176, at p.196; *Beagle Channel Arbitration between the Republic of Argentina and the Republic of Chile of 18 February 1977*, Reports of International Arbitral Awards, Vol. XXI, pp.53-264, at paragraph 19; *Sovereignty over Pulau Ligitan and Pulau Sipadan*, I.C.J. Reports 2002, p.625, at para 51; *Golder v United Kingdom*, European Court of Human Rights, App No 4451/70, Ser A 18, 1975, paragraph 34; *US-Shrimp*, Report of the WTO Appellate Body, WT/DS58/AB/R, 1998, paragraph 129.

<sup>95</sup> See, *Delimitation of the Continental Shelf between Nicaragua and Colombia (Preliminary Objections)*, I.C.J. Reports 2016, p.100, at paragraph 39; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections)*, I.C.J. Reports 2017, p.3, at paragraph 70.

<sup>96</sup> See: Article II of the 1975 Convention for the Establishment of a European Space Agency, UNTS 1297: 186; Article 1 of the 1992 Convention on Biological Diversity, UNTS 1760: 79; Article 1 of the 2000 UN Convention Against Transnational Organized Crime, UNTS 2225: 209; Article 1 of the 2003 UN Convention Against Corruption, UNTS 2349: 41. In addition, treaties that are constituting instruments of international organizations may also list the purposes of such organizations. See for instance, article 1 of the Charter of the United Nations; article 1 of the Articles of Agreement of the International Monetary Fund.

<sup>97</sup> Article 31(1) of the VCLT stipulates that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See also, articles 18, 19, 20, 33, 41 and 58 of the VCLT.

<sup>98</sup> Makane Moïse Mbengue, “The Notion of Preamble”.

<sup>99</sup> VCLT, article 31(2). Also See: M.H. Hulme, “Preambles in Treaty Interpretation”, *University of Pennsylvania Law Review*, Vol. 164, 2016, pp. 1281-1343, at p.1304, observing that “a preamble may be relevant to both the text-and-context and object-and-purpose inquiries”.

object and purpose of the convention with clarity. This difficulty has been traced by some commentators to the paradoxical task of being “guided in the interpretation of a treaty by its object and purpose when those have to be elucidated first by interpreting the treaty”.<sup>100</sup> Therefore, in such cases, a separate provision clearly articulating the object and purpose of the convention – that is, capturing the essential goals in a way that the treaty’s text could be “boiled down to a concentrated broth” signifying its essence,<sup>101</sup> – gains particular importance. Secondly, the principal subject of this convention – the right to development – has a peculiarly long evolutive trajectory. Apart from the DRTD, there is an overwhelmingly large number of resolutions, declarations and other policy documents which reaffirm this right.<sup>102</sup> The UNGA has also time and again called for operationalizing the right to development at the national and international levels.<sup>103</sup> Despite these frequent iterations and reiterations, operationalization of this right through laws, policies or practices has in fact been limited and inadequate. The *raison d’être* for this convention is, therefore, to establish a legally binding framework that will promote, protect and ensure the full, equal and meaningful enjoyment of the right to development by all as well as to guarantee its effective operationalization and full implementation at all levels. This particularity of the absence of real action in the realization of the right to development despite recognition of its need on umpteen occasions over several decades necessitates a special emphasis on the object and purpose of the convention in a separate article titled as such.<sup>104</sup>

4. Draft article 1 highlights that the object and purpose of this convention is to “promote and ensure” the enjoyment of the right to development by every individual and all peoples everywhere. The provision focuses on what the convention seeks to achieve vis-à-vis the right-holders, rather than how it seeks to do so. As such, it remains silent on the precise nature of duties of the corresponding duty-bearers, which are covered with precision subsequently in the draft convention utilizing the respect, protect and fulfil framework. This is akin to the formulation of the object and purpose provision in the CRPD, which also focuses on what that convention seeks to achieve rather than what the duty-bearers must do to help achieve the same.<sup>105</sup>

5. The phrase “full, equal and meaningful enjoyment” also draws inspiration from article 1 of the CRPD, although “meaningful” is not mentioned therein. The term “full and equal enjoyment” is also found in the CERD.<sup>106</sup> Both these conventions focus on specific categories

<sup>100</sup> Isabelle Buffard & Karl Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?”, *Austrian Review of International and European Law*, Vol.3, 1998, p.311, at p.333.

<sup>101</sup> Ibid, at p.343; See also: D.S. Jonas and T.N. Saunders, “The Object and Purpose of a Treaty: Three Interpretative Methods”, *Vanderbilt Journal of Transnational Law*, Vol. 43, No. 3, 2010, pp.565-609, at p.581.

<sup>102</sup> These include annual resolutions on the right to development adopted by the erstwhile Commission on Human Rights, the Human Rights Council and the General Assembly, as well as resolutions related to appointment of independent expert/special rapporteur on the right to development and their reports.

<sup>103</sup> A/RES/55/2, paragraph 11; A/RES/73/166, paragraphs 2, 10(c) and (d).

<sup>104</sup> In case of the CRPD, it has been noted that a separate article emphasizing on its “purpose” was necessitated because, although the core human rights treaties prohibited discrimination against everyone in general, none in fact led to adequate operationalization of these rights in a way that ensured non-discrimination against persons with disabilities. See: Emily Kakoullis and Yshikazu Ikehara, “Article 1: Purpose” in *The UN Convention on the Rights of Persons with Disabilities*, I. Bantekas, M.A. Stein, and D. Anastasiou (eds.), Oxford, Oxford University Press, 2018, p. 48; Also see generally, C. Harnacke and S. Graumann, “Core Principles of the UN Convention on the Rights of Persons with Disabilities: an Overview”, in Joel Anderson and Jos Philips (eds.), *Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities*, Netherlands Institute of Human Rights, 2012.

<sup>105</sup> For discussions on the term “ensure” during negotiations of the CRPD, see the record of the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, available at <https://www.un.org/development/desa/disabilities/resources/ad-hoc-committee-on-a-comprehensive-and-integral-international-convention-on-the-protection-and-promotion-of-the-rights-and-dignity-of-persons-with-disabilities.html>. See also, Emily Kakoullis and Yshikazu Ikehara, “Article 1: Purpose”, at p.49. The term “guarantee” is incorporated in this paragraph to reflect the views from South Centre and Ecuador as discussed in the section on consideration of suggestions received.

<sup>106</sup> Article 2(2).

of persons who were generally covered under non-discrimination provisions of previously adopted core human rights treaties, but such generality did not in practice ensure equality with others for persons with disabilities or those belonging to marginalized racial groups. As such, “full and equal enjoyment” is followed in these Conventions with the words “of all human rights and fundamental freedoms” to highlight that everything guaranteed in core human rights treaties must be fully and equally applicable to persons within these categories as well. In case of draft article 1, the focus is specifically on enjoyment of the right to development and the nature of this enjoyment must therefore be appropriately adapted. “Full and equal” are obvious candidates because they describe that the enjoyment should aim to cover the full scope of the right to development and in an equal and non-discriminatory manner to all right-holders everywhere. The inclusion of “meaningful” in draft article 1 signifies that in addition to “full and equal”, the enjoyment of the right to development should also be real or tangible and have meaning in the self-determined perspective of its right-holders. It also alludes to the indispensability of “meaningful participation” of the right-holders which is specifically incorporated in the DRTD,<sup>107</sup> as well as in paragraph (d) of the draft preamble.

6. The terms “by every individual and all peoples” describe the specific right-holders of the right to development as contained in draft article 4. The word “everywhere” thereafter highlights the applicability to right-holders in all parts of the world under all circumstances.

7. The terms “and guarantee its effective operationalization and full implementation at the national and international levels” underscore the very reason why the *status quo* on the right to development is not deemed adequate and adoption of a convention is deemed essential. “Guarantee” signifies the seriousness in purpose which has been found wanting hitherto. “Effective operationalization” reiterates the words used in the penultimate paragraph 26 of the preamble. The explanation for the choice of these words in the commentary to the preamble is equally applicable here. The paragraph further seeks to ensure that the object and purpose is not limited to “effective operationalization” irrespective of outcomes. It also aims at “full implementation” of the right in terms of achieving results. As such, the paragraph is aimed at capturing both the process and outcome aspects of the right to development. “National and international levels” follows the essence of paragraphs 23, 24 and 25 of the preamble, and more specifically, the language of article 10 of the DRTD.<sup>108</sup> As explained in earlier comments, the soul of the right to development is indeed the existence of a national and international order favourable to its realization.

8. Draft article 1 does not by itself describe the right to development or obligations of specific duty-bearers. Rather, it is aimed at clearly articulating the purpose of the convention in idealistic terms so that the substantive provisions on rights and duties to follow can be interpreted in its light.

## Article 2

### Definitions

#### For the purposes of the present Convention:

(a) “Legal person” means any entity that possesses its own legal personality under domestic or international law and is not a ~~human~~ [natural] person, a people or a State;

(b) “International organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality; international organizations may include, in addition to States, other entities as members;

<sup>107</sup> Preambular paragraph 2 and article 2(3)

<sup>108</sup> Article 10, DRTD, stipulates that “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”.

~~(c) “Working Group on the Right to Development” means the entity established by the Commission on Human Rights in its resolution 1998/72 of 22 April 1998, as endorsed by the Economic and Social Council in its decision 1998/269 of 30 July 1998;~~

~~(d) “High-level political forum on sustainable development” means the entity established pursuant to the outcome document of the United Nations Conference on Sustainable Development (Rio +20) of 2012, as endorsed by General Assembly resolution 66/288 of 27 July 2012 and supplemented by Assembly resolution 67/290 of 9 July 2013.~~

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation, in their written submissions, suggested deleting the entire article, although in the oral submissions during the 23<sup>rd</sup> session of the WGRTD, the suggestion was limited to paragraph (a). In that respect, the Russian Federation observed that the parties to the treaty should only be States. The EDG notes that the definition of “legal persons” is necessitated in view of references to this term in draft articles 7, 11, 13 and 19. Not all legal persons can be parties to this treaty, only international organizations as a specific kind of legal person can be. The legal commentaries below provide more detailed explanation. As such, the EDG recommends retaining the definition.

2. It was also recommended in the written submissions that the definition of “international organizations” be deleted. During the 23<sup>rd</sup> session, clarification was sought from the EDG by the Russian Federation on the content and normative basis for this definition. The following explanation was provided by the EDG:

“international law does not contain a common definition of ‘international organization’ that applies in all contexts. In fact, context matters. International treaties do not incorporate identical definitions for this term. [...] the International Law Commission has adopted its articles on the Responsibility of International Organizations. The Law Commission’s commentaries on article 2(a) of that document, which defines “international organization”, provide illustrations of definitions for this term adopted in different international treaties, including ones such as “intergovernmental organization” or “intergovernmental organizations that have a capacity to conclude treaties”. The ILC then proceeds to discuss their shortcomings and adopts its own definition that reflects a codification of international law on the point. It is this definition provided by the ILC that the draft convention adopts. This is especially so because the context for the references to international organizations in the draft convention is related directly to their responsibilities under international law as examined by the ILC in their Articles on Responsibilities of International Organizations.

The EDG has clarified both in the commentaries and in the previous sessions, the inclusion, in addition to States, of other entities as possible members of international organizations. There is no ambiguity in this. The ILC goes into details in explaining why it chose to highlight that members of IO’s need not be States only and that there can be other entities that are also its members. For instance, the WTO has members that do not need to be States but only need to be customs territories. It is for this reason that the ILC defines international organization in the terms included in the draft convention. The ILC also explains which organizations, even of an international character, do not constitute an international organization. Therefore, the definition adopted in this draft convention and its scope is very clear and should be uncontroversial.

On the need for defining an international organization in draft article 2, the rationale is relatively straightforward. An “international organization”, is included in the definition of “legal person”, also contained in draft article 2. However, international organizations also have certain obligations, owing to their unique status under international law, which are distinct from those of other legal persons. The ILC’s Draft Articles on the Responsibility of International Organizations (DARIO) list a series of such obligations recognized under international law that are unique to this specific type of legal person. The draft convention, including in its revised form, contains certain provisions which are directed at all legal persons, including international organizations, and some which are

directed only at international organizations and not at other legal persons. As such, it is necessary to define the term “international organization” in the draft convention.”

For these reasons, the EDG recommends retaining paragraph (b) as it is.

3. Panama recommended that the term “human person” in paragraph (a) be replaced with “individual”. The EDG considers that for syntactic reasons, context of the definition, and in view of parallel change made to the language of draft article 7 in this second revised draft, the term “natural person” is more appropriate. The said modification is therefore recommended by the EDG.

4. The Russian Federation also suggested that the definitions of “Working Group on the Right to Development” and “High-level Political Forum” be deleted since the fate of these bodies in the future might be unclear. The EDG has, for reasons elaborated upon in the commentaries to draft article 25, deleted references in this draft convention to the WGRTD and the HLPF. As such, in the absence of any need to define them anymore, the EDG deletes paragraphs (c) and (d) of this draft article.

*B. Legal commentary on the text:*

1. Draft article 2 again follows the template of the CRPD which contains a list of definitions in article 2 thereof. The terms “legal person” and “international organization” as defined in paragraphs (a) and (b) respectively are referred to in several provisions of the draft convention. Although the meaning of these terms as used in the draft convention is drawn from international law, context-specific minor variations in their use, as indicated below, are also present within different international legal instruments. For this reason, draft article 2 begins with the words “for the purpose of the present Convention”, indicating that these definitions are to be understood as specific to the draft convention.

2. In legal parlance, any entity that is a subject of rights and duties under the applicable law and thus possesses legal personality is referred to as a “person”.<sup>109</sup> International law typically distinguishes between two categories of “person” – “natural person” and “legal person”.<sup>110</sup> “Natural person” as a term refers to human beings and is interchangeably referred to as “human person”. Indeed, almost all human rights treaties explicitly refer to the dignity of the “human person” in the context of who the right-holders are.<sup>111</sup> Such is also the case with the DRTD.<sup>112</sup> The term “legal person” thus generally has a non-human connotation.

3. Although, unlike the human or natural person, the “legal person” is not a right-holder of the right to development, both categories of persons do possess certain duties under international human rights law and, consequently, under the draft convention.<sup>113</sup> In other words, the scope of their rights and duties are not coterminous. This necessitates clearly defining a “legal person”. Draft article 2 begins by defining a “legal person” as any entity. The term “entity” is used to signify in the most neutral manner “something that exists separately from other things and has its own identity”.<sup>114</sup> Draft article 2 further highlights that mere existence with a separate identity is not adequate to qualify as a “legal person”. It must further possess “its own legal personality”. “Under national or international law” underpins the well-established proposition that both domestic and international law can

<sup>109</sup> International Law Commission, *Draft Articles on Diplomatic Protection*, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), p.68, available at <https://www.refworld.org/pdfid/525e7929d.pdf>; This is a long-standing principle in international law, see: Smith, Bryant. “Legal Personality.” *The Yale Law Journal*, vol. 37, no. 3, 1928, pp. 283–299.

<sup>110</sup> *Ibid.*, *Draft Articles on Diplomatic Protection*. See also: *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain), Second Phase, Judgment*, I.C.J. Reports 1970: 4 at p. 44; *The Queen v. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust*, High Court of Justice, Queen’s Bench Division, Case 81/87, European Court Reports 1988 - 5483.

<sup>111</sup> ICCPR and ICESCR, preambular paragraph 3; ICCPR, article 10; CERD, preambular paragraph 5; CRPD, preambular paragraph (h); ICMW, article 17; CRC, preambular paragraph 2 and article 37(c); CAT, preambular paragraph 2; CEDAW, preambular paragraph 1.

<sup>112</sup> Preambular paragraph 13, articles 1(1) and 2(1).

<sup>113</sup> See commentary to draft article 7.

<sup>114</sup> See the entry for “entity” in the Oxford Learner’s Dictionary, online version, available at <https://www.oxfordlearnersdictionaries.com/definition/english/entity?q=entity>

confer independent legal personality. For instance, international organizations possess legal personality independent of their members as a result of the international agreements constituting such organizations,<sup>115</sup> and as such, qualify as “legal persons”.<sup>116</sup> Corporations are the most well-known legal persons incorporated under municipal or domestic law, and international law has long recognized this status.<sup>117</sup> Draft article 2 does not and cannot list every entity which qualifies as a “legal person” but only describes the elements necessary to qualify as such.

4. Draft article 2, however, contains certain disqualifications from being considered as a “legal person” within the meaning of the draft convention. These are captured in the words “and is not a natural person, a people, or a State”. The exclusion of “natural person” from the definition is obvious for reasons spelt out above. The same reason – distinguishing “legal person” in the sense of being non-human – also explains the exclusion of the term “people” from the definition. Although technically, States may be considered as non-human and are certainly “legal persons” owing to their full and distinct legal personality under international law, they are also excluded from the definition following established practice as well as for practical reasons. In international legal practice, where natural and legal persons have been distinguished from each other, or where only the term “person” has been employed without excluding either natural or legal persons from its meaning, the status of States as a category distinct from these terms has also been maintained.<sup>118</sup> In addition, this is the only practical course to adopt because States are the only full subjects of international law and their obligations are far broader than those of any other person, natural or legal.

5. An “international organization”, as explained above, is included in the definition of “legal person”. However, international organizations also have certain obligations, owing to their unique status under international law, which are distinct from those of other legal persons. The ILC’s Draft Articles on the Responsibility of International Organizations (DARIO) list a series of such obligations recognized under international law that are unique to this specific type of legal person. The draft convention contains certain provisions which are directed at all legal persons, including international organizations, and some which are directed only at international organizations and not at other legal persons.<sup>119</sup> As such, it is necessary to define the term “international organization” in the draft convention.

6. There are other important reasons why a definition of “international organization” is necessary in this draft convention. Firstly, international law does not contain a well-established and common definition of “international organization”. Indeed, international treaties do not incorporate identical definitions for this term. The ILC’s commentaries on article 2(a) of DARIO (which defines “international organization”) provide illustrations of definitions for this term adopted in different international treaties, including ones such as “intergovernmental organization” or “intergovernmental organizations that have a capacity to conclude treaties”.<sup>120</sup> The ILC then proceeds to discuss their shortcomings and adopts its own definition.<sup>121</sup> Secondly, definitions of “international organization” appear to be limited to the respective instruments where they are incorporated and may not be applicable to others.<sup>122</sup> The ILC itself notes that “the definition of ‘international organization’ given in article 2, subparagraph (a), is considered as appropriate for the purposes of the present draft articles and is not intended as a definition for all purposes”.<sup>123</sup> Thirdly, it is indispensable to incorporate a definition in this draft convention because it permits international organizations

<sup>115</sup> *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949: 174, at pp.178-179.

<sup>116</sup> See, article 2(a) of the *Draft Articles on the Responsibility of International Organizations*, adopted by the International Law Commission at its sixty-third session, Yearbook of the International Law Commission, 2011, vol. II, Part Two (hereinafter “DARIO”).

<sup>117</sup> See ILC, *Draft Articles on Diplomatic Protection*, Chapter III, especially commentary to article 9. Also see, *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*.

<sup>118</sup> *Ibid.*, *Draft Articles on Diplomatic Protection*, articles 1 and 13, and commentaries thereto.

<sup>119</sup> For instance, see draft articles 8 (b), (c) and (d), and 20(2).

<sup>120</sup> ILC, Commentaries to article 2(a) of DARIO, paragraph 3.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, paragraph 3.

<sup>123</sup> *Ibid.*, paragraph 1.

to become parties.<sup>124</sup> There should never be any doubts or grey areas regarding who qualifies to be a party and who does not. For instance, as the ILC explains, the clear definition adopted by it in DARIO does not accommodate organizations which have a mix of NGOs and States as members, or organizations that are established under municipal law but have States as some of the members.

7. This draft convention adopts the definition provided by DARIO. This is especially so because the context for the references to international organizations in the draft convention is related directly to their responsibilities under international law as examined by the ILC in DARIO. Not much independent commentary is fortunately necessary to explain the definition of “international organization” adopted here, considering the elaborate work done by the ILC in its commentaries to DARIO. It may only be noted that this definition also encompasses, what may generally be referred to as regional organizations, including regional integration organizations.

## Article 3

### General principles

**To achieve the object and purpose of the present Convention and to implement its provisions, the [States] Parties shall be guided by, inter alia, the principles set out below:**

*Commentary:*

#### *A. Consideration of suggestions received:*

1. The Russian Federation recommended that the word “States” be added before “Parties” to bring it in uniformity with the rest of the draft convention. The EDG agrees with this suggestion.
2. The Russian Federation also suggested that the words “principles of international law” be added after “guided by” and before “inter alia”. The EDG does not see the need for doing so in view of the provision on harmonious interpretation in draft article 24. Additionally, all the principles set out in this draft article are grounded in well-established international law as the legal commentaries to each of the paragraphs below note. In this regard, the words “inter alia” are aimed at accommodating other principles of international law as well. As such, the EDG recommends retaining the language as it is.

#### *B. Legal commentary on the text:*

1. None of the core human rights treaties, except the CRPD, incorporates a separate provision entitled “general principles” to guide the implementation of obligations contained therein. In the case of these other treaties, the principles can only be deciphered from their preamble,<sup>125</sup> and substantive provisions.<sup>126</sup> The trend in favour of ensuring clarity however changed with the CRPD which, in its article 3, specifically lists its principles. The CRPD, in turn, emulated the practice prevalent predominantly, but not only, in international environmental treaties as illustrated below.

<sup>124</sup> See draft articles 28 and 29 and the commentaries thereto.

<sup>125</sup> For instance, the preamble of CEDAW specifically affirms the “principle of the inadmissibility of discrimination”. The ICCPR, ICESCR and CERD in their first preambular paragraph, incorporate the principles proclaimed in the Charter of the United Nations, recognizing the inherent dignity and equality of all human beings.

<sup>126</sup> For instance, the Committee on the Rights of the Child identified the non-discrimination principle of equal access to rights, best interest of the child, optimal development principle for all children, and the right of the child to express views freely, as the four general principles of the CRC inferred from articles 2, 3(1), 6 and 12 thereof. See: Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003.

2. There are examples of “general principles” being incorporated in both framework conventions,<sup>127</sup> and standard conventions.<sup>128</sup> The feature overwhelmingly common to most of these conventions is that the principles are explicitly stipulated as guides to the duty-bearers for achieving the conventions’ purposes or objectives and for implementing the provisions, and are not aimed at merely guiding the interpretation of the provisions.<sup>129</sup> CRPD is an outlier to this directness because article 3 thereof begins with the passive words “the principles of the present Convention shall be”, although it is clear that these principles are also aimed at something much more specific viz. guiding States in achieving the purpose of the convention as stipulated in its article 1 and in implementing the other provisions thereof.<sup>130</sup>

3. Another important difference between CRPD and most of these other international treaties is that the latter express principles in full sentences, whereas CRPD only mentions these as short, and sometimes, monosyllabic headings. Considering the complex historical and political context of the right to development preceding the drafting of this convention, it might be best to both title and explain the principles in full sentences. Draft article 3 therefore follows the new trend of including “General Principles” in human rights treaties set by the CRPD, but also improves on it by incorporating these better features from other international treaties. It thus begins with the words “To achieve the purpose of this Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the principles set out below”. The words “*inter alia*” ensure that this is not to be considered as an exhaustive list and that there could be other principles contained in the provisions to follow as well as in the preamble that must also be considered.

4. An essential feature of the principles listed in draft article 3 is that each one is already well-established in international law. There has been no attempt made to establish new principles or norms.

**(a) Development centred on the ~~human person~~ [individual] and peoples: the ~~human person~~ [individual] and peoples are the central subjects of development and must be the active participants and beneficiaries of the right to development;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested that the words “active participants” be deleted from this paragraph. As justification for this, it noted that “when we say that the States should be guided by the following principles, then we should talk about the rights holders as beneficiaries. Therefore, the “active participants” should be deleted”. The EDG could not accept this suggestion. The words “active participants” are drawn from article 2(1) of the DRTD. The active, free and meaningful participation of the right-holders is at the core of the right to development. The right to development, as defined in draft article 4 of this draft convention mirroring article 1(1) of the DRTD, entitles the right-holders to three things: the right to participate in, contribute to, and enjoy development. It guarantees them the right to

<sup>127</sup> For instance, article 3 of the 1992 UN Framework Convention on Climate Change, article 3 of the 1992 UN Convention on Biological Diversity, and article 4 of the 2003 WHO Framework Convention on Tobacco Control.

<sup>128</sup> The best known example is, of course, article 2 of the Charter of the United Nations. Also, in addition to article 3 of CRPD, see article 3 of the 1994 UN Convention to Combat Desertification.

<sup>129</sup> For instance, article 2 of the Charter of the United Nations begins by stipulating that “the Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles”. Article 3 of the 1994 UN Convention to Combat Desertification stipulates that “In order to achieve the objective of this Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following”. Article 3 of the UNFCCC stipulates that “In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following”. Article 4 of the WHO Framework Convention on Tobacco Control similarly reads, “To achieve the objective of this Convention and its protocols and to implement its provisions, the Parties shall be guided, *inter alia*, by the principles set out below”.

<sup>130</sup> Sarah Arduin, “Article 3: General Principles” in *The UN Convention on the Rights of Persons with Disabilities*, I. Bantekas, M.A. Stein, and D. Anastasiou (eds.), Oxford, Oxford University Press, 2018, p.85.

define and author what development means to them and ensure that their development priorities are reflected in development policy at all levels. Reducing the right-holders to beneficiaries only negates their active agency in participating and contributing to the development process. It is precisely the idea of right-holders being passive recipients of the benefits of development as charity that is rejected by the right to development.

2. Ecuador recommended eliminating the term “human” while retaining “person” since the term “human person” refers to only an individual of the human species. The EDG, in view of the current state of international (human rights) law and the focus of this treaty, could not accept the suggestion to expand the coverage to non-human species. On the other hand, the EDG accepted the suggestion of Panama to replace the word “human person” with “individuals”.

3. The Holy See suggested deletion of the word “peoples”. The EDG has explained previously that “peoples” are a distinct right-holder in addition to individuals. The Holy See also suggested insertion of the words “in virtue of his or her inherent dignity” before the words “central subjects”. As was also suggested in the case of the preamble, the Holy See reiterated the importance of firmly and explicitly grounding the right to development in the dignity of the human person in this paragraph, so as to avoid any inappropriate or incomplete interpretation that would suggest that it is the Convention itself, or the international community, that bestows rights on individuals. The EDG agrees with the content of this comment, however, considers that the context of this paragraph is different. In view of the incorporation of “inherent dignity of all members of the human family” in preambular paragraph 15, the EDG does not recommend any changes here.

*B. Legal commentary on the text:*

1. Paragraph (a) of draft article 3 is titled “Development centred on the individual and peoples”. The description states that “the individual and peoples are the central subjects of development and must be the active participants and beneficiaries of the right to development”. This statement is almost identical to the thirteenth preambular paragraph of the DRTD and its article 2(1). The sole difference is that in the DRTD, only the human person (replaced with “individual” here) is mentioned as the central subject of development while the term “peoples” has no reference. This seems to be an oversight in the DRTD because the right-holders therein are identified as both the human person and peoples.<sup>131</sup> This is no mere happenstance. “People”, as a term of international law, connotes a distinct right-holder with its own legal personality, separate from the legal personality of the individual human persons that constitute it. International law confers upon a “people” certain collective rights which cannot be reduced as the sum-total of the rights of individuals who make up that collective.<sup>132</sup> The right to self-determination is guaranteed to all “peoples”. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes several rights that belong to indigenous peoples as a whole. The African Charter on Human and Peoples’ Rights, as the nomenclature itself suggests, recognizes not just collective rights for peoples which may be distinct from those enjoyed by human beings at the individual level, but also specifically, the right to development of all peoples.<sup>133</sup> The implication of this is that development should not only be human person-centred, but where development is related to traditional lands, natural resources, or other rights that belong to a particular “people” which cannot be reduced to individual rights, then development must also be people-centred.<sup>134</sup> Paragraph (a) therefore

<sup>131</sup> Article 1(1) of DRTD.

<sup>132</sup> See, UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, Paris, 1989, SHS.89/CONF.602 /7.

<sup>133</sup> African Charter on Human and Peoples’ Rights, article 22. For jurisprudence on this point under the African system, see: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 276/03, 2009; *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, 006/2012, 2017.

<sup>134</sup> The Inter-American Court of Human Rights has also recognized the legal personality of peoples as distinct from the individuals that constitute it in the context of traditional lands, natural resources and related property. See, *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations, and Costs, Judgement of November 28, 2007, especially paragraphs 159 to 175. Also see: *Moiwana Community v. Suriname*, Inter-American Court of Human

incorporates both individuals and peoples on whom development must be centred as the principle which should guide implementation.

**(b) Universal Principles common to all human rights: the right to development should be realized in a manner that integrates the principles of [universality, inalienability, indivisibility, interdependence and interrelatedness of all human rights, as well as of] equality, non-discrimination, empowerment, participation, transparency, accountability, equity, [inclusion, accessibility,] and subsidiarity;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation and Egypt recommended that the title be rephrased to “Principles common to all universal human rights”. It suggested also to delete the term “universality” from the list of principles in the text to avoid repetition. The EDG did not find the added value of transposing the word “universal” within the title as a qualifier for “principles” to a qualifier for “all human rights”. Nevertheless, in order to avoid confusion with the principle of universality in the text, the EDG recommends eliminating reference to “universal” altogether in the title. However, the EDG does not recommend deleting the principle of universality from the description since this principle is at the core of human rights.

2. Algeria recommended deletion of the term “empowerment” in the description on the ground that its meaning is unclear as a human rights principle. Similarly, the Holy See reiterated its previous recommendation to also delete the term. It acknowledged the EDG’s affirmation in the commentaries to the first revised draft that the word “empowerment” has been interpreted by the OHCHR, however, noted that such an interpretation has not been codified in international law by States. Instead, it suggested replacing the word “empowerment” with the word “promotion” so as to avoid any “individualistic interpretation” that might otherwise be applied to the term. The EDG had noted in the commentaries to the first revised draft that the word “empowerment” has already been interpreted in the context of the right to development: “Empowering people means moving beyond purely technocratic solutions and treating people as passive objects of aid or charity. People are empowered when they are able to claim their rights and to shape the decisions, policies, rules and conditions that affect their lives.”<sup>135</sup> Additionally, it had pointed out that “empowerment” as a principle of human rights is well-recognized.<sup>136</sup> The EDG takes the opportunity to also highlight that, at least in the context of women’s rights, the principle is incorporated in international human rights instruments. For instance, article 6(2) of the CRPD stipulates that “States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention”. Since the CRPD is among the last of the current core human rights treaties, the inclusion of “empowerment” therein reflects the crystallization of this principle in human rights law. Indeed, as the aforementioned article indicates in the context of the CRPD, States ought to, in order to realize also the right to development, empower the right-holders to be active and free participants and contributors to development. This is especially

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Rights, Preliminary Objections, Merits, Reparations and Costs, Judgement of June 15, 2005, especially paragraphs 130 to 135.

<sup>135</sup> United Nations Office of the High Commissioner for Human Rights, *Accelerating sustainable development with human rights*, at <https://www.ohchr.org/sites/default/files/Documents/Issues/MDGs/Post2015/EIEPamphlet.pdf#:~:text=Empowerment%20requires%20securing%20civil%20and%20political%20rights%20as,to%20act%20as%20agents%20of%20their%20own%20development.> (last accessed 1 April 2022).

<sup>136</sup> OHCHR, *What are Human Rights?*, available at <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>; World Health Organization, *A Human-rights based approach to health*, available at [https://www.who.int/hhr/news/hrba\\_to\\_health2.pdf](https://www.who.int/hhr/news/hrba_to_health2.pdf); UNFPA, *Human Rights Principles*, available at <https://www.unfpa.org/resources/human-rights-principles>; OHCHR,

*Principles and guidelines for a human rights approach to poverty reduction strategies*, available at <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; FAO, *Exploring the human rights-based approach in the context of the implementation and monitoring of the SSF Guidelines*, <http://www.fao.org/3/a-i6933e.pdf>.

the case with reference to vulnerable and marginalized right-holders who do not have the ability or capacity to enjoy their right to development without being empowered to do so by the State. The means of such empowerment would necessarily be context-specific. Education, awareness of rights, information, capacity-building, financial support, legal assistance, consultation, etc. to enable right-holders to claim their rights and shape the decisions, policies, rules and conditions that affect their lives, are all ways of empowerment. The EDG, therefore, continues to recommend that the term be included in the description of this principle.

3. Panama and the Caribbean Court of Justice recommended adding “inclusion” and “accessibility” to the description. As the Caribbean Court rightly noted, the commentaries to the first revised draft indeed acknowledged that the EDG had accepted the incorporation of these principles. However, the same was not reflected in the revised text and as such, the EDG recommends inserting the same in this second revised text.

*B. Legal commentary on the text:*

1. Paragraph (b) is titled “Principles common to all human rights” and is aimed at restating the universally acknowledged principles that are common to the realization of all human rights and ensuring that they are applied to the realization of the right to development. The description first lists the five principles applicable to the very nature of all human rights viz. universality, inalienability, indivisibility, interdependence and interrelatedness of all human rights. It then lists the well-acknowledged principles for implementation of human rights obligations viz. equality, non-discrimination, empowerment, participation, transparency, accountability, equity, inclusion, accessibility, and subsidiarity. There is ample documentation on the content of each of these principles and they do not require further elaboration in draft article 3.<sup>137</sup> It may be noted that although draft article 3 does not explicitly mention the principles of “leaving no one behind”<sup>138</sup> and “reaching the furthest behind the first”<sup>139</sup> incorporated in the 2030 Agenda, they are inherent to each of these principles, particularly to the principles of non-discrimination, equality, equity, empowerment, inclusion and accessibility. Indeed, it is these human rights principles which in fact constitute the underlying basis for the “leaving no one behind” and “reaching the further behind the first” principles.

**(c) Human rights-based development: as development is a human right that is indivisible from and interrelated and interdependent with all other human rights, the laws, policies and practices of development, including development cooperation, must be normatively anchored in a system of rights and corresponding obligations established by international law;**

*Commentary:*

*A. Consideration of suggestion received:*

1. As with previous rounds, some States – the Russian Federation, China, Egypt, Iran, and Algeria – expressed discomfiture during the 23<sup>rd</sup> session of the WGRTD with the title “Human rights-based development” on the ground that it is a controversial concept. In response, the EDG provided the following oral explanation:

“A number of comments were made with reference to draft article 3(c) on Human Rights-Based Development. The EDG fully understands and is cognizant of the critiques of “human rights-based approach to development” (HRBA) as it is deployed selectively in practice. The

<sup>137</sup> OHCHR, *What are Human Rights?*, available at <https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>; World Health Organization, *A Human-rights based approach to health*, available at [https://www.who.int/hhr/news/hrba\\_to\\_health2.pdf](https://www.who.int/hhr/news/hrba_to_health2.pdf); UNFPA, *Human Rights Principles*, available at <https://www.unfpa.org/resources/human-rights-principles>; OHCHR,

*Principles and guidelines for a human rights approach to poverty reduction strategies*, available at <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; FAO, *Exploring the human rights-based approach in the context of the implementation and monitoring of the SSF Guidelines*, <http://www.fao.org/3/a-i6933e.pdf>

<sup>138</sup> A/RES/70/1, paragraphs 4, 48 and 72

<sup>139</sup> *Ibid.*, paragraphs 4 and 74(e)

Expert Mechanism on the Right to Development has in fact critiqued current practices of HRBA in its first thematic study. HRBA is not a principle explicitly found in any treaty or state-led international instrument. It emerged through the UN System's internal Statement of Common Understanding on Human Rights Based Approaches. However, this Common Understanding of the UN system, made no reference to the right to development. In practice, HRBA has been deployed in a lopsided manner whereby scrutiny is placed only on the side of recipients of development cooperation and not also on the side of the providers of development cooperation. Additionally, the human rights impacts of those taking domestic measures that have extraterritorial adverse impacts on the right to development of others does not find a place in HRBA in practice. Nor do impacts of collective action or inaction of States in regional or international partnerships find adequate space in HRBA practice. This form of HRBA is a distorted deployment of the right to development and is counterproductive rather than helpful. HRBA cannot focus only on an enabling internal environment while ignoring the need for an enabling international environment for development to be realized as a human right. Now, there are two ways of going about HRBA for those concerned with its political use or abuse. One, is to take matters in hand, challenge the status quo, and use the Convention to, for the first time, define it as the right to development. By doing so, all current practices whereby HRBA is deployed will need to be tested against the touchstone of the Convention's understanding of it as the right to development. HRBA will then include extraterritorial as well as collective actions, not just internal actions by States. The other option is to let go of this opportunity and live with the status quo, which is continuation of a lopsided deployment of HRBA by the World Bank, development agencies etc. The choice is with States. On our part, we would urge delegates with concerns about how HRBA has been used thus far to consider taking this Convention as an opportunity to concretely define it through the lens of the right to development and change the narrative to where it should be.

In light of the explanation above provided pursuant to concerns raised by some States against the term, the EDG continues to recommend its retention in the title. The legal commentary to this draft principle below provides additional analysis.

2. The Caribbean Court of Justice and the International Human Rights Association of American Minorities recommended adding a new paragraph below the current one titled: "international humanitarian-law based approach to development: colonialism and foreign occupation must be realized consistent with international humanitarian law for the restoration and reparation of exploited peoples and countries". The EDG assumes that there is an error in the phrase "colonialism and foreign occupation must be realized consistent with international humanitarian law". It does acknowledge the importance of restoration and reparation of exploited peoples and countries. Nevertheless, it is doubtful whether international humanitarian law is the appropriate normative framework for such restoration or reparation in the context of colonialism and foreign occupation, or more broadly, as a principle for the implementation of obligations of States related to the right to development. As such, the EDG does not recommend its inclusion.

3. The Holy See recommended replacing the words "all other human rights" with "fundamental human rights" to reflect the usage in the UDHR and the two covenants. The EDG notes that the context for usage of the words "all other human rights" in this paragraph is specific. It is aimed at stressing that development itself is a human right that is self-standing and at par with all other human rights. It also seeks to ensure that human rights-based approach to development is not interpreted, as it often is, in a manner where development and human rights are two separate domains. As such, the EDG recommends retention of the text as it is.

*B. Legal commentary on the text:*

1. The principle in paragraph (c) is entitled "Human rights-based development". Its main objective is to recalibrate the current dominant understanding of the phrase, which is considered by many States, as well as by the Expert Mechanism on the Right to Development, to be problematic and lopsided in its use. In particular, the description following the title seeks to digress from the current conceptual framework of human rights-based development and reposition it in a way that is fully compatible with the normative framework of the right to development. This also provides, for the first time, a specific understanding of the concept

crystalized in a legally binding instrument, that will inform current frameworks that are problematic and require modifications in them.

2. Human rights-based development, also referred to as Human Rights Based Approach to Development (HRBA), is the principal conceptual framework adopted by the United Nations system, and also employed by some governments, development aid agencies and NGOs, for ensuring that development is not operationally realized in a manner inimical to human rights, but rather in a way that ensures respect, protection and fulfilment thereof. It focuses on linking and aligning the objectives of development projects to specific human rights norms, standards and principles.<sup>140</sup> This conceptual framework owes its genesis, in the practice of the United Nations and its entities, to the Statement of Common Understanding Among UN Agencies on the Human Rights Based Approach to Development Cooperation. This common understanding was adopted by the UN pursuant to an interagency workshop on this topic held in the context of UN reforms from 3 to 5 May, 2003, to address divergent uses of this concept by different agencies. This common understanding is based on the following three principles:

- a. 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.
- b. 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.
- c. 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.

What is noteworthy is that this understanding of HRBA considers development and human rights as separate domains whereby development cooperation and programming must on the one hand be guided by international human rights standards, and on the other hand, must have realization of human rights as their objective. However, development itself is not visualized as a human right. Indeed, there is not a singular reference in this common understanding to the right to development. In 2006, the OHCHR published the “Frequently Asked Questions About Human Rights-Based Approach to Development Cooperation” consolidating further inputs from various UN agencies. This document also carries forward the compartmentalization of human rights and development into different boxes such that they are “close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully”. This approach also ignores the normative framework of the right to development which insists that development itself is a human right. As the Expert Mechanism on the Right to Development noted in its critique of HRBA, this framework conceptualizes development as a set of objectives to be realized through the adoption of an approach based on human rights, rather than as a self-standing human right. As it further observed, this normative downgrading seriously impedes the operationalization of the right to development, especially when HRBA is deployed in development cooperation practiced by States or their development agencies. Retention of human rights and development in separate albeit related domains has permitted its deployment selectively in many of development cooperation practices on the ground, especially since such practices focus predominantly, in programmatic terms, on the internal obligations of States and not equally on the external and collective dimensions of the obligations of States. For instance, as the Expert Mechanism has noted,

“the human rights-based approach practised by many donor countries, or their development agencies, requires recipients of development aid or assistance to ensure respect for human

<sup>140</sup> United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, Geneva, United Nations, 2006. See also, United Nations Development Group, *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)*, New York, United Nations, 2003.

rights while implementing development projects, including through transparent and accountable institutions. While this is indispensable and intrinsic to the right to development, in such frameworks it is not generally considered the duty of donors to realize development and not impede it. In effect, these frameworks may not include adequate attention paid to the obligations of development cooperation partners not to impair the right to development of recipients when aid and assistance practices undermine development priorities and the policy or governance space of recipients. That occurs when donors, rather than recipients, determine the sectors for aid allocation, misalign funding with recipient country priorities, or undermine recipient country ownership over development programmes. Aid or assistance as loans designed to increase debt, with predatory conditionalities attached or requiring contracts for donor companies can violate the right to development of recipients. None of the responses to questionnaires received provided instances of human rights-based frameworks that focus on the obligations of States externally and collectively in the same manner as they focus on the realization of the obligations of States internally”.

This lopsided deployment of human rights-based approach to development is contrary to the right to development that requires an equal focus on all three dimensions of obligations of States – internal, external, and collective.

3. The description of the principle thus begins with the words “as development is a human right”. This is aimed specifically at addressing the problem above. It follows with the words “that is indivisible from and interrelated and interdependent with all other human rights” to highlight its self-standing nature but also its mutual relation with “all other” human rights. The terms “laws, policies and practices of development, including development cooperation” provide a comprehensive coverage of the means by which the development process may be carried out but importantly, also place a spotlight on development cooperation so that the principle covers providers as well. This is important to ensure that HRBA in development cooperation understands development itself as a human right. It applies not only to bilateral cooperation, including through development agencies, but also when States act at international organizations.

4. Finally, the phrase “must be normatively anchored in a system of rights and corresponding obligations established by international law” is drawn from the definition of HRBA adopted by the UN system. However, unlike that definition, in this draft principle, these words are preceded by a recognition that this is so because development itself is a human right. The paragraph in its entirety therefore is a principle that ought to guide States in the implementation of almost every obligation contained in the draft convention, including those related to conducting impact assessments, international cooperation, and implementation of development agendas.<sup>141</sup> Any approach to development incompatible with this principle is also incompatible with the right to development.

**(d) Contribution of development to the enjoyment of all human rights: development, as described in the present Convention, is essential for the improvement of living standards and the welfare of human persons [individuals] and peoples and contributes to the enjoyment of all [other] human rights;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested replacing the word “all human rights” with “universal human rights”. The EDG does not consider that this enhances the provision since all human rights are universal.

2. Panama suggested replacing the word “human persons” with “individuals”. In line with other changes made, the EDG accepted this recommendation.

<sup>141</sup> For instance, the policy and operational support prepared by the UN Development Group for UN Country Teams in integrating human rights in SDGs implementation underscores the importance of the right to development and is essentially built on this principle. Available at <https://undg.org/wp-content/uploads/2016/09/Policy-Operational-Support-to-UNCTs-on-HR-in-SDG-Implementation-FINAL...-1-1.pdf>

3. Uruguay recommended incorporation of “cooperation” in the paragraph in line with draft article 13. The EDG notes that this is not necessary here in view of the draft principles 3(c), (e), (i) and (j).

4. APG23 on behalf of CINGO suggested that the description begin with the words “right to development, as described in this convention,” rather than “development, as described in this convention”. The EDG notes that development as described in the convention is indeed as a right, and as such, did not feel the need to make the change. However, the EDG accepted the suggestion by APG23 to add the word “other” between “all human rights” at the end of the sentence.

*B. Legal commentary on the text:*

1. This principle is added to reflect Human Rights Council Resolution 41/19 titled “The contribution of development to the enjoyment of all human rights”. The text of the description draws from preambular paragraph 7 thereof.

2. The main modification, and an important one, is reflected in the words “development, as described in this convention”. This is to ensure that the term “development” is not assigned a meaning that is incompatible with the human rights-centric understanding or sustainability dimension of the term as employed in this convention.

**(e) Principles of international law concerning friendly relations and cooperation among States: the realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations;**

*Commentary:*

*A. Consideration of suggestions received:*

1. There was some hesitation regarding this principle expressed by the Russian Federation. However, the EDG considered this principle to be firmly embedded in international law. In view of the importance of the duty of international cooperation for the realization of the right to development, the EDG recommends retaining this principle.

*B. Legal commentary on the text:*

1. This paragraph reflects article 3(2) of the DRTD which recognizes that the right to development requires “full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.” This reflects an architectural norm aligned with the fundamental purposes and principles of the Charter of the United Nations, as well as UN General Assembly Resolution 2625 (XXV) of 1970,<sup>142</sup> which is considered by the International Court of Justice to reflect customary international law.<sup>143</sup>

**(f) Self-determined development: [the priorities of] development is [are] determined by individuals and peoples as rights holders [in a manner consistent with the provisions of the present Convention]. The right to development and the right to self-determination of peoples are integral to each other and mutually reinforcing;**

*Commentary:*

*A. Consideration of suggestions received:*

1. Argentina suggestion deletion of the word “peoples” in the second sentence on the ground that “this creates confusion” because “free determination is applicable only when there is an active right holder of that right”. The EDG notes that the word “of peoples” was not present in the zero draft and was added during the first round of revisions based on the

<sup>142</sup> UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations”, Resolution 2625(XXV), adopted by the UNGA, on 24 October 1970.

<sup>143</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para.80; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193

recommendation of Argentina itself. The EDG added the words since they are in line with international law that recognizes the right to self-determination for peoples as the rights holders. As such, the EDG does not recommend deleting it again.

2. The Holy See suggested reformulating the first paragraph of the description as follows: “the priorities of development are determined, *inter alia*, by individuals and peoples as rights holders, with due consideration for promoting the common good”. By way of explanation, it suggested that the text in the first revised version is problematic because “States necessarily have a role to play in ‘determining’ development, based, *inter alia*, on available resources, global markets, and national/cultural values”. It also noted that “‘determining’ development seems to suggest a very relativistic approach, in which ‘individuals and peoples’ would decide what it means. This is particularly problematic from a perspective of a holistic understanding of human development, which is based on the objective and unchanging values that promote the dignity of the human person, while being implemented in a way that takes into account the subjective and cultural context”. The EDG agrees that while the *priorities* for development must be determined by the rights holders, the State has the principal role to play in planning, programming and implementing them. As such, the EDG suggests adding the word “priorities” to the text to clarify its import. The EDG does not, however, recommend adding the words “*inter alia*” because they introduce the possibility of actors other than the rights holders determining development priorities. The States’ duty is indeed to plan, programme and implement development policies based on the priorities as determined by the rights holders. The words also may permit international organizations, including international financial institutions, to determine development priorities of the rights holders, which is contrary to the very essence of the right to development. The EDG also does not recommend adding the words “with due consideration for promoting the common good” since the words “common good” are not defined in international law and are subject to different interpretations. The EDG, however, agrees with the overall essence of the submission by the Holy See, and suggests adding the words “in a manner consistent with the provisions of the present Convention”. This ensures that the determination of priorities by the rights holders are not in violation of human rights norms but help realize them, including the right to development.

3. APG23 on behalf of CINGO recommended reframing the title to just “self-determination”, deleting the first sentence, and adding the word “individuals” in the text of the second sentence. The EDG notes that there is a particular value in the title “self-determined development” since it highlights that development priorities must be self-determined by the rights holders and not imposed upon them. Same is the case with the first sentence. As such, the EDG does not recommend modifying the paragraph as suggested. Insofar as adding the word “individuals” in the last sentence is concerned, the EDG notes that the right of self-determination is guaranteed in international law to peoples as the right holder and not to individuals. As such, no modification on those lines is recommended.

*B. Legal commentary on the text:*

1. Paragraph (f) crystallizes another fundamental principle inherent to the right to development and its proper realization – the principle that development should be self-determined. This is inherent to the right to self-determination which finds a prominent recognition in the Charter of the United Nations.<sup>144</sup> It is also the very first provision of both the ICCPR and the ICESCR indicating its vital importance to the realization of all human rights in general. Unsurprisingly, it is of core essence to the right to development as articulated in article 1 of the DRTD. It is also referenced in paragraph 6 of the preamble to the DRTD.

2. The description in this paragraph comprises two sentences. The first states that “the priorities of development are determined by individuals and peoples as rights holders in a manner consistent with the provisions of this Convention”. It stresses that the rights holders are the ones that determine their development priorities, and the planning, programming and implementation of development plans by the State or support by international development organizations must aim at realizing those priorities. At the same time, the description stresses that such determination of priorities cannot be in violation of human rights or the right to

<sup>144</sup> Article 1(2)

development, including of others. The words “in a manner consistent with the provisions of this Convention” are aimed at ensuring this.

3. The second sentence stipulates that “the right to development and the right to self-determination of peoples are integral to each other and mutually reinforcing” This phrasing demonstrates that the relationship between the right to development and the right to self-determination is such that neither exists nor can be realized without the other. Undermining one necessarily defeats the realization of the other. This principle guides the implementation of several provisions of the draft convention, including in particular, draft articles 5, 7, 10, 12(3) and 14.

**(g) Sustainable development: development must be achieved in [all] its ~~three dimensions, namely~~ [including], economic, social and environmental, in a balanced and integrated manner and in harmony with nature. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; and the right to development cannot be realized if development is unsustainable.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Holy See has recommended that the first part of the text be modified to “development must be achieved in ~~its three dimensions, namely~~ [all of its aspects, including, inter alia,] economic, social, [cultural] and environmental. The EDG agrees with the explanation provided by the Holy See that limiting the dimensions of sustainable development only to three, namely, economic, social and environmental might be too conservative and that there are other dimensions to sustainable development as well. The EDG agreed to replace the words “in its three dimensions, namely” with “in all its dimensions, including”. This rephrasing permits an evolutive understanding of sustainable development. At the same time, it is recommended that the dimensions that are referred to after the word “including” be the same as in the first revised draft viz. economic, social and environmental, to mirror the consensual language from the 2030 Agenda and not open up recommendations for other additions.<sup>145</sup>

*B. Legal commentary on the text:*

1. Paragraph (g) underscores the importance of the principle of sustainable development in the implementation of obligations under the draft convention. It seeks to do so in simple, straight-forward and uncontroversial terms. The first sentence of this sub-paragraph is drawn from the 2030 Agenda for Sustainable Development and mirrors the language from draft preambular paragraph 12 of this convention. However, while the 2030 Agenda, referring to the SDGs, stipulates that “they are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental”, this draft principle acknowledges that there are other dimensions of sustainable development as well as reflected in the exhaustive 17 SDGs and 169 targets thereunder. As such, the dimensions of sustainable development are referred to in this paragraph in an open-ended manner with the words “development must be achieved in all its dimensions, including, economic, social and environmental”. The explanation for the words “in a balanced and integrated manner and in harmony with nature” in the commentaries to draft preambular paragraph 12 above is the same with respect to this paragraph.

2. The first part of the second sentence is drawn from principle 3 of the 1992 Rio Declaration on Environment and Development stipulating that “the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”.

3. The second part of the second sentence reflects the fact that the relationship between sustainable development and the right to development is not unidirectional. The full scope of this symbiotic relationship is developed fully in draft article 23, which also highlights its bidirectional nature.

<sup>145</sup> Preambular paragraph 1.

**(h) Right to regulate: the realization of the right to development entails the right for States Parties, on behalf of the rights holders, to take regulatory or other related measures to achieve sustainable development on their territory in accordance with international law, and consistent with the provisions of the present Convention;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of the entire paragraph on the ground that this would affect the relationship between States and investors. Specifically on the text of draft article 3(h), during the 23<sup>rd</sup> session of the WGRTD, a concern was raised by the Russian Federation that recognizing this right might impact on previous investment agreements entered into by foreign investors with States that are parties to this convention. During the 22<sup>nd</sup> session of the WGRTD, the EDG had clarified that this need not be a concern. In any case, the EDG had already incorporated the words “in accordance with international law”, upon the recommendation of Argentina, to address any concerns mentioned above. As such, the EDG strongly recommends retention of this paragraph as it stands.

2. There were no other specific recommendations regarding the language of this subparagraph.

*B. Legal commentary on the text:*

1. Paragraph (h) enshrines “the right to regulate” as an essential principle that ought to guide the implementation of the draft convention and stipulates that “realization of the right to development entails the right for States Parties, on behalf of their peoples, to take regulatory or other related measures to achieve sustainable development on their territory”. The fundamental basis for this principle is that the right to development cannot be realized without guaranteeing that States Parties are able to fully exercise their right to take regulatory measures domestically to ensure sustainable development. The right to regulate essentially reflects the right of all States to the availability and use of adequate “policy space”,<sup>146</sup> or “governance space”,<sup>147</sup> to realize sustainable development. It is inherent to State sovereignty and is guaranteed under customary international law.<sup>148</sup> International trade law has long incorporated this principle, albeit not explicitly by that name and perhaps not entirely adequately,<sup>149</sup> by permitting States to take certain measures that would otherwise violate their free trade obligations if such regulation is necessary to protect public morals,<sup>150</sup> necessary to

<sup>146</sup> For an elaborate discussion on “policy space”, see: South Centre, “Policy Space for the Development of the South”, *T.R.A.D.E. Policy Brief*, No. 1, 2005, pp. 1 – 8, contending that policy space is about the freedom of each State to choose the best mix of policies possible for achieving sustainable and equitable development given their unique and individual social, political, economic and environmental conditions. See also, Ha-Joon Chang, “Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies”, *Economic and Political Weekly*, Vol. 41, No. 7 (Feb. 18-24, 2006), pp. 627-633; Kevin Gallagher, *Putting Development First: The Importance of Policy Space in the WTO and IFIs*, London, Zed Books, 2005; Yilmaz Yakyuz, “Multilateral Disciplines and the Question of Policy Space”, *Third World Network Trade and Development Series*, Vol.38, pp. 1-88.

<sup>147</sup> Mihir Kanade, *The Multilateral Trading System and Human Rights*, contending that although good governance is seen as a precondition for fulfillment of human rights obligations by States, ensuring good governance needs, in the first place, the availability of “governance space” by States. The right to the availability and use of “governance space” is an essential component of the right to development.

<sup>148</sup> See, South Centre, “Policy Space for the Development of the South”; Mihir Kanade, *The Multilateral Trading System and Human Rights*. See also the discussion below highlighting the “reaffirmation” of the inherent right to regulate in new international investment agreements.

<sup>149</sup> See, Mihir Kanade, *The Multilateral Trading System and Human Rights*; James Harrison, *The Human Rights Impacts of the World Trade Organization*, Portland, Hart Publishing, 2007.

<sup>150</sup> Article XX(a) of General Agreement on Tariffs and Trade, Annex 1A to the Agreement Establishing the World Trade Organization, 15 April 1994, United Nations Treaty Series, 1869, pp.190-1, incorporating the General Agreement on Tariffs and Trade, 1947 (GATT 1947). See also Article XIV(a) of the General Agreement on Trade in Services (GATS), Annex 1B to the Agreement Establishing the World Trade Organization, 15 April 1994, United Nations Treaty Series, 1869, pp.183-218, including the objective to “maintain public order” within the right to take measures.

protect human, animal or plant life or health,<sup>151</sup> or relates to the conservation of exhaustible natural resources.<sup>152</sup> The right to regulate, however, has specifically also developed in international investment law, especially through the new generation of international investment agreements (IIAs), involving both developed and developing States.<sup>153</sup> These come in the backdrop of investment disputes in the past few years where some States have seen themselves prevented or limited in the exercise of their right to regulate in order to achieve fundamental developmental goals in accordance with their national policies and their commitments under the 2030 Agenda. In this respect, these new generation of IIAs insist on the reaffirmation of the right of States to regulate within their jurisdiction, especially when States pursue developmental goals that would allow them to, essentially, realize the right to development. For instance, in the 2012 SADC Model Bilateral Investment Treaty, States Parties stipulate in the preamble that they are “reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right”. Similarly, in the 2016 Pan-African Investment Code, States Parties recognize in the preamble “their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives”. Article 8.9 of the investment chapter of the Comprehensive and Economic Trade Agreement (CETA) between the European Union and Canada reads as follows:

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

It is pertinent to point out that both the SADC Model BIT and the CETA “reaffirm” the right to regulate indicating that this right is to be treated as inherently present in States and is not conferred anew by those IIAs. It is following these trends that this draft convention explicitly references the inherent right of the States Parties to regulate so as to ensure that it is in no way questioned when they adopt measures to achieve sustainable development and realize the right to development.<sup>154</sup> This specific incorporation of the right to regulate as a principle guiding States Parties is also to ensure that policies adopted by them to realize the right to development are not impeded by the first generation of investment agreements.

2. The description however qualifies the right of the State “to take regulatory or other related measures to achieve sustainable development on their territory” with the words “in accordance with international law, and consistent with the provisions of the present Convention”. This right therefore must be exercised by the State in accordance with international law, including any investment agreements that the State may have entered into. In other words, while States possess the inherent right to regulate, they are not prohibited from expressly consenting to restrict its use under specific circumstances in a particular agreement. Whether or not a particular agreement, such as an investment agreement, should be interpreted as incorporating consent by a State to give up its inherent right to regulate over a foreign investor, to whatever extent that may be, is a question that is to be decided with

<sup>151</sup> Article XX(b) of GATT 1947 and Article XIV(b) of GATS.

<sup>152</sup> Article XX(g) of GATT 1947.

<sup>153</sup> Catharine Titi, “The Right to Regulate”, in Makane Mbengue and Stefanie Schacherer (eds) *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)*, Studies in European Economic Law and Regulation, vol 15. Cham, Springer, 2019, pp.159-183; Elizabeth Trujillo, “Balancing Sustainability, the Right to Regulate, and the Need for Investor Protection: Lessons from the Trade Regime”, *Boston College Law Review*, Vol. 59, No.8, pp.2735-2764;

<sup>154</sup> Indeed, the 2030 Agenda reiterates the importance of retaining “policy space” on at least 6 occasions. In particular, SDG 17.15 contains the commitment to “respect each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development”.

reference to the provisions of that specific investment agreement. The aim of this general principle in this provision is to serve as a guidance to parties to help them achieve the object and purpose of the Convention and to implement its provisions.

**(i) National and international solidarity: the realization of the right to development requires an enabling national and international environment created through a spirit of cooperation and unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals everywhere. This principle includes the duty to cooperate with complete respect for the principles of international law;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of the second sentence in the paragraph. In the absence of an explanation for this recommendation, and in view of the centrality of the duty to cooperate to solidarity, the EDG could not agree to delete this sentence.
2. The Caribbean Court of Justice recommended adding the words “regional” in the title and text. The EDG has already noted above that the term “international” includes “regional” in the context of this draft convention and as such does not recommend this modification.
3. China suggested the inclusion of words “adhere to the principle of common but differentiated responsibilities” after the words “duty to cooperate” in the second sentence. The EDG acknowledges the importance of the principle of common but differentiated responsibilities in the context of international cooperation but considers that this paragraph may not be the appropriate place for its inclusion. This principle has emerged mostly in the context of international law related to climate change and environmental degradation whereas the principle of national and international solidarity, including the duty to cooperate, is much broader and includes many other context-specific dimensions that are fully incorporated in draft article 13 dedicated to the duty to cooperate. The principle of common but differentiated responsibilities is also specifically incorporated in article 13(4)(h) as modified in this 2<sup>nd</sup> revised draft, as well as in draft article 15(2)(a). As such, the EDG does not recommend its addition here.

*B. Legal commentary on the text:*

1. Paragraph (i) incorporates “national and international solidarity” as an essential principle that should guide the implementation of obligations related to realization of the right to development under the draft convention.
2. The relationship between international solidarity and human rights has been formally examined by States through the United Nations human rights system since 2005, including through the appointment of independent experts on the topic.<sup>155</sup> As mandated, a draft declaration on human rights and international solidarity was submitted by Ms. Virginia Dandan, the second independent expert, to the Human Rights Council in 2017.<sup>156</sup> The draft declaration defines international solidarity as the “expression of a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals”.<sup>157</sup> The draft declaration notes that international solidarity consists of preventive solidarity, reactive solidarity and international cooperation.<sup>158</sup> It further recognizes the right to international solidarity as a human right.<sup>159</sup> The current independent expert, Mr. Obiora Okafor, has endorsed the draft declaration,<sup>160</sup> and has noted that

<sup>155</sup> E/CN.4/RES/2005/55, adopted on 20 April 2005.

<sup>156</sup> Annex of report A/HRC/35/35 of the Independent Expert on human rights and international solidarity, Virginia Dandan.

<sup>157</sup> *Ibid.*, article 1

<sup>158</sup> *Ibid.*, article 2

<sup>159</sup> *Ibid.*, article 4

<sup>160</sup> See Report of the Independent Expert on human rights and international solidarity, Obiora Okafor, /HRC/38/40, 11 April 2018, paragraph 13 noting that “the draft declaration is an extraordinary

“inadequate attention has thus far been paid to the importance of international solidarity to the fuller realization of human rights, including the right to development”.<sup>161</sup> Without prejudging the work of the independent expert on consensus-building relating to the status of international solidarity as a human right, and without taking a stand on it, draft article 3, paragraph (i) acknowledges the fundamental importance of international solidarity as a guiding principle in realization of the right to development. It, therefore describes the principle by stating that “the realization of the right to development requires an enabling national and international environment created through a spirit of cooperation and unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals everywhere. This principle includes the duty to cooperate with complete respect for the principles of international law”. The primary practical importance of incorporating this principle is to say that the implementation of obligations related to international cooperation running through the draft convention like a binding thread should be guided by the principle of international solidarity. The Expert Mechanism on the Right to Development has explained the relation between international solidarity and international cooperation as follows: “It may be stressed that the duty of international cooperation is underpinned by the indispensability of international solidarity. Much like human dignity constitutes the foundation for universal human rights, international solidarity constitutes the foundation for the duty of international cooperation”.

3. The paragraph, in addition to international solidarity, also includes a reference to national solidarity.<sup>162</sup> It recognizes that solidarity at the national level is also an important guiding principle for realizing the object and purpose of this convention.

**(j) South-South [and triangular] cooperation as a complement to North-South cooperation: South-South [and triangular] cooperation [contribute to the realization of the right to development. They] is [are] not a substitute for, but rather a complement to, North-South cooperation, ~~and hence should not result in the reduction of North-South cooperation or hamper progress in fulfilling existing official development assistance commitments;~~**

*Commentary:*

*A. Consideration of suggestions received:*

1. The text of paragraph (j) in the first revised draft convention read as follows: “South-South cooperation is not a substitute for, but rather a complement to, North-South cooperation, and hence should not result in the reduction of North-South cooperation or hamper progress in fulfilling existing official development assistance commitments”. CETIM recommended that the second part of this paragraph “and hence [...] commitments” be deleted. It suggested that this might create obstacles to the realization of the right to development since much of North-South cooperation and official development assistance commitments are tied to conditionalities. The EDG agrees with this suggestion and hence recommends deletion of this last part of the text. The language of this paragraph as incorporated in the first revised draft was based on a suggestion received. It may be noted that the commentaries to the first revised draft indicate that the text of this paragraph is drawn from paragraph 10 of the Buenos Aires outcome document of the second High-Level United Nations Conference on South-South Cooperation, as endorsed by the General Assembly in Resolution A/RES/73/291 of 15 April 2019.<sup>163</sup> The EDG studied the document afresh and noted that paragraph 10 thereof

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document, which presents a genuine practical tool for the expansion of international solidarity and human rights around the world, with the ultimate goal of realizing what was promised by the Universal Declaration of Human Rights: a social and international order in which all human rights and fundamental freedoms can be realized”.

<sup>161</sup> Ibid, paragraph 4.

<sup>162</sup> This inclusion was based on suggestions received prior to the first revision to the draft convention.

<sup>163</sup> A/RES/73/291, 30 April 2019, full text at <https://www.unsouthsouth.org/wp-content/uploads/2019/10/N1911172.pdf> (last accessed 1 April 2022). See also United Nations, *Report of the second High-level United Nations Conference on South-South Cooperation*, A/CONF.235/6, 20-22 March 2019, para. 10, full text at <https://www.unsouthsouth.org/wp-content/uploads/2019/07/N1920949.pdf> (last accessed 1 April 2022).

only limits itself to the statement that “South-South cooperation is not a substitute for, but rather a complement to, North-South cooperation”. In fact, there is no similar language in the document as the second part of the paragraph sought to be deleted. For this reason, the EDG recommends retaining only the first part of the paragraph.

2. Ecuador suggested that no distinction be made between North-South and South-South cooperation. As noted above, this paragraph was introduced in the first revised draft in view of specific proposal by some States to highlight the relation between South-South and North-South cooperation. A fresh examination of the Buenos Aires outcome document necessitated the introduction of triangular cooperation as well in this paragraph.<sup>164</sup> This addresses the concern raised by Ecuador and fills in the gap using language from the aforesaid outcome document.

3. The EDG also recommends that the sentence “South-South and triangular cooperation contribute to the realization of the right to development” be introduced in the text as its first sentence. This sentence gives context to the principle and is drawn from the language of paragraph 6 of the Buenos Aires outcome document.<sup>165</sup>

*B. Legal commentary on the text:*

1. This principle is drawn from paragraph 6 and paragraph 10 read in conjunction with paragraphs 11, 12 and 30 of the Buenos Aires outcome document of the second High-Level United Nations Conference on South-South Cooperation, as endorsed by the General Assembly in Resolution A/RES/73/291 of 15 April 2019.<sup>166</sup>

**(k) Universal duty to respect human rights: everyone has the duty to respect all human rights, including the right to development, in accordance with international law;**

*Commentary:*

*A. Consideration of the suggestions received:*

1. The Russian Federation suggested deleting this principle. It agreed with the principle that every person has a duty to respect human rights, however, did not support this paragraph on the ground that it “undermines the role of States and its duties”. Uruguay found the paragraph “unclear when highlighting major responsibility under the international human rights law”. The EDG notes that the duty of everyone to respect human rights is distinct from the duty of States to not only respect, but also protect and fulfil human rights. The principle enshrined in this paragraph limits itself only to the duty of everyone to do no harm to the human rights of others. The commentary to draft article 7 below provides a detailed explanation of the normative basis for this principle in international law. As such, the EDG recommends retention of this principle.

2. Iran recommended the addition of the words “and to refrain from participating in the violation of the right to development”. The EDG does not recommend this since the suggested addition is largely a duplication of the duty to respect already incorporated in the paragraph. It does not add to or strengthen the principle itself and makes it verbose.

*B. Legal commentary on the text:*

1. Paragraph (k) is titled as “Universal duty to respect human rights” and stipulates that “everyone has the duty to respect all human rights, including the right to development, in accordance with international law”. This principle is fully developed in the commentary to draft article 7. It is sufficient to note here that although under international law States undoubtedly have the full range of human rights obligations – viz. to respect, protect and fulfil – there is sound legal basis to recognize that everyone else has the minimum obligation

<sup>164</sup> Ibid. Paragraphs 11, 12 and 30.

<sup>165</sup> Ibid. Paragraph 6 stipulating that “We recognize that South-South and triangular cooperation contribute to the implementation of the 2030 Agenda for Sustainable Development”.

<sup>166</sup> A/RES/73/291, 30 April 2019, full text at <https://www.unsouthsouth.org/wp-content/uploads/2019/10/N1911172.pdf> (last accessed 1 April 2022). See also United Nations, *Report of the second High-level United Nations Conference on South-South Cooperation*, A/CONF.235/6, 20-22 March 2019, para. 10, full text at <https://www.unsouthsouth.org/wp-content/uploads/2019/07/N1920949.pdf> (last accessed 1 April 2022).

to respect human rights of others, that is, to do no harm to, abuse or violate the human rights of others. The principle contained in paragraph (k) of draft article 3 applies to everyone – all persons, natural or legal, including business corporations and international organizations – and recognizes the universal duty to respect all human rights, including the right to development, in accordance with international law.

**(l) Right and responsibility of individuals, peoples, groups and organs of society to promote and protect human rights: in accordance with international law, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of the right to development at the national and international levels. Individuals, peoples, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the right to development can be fully realized.**

*Commentary:*

*A. Consideration of the suggestions received:*

1. The Russian Federation recommended that the text be modified as follows: “Individuals, peoples, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the right to development can be fully realized”. Nigeria recommended that the language be streamlined with international instruments. The EDG notes that the title and language of this paragraph follows the landmark “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” adopted unanimously by the UNGA in 1998.<sup>167</sup> This Declaration is also commonly known as the UN Declaration on Human Rights Defenders.<sup>168</sup> The description addresses the related rights as well as the responsibilities of human rights defenders and follows the agreed language of this Declaration. The suggestion by the Russian Federation eliminates the “right” aspect entirely. The EDG is of the view that it is important to follow the unanimously agreed language from this important declaration and refrain from editorializing it, especially if this weakens the import of the principles contained therein. The first statement of this paragraph focusing on rights reflects article 1 of the 1998 Declaration and the second sentence focuses on the roles and responsibilities as enshrined in article 18(3) of the 1998 Declaration.<sup>169</sup> As such, it recommends retaining the paragraph as it stands.

2. Iran recommended modifying the title to “[Individual and collective] Right and responsibility [~~of individuals, peoples, groups and organs of society~~ of all human beings] to promote and protect [“the right to development as] human rights”. The EDG notes that this suggestion fundamentally changes the import of the principle. The principle is aimed at not just human beings but, as the 1998 Declaration stipulates, also to “groups of individuals, institutions or non-governmental organizations”. As such, the EDG does not recommend this modification.

3. The Caribbean Court of Justice suggested adding the word “regional” in the description. For reasons noted earlier, the EDG does not recommend this.

*B. Legal commentary on the text:*

1. Paragraph (l) incorporates the general principle that the right and responsibility of individuals, groups and organs of society to promote and protect human rights must guide Parties in achieving the object and purpose of this Convention and to implement its provisions. In effect, it seeks to ensure that Parties to this convention implement its provisions

<sup>167</sup> A/RES/53/144 of 9 December 1998.

<sup>168</sup> For a discussion, see <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

<sup>169</sup> Ibid, article 18(3), stipulating that “Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized”.

by fully respecting the role of human rights defenders and non-governmental organizations in protecting and promoting the right to development. The most important relevant legal instrument is the “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” adopted unanimously by the UNGA in 1998.<sup>170</sup> This Declaration is also commonly known as the UN Declaration on Human Rights Defenders.<sup>171</sup> The title of the principle enshrined in paragraph (i) follows the name of this Declaration. The description addresses the related rights as well as the responsibilities of human rights defenders and follows the agreed language of this Declaration. Thus, the first statement focusing on rights reflects article 1 of the 1998 Declaration and stipulates that “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of the right to development at the national and international levels”.<sup>172</sup> Similarly, the second sentence focuses on the roles and responsibilities as enshrined in article 18(3) of the 1998 Declaration.<sup>173</sup>

## Article 4

### Right to development

**1. Every ~~human person~~ [individual] and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to, and enjoy civil, cultural, economic, [environmental,] political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.**

*Commentary:*

#### *A. Consideration of suggestions received:*

1. During the oral discussions at the 23<sup>rd</sup> session of the WGRD, the Russian Federation, Argentina and Uruguay suggested that the definition of the right to development in draft article 4 is unclear. The EDG provided the following explanation:

“Some delegates suggested that the right to development is not clearly defined in draft article 4. The EDG believes that it is. In fact, based on inputs from various stakeholders, the current draft article 4 comprising 2 sub-paragraphs and read in conjunction with the article to follow on self-determination, is a substantial improvement over corresponding article 1 of the 1986 Declaration. The draft article highlights the following clearly:

1. Who are the rights-holders – individuals and peoples
2. RtD is an inalienable self-standing human right. This means that the right to development has its own character, that is of course, interdependent with and interrelated with all other human rights, but is still distinct. In other words, development itself is a human right.
3. The RtD entails three entitlements for the rights-holders – the right to participate in, contribute to, and enjoy development. A denial of any of these three elements will be a violation of the RtD. If international or national development policies and practices do not reflect the development priorities of

<sup>170</sup> A/RES/53/144 of 9 December 1998.

<sup>171</sup> For a discussion, see <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

<sup>172</sup> See A/RES/53/144 of 9 December 1998, article 1, stipulating that “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels”.

<sup>173</sup> *Ibid*, article 18(3), stipulating that “Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized”.

the rights-holders, if such policies and practices deny them participation before they are developed and deployed, if such policies and practices exclude the rights-holders from contributing to their own development, for instance, denying country ownership in development aid, or denying local employment in development projects, or if such policies and practices deny the right to equally enjoy the benefits of development, that will be a violation of the right to development. The draft convention complements this description of rights with an extensive exposition of what the corresponding duties are of the duty-bearers.

4. The type of development we are speaking of is not one where human rights can be violated. For instance, a loan by the WB or IMF attached with conditionalities that conflict with the development priorities of the rights-holders in recipient countries, does not comply with draft article 4.

There are many denials of entitlements of human beings and peoples that cannot fit well within the context of civil, political, economic, social or cultural rights. For instance, when citizens of a country go on a protest against conditionalities imposed by the IMF or a regional development Bank, they are fundamentally complaining against the rejection of their development aspirations and priorities, that is, their right to development. They are complaining that what they consider as development is not reflected in the policies imposed by the international financial institutions. None of the civil, political, economic, social, or cultural rights can accommodate this demand adequately. That development itself is a human right has its own value. Now, beyond this, if there is further room for clarification in draft article 4 of what the right to development entails, the EDG will be more than happy to receive suggestions. Please do bear in mind however that normal treaty practice, especially in the field of human rights, is entirely consistent with the template of draft article 4. None of the core human rights treaties give a detailed exposition of the contents of rights. The development of the nature, scope and content of each right is left to the treaty bodies to do so in their general comments or recommendations, or through jurisprudence, including of different courts. The right to social security, right to the highest attainable standard of health, the right to adequate standard of living, right to take part in cultural life, or the right to be treated with humanity and with respect for the inherent dignity of the human person under the ICCPR, or the right to freedom of thought, conscience and religion, or even the right to be free from torture, has required content to be provided by the treaty bodies and courts. These provisions were not cited as vague. There is no reason why we should be harsher on draft article 4 on the right to development and label it as not clear enough. For instance, the African Charter comprises the right to development as a guaranteed right and binding obligation on States. It is the African Commission that gave content to it. Again, we certainly think that draft article 4 is quite clear, but also welcome suggestions to further refine it.

For the aforesaid reasons, the EDG does not consider that draft article 4 contains a vague definition of the right to development that is inappropriate for a legally binding instrument. To the contrary, as noted above, the draft article is very clear and is complemented by corresponding duties in the following part of the draft convention.

2. Panama recommended replacing the words “human persons” with “individuals”. In line with changes made above and for reasons spelt out earlier, the EDG accepts this suggestion.
3. Ecuador recommended that the words “environmental” be added after “economic”. The EDG agrees with this suggestion in light of the language in preambular paragraph 16 which describes “development”. Ecuador also recommended adding the words “and inalienable” after “indivisible”. The drafting notes that the context of the sentence is to stress that the right to development is indivisible from other human rights and fundamental freedoms. The context does not permit addition of the word “inalienable” since this concept refers to

inalienability of rights from the human being and not “from all other human rights”. As such, the EDG does not recommend this modification.

4. Iran recommended replacing the word “peoples” with “nations”. The EDG notes that this fundamentally changes the nature of the right to development whose rights holders include individuals and peoples and not nations. As such, it is recommended that the word “peoples” be not replaced as suggested.

5. China recommended adding the words “and enjoy the benefits of coordinated and balanced development” after the words “social development”. The EDG could not find a normative basis in international legal instruments for these words. In particular, the EDG considered that the words “coordinated and balanced development” may dilute the empowerment and agency of the rights-holders and permit a limitation of the enjoyment of their right to development based on what is considered “coordinated and balanced” by governments in power at different moments of time. The EDG also considered that the broader notion of the right to enjoy development is already incorporated in the paragraph. It, therefore, does not recommend the modification as suggested.

6. Maat for Peace proposed that article 4 on the definition of the right to development should be redrafted to include that the right to development is an inalienable human right, whereby everyone and all peoples have the right to participate and to enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully enjoyed. The EDG notes that the suggestion is already covered in the current text. The legal commentaries below further explain the rational of the current text which is an improvement over the text of article 1(1) of the DRTD.

*B. Legal commentary on the text:*

1. Paragraph 1 of draft article 4 formulates the principal subject of this draft convention – the right to development – and is titled as such. The starting point of reference for draft article 4 is article 1 of the DRTD. The first paragraph thereof stipulates that “the right to development is an inalienable human right by virtue of which every individual 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.” Paragraph 2 thereof explains the integral relationship between the right to development and the right to self-determination. The draft convention splits these two paragraphs into two separate draft articles 4 and 5.

2. Paragraph 1 of draft article 4 consciously does not tamper significantly with the formulation of the right to development in article 1(1) of the DRTD. It only makes suitable modifications to adapt to the requirements of a legally binding instrument and to ensure that there is no room for any ambiguity in its construction.

3. Article 1(1) of the DRTD begins with the words “the right to development is an inalienable human right”. To adapt this definitional formulation for the purpose of a legally binding instrument, paragraph 1 of draft article 4 begins with the words “every individual and all peoples have the inalienable right to development”. The right-holders – “every human person and all peoples” – identified in article 1(1) does not need much tampering with, except the replacement of words “human person” with “individual” in line with all other provisions of this draft convention. It is well-settled that the right to development is both an individual right and a collective right, as has been rightly reiterated in the Frequently Asked Questions prepared by the OHCHR.<sup>174</sup> This dual framing is crucial. The individual nature of the right ensures that all human beings are equally entitled to participate in, contribute to, and enjoy the right to development. The collective dimension – the right of all peoples to development – has been explained in the commentary to draft article 3(a). In addition, this collective nature of the right is closely linked to the fundamental right of all peoples to self-determination recognized in the Charter of the United Nations, the ICCPR and the ICESCR. This includes right of all peoples to full sovereignty over all their natural wealth and resources, and obligations on all States, whether acting individually or collectively through multilateral or

<sup>174</sup> See OHCHR, *Frequently Asked Questions on the Right to Development*.

regional institutions, to ensure that “in no case may a people be deprived of its own means of subsistence”.<sup>175</sup>

4. A dominant feature of article 1(1) of the DRTD is its incorporation of what the right to development specifically entitles the rights holders to. It highlights that by virtue of the right to development, every person and all peoples are entitled to – that is they have a right to – “participate in, contribute to, and enjoy” economic, social, cultural and political development. This three-dimensional entitlement encompassed by the right to development – participation, contribution, and enjoyment – underpins the very essence of the right as including both the process as well as the outcome aspects of development. It stresses that the right to development is realized not only based on ‘what’ is achieved, but also on ‘how’ it is achieved. Paragraph 1 of draft article 4, therefore, retains the words “by virtue of which they are entitled to participate in, contribute to, and enjoy”.

5. The aforesaid words are followed in article 1(1) of the DRTD by a description of the dimensions involved in development viz. “economic, social, cultural and political development”. Interestingly, the phrasing does not mention the word “civil”. In the absence of documentation on debates during the drafting process, it is difficult to surmise what the reason might have been for this omission except to presume that “civil development” perhaps seemed like a concept odd enough not to merit inclusion. This omission, however, is strange considering that the entire objective of the DRTD was to declare development as a human right, and therefore, all dimensions of human rights viz. civil, cultural, economic, political and social ought to have naturally related to a corresponding dimension of development. Taken in isolation and outside of this context, perhaps, “civil development” may not sound natural, but the same can be said about “political development” which was nevertheless included in article 1(1). There is no theoretical reason why “civil development” of all human persons and all peoples must be omitted from the formulation of the right to development. To put it conversely, considering that development is a human right as per the draft convention, there is every theoretical reason to include the word “civil” along with names of the other dimensions of human rights in the formulation of the right to development. Article 1(1) of the DRTD also does not contain the word “environmental” in articulating the dimensions of development. As noted in the commentaries above, this is not surprising since the environmental dimension of development as well as of human rights emerged only after 1986 when the DRTD was adopted. In line with the inclusion of “environmental” in the description of “development” in draft preambular paragraph 16, this draft article also includes “environmental”. As such, paragraph 1 of draft article 4 incorporates the phrase “civil, cultural, economic, environmental, political and social development”.

6. The final part of paragraph 1 of draft article 4 is a modification from article 1(1) of the DRTD. This part of the formulation of the right to development in the DRTD has not been without interpretative differences and enough academic ink has been shed over the last three decades on identifying its true purport. Because a legally binding instrument must not admit this possibility, and in order to explain the improvements in the formulation of the right to development in paragraph 1 of draft article 4, concerns raised by scholars in the past, many of which are unfortunately simply misguided or based on misunderstanding of the right to development, must be pointed out. Some scholars have in the past contended that the formulation in the DRTD is vague and theoretically problematic.<sup>176</sup> The contention is that on the one hand, the right to development is explicitly recognized as an inalienable self-standing human right, and on the other hand, the last part of that paragraph employs the terms “*in which* all human rights and fundamental freedoms can be fully realized”. Based on this, questions have been raised how the right to development can be a self-standing human right, and be at the same time, some sort of an amalgamation of all other human rights. The argument that the right to development has been considered in this formulation as if it were some sort of a meta-right has led to the dismissal of the right itself by some scholars.<sup>177</sup>

<sup>175</sup> ICCPR, article 1.

<sup>176</sup> Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development”, *California Western International Law Journal*, 15(3): 473-509; Yash Ghai and Y.K. Pao, *Whose Human Right to Development?*, London, Commonwealth Secretariat, 1989.

<sup>177</sup> *Ibid.*

7. In 1999, Mr. Arjun Sengupta began work as the first independent expert on the right to development following the mandate of the erstwhile Commission on Human Rights.<sup>178</sup> This coincided with the paradigm shift in the field of economics, led by the publication of Nobel Laureate Amartya Sen's landmark book 'Development as Freedom' around the same time, in which he described development in pretty much the same terms as the preamble of the DRTD.<sup>179</sup> Both focused on the objectives of development in terms of *well-being* of people rather than mere income or wealth indicators. In trying to demystify the formulation of the right to development in article 1(1) of the DRTD, Mr. Sengupta presented a Vector Model of the right, where he posited that the right to development, being a self-standing human right, must be understood as a vector, with all other human rights as its elements.<sup>180</sup> As per this conceptualization, the vector of the right to development can be advanced only if there is an improvement in any one of these elemental rights and no deterioration in any other.

8. This explanation was however perceived as problematic by some on the ground that it still conceptualizes the right to development as a meta-right;<sup>181</sup> an all-encompassing umbrella right which subsumes all other human rights within it. If the Vector model is understood in that fashion, the conceptualization of the right does enter difficult theoretical terrain, because a violation of any human right would then automatically result in violation of the right to development as well *without* the need for any independent analysis. The model is, however, still very useful because it helps underline the obvious fact that development by its very nature is such that, as a right, it cannot be seen to have improved, if in the development process, one human right is sought to be realized at the cost of violating some other human right.<sup>182</sup> In other words, the nature of development as a self-standing right is such that a trade-off with or between other human rights is not permissible in the development process. This specific characteristic of the right to development is a significant value-added to the corpus of existing human rights treaties because it provides the most comprehensive normative basis yet for the interdependence, indivisibility and interrelated nature of all human rights. The words "in which" in article 1(1) of the DRTD do not unambiguously capture these dynamics and ought to be replaced by clearer words that do not permit misinterpreting the right to development as a meta-right, but at the same time highlight that for a process of development to be seen as realizing the right to development, it cannot come at the cost of some other human right. Paragraph 1 of draft article 4, therefore, slightly modifies the formulation in the DRTD by incorporating the words "that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms". This formulation avoids the meta-right trap. The words "that is indivisible from and interdependent and interrelated with" highlight that right-holders are entitled to development that does not violate any of their human rights. The words "all *other* human rights and fundamental freedoms" reinforce that the right to development is not just about ensuring human rights in development, but more importantly, that development itself is a human right.

9. Another important benefit of this slight reformulation relates to the feasibility of a claim that the right to development has been violated. The formulation in the DRTD that everyone is "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*" may almost certainly also result in unbridled claims of violations of the right because most development efforts may not pass the test of being such as can ensure "full" realization of "all" human rights and fundamental freedoms. On the other hand, development "that is indivisible from and interdependent and interrelated with all other human rights and

<sup>178</sup> E/CN.4/RES/1998/72, 22 April 1998.

<sup>179</sup> Amartya Sen, *Development as Freedom*.

<sup>180</sup> United Nations Commission on Human Rights, *Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta*, E/CN.4/2001/WG.18/2, 2 January 2001, paragraphs 9-10.

<sup>181</sup> Sengupta expanded on this notion of right to development as a meta-right in subsequent publications. See, Arjun Sengupta, "On the Theory and Practice of the Right to Development", *Human Rights Quarterly*, Vol. 24, No. 4, 2002, pp. 837-889; Arjun Sengupta, "Elements of a Theory of the Right to Development", in Kaushik Basu and Ravi Kanbur (eds.), *Arguments for a Better World: Essays in Honor of Amartya Sen: Volume I: Ethics, Welfare, and Measurement*, Oxford, Oxford University Press, 2009, pp.80-102.

<sup>182</sup> A water pipeline project in a rural area installed by forcibly taking lands of poor farmers without consultation or adequate compensation cannot be seen as an improvement in the right to development.

fundamental freedoms”, as a qualification, serves the same purpose of ensuring compatibility with realization of all human rights that article 1(1) of the DRTD aims for, but also makes a claim of its violation more realistic and feasible.

**2. Every ~~human person~~ [individual] and all peoples have the right to active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.**

*Commentary:*

*A. Consideration of suggestions received:*

1. Iran recommended replacing the word “peoples” with “nations”. For reasons stated in the commentaries to draft article 4(1) related to a similar suggestion, the EDG does not recommend this modification since it fundamentally modifies the well-established rights holders of the right to development.

2. Panama recommended modification of “human person” with “individuals”. For reasons noted above, the EDG agrees with this suggestion.

3. CETIM recommended that the paragraph be modified as follows: “All human beings and all peoples have the right to participate actively, freely and meaningfully in the choice of development and in the equitable sharing of the benefits resulting from such development”. The EDG considered this recommendation carefully. Insofar as the words “choice of development” to replace “development” is concerned, the EDG agrees with the rationale of CETIM that “in a world where a single development model is imposed on a global scale with catastrophic consequences, it is very important for the peoples and the States that represent them to be able to choose their mode of development according to their needs and priorities”. However, it also notes that the description of “development” in draft preambular paragraph 16 already addresses the concern, including with its focus on a comprehensive and multidimensional process, outcome in terms of well-being, and participation of the rights holders. The suggestion to replace the words “fair distribution of benefits” with “equitable sharing of benefits”, was also interesting. Nevertheless, the EDG considers that the language of this paragraph be consistent with both the DRTD and draft preambular paragraph 16 above, which employ the term “fair distribution of”. As such, the EDG does not recommend making modifications as suggested despite the merits therein.

*B. Legal commentary on the text:*

1. Paragraph 2 of draft article 4 recognizes the right of every individual and all peoples – the right holders – to “active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”. These terms reflect the description of development incorporated in draft preambular paragraph 16 as well as the object and purpose of the convention as expressed in draft article 1. The language echoes preambular paragraph 2 as well as article 2(3) of the DRTD. The significance of paragraph 2 of draft article 4 lies in the content it gives to elements of participation, contribution and enjoyment of development as contained in paragraph 1. In particular, the requirement that in order to ensure the right to development, participation must satisfy the three-fold qualifications of being active, free and meaningful, has specifically been recognized by the African Commission on Human and Peoples’ Rights.<sup>183</sup>

## Article 5

### Relationship with the right of peoples to self-determination

*Commentary:*

*A. Consideration of suggestions received:*

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<sup>183</sup> Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, 276/03, 2009, at para.283; See also, African Commission on Human and Peoples’ Rights v. Republic of Kenya, 006/2012, 2017, paragraphs 209–211.

1. There were no suggestions for modification of the title.

*B. Legal commentary on the text:*

1. Draft article 5 relates to article 1(2) of the DRTD and is the counterpart in terms of rights and obligations to the principle of self-determined development contained in paragraph (f) of draft article 3. However, draft article 5 is formulated in a much fuller manner as compared to article 1(2) of the DRTD which stipulates that “The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”. This formulation in article 1(2) highlights that the right to development cannot be realized without full realization of the right of peoples to self-determination. The word “implies” signifies the inability of the right to development to meaningfully exist without the right to self-determination. The formulation also explains what the right to self-determination includes and makes a reference to the ICCPR and the ICESCR where it has been explicitly incorporated. The importance of the right to self-determination to the human right to development cannot be overemphasized and, in that sense, article 1(2) of the DRTD is satisfactory. However, this is a unidirectional formulation – that the right to development implies full realization of the right to self-determination – which does not appear to do full justice to the symbiotic and integral relationship between the two rights.<sup>184</sup> The converse proposition that the right to self-determination is also meaningless in the absence of the right to development for all peoples is equally true. Since this is a comprehensive legally binding instrument, the instrumental role of the right to development in realization of the right to self-determination must also be highlighted. For this reason, draft article 5 is entitled “Relationship with the right of peoples to self-determination”.

**1. The right to development implies the full realization of the right of all peoples to self-determination.**

*Commentary:*

*A. Consideration of suggestions received:*

1. There were no suggestions received for modification of this paragraph (see the note by the secretariat in the document “compilation of comments for the second revised draft”).

*B. Legal commentary on the text:*

1. The text of draft article 5 combines article 1(2) of the DRTD and articles 1 common to the ICESCR and the ICCPR and provides a much more integral understanding of the *inter se* relationship between the two rights. Paragraph (1) thereof, in the same vein as article 1(2) of the DRTD, stipulates that “the right to development implies the full realization of the right of all peoples to self-determination”. The word “all” is added before “peoples” to align with the formulation of the right to development.

**2. All peoples have the right to self-determination, by virtue of which they freely determine their political status and freely pursue the realization of their right to development.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Caribbean Court of Justice recommended that the paragraph be modified to “All peoples have the right to self-determination. By virtue of ~~which~~ [that right] they freely determine their political status and freely pursue [their economic, social and cultural development and] the realization of their right to development. The EDG considered the proposed addition of the words “their economic, social and cultural development” to be repetitive since the “realization of the right to development” already incorporates these elements. The legal commentaries below further explain the language of the current text.

<sup>184</sup> See commentary to draft article 3(d).

2. China recommended that a second sentence be added stipulating that “Each state has the inalienable right to choose freely and develop in accordance with the sovereignty will of its people, its own political, social, economical and cultural systems, without interference from any other State or non-state actor”. The normative justification provided for this suggestion was preambular paragraph 11 of Human Rights Council Resolution 43/21 of 22 June 2020 on “Promoting mutually beneficial cooperation in the field of human rights”. The EDG notes that Human Rights Council Resolutions 47/9 of 12 July 2021 and 50/4 of 15 July 2022 on “Enhancement of international cooperation in the field of human rights” also contain the suggested text in the operative sections. The EDG, however, considered that the suggested text was not appropriate for inclusion in this draft article since it introduces a State right in a provision aimed at the right of peoples to self-determination. Additionally, the context for the inclusion of the text in the three resolutions of the Council was “mutually beneficial cooperation” or “enhancement of international cooperation” among States in the field of human rights, not the right of peoples to self-determination.

*B. Legal commentary on the text:*

1. The second paragraph of draft article 5 is almost identical to the first paragraph of articles 1 common to the ICCPR and the ICESCR, which stipulates that “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. The words “their economic, social and cultural development” have, however, been replaced by the words “the realization of their right to development” to allude again to the norm that development is itself a human right. The integral and mutually reinforcing nature of the right to self-determination and the right to development finds full expression here. While the first paragraph highlights the importance of the right to self-determination to the right to development, the second paragraph runs in the other direction by incorporating the right to development within the very definition of the right to self-determination. It ensures that the interpretation of the right to self-determination also, as per the States Parties, is such that all peoples can freely pursue their development as a human right.

**3. All peoples may, in pursuing the realization of their right to development, freely dispose of their ~~natural~~ wealth and [sustainably use their natural] resources based upon the principle of mutual benefit, ~~sustainable development~~, and international law. In no case may a people be deprived of its own means of subsistence. Nothing in the present Convention shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their ~~natural~~ wealth and [natural] resources [in a manner consistent with international law and the provisions of the present Convention].**

*Commentary:*

*A. Consideration of the suggestions received:*

1. The Russian Federation noted that it does not support the language of this paragraph and suggested its deletion. The EDG notes that this paragraph is based on paragraph 2 of article 1 common to the ICCPR and the ICESCR and therefore, reflects an established norm of international law. As such, the EDG recommends retention of this paragraph.

2. China suggested that the first sentence of this paragraph be replaced to reflect the language of preambular paragraph 7 of the DRTD which recalls “the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources”. In addition, it recommended using in the third sentence, “all forms of racism and racial discrimination, colonialism, foreign domination and occupation”. The EDG has noted above that the language of the current text reflects existing international law as reflected in common article 1(2) of the two covenants. As such, no modification as suggested is recommended by the EDG.

3. Prior to the first revision of the draft convention, Cuba and Ecuador had recommended modifying the words “natural wealth and resources” to “wealth and natural resources”. The commentaries thereto note that the suggestions were approved by the EDG. However, the same was not reflected in the text of the first revised draft. As such, the EDG has rectified the error and incorporated the above change. In addition, the EDG recommends that the words “freely dispose of their wealth and natural resources” be modified to “freely dispose

of their wealth and sustainably use their natural resources” since the right of States with respect to their natural resources is not limited to only “disposing” them but also extends to their sustainable use. For syntactic reasons and to avoid repetition, the EDG recommends deleting the words “sustainable development” in the list of principles that follow.

4. Ecuador recommended adding the words “sovereignty, integration” before “mutual benefit” as principles. The EDG notes that the principle of sovereignty is implicit in the provision and in the phrase “international law”. The EDG does not recommend adding “integration” as a principle since its meaning was not clear as a term of law in the context of self-determination. Ecuador also recommended adding the words “in a sustainable and maintainable manner” at the end of the paragraph. The EDG notes that this paragraph reflects article 25 of the ICESCR and article 47 of the ICCPR which stipulate that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”. It is understandable that sustainability was not incorporated in the two covenants since, as noted previously in this document, the concept emerged on the global policy agenda much later in 1987. The EDG agrees with the essence of the suggestion by Ecuador. However, it suggests a broader and more inclusive phrasing “in a manner consistent with international law and the provisions of the present convention”, which include sustainability as an essential guiding principle as well as a substantive provision.

5. Iran suggested that the word “and nations” be added after “all peoples” in the last sentence. The EDG has noted above that the said right is guaranteed in international law, especially common article 1 of the two covenants and article 25 of the ICESCR and article 47 of the ICCPR to “peoples” as rights holders and not to nations. As such, the EDG does not recommend making this modification.

*B. Legal commentary on the text:*

1. Paragraph (3) of draft article 5 combines common article 1(2) of the ICCPR and the ICESCR on the one hand, and article 25 of the ICESCR which is identical to article 47 of the ICCPR, on the other hand.

2. The first two sentences are almost identical, with necessary modifications, to the second paragraph of articles 1 of ICCPR and ICESCR which stipulates that “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”. The words “for their own ends” have been replaced by the words “in pursuing the realization of their right to development” in the same spirit of highlighting the integral and mutually reinforcing nature of the two rights. The words “natural wealth and resources” have been replaced with “wealth and natural resources” to indicate that “wealth” can be natural as well as acquired and includes various forms and dimensions other than only natural wealth. In addition, the words “dispose of their natural wealth and resources” have been replaced with “dispose of their wealth and sustainably use their natural resources” since the right of States with respect to their natural resources is not limited to only disposing them but also extends to their sustainable use. The words “without prejudice to any obligations arising out of international economic co-operation” in articles 1 of the ICCPR and the ICESCR have been eliminated in draft article 5 as redundant in view of the requirement that the right is anyway based upon the principle of mutual benefit and international law, the latter of which has developed significantly since the Covenants were adopted.

3. The last sentence mirrors article 25 of the ICESCR and article 47 of the ICCPR. The only addition are the words “in a manner consistent with international law and the provisions of this convention”. These words are aimed at ensuring that the “inherent right of all peoples to enjoy and utilize fully and freely their wealth and natural resources” is exercised in a manner that does not violate international law and is also consistent with the principles such as sustainability and obligation to do no harm to human rights of others enshrined in the draft convention.

**4. The States Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing Territories, shall promote the realization**

**of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations and international law.**

*Commentary:*

*A. Consideration of suggestions received:*

1. Ecuador recommended that the words “and the current national regulations” be added at the end of the sentence. The EDG does not recommend making this modification so as to avoid legitimizing a scenario where national regulations, especially in case of non-self-governing territories, may not be consistent with the provisions of the Charter of the United Nations or international law.

*B. Legal commentary on the text:*

1. Paragraph (4) of draft article 5 corresponds to the third paragraph of articles 1 of the ICCPR and the ICESCR. Two minor modifications have been made. The draft text eliminates a reference to Trust Territories in view of the exhaustion of this list over time. The draft text also incorporates the words “international law” at the end to reflect evolution of the right to self-determination in international law beyond the Charter of the United Nations such as in the two covenants, jurisprudence of various courts, or the UNDRIP.

**5. States [Parties] shall take resolute action to prevent and eliminate massive and flagrant violations of the human rights of persons and peoples affected by situations such as those resulting from apartheid, all forms of racism and discrimination, colonialism, domination and occupation, aggression, [foreign] interference and threats against national sovereignty, national unity and territorial integrity, threats of war and the refusal to [otherwise] recognize the fundamental right of peoples to self-determination.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Holy See recommended reverting back to the text of this paragraph as incorporated in the zero draft which read as follows: “States shall take resolute steps to prevent and eliminate the massive and flagrant violations of the human rights of persons and peoples affected by situations such as those resulting from apartheid, all forms of racism and *racial* discrimination, colonialism, *foreign* domination and occupation, aggression, *foreign* interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to *otherwise* recognize the fundamental right of peoples to self-determination” (the italicised words were deleted in the first revised draft). The EDG notes that the above stipulation in the zero draft reflected article 5 of the DRTD. China also recommended adding the word “foreign” before “domination”.

The Expert Mechanism on the Rights of Indigenous Peoples submitted a comment prior to the first revision suggesting the following modifications: “States shall take resolute ~~steps~~ [action] to prevent and eliminate massive and flagrant violations of the human rights of persons and peoples affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, ~~colonialism, foreign domination and occupation,~~ [all forms of] aggression, [colonialism, domination and occupation], ~~aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war~~ and the refusal to recognize otherwise the fundamental right of peoples to self-determination”. It may be necessary to reproduce the explanation provided by that Expert Mechanism:

“The EMRIP is of the view that points 5 and 6 contain contradictions that can lead to misunderstandings and in some cases justify violations of human rights by States. In some countries, speaking out on the autonomy of a region populated by indigenous people is enough to be accused of treason, separatism, and undermining national unity and the territorial integrity of the State. It is difficult to see how the right to self-determination can be affirmed when the mere verbal reference to this right can lead to a long prison sentence in some States. Similar problems arise in militarized indigenous territories, when military forces are considered by indigenous peoples as occupying forces. For

the EMRIP, the risk of conflict can only be prevented through respect for the rights of peoples and the individual”.

The commentaries to the zero draft note that “the EDG largely agrees with the observations made by the Expert Mechanism and has modified the language of paragraph 5 accordingly”. The main modification to address this concern was the elimination of the word “foreign” before “domination” as suggested by EMRIP.

Although not explained in the commentaries to the first revised draft, the EDG had decided to retain the words “foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war” because these “situations” are aimed at those emanating from the outside viz. “foreign” and do not in any way justify violence against indigenous peoples exercising their right to self-determination in accordance with international law and the UNDRIP. The EDG notes that while the right to self-determination and autonomy is guaranteed by the UNDRIP to indigenous peoples, it also qualifies this right with a provision stipulating that “Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”, which is also reflected in the next paragraph of this draft article. Inadvertently, it appears that during the editorial process of the first revised draft of the convention, the word “foreign” before “interference” was also deleted. This deletion is problematic since, on the one hand, it digresses from the essence of the “situation” from which massive and flagrant violations of human rights emerge in the context of this provision viz. “foreign” interference and threats against national sovereignty, national unity and territorial integrity, threats of war”, and on the other hand, may subject indigenous peoples to abuse *within* some States. It is therefore important that the focus of this part of the provision be retained as “foreign”. As such, the EDG agrees with the suggestion of the Holy See to revert back to this term in this part of the provision, while continuing to refrain from using it prior to the word “domination” in deference to the suggestion from EMRIP.

2. The EDG also agreed to bring back the term “otherwise” in the last part of the sentence since it appears to have been eliminated inadvertently during the editorial process of the first draft (the commentaries to the first revised draft do not discuss such a deletion). The word “otherwise” has meaning since it alludes to the fact that there are other ways of undermining the right to self-determination than the ones listed in the prior part of the provision.

3. China recommended that the word “racial” be added before “discrimination”. The commentaries to the first revised draft had explained that the word “racial” was deleted based on several suggestions received to address the fact that there are multidimensional forms of discrimination. As such, the EDG does not recommend limiting the word “discrimination” only to racial contexts.

#### *B. Legal commentary on the text:*

1. Paragraph (5) of draft article 5 corresponds almost *verbatim* to article 5 of the DRTD which stipulates that “States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination”. The main exception in this draft paragraph is that the word “prevent” has been added to highlight that not only must existing violations be eliminated, emergence of new ones must also be prevented.

2. Additionally, the words “all forms of racism and racial discrimination” in the DRTD were replaced with “all forms of racism and discrimination” to accommodate massive and flagrant violations of human rights resulting from non-racial forms of discrimination as well, which can also undermine the exercise of the right to self-determination.

3. Finally, the word “foreign” before “domination” as employed in the DRTD was eliminated to address violations of the right to self-determination of indigenous peoples within a State.<sup>185</sup>

**6. Nothing contained in the present Convention shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory, without distinction of any kind. [Each State Party shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State.]**

*Commentary:*

*A. Consideration of suggestions received:*

1. Argentina in its oral statement at the 21<sup>st</sup> session of the WGRTD noted that “only part of the corresponding resolution 2625 has been copied and this could weaken the paragraph”. In order to strengthen the principle of respecting the territorial integrity, it suggested that this paragraph be completed with the statement in resolution 2625 that follows the one originally proposed. The EDG, in its commentaries to the first revised draft, noted its agreement with this suggestion and observed that it has therefore included the sentence “Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State”. This sentence was, however, not reflected in the text of the first revised draft. The EDG rectifies this error in this second revised draft with a minor modification that the word “every” is replaced with “each”.

*B. Legal commentary on the text:*

1. Paragraph (6) incorporates two cardinal principles introduced in the law on self-determination through the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the UNGA in 1970.<sup>186</sup> The first principle seeks to balance the right to self-determination of peoples with the right of States to protection of their territorial integrity, if they are conducting themselves in compliance with the principle of equal rights and self-determination of peoples and are thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. The principle has now become firmly embedded in international law.<sup>187</sup> The second principle reflects the obligation on all States to refrain from taking any action that is aimed at the partial or total disruption of the national unity and territorial integrity of any other State.

## Article 6

### Relationship with other human rights

**1. States Parties reaffirm that all human rights, including the right to development, are universal, inalienable, interrelated, interdependent, indivisible and equally important.**

*Commentary:*

*A. Consideration of the suggestions received:*

<sup>185</sup> This was based on a suggestion from the UN Expert Mechanism on the Right to Development.

<sup>186</sup> The UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the UNGA on 24 October 1970 in resolution 2625 (XXV), annex.

<sup>187</sup> See for instance, the Vienna Declaration and Programme of Action, A/CONF.157/24 (Part I), chap. III, paragraph 2; Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, A/RES/50/6, adopted by the UNGA on 24 October 1995. See also, article 46(1) of UNDRIP.

1. The Russian Federation suggested deleting this provision in view of similar language in draft article 3(b). The EDG notes that the objective of draft article 3 is to provide a list of guiding principles which Parties must be guided by to achieve the object and purpose of the present Convention and to implement its provisions. The purpose of draft article 6 is entirely different. It is aimed at highlighting the relationship between the right to development and other human rights. The legal commentaries below explain the rationale in more detail. As such, the EDG recommends against its deletion.

2. The Holy See recommended deleting the words “equally important”. As rationale it noted that “it is incorrect to suggest that all human rights are “equally important”, since certain rights (e.g. the right to life) are necessary conditions for the enjoyment of other rights”. The EDG disagrees with this observation. As the commentaries below note, the 1993 Vienna Declaration on Human Rights consciously makes an effort to highlight that all human rights are equally important. As is well-known, this declaration was adopted after the end of the Cold War to undo the prioritization of some rights over others by States based on their ideological constructs. The EDG notes that all human rights are necessary conditions for the enjoyment of other rights. For instance, the right to health, adequate standard of living, including food, housing and water and sanitation, social security amongst others, are also necessary to ensure the right to life. It is true that international law recognizes that some rights are non-derogable under any circumstance, that some are derogable during proclaimed public emergencies, and that some human rights can be limited through legally codified reasonable restrictions. As such, there is indeed variability in the scope of measures States can take to ensure the realization of different human rights. However, this fact by itself does not make some rights more “important” than others as a matter of general principle, if this means that realization of one right can come at the cost of another. As the Vienna Declaration notes “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.<sup>188</sup> As such, the EDG does not recommend deleting the words as suggested.

3. Panama supported a previous recommendation by UNESCO that the words “and apply online and offline” be added at the end of the sentence. The commentaries to the first revised draft noted that while the EDG agreed with the notion that all human rights apply online and offline, it did not consider it contextual to include these words in this paragraph. As such, the EDG again recommends that the words not be included in this paragraph.

*B. Legal commentary on the text:*

1. Draft article 6 is entitled “Relationship with other human rights” and is included for the following reason. As discussed above, ever since the adoption of the DRTD, scholarly publications were animated with unhelpful debates on the relationship between the right to development and other human rights, including whether the former was a meta-right. The debates were not settled even with the vector model proposed by the first independent expert on the right to development, Dr. Arjun Sengupta. The draft convention, therefore, incorporates a separate provision to ensure that the implementation of the convention does not get derailed by unnecessary and incessant debates on this point. For this reason, the title employs the words “other human rights” to highlight that the right to development is a distinct right in its own standing.

2. In draft paragraph (1), States Parties reaffirm that “all human rights, including the right to development, are universal, interrelated, interdependent, indivisible and equally important”.<sup>189</sup> This principle is commonly invoked in the context of relationship between civil and political rights on the one hand, and economic, social and cultural rights on the other. The importance of the provision lies in the fact that it highlights that the right to development is undeniably an integral part of this principle. It may be pointed out that reaffirmation of a human rights principle in a substantive provision of a human rights treaty

<sup>188</sup> See, A/CONF.157/24 (Part I), chap. III, paragraph 5.

<sup>189</sup> The Vienna Declaration and Programme of Action stipulates in its paragraph 5 that “All human rights are universal, indivisible and interdependent and interrelated”. It further highlights that they are all equally important by stipulating that “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. See, A/CONF.157/24 (Part I), chap. III, paragraph 5.

is not novel. Like draft article 6, CRPD articles 10 and 12 also reaffirm existing principles because of their contextual importance.<sup>190</sup>

**2. States Parties agree that the right to development is an integral part of human rights and ~~should~~ [must] be realized in conformity with the full range of civil, cultural, economic, [environmental], political and social rights.**

*Commentary:*

*A. Consideration of the suggestions received:*

1. There were no suggestions received for modification of this paragraph. However, the EDG notes that in the commentaries to the first revised draft, it was noted that “The Grand Council of the Crees suggested replacing the word ‘should’ with ‘must’. The EDG agrees with this recommendation in light of similar changes made in other provisions”. Unfortunately, this modification was not reflected in the text of the first revised draft, which has now been rectified.

2. The EDG also recommends adding the word “environmental” in the list of rights to reflect parallel additions of this word in draft preambular paragraphs 1 and 16 and draft article 4(1).

*B. Legal commentary on the text:*

1. Paragraph (2) of draft article 6 then records the agreement of States Parties that “the right to development is an integral part of human rights” and that it “must be realized in conformity with the full range of civil, cultural, economic, political and social rights”. The first part of this paragraph flows from the outcome document of the World Conference on Human Rights held in Vienna in 1993 and the Vienna Declaration and Programme of Action which reaffirmed the right to development as a universal and inalienable right and “an integral part of fundamental human rights”.<sup>191</sup> The objective of this statement was clearly to dispel contentions that the right to development was not part of the corpus of fundamental human rights. Subsequently, it appears that this statement underwent an almost unnoticed modification in resolutions of the UNGA where the right to development is noted as “an integral part of all human rights and fundamental freedoms”.<sup>192</sup> This framing appears conceptually problematic if it means that the right to development is to be understood as an element of every other human right – an almost diametrically opposite view from the equally problematic meta-right framing. However, the proposition seems appropriate if it means that development as a human right cannot be compartmentalized as a civil, political, economic, environmental, social or cultural right, and must be seen as integral to each of these rather than as a new category. There is, however, no specific need to include this proposition in the draft convention and is best left to the proposed implementation mechanism under draft article 26 to expound upon at a subsequent stage, if necessary. The framing of right to development as “an integral part of human rights” is adequate as incorporated in paragraph (2).

2. The second part of paragraph (2) alludes to the feature of the right to development, discussed in the commentary to draft article 4, to the effect that development as a human right can be realized only if it is in conformity with all other human rights, that is “the full range of civil, cultural, economic, environmental, political and social rights”.

<sup>190</sup> CRPD, article 10 stipulates that “States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others”. Similarly, article 12(1) stipulates that “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”.

<sup>191</sup> A/CONF.157/24 (Part I), chap. III, paragraph 10.

<sup>192</sup> See for instance, A/RES/73/166, Para 2 and 10(c)

## Article 7

### Relationship with the responsibility of everyone to respect human rights under international law

Nothing in the present Convention may be interpreted as implying for any **human** [natural] or legal person, people, group or State any right to engage in any activity or perform any act aimed at the destruction, nullification or impairment of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. To that end, States Parties agree that all **human** [natural] and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development.

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. The Russian Federation and Iran recommended deletion of this provision. The EDG has addressed this suggestion in the commentaries to the first revised draft. Additionally, the legal commentary below explains in detail the normative justification for this provision. As such, the EDG recommends against its deletion in the draft convention.

2. Panama recommended replacing the words “human or legal persons” with “natural or legal persons”. The EDG accepts this recommendation. Panama also recommended adding the words “online and offline” after the words “perform any act”. The EDG does not consider that this additional emphasis would be apt for the context of this provision. The words “engage in any activity or perform any act” include all actions of any nature.

3. The Holy See made certain suggestions that were a repetition of those considered already in the commentaries to the first revised draft. Additionally, it suggested adding the following sentence at the end: “States have the duty to implement appropriate mechanisms, at the national and international levels, to ensure that such violations do not occur and that recourse is provided for victims in the event of such violations.” The EDG notes that this suggested paragraph refers to obligations of States Parties which are detailed in Part III of the draft convention. As such, the EDG does not recommend adding this paragraph here.

##### *B. Legal commentary on the text:*

1. Considering the positive contribution of non-state actors, especially legal persons, in promoting development as well as their significant potential to have negative impacts on development, it is impossible to avoid a meaningful reference to their role in this draft convention. Indeed, scholars have pointed out that any adequate conception of the right to development in the 21<sup>st</sup> century should not be purely statist and must account for the role of everyone, particularly legal persons as defined in this draft convention, in governance at national and global levels.<sup>193</sup> In a legally binding instrument, this, however, must be done in a manner that accurately reflects the current position in international law in as uncontroversial terms as possible, without foreclosing the possibility of States accepting at a later time the prevalence or adoption of higher standards under international law.

2. The human rights obligations of natural and legal persons under international law have been a subject of debate among scholars.<sup>194</sup> Diverse arguments have been made based on both treaty and customary international law as sources. There appears to be consensus that

<sup>193</sup> Balakrishnan Rajagopal, “Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On”, *Human Rights Quarterly*, Vol.35, No.4, November 2013, pp.893-909; Mihir Kanade, *Multilateral Trading System and Human Rights*.

<sup>194</sup> See in general, Andrew Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, Oxford University Press, 2006; Adam McBeth, “A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights”, *George Washington International Law Review*, Vol.40, No. 4, 2009, pp.1101-1156; Adam McBeth, “Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights”, *Hamline Journal of Public Law and Policy*, Vol. 30, No. 1, 2008.

only States have the full range of obligations under international law to respect, protect and fulfil human rights, and that non-state actors cannot *generally* be expected to be bound by the latter two types of obligations.<sup>195</sup> The main bone of contention has been whether current international law recognizes the minimum obligation to *respect* human rights, that is do no harm to human rights, not just on States but universally on everyone.

3. In order to provide a proper commentary to draft article 7, it is first important to address the following questions sequentially: a) Do current international law instruments restrict human rights duties only to States? b) If not, how are the duties of natural and legal persons and other non-State actors articulated and interpreted?

4. In the post WWII era, the UDHR was the first international legal instrument specifically focused on human rights. Its first preambular paragraph recognizes “the inherent dignity [...] of all members of the human family” as the foundation of freedom, justice and peace in the world. The final paragraph of the preamble then proclaims that the UDHR serves “as a common standard of achievement for all peoples and all nations” and prescribes what is required “to this end” viz. “*every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms *and by progressive measures, national and international, to secure their universal and effective recognition and observance [...]*”. The phrase “every organ of society” clearly includes everyone who plays a role in the social order and must, at the very least, include everyone capable of impeding the realization of the rights proclaimed in the UDHR. In this context, it has been noted that although the UDHR contains a catalogue of rights, it does not identify any specific duty-bearer.<sup>196</sup> Some scholars have interpreted this absence to contend that international law does not restrict human rights duties only to States,<sup>197</sup> while others have noted that not much should be read into the absence considering that the UDHR was meant to be non-binding.<sup>198</sup> In terms of the substantive provisions, article 29(1) of the UDHR stipulates that “everyone has duties to the community in which alone the free and full development of his personality is possible”. Although the precise content of duties of “everyone” to others is not stipulated herein, this provision is the clearest rejection of the position that human rights duties under international law are restricted only to States. The preambles of both the ICCPR and the ICESCR are on similar lines. They recognize that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”.<sup>199</sup> This statement also acknowledges that non-state actors, in this case individuals, have duties to others, and that this duty includes at the least “a responsibility to strive for the promotion and observance of the rights”. Among the regional instruments, the American Convention on Human Rights specifically incorporates Chapter V entitled “Personal responsibilities” and its singular provision, article 30, is entitled “Relationship between Duties and Rights”. It stipulates that “every person has responsibilities to his family, his community, and mankind”.<sup>200</sup> It also provides the rationale behind this duty by stipulating that “the rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society”.<sup>201</sup> The African Charter on Human and Peoples’ Rights is the most explicit in recognizing human rights duties on individuals, in a separate Chapter entitled “Duties”. Article 27 thereof, provides that “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community”. Similar to the American Convention, the stated rationale for this duty is that “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest”.<sup>202</sup> Articles 28 and 29 then incorporate a series of duties on

<sup>195</sup> Adam McBeth, *Every organ of society*, *ibid.* p.52.

<sup>196</sup> Andrew Clapham, *Human Rights Obligations of Non-State Actors*, at p.34.

<sup>197</sup> Adam McBeth, *Every organ of society*.

<sup>198</sup> John H. Knox, “Horizontal Human Rights Law”, *American Journal of International Law*, Vol 102, No.1, 2008, pp.1-47, at p.30.

<sup>199</sup> ICCPR and ICESCR, fifth preambular paragraph.

<sup>200</sup> American Convention on Human Rights, article 30(1). In this respect, also see the American Declaration on the Rights and Duties of Man, 1948.

<sup>201</sup> *Ibid.*, article 30(2).

<sup>202</sup> African Charter of Human and Peoples’ Rights, article 27(2).

the individual. The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted unanimously without vote by the UNGA in 1998, recognizes in its preamble “the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels”.<sup>203</sup> In terms of international organizations, there is no doubt that several of them do already contain duties with relation to human rights.<sup>204</sup> Thus, there is no legal basis for sustaining the proposition that international law can impose, or even that it actually imposes, human rights duties only on States. It is equally clear that there is no theoretical justification for a proposition that States cannot recognize or confer human rights obligations on non-State actors without their consent.<sup>205</sup> States do have the jurisdiction and authority to enter into such international treaties that create rights and obligations for third parties within their jurisdictions as a matter of their reserved domain of domestic jurisdiction. One must hasten to add that recognition of human rights duties under international law, whether on States or non-State actors, does not *ipso facto* correspond with a requirement that its enforcement must also be through an international mechanism.<sup>206</sup> In fact, this is hardly the case and there is no necessary existential correlation between the two. Duties recognized under international law may be enforced through a range of international mechanisms, or may be left to States to enforce domestically, or may not be enforced at all. The presence or absence of enforcement or its mechanism does not have any bearing on the presence or absence of a right or duty.

5. Since international law clearly does not restrict human rights duties to only States, it is now important to analyse how the duties of natural and legal persons are articulated in these instruments and interpreted by courts, human rights bodies, and scholars. Some of the provisions outlined above already provide good illustrations. No explicit general obligation on natural and legal persons to protect and fulfil human rights can be gathered from these instruments.<sup>207</sup> But, this may be difficult to sustain with regards to the obligation to respect human rights. The strongest argument from scholars in favour of the proposition that universal duty of everyone to respect human rights already exists, emerges from article 5(1) common to both the ICCPR and the ICESCR stipulating that “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.<sup>208</sup> The argument is that this provision, by prohibiting an interpretation of the Covenants as validating the presence of any right in anyone to violate human rights of others, in effect recognizes the obligation on everyone, whether a State or not, to respect human

<sup>203</sup> UNGA Resolution A/RES/53/144 of 9 December 1998., available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>. See also, article 18(1) thereof, reiterating article 29(1) of the UDHR.

<sup>204</sup> See for instance, founding documents of United Nations and its specialized agencies such as Food and Agriculture Organization, World Health Organization, United Nations Educational, Scientific and Cultural Organization. Also see Charter of the Organization of American States, Constitutive Act of the African Union, and the Treaty on the European Union, amongst others.

<sup>205</sup> The clearest example of this is the Rome Statute of the International Criminal Court not only recognizing duties on individuals with respect to gross violations of human rights amounting to international crimes, but also creating mechanisms for enforcing them directly under international law.

<sup>206</sup> See: Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility”, *Yale Law Journal*, Vol.111, 2001, pp.443-481; John H. Knox, “Horizontal Human Rights Law”, at p.31.

<sup>207</sup> That the contribution of non-state actors in protecting and fulfilling human rights is more within the realm of expectation rather than a binding duty is clear from articles 18(2) and (3) of the 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Resolution A/RES/53/144.

<sup>208</sup> See also article 30 of the UDHR and article 18 of the European Convention on Human Rights.

rights of others.<sup>209</sup> Article 5(1) of the Covenants is derived from article 30 of the UDHR.<sup>210</sup> It has been pointed out that a reading of this provision that limits the obligation to respect human rights to States necessarily contravenes article 30, “as the absolution of non-state actors from the obligation to respect human rights amounts to a right on the part of those actors to engage in activity or perform acts that destroy human rights”.<sup>211</sup> Therefore, “the converse application of article 30 of the UDHR implies that non-state actors have an obligation to respect human rights, in that they are prohibited from infringing human rights in their own actions, although a duty to protect and to promote or fulfill human rights is not necessarily implied”.<sup>212</sup>

6. However, on the other side, scholars have raised two arguments to contend that this interpretation misreads the objective of the provision. Firstly, they contend that the provision is only an articulation of the doctrine of “abuse of rights” which operates in a very limited context and arguably has nothing to do with any presumed expression of duty on non-State actors to respect human rights. Secondly, even if the provision were to apply beyond the “abuse of rights” context, it has been contended that the provision only implies “the absence of a right to do something” viz. absence of the right to violate rights of others, and that is “not the same as a duty not to do it” viz. prohibition to violate rights of others.<sup>213</sup>

7. The first argument is derived from the title “Prohibition of abuse of rights” of the analogous provision in article 17 of the European Convention on Human Rights which was contemporaneously drafted.<sup>214</sup> Neither the UDHR nor the two Covenants contain these words. Nor is the term employed in the similar article 29(1) of the American Convention on Human Rights, which is titled simply as “Restrictions regarding interpretation”.<sup>215</sup> “Abuse of rights” refers “to the harmful exercise of a right by its holder in a manner that is manifestly inconsistent with or contrary to the purpose for which such right is granted/designed”.<sup>216</sup> The essence of this concept is that the right-holders recognized under the Convention should not have the possibility to rely on the very rights guaranteed to them therein in such a way as to claim justification for violation of rights of others.<sup>217</sup> Based on this title, article 17 of ECHR is interpreted as pre-requiring the *presence* of a right recognized in the Covenant that is capable of being invoked as a reason to restrict rights of others.<sup>218</sup> If there is no specific right which its right-holder is abusing or intends to abuse, the provision is inapplicable.<sup>219</sup> In other

<sup>209</sup> Denis Arnold, “On the Division of Moral Labour for Human Rights Between States and Corporations: A Reply to Hsieh”, *Business and Human Rights Journal*, Vol. 2, 2017, pp.311–316, at p.314.

<sup>210</sup> Article 30 UDHR stipulates that “Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein”.

<sup>211</sup> Adam McBeth, *Every organ of society*, p.52. Also see, Jordan J. Paust, “Human Rights Responsibilities of Private Corporations”, *Vanderbilt Journal of Transnational Law*, Vol. 35, 2002, p.801, at pp.811-812.

<sup>212</sup> *Ibid.*

<sup>213</sup> John H. Knox, “Horizontal Human Rights Law”, at p. 31.

<sup>214</sup> European Convention on Human Rights, Article 17: Prohibition of abuse of rights – Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

<sup>215</sup> Article 29(a) of American Convention stipulates that “No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein”.

<sup>216</sup> *Mirojubovs and Others v. Latvia*, ECHR, No. 798/05, 2009, paragraphs 62 and 65; *S.A.S. v. France* [GC], ECHR, No. 43835/11, 2014, paragraph 66.

<sup>217</sup> *Perinçek v. Switzerland* [GC], ECHR, No. 27510/08, 2015, paragraph 113; *Ždanoka v. Latvia* [GC], ECHR, No. 58278/00, 2006-IV, paragraph 99. Also see, Frederick Cowell, “Anti-Totalitarian Memory: Explaining the Presence of Rights Abuse Clauses in International Human Rights Law”, *Birkbeck Law Review*, Vol. 6, 2018, pp.35-62.

<sup>218</sup> *Lawless v. Ireland* (no. 3), ECHR, 1 July 1961, Series A no. 3, paragraph 6 of “the Law” part; *Preda and Dardari v. Italy* (dec.), ECHR, Nos. 28160/95 and 28382/95, 1999-II.

<sup>219</sup> For extensive jurisprudential analysis of this proposition see, European Court of Human Rights,

words, the provision may not govern situations when the person, group or State is abusing or intends to abuse a *duty*. Because the provision is thus to be understood only in the context of “abuse of rights”, it becomes irrelevant to situations of duties of these actors and thus no inference may then also be drawn that the provision in fact recognizes any duties. Caution, however, needs to be exercised in drawing such serious restrictive interpretations to article 30 of the UDHR or article 5(1) of the ICCPR and ICESCR. It appears that article 17 of the European Convention was introduced with the specific title “Prohibition of abuse of rights” to impede the abusive exercise of certain rights such as freedom of religion, belief, expression, assembly or association by fascist individuals or groups or those with other totalitarian ideologies aiming “to do away with democracy, after prospering under the democratic regime, there being examples of this in [...] European history”.<sup>220</sup> Indeed, it has been pointed out that “this fundamental provision of the Convention is designed to safeguard the rights listed therein by protecting the free operation of democratic institutions”.<sup>221</sup> Referring to the *travaux préparatoires* of the UDHR and the ICCPR, it has been pointed out that the original intent of their drafters also was perhaps similarly to restrict use of, in particular, political rights and freedoms by those promoting fascism and totalitarian ideologies to defeat human rights of others in the society.<sup>222</sup> This line of argument restricts the interpretation of these provisions to the very limited historical context of preventing abuse of civil and political rights for promotion of fascism and ideologies of hatred and xenophobia.<sup>223</sup> This does not, however, explain its inclusion in the ICESCR, which fact negates the idea that the provision should be restricted to such exclusive contexts of abuse of civil and political liberties which fascist or racist groups might otherwise claim from human rights instruments. But more importantly, the very language of these provisions does not lend any support to the proposition that they are applicable only if *rights* of persons, groups or States as incorporated in the Covenants are specifically invoked in an abusive manner. Article 5(1) of the ICCPR and the ICESCR begins with the words “nothing in the present Covenant may be interpreted” rather than something to the effect that “no rights recognized in the present Covenant may be interpreted”. Similar words are employed in article 30 of the UDHR, article 17 of the ECHR and article 29 of the ACHR. The all-encompassing coverage of these words can only mean a rejection of the idea that the provisions apply only to *rights* recognized in the Covenants that may be invoked by persons, groups or States. There is no basis in international law other than the title of article 17 of the European Convention for such a restrictive interpretation.<sup>224</sup>

8. The second argument is that even if article 5(1) is not restricted to abuse of rights but to abuse of anything in the Convention, the provision still signifies only “the absence of a right to do something” and that is “not the same as a duty not to do it”.<sup>225</sup> In other words, all that the provision arguably does is indicate that the Covenant should not be interpreted in a manner that allows deriving from it a positive right to violate rights of others, but this does not mean that there is a prohibition to violate rights of others. This argument, ironically, is defeated by the title of article 17 of the European Convention discussed above, which categorically stipulates that what is contained in the provision is a “prohibition of abuse” (even though it restricts its further applicability to rights and not to the entire Convention).

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*Guide on Article 17 of the European Convention on Human Rights*, 1st edition – 31 March 2019, Prepared by Directorate of the Jurisconsult, available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_17\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf)

<sup>220</sup> *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], ECHR Nos. 41340/98 and 3 others, 2003-II, paragraph 99.

<sup>221</sup> *German Communist Party (KPD) v. Germany*, no. 250/57, European Commission decision of 20 July 1957

<sup>222</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights*, at p.115.

<sup>223</sup> Indeed, the limited context in which article 17 has been invoked in cases before the European Court of Human Rights are related to political activities leading to Hatred, xenophobia and racial discrimination, anti-semitism, islamophobia, terrorism and war-crimes, negation and revision of clearly established historical facts, such as the Holocaust, contempt for victims of the Holocaust, of a war and/or of a totalitarian regime, totalitarian ideology and other political ideas incompatible with democracy. See, *Guide on Article 17 of the European Convention on Human Rights*, paragraph 25.

<sup>224</sup> That itself may be explained by the fact that the European Convention establishes the European Court of Human Rights where only duties of States can be challenged, and not of non-State actors.

<sup>225</sup> John H. Knox, “Horizontal Human Rights Law”, at p.31.

In other words, the provision incorporates a *prohibition* (duty not to do something) not just the absence of permission as is suggested. Indeed, the Human Rights Committee has accepted this principle in the case of *Sergio Euben Lopez Burgos v. Uruguay*,<sup>226</sup> where it was considering whether a State Party can be held accountable for violations of rights under the Convention which its agents commit upon the territory of another State. After referring to article 5(1) of the ICCPR as it relates to States, it noted that “in line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory”.<sup>227</sup> Not only did the Committee clearly interpret article 5(1) as containing a *prohibition* that would necessitate holding States accountable, it also applied the provision beyond the “abuse of rights” concept when it analysed the issue from the perspective of the abuse of “responsibility under article 2 of the Covenant”.

9. It is clear, therefore, that the arguments in favour of interpreting article 5(1) of the ICCPR and ICESCR as recognizing general duties on everyone, not just States, to respect human rights have significant merit. The clearest expression of this is in article 10 of the consensual 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, which stipulates that “no one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms and no one shall be subjected to punishment or adverse action of any kind for refusing to do so”.<sup>228</sup>

10. During the 21<sup>st</sup> and 23<sup>rd</sup> sessions of the WGRD, some questions were raised regarding the applicability of this provision specifically to the duty of business corporations, as legal persons, to respect human rights. While an overwhelming majority of participants supported the provision and suggested language to further strengthen it, few States questioned the same for reasons that were based on misunderstanding of international law. As such, these commentaries will address some of those questions raised with the objective of clarifying the applicable international law.

11. It was suggested that only States and international organizations are subjects of international law, and natural or legal persons are not. This is an incorrect understanding of international law. Subjects of international law include anyone that has rights and/or duties recognized in international legal instruments.<sup>229</sup> While it is true that States are the original and full subjects of international law, there are a number of other partial subjects. Indeed, since the adoption of the Charter of the United Nations and the UDHR, human beings and peoples are undisputedly recognized as subjects of international law since they possess numerous human rights.<sup>230</sup> Their ability to bring complaints against States before international and regional fora would be impossible if they did not have partial international legal personality. Human beings also possess duties as signified in the commentaries above and in this draft article, but also in fields such as international humanitarian and criminal law. Business corporations are entirely capable of entering into agreements with States, including investment agreements or for salvage operations, and have the ability to enforce them in international fora. As such, it is an incorrect proposition and a voice from the past to suggest that human beings and legal persons are incapable of having, or do not have, partial international legal personality. Since they can and do possess rights and duties under international law, they are partial subjects of international law.

12. There were also questions raised that stemmed from the debates on whether business corporations, as legal persons whose existence is owed to domestic law, can have and do have obligations of any nature also under international law. In this context, it is important to state that under international law, it is clear that States have plenary competence to confer and recognize rights and duties on any non-State actor or legal person, whether incorporated under domestic law or international law. The competence of States to do so is unquestionable.

<sup>226</sup> CCPR, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

<sup>227</sup> Ibid, paragraph 12.3.

<sup>228</sup> A/RES/53/144

<sup>229</sup> See: Christian Walter, 2013, *Subjects of International Law*, Max Planck Encyclopedia of Public International Law.

<sup>230</sup> Ibid.

Indeed, the EU Parliament has adopted a resolution by an overwhelming majority calling for a EU law whereby companies would be required to conduct environmental and human rights due diligence along their full value chain.<sup>231</sup> As noted above, States do have the jurisdiction and authority to enter into international treaties that create rights and obligations for third parties within their jurisdictions as a matter of their reserved domain of domestic jurisdiction. The consent of such third parties is not necessary. The question is whether current international law, as it exists, does so. In other words, does current international human rights law recognize obligations on legal persons, including businesses, of any nature. As the commentaries above explain, the answer is a resounding yes. The duty on legal persons to respect human rights and refrain from participating in violations of human rights, including the right to development, is distinct from the nature of obligations that international law recognizes for States. It bears repeating that States have the entire range of human rights obligations – respect, protect and fulfil. On the other hand, the commentaries above have referred to salient provisions of existing human rights instruments to point out that these instruments recognize the duty of legal persons, such as businesses, to one of those dimensions – that is, the duty to respect human rights. In other words, this refers to the duty to not violate the human rights of human beings and peoples.

13. At this juncture, it may be necessary to take note of the fact that the UN Guiding Principles on Business and Human Rights of 2011 limited themselves to recognizing only a moral responsibility on corporations to respect human rights and did not go to the extent of acknowledging that they already do possess the legally binding duty to respect human rights under existing human rights law. However, this issue has thereafter been settled by the Committee on Economic Social and Cultural Rights in its General Comment 24 on States' obligations in the context of business activities.<sup>232</sup> In its para 5, the Committee stated as follows:

“under international standards, *business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice*. The present general comment therefore also seeks to assist *the corporate sector in discharging their human rights obligations and assuming their responsibilities*, thus mitigating any reputational risks that may be associated with violations of Covenant rights within their sphere of influence”.

The Committee has thus acknowledged that businesses, as legal persons, already have human rights obligations to not violate Covenant rights. In other words, even if businesses may have been incorporated under domestic law, international human rights law considers them as subjects insofar as these relate to the duty to respect human rights. As has been alluded to earlier, this does not mean at all that recognition of human rights duties under international law, whether on States or non-State actors, *ipso facto* corresponds with a requirement that its enforcement must also be through an international mechanism. In fact, this is hardly the case and there is no necessary existential correlation between the two. Duties recognized under international law may be enforced through a range of international mechanisms, or may be left to States to enforce domestically as is the case currently with businesses, or may not be enforced at all. The presence or absence of enforcement or its mechanism does not have any bearing on the presence or absence of a right or duty.

14. As noted in the commentaries above, article 30 of the UDHR, common article 5(1) of the two covenants, and article 9(2) of the DRTD itself explicitly recognize the duty to respect human rights not only on States, but to groups and persons as well. There was a suggestion during the 21<sup>st</sup> session of the WGRD that perhaps when these provisions refer to the words “any State, group or person” as having the obligation not to violate human rights, they refer either to a State or to groups of human beings, or to individual human beings, but not to legal persons. In other words, the suggestion was that while States are covered at one end of the spectrum and while the very individual is covered at the other end of the spectrum, legal persons are not. This, in the opinion of the EDG, is not how the provision ought to be read. There is no reason why the words group or person should exclude body incorporates. If that

<sup>231</sup> European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

<sup>232</sup> E/C.12/GC/24

were the case, the easiest way for individuals or groups of individuals to violate human rights would be to simply create a legal person such as a business corporation and do through that legal person what international law prohibits them to do as human beings. International law cannot be interpreted in a manner that permits or legitimizes violations of human rights.

15. In any case, even the question of whether these provisions cover legal persons such as businesses has been answered by an international investment tribunal in the case of *Urbaser vs. Argentina* decided in 2016.<sup>233</sup> Interpreting article 30 of the UDHR, the Tribunal held:

“The Declaration avoids making reference to who would be responsible for the rights and obligations arising therefrom. However, upon reading the Declaration, it is evident that obligations arising therefrom do not lie exclusively on States. The Preamble expressly sets forth that the duties would lie both on institutions and on individuals. [...]”<sup>234</sup>

The tribunal then quoted article 30 of the UDHR and concluded that “therefore, business companies and international corporations are affected by the obligations included in international human rights law”.<sup>235</sup> It describes this obligation on individuals and private parties in its decision as an obligation to abstain, that is, an obligation that prohibits the committing of acts violating human rights.<sup>236</sup>

16. It may be reiterated that article 10 of the consensual 1998 United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, stipulates that “no one shall participate, by act or by failure to act where required, in violating human rights and fundamental freedoms”. The words “no one” in this Declaration includes all organs of society, not just individuals or groups of individuals. In this respect, the commentaries to the 1998 Declaration prepared by the UN Special Rapporteur on the situation of human rights defenders acknowledge that this article is addressed not only to States and human rights defenders, but to everyone and that this includes “all non-state actors, including armed groups, the media, faith-based groups, communities, companies and individuals”.<sup>237</sup>

17. Finally, a reference may be made to the ongoing parallel process in the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights for drafting a legally binding instrument. It is noteworthy that the third revised draft of that convention specifically acknowledges the existing obligations of business corporations to respect human rights under international law in the following two preambular paragraphs:

(PP11) Underlining that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships;

(PP18) Desiring to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the obligations of business enterprises in that regard;

<sup>233</sup> Award of the Tribunal in ICSID Case No. ARB/07/26, available at [https://www.italaw.com/sites/default/files/case-documents/italaw8136\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf).

<sup>234</sup> Ibid. para.1159.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid. para.1210.

<sup>237</sup> UN Special Rapporteur on the situation of human rights defenders, 2011, Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, available at <https://www.ohchr.org/Documents/Issues/Defenders/CommentarytoDeclarationondefendersjuly2011.pdf>

These draft preambular paragraphs represent an accurate interpretation of existing international law.

18. In light of the aforesaid, draft article 7 is entitled “Relationship with the responsibility of everyone to respect human rights under international law”. The use of the word “responsibility” in the title followed by the language in the text of the paragraph is aimed at highlighting that the duty to respect entails legal responsibility and not merely moral responsibility. There is sometimes an artificial distinction drawn between the meaning of the words “responsibility” and “duty” in international human rights law to suggest that the former signifies only a moral commitment whereas the latter represents a legally binding duty. There is no legal basis in international law for this fiction. For instance, the ILC draft articles on Responsibility of States for Internationally Wrongful Acts unequivocally use the word “responsibility” to signify legally binding obligations and not just moral commitments. The conscious use of the word “responsibility” in the title therefore seeks to avoid misinterpretation of the terms. First part of the draft article is an almost identical replication of article 5(1) of the ICCPR and ICESCR. It may also be noted that article 9(2) of the DRTD stipulates the following “Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights”. The only difference in the text of draft article 7 is that instead of “person” employed in the latter, paragraph 1 disaggregates it to “natural and legal persons”, in line with other provisions of the draft convention. Additionally, “people” is also added to the provision considering the importance of their legal personality under the draft convention. The second part of draft article 7 records the agreement by States of the proposition that “all human and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development”. This language reflects the consensual article 10 of the 1998 UNGA Declaration referred to above. This part of the article has been drafted as an agreement by States of a proposition to signify that the general obligation of everyone to respect human rights already exists under international law and that the draft convention is not conferring upon anyone new obligations to respect the right to development. The words “to this end” signify that this agreement by States is related to the prohibition contained in the previous sentence.

### **Part III**

#### **Article 8**

##### **General obligations of States Parties**

**1. States Parties shall respect, protect and fulfil the right to development for all, without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, ~~nationality, statelessness,~~ national, ethnic, or social origin, property, disability, birth, age or other status, in accordance with obligations set forth in the present Convention.**

*Commentary:*

##### *A. Consideration of suggestions received:*

1. The Russian Federation recommended deletion of the specific kinds of discrimination and leaving the words “without discrimination of any kind”. On the other hand, Egypt and Pakistan recommended limiting the list only to those specifically mentioned in the ICCPR and ICESCR viz. race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The EDG notes that in line with the two covenants, it is important to list the grounds of discrimination. At the same time, it is important to incorporate the minimum additional kinds of discrimination not referred to in

the two covenants to reflect the evolution of international law thereafter. The draft article thus contains the following additional kinds of discrimination viz. disability, and age. “Disability” has been added to reflect the evolution of human rights law through the CRPD, while “age” is added especially in view of the CRC. With respect to the addition of “nationality”, the EDG had noted in the commentaries to the first revised draft that the International Court of Justice, in the judgement rendered in the case of *Qatar vs. UAE* regarding the interpretation and application of the Convention on Elimination of Racial Discrimination, has drawn a distinction between nationality and national origin, holding only the latter as covered by CERD (which was the treaty invoked in this case) but also accepting that discrimination on the ground of nationality is a violation of general international human rights law.<sup>238</sup> In view thereof, the EDG had considered it rational to include this term, which in turn, required addition of the word “statelessness”. However, in light of the recommendations made by States and in view of the words “other status”, the EDG agrees to delete the words “nationality” and “statelessness”. However, the EDG does not recommend deleting the very few additional kinds of discrimination represented by “age” and “disability”.

2. Argentina recommended adding the words “subject to their jurisdiction” in this paragraph. The EDG notes that the specific scope of obligations to respect, protect and fulfil the right to development as well as the duty to cooperate are spelt out in the provisions to follow. They include extraterritorial obligations of States as well as collective obligations, and are not restricted to duties owed only to those subject to their own jurisdictions. In this paragraph, the terms “in accordance with the obligations set forth in this Convention” are adequate. As such, the EDG recommends against this addition.

3. Ecuador recommended addition of the word “promote” to the typology of “respect, protect and fulfil”. The legal commentary below explains at length the rationale behind adoption of the three-fold typology of “respect, protect and fulfil”. They also consider the word “promote”. In the opinion of the EDG, the obligation to promote is cross-cutting across the obligations to respect, protect and fulfil and is not a separate stand-alone obligation with its own content that is distinct from the threefold typology referred to above. Additionally, the provisions to follow in Part III are based on this three-fold typology. As such, the EDG does not recommend adding a fourth category and suggests aligning with practice of human rights treaty bodies as reflected in the legal commentary below.

#### *B. Legal commentary on the text:*

1. Draft article 8 lays down the “general obligations of States Parties” under the draft convention. It is therefore restricted to obligations on States, whereas, the obligations on non-State actors are covered under draft articles 7 and 9. Although the only current core human rights treaty containing a provision with a similar title is the CRPD,<sup>239</sup> general obligations provisions are also present in the ICCPR,<sup>240</sup> the ICESCR,<sup>241</sup> and the CRC.<sup>242</sup> A common feature of these provisions is that they also contain specific obligations related to non-discrimination, although each of them is formulated with some differences. The text of paragraph (1) of draft article 8 has been developed after comparing the language in analogous provisions of some of these core human rights treaties and adapting them to the specific nature of the right to development as well as taking into account the evolution of concepts in human rights law itself over time.

2. Paragraph (1) of draft article 8 thus stipulates that “States Parties undertake to respect, protect and fulfil the right to development for all [...]”. The typology of respect, protect, and fulfil is not used in any current core human rights treaty. For instance, article 2(1) of the ICCPR employs the phrase “Each State Party to the present Covenant *undertakes to respect*

<sup>238</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v. United Arab Emirates*), Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71

<sup>239</sup> Article 4

<sup>240</sup> Article 2(1)

<sup>241</sup> Article 2(2)

<sup>242</sup> Article 2(1)

and to ensure to all individuals [...]”. Article 2(2) of the ICESCR stipulates that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised [...]”. Article 4 of the CRPD stipulates that “States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities [...]”. However, over time, the typology of respect, protect and fulfil to describe the levels of States’ human rights obligations has become firmly embedded in international law. The various Committees constituted under the core human rights treaties have time and again reinforced these three types of human rights obligations. Most explicit and detailed has been the Committee on Economic, Social and Cultural Rights (CESCR), which has provided an elaborate explanation of this typology. In its General Comment No. 12 on the right to adequate food, the CESCR noted that:

The right to adequate food, *like any other human right*, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.<sup>243</sup>

3. Three years later, in its General Comment No. 15 on the right to water, the CESCR further developed the obligation to fulfil by noting that it “can be disaggregated into the obligations to facilitate, promote and provide”.<sup>244</sup> The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of human rights.<sup>245</sup> The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of human rights, including adopting the necessary and effective legislative and other measures to restrain third parties from denying human rights.<sup>246</sup> Third parties include “individuals, groups, corporations and other entities as well as agents acting under their authority”.<sup>247</sup> The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of human rights.<sup>248</sup> Within the obligation to fulfil, the CESCR has explained that the obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the human right.<sup>249</sup> The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the enjoyment of the human right.<sup>250</sup> Obligation to provide arises when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.<sup>251</sup> The CESCR has continually thereafter reiterated the basic typology of respect, protect and fulfil.<sup>252</sup> Although the Human Rights Committee under the ICCPR (CCPR) has not been as explicit in referencing this typology in a single phrase, in elaborating on the nature of States’ obligations under the ICCPR to “respect and ensure”, it has unequivocally explained that the word “ensure” refers to both the obligation to protect,<sup>253</sup> and to fulfil,<sup>254</sup> including raising levels of awareness about the Covenant among public officials, State agents and the population at large.<sup>255</sup> Treaty bodies under other core human rights treaties have also reiterated this typology repeatedly in several general comments and recommendations. Similarly, this typology has been copiously utilized and

<sup>243</sup> CESCR, *General Comment No. 12: The right to adequate food (Article 11)*, E/C.12/1999/5, 12 May 1999, paragraph 15.

<sup>244</sup> CESCR, *General Comment No. 15: The Right to Water (Articles 11 and 12)*, E/C.12/2002/11, 20 January 2003, paragraph 25.

<sup>245</sup> *Ibid.*, paragraph 21.

<sup>246</sup> *Ibid.*, paragraph 23.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*, paragraph 26.

<sup>249</sup> *Ibid.*, paragraph 25.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> For instance, see: CESCR, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, 10 August 2017.

<sup>253</sup> CCPR, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, paragraph 8.

<sup>254</sup> *Ibid.*, paragraph 7.

<sup>255</sup> *Ibid.*

discussed by the OHCHR, regional human rights courts and in scholarly publications.<sup>256</sup> Because international human rights law has now firmly and clearly embedded the obligations to respect, protect and fulfil as expressing the full range of States' obligations, it is only appropriate that the draft convention does not revert back to generic terms. In this regard, reference may also be made to the Maastricht Principles on Extraterritorial Obligations of States under ICESCR (hereinafter, Maastricht Principles), which also follow the respect, protect and fulfil framework to elaborate, one by one, on each of these types of obligations.<sup>257</sup>

4. Another important reason why draft article 8 uses this typology relates to debates in the past regarding difference between the nature of States' obligations under the ICCPR and the ICESCR. It is now clear that not only are the differences not as vast as some had initially claimed, the similarities are far more common.<sup>258</sup> In particular, as explained above, whichever type of human right might be under consideration, the respect, protect and fulfil framework is fully applicable. This is evident from the fact that in treaties such as CEDAW, CRC and CRPD which contain both civil and political rights, and economic, social and cultural rights, the corresponding obligations thereunder have been explained by their respective committees using the respect, protect and fulfil typology. As has been commented upon earlier, the right to development cannot be compartmentalized as civil, political, economic, social or cultural. As such, description of States' obligations related to the right to development should preferably be based on the language common to all human rights, that is, using the typology of respect, protect and fulfil.

5. Subsequent provisions of this draft convention are also, for this reason, developed using this typology. In view of the elaborate treatment of each type of obligation as regards the right to development in separate provisions, draft article 8 does not go on to further explain their content. The last part of the provision merely uses the words "in accordance with obligations set forth in this Convention".

6. The part corresponding to non-discrimination in this draft article relates to the undertaking to respect, protect and fulfil the right to development for all "without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth, age or other status". Although the ICCPR employs the term "distinction" instead of "discrimination", subsequent treaties like the CRC and the CRPD prefer the latter term.<sup>259</sup> CEDAW and CERD use the term "discrimination" directly in their titles. The draft convention prefers the term "discrimination" to explicitly connect it to the human rights principles of non-discrimination, equality and equity. Each of the bases of discrimination referred to in draft article 8, including the generic category of "other status", is present in at least one of the non-discrimination provisions of the core human rights treaties. The only exception is "age". "Age" is included in the draft article since it is referred to in several other provisions of the CRPD.<sup>260</sup> In

<sup>256</sup> For instance, see Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, 2005, paragraphs 47-48, available at <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf>; African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96, 2001, A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44-48. See also, Olivier De Schutter, *International Human Rights Law*, Cambridge, Cambridge University Press, 2010, pp. 242-253; Manfred Nowak, *UN Covenant on Civil and Political Rights – CCPR Commentary*, N.P. Engel Verlag, Kehl am Rhein, 2005, pp.37-41.

<sup>257</sup> See, *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, January 2013, available at [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23); See also, Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol. 34, 2012, pp.1084-1171.

<sup>258</sup> For a discussion, see: Chisanga Puta-Chekwe and Nora Flood, "From Division to Integration: Economic, Social, and Cultural Rights as Basic Human Rights", in Isfahan Merali and Valerie Oosterveld (eds.), *Giving Meaning to Economic, Social, and Cultural Rights*, University of Pennsylvania Press, 2001, pp.39-51.

<sup>259</sup> See article 2(1) of CRC and article 4(1) of CRPD.

<sup>260</sup> For references to age, see in particular preambular paragraph (p) and articles 7, 8, 13 and 16 of the CRPD.

addition, the CRC recognizes numerous rights of the child in connection with their age, including the right to participate in matters and decisions affecting them (which is an essential component of the right to development).<sup>261</sup>

**2. States Parties shall cooperate with each other in ensuring development and eliminating obstacles to development, encouraging full observance and realization of all human rights.**

*Commentary:*

*A. Consideration of suggestions received:*

1. Ecuador suggested reformulating the paragraph as follows: “States Parties shall cooperate with each other [~~in ensuring~~ to achieve] development and eliminate [~~ing~~] obstacles [~~to development, encouraging full observance and realization of all human rights~~ for its achievement, promoting the full observance, guarantee and realization of all human rights without discrimination]. The EDG considers this suggestion makes the paragraph cryptic and repetitive, and as such, does not recommend its addition since it does not strengthen the provision.

2. The EDG also notes that this paragraph was introduced on the suggestion of Pakistan, although the commentaries to the first revised draft erroneously note that the suggestion was not accepted. The EDG wishes to rectify this for the record.

*B. Legal commentary on the text:*

1. Paragraph 2 of draft article 8 reflects the general obligation on all States to cooperate with each other. It reflects article 3(3) of the DRTD which stipulates in its first sentence that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development”. The words “encouraging full observance and realization of all human rights” are drawn from the second sentence of article 3(3) of the DRTD which stipulates that “States should realize their rights and fulfil their duties in such a manner as to [...] encourage the observance and realization of human rights”.

2. While this paragraph is situated in draft article 8 to reflect a general obligation to cooperate on States Parties, draft article 13 elaborates in much detail the full scope of this obligation.

**3. States Parties shall ensure that public authorities and institutions at all levels act in conformity with the present Convention.**

*Commentary*

*A. Consideration of suggestions received:*

1. The Holy See suggested deletion of the words “at all levels” on the ground that its inclusion “could lead to problematic interpretations, especially considering the inclusion in numerous articles of the duty of States to ensure compliance with the Convention even outside their territories, regarding which numerous States have expressed their concern”. In the commentaries to the zero draft, the EDG noted that the words “at all levels” were added primarily because many development projects are implemented, and sometimes even policies framed, at decentralized levels. However, this does not mean that actions undertaken at the national level can be considered legal if they violate the right to development of those outside their jurisdiction. This prohibition is a cardinal principle of the right to development. Similarly, the obligation to cooperate internationally is at the heart of the right to development. Without these, the right to development has no meaning. As such, the EDG cannot accept the suggestion made if it is aimed at excluding obligations extraterritorially or collectively, and recommends against deletion of the words as suggested.

*B. Legal commentary on the text:*

1. Paragraph 3 of draft article 8, stipulating that “States Parties shall ensure that public authorities and institutions at all levels act in conformity with the present Convention” is

<sup>261</sup> For instance, see CRC, articles 9, 23 and 31.

similar to paragraph (d) of the general obligations provision in article 4 of the CRPD.<sup>262</sup> For the sake of further clarity, the words “at all levels” have been added in the draft article. This paragraph is considered essential taking into account the fact that many development projects are implemented, and sometimes even policies framed, at decentralized levels. Because violations are very much likely to arise in those cases as well, it is incumbent upon States Parties to ensure compliance by public authorities and institutions at all levels. This obligation underpinned by the terms “shall ensure” implies a standard of due diligence further given shape in draft article 19 related to the conduct of impact assessments.

**4. States Parties recognize that each State has the right, on behalf of its peoples, and also the duty to formulate, adopt, and implement appropriate national development laws, policies and practices in conformity with the right to development and aimed at its full realization. To that end, States Parties undertake to refrain from nullifying or impairing, including in matters relating to cooperation, aid, assistance, trade or investment, the exercise of the right and discharge of the duty of every State Party to determine its own national development priorities and to implement them in a manner consistent with the provisions of the present Convention and international law.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested that the first sentence of this paragraph is self-evident and does not need to be stated in the convention. The EDG notes that this sentence serves several objectives which add significant value to the convention. These are explained in detail in the legal commentaries below.

2. Iran recommended adding the words “hindering” or “obstructing” after “nullifying or impairing”. The EDG has explained in the commentaries to the zero draft that the words “nullifies” and “impairs” are drawn from the language of human rights treaties, which do not additionally incorporate the word “hinders”. In any case, the EDG considered that that word “impairs” includes “hinders” (or “obstructs”) and the use of both simultaneously is largely a duplication. As such, the EDG does not recommend making the suggested modification.

3. Ecuador suggested adding the words “create and establish” between “formulate” and “adopt”. The EDG considers that these words are inherent in the words “formulate, adopt and implement” and do not add any new element. As such, the EDG does not recommend making the paragraph more verbose.

*B. Legal commentary on the text:*

1. Paragraph (4) of draft article 8 explains another related dimension of the general obligation of States. The provision is an elaboration and an improvement over article 2(3) of the DRTD which stipulates that “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”. This provision has led to some confusion in the past and an explanation is in order. Article 2(1) of the DRTD stipulates that “The human person is the central subject of development and should be the active participant and beneficiary of the right to development”. Article 2(3), however, as mentioned above stipulates that “States have the right and the duty to formulate appropriate national development policies [...]”. Based on this, questions have been raised whether the right to development can be called as a human right at all, if States have been identified as having the right to formulate appropriate national development policies. This is a misunderstanding of the provision and the right itself. As has been pointed out by commentators, human beings, individually and collectively, always remain the right-holders of the right to development.<sup>263</sup> When States are identified in this provision as having

<sup>262</sup> It stipulates that “to this end, States Parties undertake: [...] (d) [...] to ensure that public authorities and institutions act in conformity with the present Convention”.

<sup>263</sup> See, Anne Orford, “Globalization and the Right to Development”, in Philip Alston (ed.), *People’s Rights*, Oxford, Oxford University Press, 2001, pp. 127–84, Mihir Kanade, *Multilateral Trading System and Human Rights*.

the right to formulate appropriate national development policies, it is a right exercised by the State against other States and the international community *on behalf of* or *as agents* of their peoples and human persons – the principal right-holders.<sup>264</sup> Importantly, States can never exercise this right against their own citizens to determine development priorities. It is for this reason that paragraph 2 of draft article 12 stipulates in the first sentence that “States Parties recognize that each State has the right *on behalf of its peoples*, and also the duty, to formulate, adopt and implement appropriate national development laws, policies and practices in conformity with the right to development and aimed at its full realization”. The words “in conformity with the right to development” seek to further ensure that the right (and the duty) of a State Party recognized above is not abused to the detriment of the right-holders. As such, not only does this entail that States Parties must ensure participation and contribution of the right-holders, they must also ensure that the enjoyment of this right is not denied – territorially as well as extraterritorially – as a result of such national laws, policies or practices.

2. The undertaking that follows is “undertake to refrain from nullifying or impairing, including in matters relating to cooperation, aid, assistance, trade or investment, the exercise of the right and discharge of the duty of every State Party to determine its own national development priorities and to implement them in a manner consistent with the provisions of the present Convention and international law”. In a way, this has some overlap with the obligation to respect contained in draft article 10(a) which prohibits any conduct by a State Party that nullifies or impairs “the enjoyment and exercise of the right to development”. The focus of paragraph 2 of draft article 12, however, is not directly on the infringement of the rights of the principal right-holders – peoples and human persons – but rather on the ability of their States to design and implement development policies in realizing the obligations of such States vis-à-vis such right-holders. The words “to this end” at the beginning of the second sentence highlight that the undertaking to follow is to be understood in the context of the first sentence which is precisely about the right of other States to have this governance space available (although on behalf of their peoples) in order to fulfil their duties to their right-holders.<sup>265</sup> In other words, the second sentence of paragraph 2 accentuates the fact that unless States have the right to determine and implement their own national development priorities and implement them, they cannot perform their duty to fulfil the right to development. The words “including in matters relating to cooperation, aid, assistance, trade or investment” indicate a non-exhaustive list of the most common areas where the right of States, on behalf of their peoples, to determine priorities and implement them are infringed. The provision also, however, underlines that no State has the unrestrained right or duty to design and implement development priorities in a manner that itself undermines the right to development. This consistency with the right to development is ensured by the inclusion of words “in a manner consistent with the provisions of this Convention and international law”.

## Article 9

### General obligations of international organizations

**Without prejudice to the general duty contained in article 7, States Parties agree that international organizations also have the obligation to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach any obligation that the State or the latter organization may have with regard to the right to development.**

*Commentary:*

#### A. *Consideration of suggestions received:*

1. The Russian Federation suggested deleting this article because in their view “it is not acceptable that organisations are mentioned on the same footing as a State in a legally binding document, because we are running against international law”. The EDG notes that obligations

<sup>264</sup> Ibid.

<sup>265</sup> For a detailed analysis, see Mihir Kanade, *Multilateral Trading System and Human Rights*.

of international organizations are in fact not at the same footing as those of States. There is a vast difference between the obligations referred to in this paragraph of a general nature on international organizations and those on States referred to in other provisions of this draft convention viz. respect, protect and fulfil. The rationale behind the suggestion being erroneous, the EDG recommends against deleting this provision. The legal commentaries below explain the normative justification for this paragraph.

2. Argentina recommended clarification of which organizations are referred to in this draft article. The EDG notes that draft article 2(b) precisely defines international organizations and it is that definition that applies to this provision and to others that refer to this term.

3. The Holy See recommended replacing the words “general duty contained in article 7” with “general responsibility contained in article 7”. The legal commentaries to draft article 7 above have explained that the word “responsibility” in the title of draft article 7 is a conscious choice. The text of that draft article explicitly stipulates a duty to respect human rights. The text of draft article 9 refers to that duty. In light thereof, the EDG does not recommend modifying the text of this draft article to that effect.

*B. Legal commentary on the text:*

1. Draft article 9 incorporates collectively the provisions of articles 14 to 16 of DARIO and does not necessitate much explanation considering the rigorous process following which the ILC adopted the aforementioned articles. These obligations are specific to international organizations, which are one type of legal persons covered by draft article 7. For this reason, draft article 9 begins with the words “without prejudice to the general duty contained in article 7”.

## Article 10

### Obligation to respect

**States Parties shall refrain from conduct, whether expressed through law, policy or practice, that:**

*Commentary:*

*A. Consideration of the suggestions received:*

1. The Russian Federation recommended deletion of this article. It noted that there is a distinction between voluntary commitments and obligations. The EDG notes that the obligation to respect human rights, including the right to development, is not a voluntary commitment. It is perhaps the most important principle of human rights law. As such, the EDG recommends retaining of this provision.

2. The Holy See recommended deletion of the words “whether expressed through law, policy or practice”. It noted that “the Commentary specifies that ‘conduct’ implies both acts and omissions. The very broad context of such conduct, which would include ‘law, policy or practice’, potentially exposes States to numerous allegations of breaching international obligations. This is all the more the case given the fact that, in virtue of Article 10(a), States would be held accountable for action/inaction that occurs outside their territory”. The EDG does not share this concern. The types of conduct which are illegal under this provision are specifically enumerated in the sub-paragraphs. There is no vagueness in the provision that would permit an unfair allegation of breaching the obligation to respect. No such circumstances have been provided by the Holy See nor can the EDG envision such scenarios. As such, the EDG does not recommend deleting these terms.

*B. Legal commentary on the text:*

1. Draft article 10 is the first in the series of ensuing provisions related to specific obligations recognized in the draft convention which give content and meaning to the words “in accordance with obligations set forth in this Convention” incorporated in draft article 8. The title and first three paragraphs of draft article 10 follow, in general, part 3 of the Maastricht Principles. The said part 3 is titled “obligations to respect”. It may be pointed out

that although the Maastricht Principles are elaborated with reference to extraterritorial ICESCR obligations, they are equally applicable territorially, as well as to all human rights, including the right to development. There are four separate principles 19 to 22 in Part 3 of the Maastricht Principles. Draft article 10 omits Maastricht Principle 19 entitled “general obligations” since it is already addressed in the general obligation under draft article 8. Paragraphs (a) to (c) of draft article 10 combine Maastricht Principles 20 and 21. Draft article 14 corresponds to Maastricht Principle 22 in a separate provision for reasons discussed in the commentary thereto. Draft article 10 also contains paragraph (d) which is drawn from DARIO.

2. Maastricht Principle 20 is titled “direct interference”,<sup>266</sup> whereas Principle 21 is titled “indirect interference”.<sup>267</sup> Draft article 10 combines the two into one provision and omits these sub-headings. Draft article 10 begins with the words, “States Parties undertake to refrain from conduct, whether expressed through law, policy or practice, which [...]”. The obligation to refrain from any conduct that violates human rights is the essence of the obligation to respect as explained in the commentary to draft article 8. “Conduct” includes both acts and omissions.<sup>268</sup> The words “whether expressed through law, policy or practice” are not present in Part 3 of Maastricht Principles. However, they have been incorporated in this draft convention to cover the entire spectrum of mechanisms through which States can conduct themselves in a way that may adversely impact the right to development. “Law, policy or practice” (and its grammatical variations) is a common expression in the field of human rights law and is referenced in Maastricht Principle 14 in the context of impact assessments.<sup>269</sup> The intention is to cover not just domestic and international law, but also policies and practices, which terms collectively include every possible mechanism through which States may act, such as agendas, programmes of action, partnerships, plans, licenses, permissions, amongst others.

**(a) Nullifies or impairs the enjoyment and exercise of the right to development;**

*Commentary:*

*A. Consideration of the suggestions received:*

1. Iran has recommended modifying this provision to “Nullifies [,hinders, obstructs] or impairs the [full] enjoyment and exercise of the right to development”. The EDG has already explained why the words “hinders” or “obstructs” do not add any new element to what has already been mentioned in the text. As such, it does not recommend its addition. The introduction of the word “full” weakens the provision significantly because it adds an extremely high threshold that is not present in the case of any other human rights treaty.

2. It may be recalled that the original formulation in the zero draft included the words “within or outside their territories”. During the first revision of the draft convention, China recommended deletion of the words “or outside”, a view that appeared to be shared by the Holy See. This suggestion appeared to limit the duty to respect only within the territory of the State excluding extraterritorial obligations of States to respect the right to development of those outside their territories. This fundamentally altered the core essence of the right to development. As such, the EDG could not delete only the words “or outside” but agreed to delete both words “withing or outside their territories” as a compromise. As noted in the commentaries to the first revised draft, however, this deletion should be seen in a manner that is “mindful that the same does not affect the binding effect of the right to development on a

<sup>266</sup> Principle 20. Direct interference: All States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.

<sup>267</sup> Principle 21. Indirect interference: States must refrain from any conduct which:

a) impairs the ability of another State or international organisation to comply with that State’s or that international organisation’s obligations as regards economic, social and cultural rights; or

b) aids, assists, directs, controls or coerces another State or international organisation to breach that State’s or that international organisation’s obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act.

<sup>268</sup> See, RSIWA, article 2 as well as commentary thereto.

<sup>269</sup> See also CESCR, *General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12)*, E/C.12/GC/22, 2 May 2016, paragraphs 27, 28, 34, 49(a).

State Party's internal and external (or extra-territorial) conduct, as specified throughout the Revised Draft Convention itself". Any interpretation that excludes the obligations of States to respect the right to development extraterritorially is against the object and purpose of the convention and contrary to the three levels of obligations entailed by the right to development, as discussed in the commentaries to the zero draft and to the legal commentaries below.

*B. Legal commentary on the text:*

1. Paragraph (a) of draft article 10 follows the language of Maastricht Principle 20 but modifies its exclusive context of extraterritoriality. The obligation entailed in this paragraph applies both within and outside their territories, although these words are not incorporated for reasons noted in the section above. The duty of the State to refrain from any conduct that violates human rights both territorially and extraterritorially is a well-settled proposition under international law. The CESCR,<sup>270</sup> as well as the commentary to Maastricht Principles 19,<sup>271</sup> explain the legal basis for this in relation to economic, social and cultural rights. In terms of the ICCPR, the general obligations on States have been referred to in article 2(1) thereof with the words "within its territory and subject to its jurisdiction". In interpreting these words, the Human Rights Committee has recently observed that:

In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. *This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.*<sup>272</sup>

The essence of this is that even if rights violations are committed against persons outside a territory that is effectively controlled by a State (that is, entirely extraterritorial), as long as the State is capable of having adverse impacts on them through its direct and reasonably foreseeable activities, the duty to respect remains. As noted in the introduction to these commentaries, the 2010 Report of the high-level task force on the implementation of the right,<sup>273</sup> identified the three levels of obligations on States related to the realization of the right to development as: (a) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction; (b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (c) States acting collectively in global and regional partnerships.<sup>274</sup>

2. To reflect this international law position, especially the first two levels of obligations identified by the task-force above, paragraph (a) of draft article 10, together with the *chapeau*, thus reads: "States Parties undertake to refrain from conduct, whether expressed through law, policy or practice, which nullifies or impairs the enjoyment and exercise of the right to development". No further qualifications are necessary because the obligation to refrain clearly arises in this construction when the State concerned has the capability, through its conduct, to deny the right to development anywhere. In other words, it is the power to deny the enjoyment of the right, irrespective of where the denial is felt, that brings with it the obligation to refrain from such adverse conduct.

3. The words "nullify" and "impair", along with their derivatives, have also been used in several other draft articles, and hence need an explanation. Apart from the fact that these expressions in paragraph (a) of draft article 10 are directly drawn from Maastricht Principle 21, they have also been used in several core human rights treaties to describe the obligation

<sup>270</sup> CESCR, General Comment No. 24 (2017), paragraph 29. See also, CESCR, *General Comment No. 8(1997): The relationship between economic sanctions and respect for economic, social and cultural rights*, E/C.12/1997/8, 12 December 1997.

<sup>271</sup> Olivier de Schutter and others, "Commentary to the Maastricht Principles".

<sup>272</sup> CCPR, *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, 30 October 2018, CCPR/C/GC/36, at paragraph 63.

<sup>273</sup> A/HRC/15/WG.2/TF/2/Add.2 and Corr.1

<sup>274</sup> *Ibid.*, annex, paragraph 1.

to respect.<sup>275</sup> There is, thus, strong basis in international law for the incorporation of these words to explain what the prohibition on States relates to.<sup>276</sup> It may be important to note that in the human rights context, the words “nullify” and “impair” are generally employed not to rights themselves (for, rights or duties may not be nullified or impaired), but to the enjoyment or exercise of such human rights.<sup>277</sup>

**(b) Impairs the ability of another State or an international organization to comply with that State’s or that international organization’s obligations with regard to the right to development;**

*Commentary:*

*A. Consideration of the suggestions received:*

1. Iran recommended adding the words “opportunity and” before “ability”. The EDG does not consider that any new element is introduced as a result of this word. As such, the EDG does not recommend adding it since it is largely a duplication.

*B. Legal commentary on the text:*

1. The legal commentary to this paragraph is elaborated below conjointly with the commentary for paragraph (c).

**(c) Aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, another State or an international organization to breach that State’s or that international organization’s obligations with regard to the right to development;**

*Commentary:*

*A. Consideration of the suggestions received:*

1. There were no suggestions for modification of the text of this paragraph received.

*B. Legal commentary on the text:*

1. As noted above, the legal commentary in this section covers both paragraphs (b) and (c). Paragraphs (b) and (c) of draft article 10 are a *verbatim* reproduction of the Maastricht Principles 22(a) and (b), modified only to refer specifically to the right to development. The commentary to the Maastricht Principles provides a detailed explanation of its second paragraph.<sup>278</sup> Insofar as its first paragraph corresponding to paragraph (b) of draft article 10 is concerned, the commentary to the Maastricht Principles does not elaborate much, perhaps presuming the obvious nature of the proposition as being inherent to the duty to respect. The present commentary, however, does provide a short justification for its inclusion.

2. The difference between draft paragraphs (b) and (c) must first be noted because they cover aspects of the duty to respect which are related but are also different. While draft paragraph (c) relates to acts of aiding, assisting, directing, controlling or coercing another State or international organization in committing violations of obligations related to the right to development by that other State or international organization, paragraph (b) prohibits the

<sup>275</sup> Both words have been referenced together in article 1 of CEDAW, article 1 of CERD, and article 2 of CRPD. They have also been referenced in article 1 of ILO C111 - Discrimination (Employment and Occupation) Convention and article 28 of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. The word “impair” alone in the context of rights, which would be a much lower threshold than “nullify”, has been referenced in articles 18(2) and 47 of ICCPR, article 25 of ICESCR, articles 12, 23, 68(2), and 81(2) of ICMW, article 33 of UNDRIP, and the preamble and article 21(5) of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.

<sup>276</sup> See also: CCPR, *General Comment No. 18: non-discrimination*, 10 November 1989, paragraph 7; CESCR, *General Comment No. 5: persons with disabilities*, E/1995/22, 9 December 1994, paragraph 15; CESCR General Comment No. 22: right to sexual and reproductive health, E/C.12/GC/22, 2 May 2016, paragraph 34.

<sup>277</sup> To avoid any misinterpretations, it may be highlighted that the terms “nullify” and/or “impair” are employed in GATT/WTO Law – especially in article XXIII of GATT 1947 – with different connotations. Considering their different contexts, the usage and interpretation of these terms in human rights law and GATT/WTO law has developed in mutually autonomous manner.

<sup>278</sup> Olivier de Schutter and others, “Commentary to the Maastricht Principles”.

impairing of the ability of that other State or international organization to perform their obligations.

3. The justification for States undertaking to refrain from conduct that “impairs the ability of another State or international organization to comply with that State’s or that international organization’s obligations with regard to the right to development” flows from well-established international law.<sup>279</sup> This prohibition is, in fact, an explicit articulation of the obligation imposed under article 56 of the Charter of the United Nations which stipulates that “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”. Article 55 lists among its purposes, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” as well as “higher standards of living, full employment, and conditions of economic and social progress and development, solutions of international economic, social, health, and related problems, and international cultural and educational cooperation”. If States are required to cooperate with each other to ensure *universal* respect for human rights, then they, as a natural corollary, have the duty to not impair each other’s abilities to comply with their human rights obligations. In addition, as indicated in the commentary to draft article 7, this prohibition is also implicit in article 30 of the UDHR, and articles 5(1) of the ICCPR and the ICESCR. Lastly, the CCPR has reminded that human rights treaties are essentially contractual in nature:

While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. *Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty.*<sup>280</sup>

Paragraph (c), as indicated above, is reproduced from Maastricht Principle 22(b), which in turn, is replicated from articles 16-18 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),<sup>281</sup> and corresponding provisions in articles 58-60 of DARIO with respect to obligations of States to international organizations.

**(d) Causes an international organization of which it is a member to commit an act that, if committed by the State Party, would constitute a breach of its obligation under the present Convention, and does so to circumvent that obligation by taking advantage of the fact that the international organization has competence in relation to its subject matter.**

*Commentary:*

A. *Consideration of the suggestions received:*

1. There were no suggestions for modification of the text received.

B. *Legal commentary on the text:*

1. Paragraph (d) is a close paraphrasing of article 61 of DARIO which reads as follows:

*Article 61: Circumvention of international obligations of a State member of an international organization*

<sup>279</sup> See CESCR, *General Comment No. 24*, paragraph 29, observing that as part of the obligation to respect, “States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant”.

<sup>280</sup> CCPR, *General Comment No. 31*, paragraph 2.

<sup>281</sup> International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, 2001, vol. II, Part Two.

1. A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

2. Considering that paragraph (2) of DARIO article 61 is only explanatory that the international responsibility of the State applies in both the situations mentioned therein, it is unnecessary to add the same to draft article 10. The basic principle behind this provision is that unless otherwise specifically permitted by international law, no State should legally be allowed to do through an international organization, what it itself cannot legally do.<sup>282</sup> In other words, a State should not be allowed to misuse an international organization to escape responsibility by 'outsourcing'.<sup>283</sup> One important operative term in this paragraph is "circumvent". According to the ILC, this implies "the existence of an intention to avoid compliance".<sup>284</sup> It further explains that "international responsibility will not arise when the act of the international organization, which would constitute a breach of an international obligation if done by the State, has to be regarded as the unintended result of the member State's conduct".<sup>285</sup> Another important operative term in this paragraph is "causes" which signifies that the State must have made use of its power or authority in a manner as to make the international organization act in a particular fashion. In the words of the ILC, "there must be a significant link between the conduct of the circumventing member State and that of the international organization".<sup>286</sup>

## Article 11

### Obligation to protect

**States Parties shall adopt and enforce all necessary, appropriate and reasonable measures, including administrative, legislative, investigative, judicial, diplomatic or [and] others, to ensure that human [natural] or legal persons, peoples, groups, or any other State or agents that the State is in a position to regulate do not nullify or impair the enjoyment and exercise of the right to development within or outside their territories when:**

*Commentary:*

A. *Consideration of the suggestions received:*

1. Ecuador recommended changing the title of the provision "from 'Obligation to protect' to 'Obligation of protection', since its range of application is wide". The EDG could not see any difference and recommends retaining the title as it is since the obligation to protect is the legal typology employed in international human rights law as discussed in the commentaries above.

<sup>282</sup> The commentary to the Maastricht Principles rightly points out that "It is therefore incumbent on a State establishing an international organization or joining an international organization that it ensures that the powers delegated to that organization shall not be exercised in ways that may result in a violation of the human rights that the State has committed to uphold". See, Olivier de Schutter and others, "Commentary to the Maastricht Principles", at p.25.

<sup>283</sup> With respect to a similar obligation on international organizations under DARIO article 17, the ILC observed: "as was noted by the delegation of Austria during the debate in the Sixth Committee, 'an international organization should not be allowed to escape responsibility by "outsourcing" its actors"'. DARIO, p.68.

<sup>284</sup> DARIO, Commentary to article 61, paragraph 2, at p.99

<sup>285</sup> Ibid.

<sup>286</sup> Ibid, paragraph 7, p.99.

2. The Russian Federation, similar to its suggestion for the previous article, recommended a complete deletion. The EDG cannot accept these suggestions since they entirely render the draft convention worthless.
3. Panama recommended modifying the word “human person” with “natural person”, which the EDG accepts in view of similar changes made in other provisions.
4. The Holy See recommended deletion of the words “within or outside their territories” and suggested that there are no extraterritorial obligations with regards to the right to development. The EDG has rejected this interpretation earlier and as such, recommends against deletion of these crucial words in this provision. Additionally, the words “which they are in a position to regulate” qualify the circumstances in which this provision applies and act as a safeguard. Finally, these words are essential in the context of the paragraphs to follow in this provision.
5. Ecuador also recommended adding the word “elaborate” between “adopt” and “enforce”. The EDG did not find any new element added through this suggestion nor any precedent in international human rights treaties. As such, it recommends retaining the language as it stands.
6. Finally, upon the recommendation of the OHCHR editors, the word “or others” has been replaced with “and others”.

*B. Legal commentary on the text:*

1. Draft article 11 addresses the second type of obligation on States Parties with respect to the right to development viz. the obligation to protect, which is also the title of the provision. The formulation of draft article 11 and its paragraphs closely follows and combines the language of Maastricht Principles 24 and 25. The *chapeau* begins with the words “States Parties shall adopt and enforce all necessary and appropriate measures, including administrative, legislative, investigative, judicial, diplomatic or others [...]”. The words “adopt and enforce” are borrowed from Maastricht Principle 25 for their completeness. The words “all necessary and appropriate measures” imply that the obligation to protect is to be undertaken through every measure which is both necessary and appropriate. Considering that the obligation to protect entails extraterritorial impacts also, it is important that the measures taken by a State be appropriate as well, which term signifies considerations of reasonableness, feasibility, proportionality and effectiveness. The list of possible measures is non-exhaustive as signified by the words “including” and “or others”. The words administrative, legislative, investigative, judicial and diplomatic have been collated from different sources.<sup>287</sup>
2. The words “to ensure that natural or legal persons, groups, or any other State or its agents” provide a list of actors, regulation of whose actions, fall within the obligation of a State to protect. The choice of words is very specific and is used to ensure consistency with draft articles 13(2)(a) and 15(1), and most importantly, with draft article 7. It covers both natural and legal persons. The inclusion of the term “groups” follows the wording of article 30 of the UDHR, articles 5(1) of the ICCPR and the ICESCR, and article 9(2) of the DRTD, and is to be understood as referring to those loose groupings of persons that have not been formally recognized with a legal personality under domestic or international law but may still be capable of nullifying or infringing upon the human rights of others. The terms “or any other State or its agents” must be understood in an extremely limited context since the principles of sovereignty and self-determination do not permit one State to regulate actions of another, and certainly not in a manner that amounts to a unilateral coercive measure. These words are employed here to address situations where the territory of a State is being used by another State or its agents for conduct that amounts to a violation of the right to development anywhere. This follows the well-settled principle that no State must allow its territory to be used by another State or its agents for committing illegal activities, if the former State knows

<sup>287</sup> CRC, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16; CESCR, *General Comment No.24*; Maastricht Principles.

or ought to have known about such unlawful activity.<sup>288</sup> Specifically, in the *Corfu Channel* case, the ICJ held that Albania was responsible to the United Kingdom because it “knew or must have known”, of the presence of mines in its territorial waters and did nothing to warn third States of their presence.<sup>289</sup> This requirement related to knowledge and the due diligence this entails is addressed in draft article 11 with the use of words “which they are in a position to regulate”. These words, therefore, trigger the obligation of a State to protect against the conduct of another State or its agents, only if the former State is in a position to regulate that conduct. The term “position” includes both *de jure* and *de facto* circumstances which might not permit a State to regulate the conduct of another, including lack of knowledge of the act, mandate of the United Nations Security Council to the contrary, or coercion of that other State. The terms “which they are in a position to regulate” are important also with respect to their applicability to “legal persons”, especially, international organizations. The independent legal personality of an international organization under international law may exclude the applicability of domestic law or regulation to a large extent if not all. Under such circumstances, the conduct of the international organization may not fall within the obligation of a State to protect under draft article 11 because it may not be in a position to regulate the same.

3. The choice of words “do not nullify or impair the enjoyment of the right to development within or outside their territories when [...]” follows the language of draft article 10(a) and is commented upon earlier.

**(a) Such conduct ~~originates from or~~ occurs[, partially or fully,] on the territory of the State Party;**

*Commentary:*

*A. Consideration of the suggestions received:*

1. The Holy See recommended deletion of the words “originates from”. By way of explanation, it noted that “the broad applicability of conduct, including omissions, and the lack of jurisdiction of a State on such conduct that occurs outside its territory would create undue burdens on States to uphold their obligation to protect. The Holy See therefore suggests to limit the scope of this sub-paragraph to such conduct that occurs on the territory of the State Party”. The EDG agreed to eliminate the words “originates from” but recommends adding the words “partially or fully” after “occurs”.

*B. Legal commentary on the text:*

1. The commentary to this paragraph is developed conjointly with paragraph (b) below.

**(b) The ~~human~~ [natural] or legal person has the nationality of the State Party;**

*Commentary:*

*A. Consideration of suggestions received:*

1. Panama recommended replacing the word “human” with “natural”. This was accepted in view of parallel changes made in the rest of the document.

*B. Legal commentary on the text:*

1. The legal commentary below relates to paragraphs (a) and (b) above.

2. The specific circumstances listed in paragraphs (a) and (b) describe the instances when a State fulfilling the requirements of the chapeau *must* protect the right to development within its territory or extraterritorially. These follow the template of paragraphs (a) and (b) of Maastricht Principle 25 which lists the bases for protection for States under the ICESCR. It may be noted that although the Maastricht Principles cover mostly the extraterritorial obligations of States, draft article 11 covers both territorial and extraterritorial obligations.

<sup>288</sup> See, *Corfu Channel Case*, I.C.J. Reports 1949: 4. Also see, Olivier de Schutter and others, “Commentary to the Maastricht Principles”, p.1136.

<sup>289</sup> *Ibid.*

Despite this, as explained below, there is no additional category of circumstances that need to be listed to address territoriality separately.

3. As explained in the commentary to the Maastricht Principles, its paragraphs (a) and (b), which are very similar to those in draft article 11, are a reflection of the active personality principle as a basis for extraterritorial jurisdiction. The same paragraphs, however, also recognize the basis for a State to invoke jurisdiction territorially under the subjective and objective territoriality principles. Paragraph (a) of draft article 11 requires protection against nullification or impairment when “such conduct occurs, partially or fully, on the territory of the State Party”. The word “conduct” is preferred here over the more fluid term “harm” used in paragraph (a) of Maastricht Principle 25.<sup>290</sup> As with draft article 10, the term “conduct” includes both acts and omissions. While paragraph (a) of article 25 of the Maastricht Principles employs the phrase “the harm or threat of harm originates or occurs on its territory”, paragraph (a) herein prefers the term “such conduct occurs, partially or fully, on the territory of the State Party”. This change is due to the replacement of the word “harm or threat of harm” with “conduct”. Conduct originating from a State Party is covered by the terms “occurs, partially or fully”, and ensures a more precise legal construction. Paragraph (b) of draft article 11 covers circumstances when “the natural or legal person has the nationality of the State Party”,<sup>291</sup> and does not refer to “groups” in view of their lack of formal legal personality.

**(c) The State Party has the requisite legal duty under either domestic or international law to supervise, regulate or otherwise exercise oversight of the conduct of the legal person engaging in business activities, including those of a transnational character.**

*Commentary:*

*A. Consideration of the suggestions received:*

1. There were no suggestions for modification of the text received.

*B. Legal commentary on the text:*

4. This paragraph, in the zero draft of the convention, was based on paragraph (c) of Maastricht Principle 25 which articulates the base for protection as follows: “as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned”. Following the language of article 7 of the first revised draft of the “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”,<sup>292</sup> the zero draft articulated this paragraph as follows: “The legal person conducting business activities, including those of a transnational character, is domiciled in the State Party, whether by virtue of having its place of incorporation, statutory seat, central administration or substantial business interests in that State Party”. Following suggestions received from stakeholders, this paragraph was reformulated entirely. Paragraph (c) now focuses on the “requisite legal duty” of the State, either as defined under “domestic law or international law”, to “supervise, regulate or otherwise exercise oversight of the conduct of the legal person engaging in business activities”. The ultimate lens that would determine that supervision, regulation, or oversight would be the source of law from where the State Party’s requisite legal duty arises. This includes both domestic and international law. This paragraph should be read in

<sup>290</sup> See also the preference for terms “acts or omissions” in the second revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, over the term “harm” adopted previously in the zero draft. For revised draft, see: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf)

<sup>291</sup> It is sometimes wrongly assumed that only human persons can have nationality. Nationality of legal person is a well-established principle of international law. For instance, see: International Law Commission, *Draft Articles on Diplomatic Protection*, Chapter III “Legal Persons”, article 9 “State of nationality of a corporation” and article 13 “other legal persons”; *Case concerning the Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, *Second Phase, Judgment*; Maastricht Principle 25(b) and commentaries thereto.

<sup>292</sup> *Ibid.*

conjunction with paragraphs (a) and (b), where the State always has the duty to protect from violations by legal persons, when it is in a position to so regulate, when the conduct arises partially or fully on its territory or the legal person has the nationality of that State. Similar to paragraphs (a) and (b), this paragraph is a reflection of the subjective and objective territoriality principle as the basis for the State to invoke jurisdiction territorially, and active personality principle as a basis for extraterritorial jurisdiction. It is a well-settled principle of international law that “the state is under a duty to control the activities of private persons within its state territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state”.<sup>293</sup>

5. Finally, it may be noted that paragraphs (d) and (e) of the Maastricht Principles have not been incorporated in draft article 11. Paragraph (d) thereof reads as follows: “where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor’s activities are carried out in that State’s territory”. While this base is useful to determine when it might be legitimate for a State to invoke its extraterritorial jurisdiction, it is perhaps too broad and imprecise when describing a circumstance when a State *must* do so. As such, draft article 11 does not include paragraph (d) of Maastricht Principle 25. Paragraph (e) of Maastricht Principle 25 requires protection in case “such conduct constitutes a violation of a peremptory norm of international law”. The principle that any conduct constituting a violation of peremptory norms is illegal is well-settled.<sup>294</sup> As such, this general proposition needs no reiteration in a treaty, making its incorporation in draft article 11 unnecessary.

## Article 12

### Obligation to fulfil

**1. Each State Party shall take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to its obligations to respect and protect the right to development contained in articles 10 and 11 of the present Convention or to those obligations contained in the present Convention that are of immediate effect. States Parties may take such measures through any appropriate means, in particular through the adoption of legislative measures.**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. There were no suggestions received for modifying this paragraph, except the recommendation by the Russian Federation to delete it entirely. The EDG considers this draft article to be central to the right to development and as such recommends against its elimination.

##### *B. Legal commentary on the text:*

1. Draft article 12 deals with the third typology of human rights obligations viz. the obligation to fulfil. Following the titular format of draft articles 10 and 11, this provision is entitled “Obligation to fulfil”. It contains two paragraphs, each of which is drafted considering the particular characteristics of the right to development and its evolution.

2. Paragraph (1) is inspired significantly from article 4(2) of CRPD, which stipulates that “With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of

<sup>293</sup> Ian Brownlie, *System of the Law of Nations: State Responsibility (Part 1)* 165 (1983); Nicola M.C.P. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* 172; Olivier de Schutter and others, “Commentary to the Maastricht Principles”, p.1136 (2002).

<sup>294</sup> For a detailed analysis, see International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, paragraphs 361-379.

these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law". This statement reflects the fact that both civil and political rights on the one hand, and economic, social and cultural rights on the other, have been recognized for persons with disabilities in the CRPD. Article 4(2) of the CRPD corresponds to obligations of States relating to ESC rights in the said Convention and therefore follows the template of article 2(1) of ICESCR.<sup>295</sup>

3. Given the nature of development, the right to development, as discussed earlier, has characteristics of both civil and political rights, as well as economic, social and cultural rights. It would be erroneous to characterize the right to development within either of these compartments or to follow the template of only the ICCPR or the ICESCR to describe obligations of States. Although the typology of respect, protect and fulfil applies to both ICCPR and ICESCR obligations equally, the general obligations under articles 2(1) of both instruments are different. The elements of "taking measures", "progressive realization" and "the maximum of its available resources" are associated mostly with economic, social and cultural rights, rather than with civil and political rights. The nature of the right to development, as dependent on national and international environments enabling it, is such that while the above elements are applicable to it, there are elements common to civil and political rights also which apply. As such, the essence of the first paragraph of draft article 12 is to strike this balance considering three features. One, the obligation to fulfil the right to development does need to reflect the fundamental concept behind the framing of the general obligation of States under article 2(1) of the ICESCR, including, features such as the undertaking to "take measures", "individually and through international assistance and cooperation", and "achieving progressively the full realization of", but ought not to be identically phrased to falsely suggest an equation with ICESCR obligations only. Two, at the same time, it must not be drafted in a way that suggests a fallacious understanding that article 2(1) of the ICESCR contains only the obligation to fulfil and not to respect and protect. Therefore, draft article 12 needs to be formulated in a way that although the obligation recognized therein is similar to article 2(1) of the ICESCR, its scope is restricted to that part of article 2(1) that corresponds with the obligation to fulfil. That is, the provision is otherwise without prejudice to the obligations to respect and protect, which are specifically contained in draft articles 10 and 11, and which obviously do not build on any characteristics peculiar to only ICCPR or ICESCR obligations. Three, in addition and as is the case with article 4(2) of the CRPD, it must be clarified that this obligation to fulfil is also without prejudice to those obligations contained in the present Convention that are of immediate effect. As with article 4(2) of CRPD, this part retains the validity of all obligations contained in the convention that are of immediate effect and do not permit States Parties to wriggle out under the pretext that the obligations are only to "take measures" and that the rights are to be only progressively enhanced.<sup>296</sup>

4. For all the aforesaid reasons, draft article 12 stipulates that "Each State Party shall take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to its obligations to respect and protect the right to development contained in articles 10 and 11 of the present Convention or to those obligations contained in the present Convention that are of immediate effect". The words "maximum of its available resources" employed in article 2(1) of the ICESCR and article 4(2) of the CRPD have not been incorporated here since those terms are very specific only to ICESCR obligations,<sup>297</sup> but the idea of taking into account the availability of a States' resources in fulfilling its right to development obligations is by no means discounted. To the contrary, it is indeed inherent in the terms "individually and

<sup>295</sup> Article 2(1) of ICESCR stipulates that "1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

<sup>296</sup> For the concept of immediate obligations, see CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.

<sup>297</sup> Ibid, paragraph 10, developing the concept of "minimum core obligations" related to the ICESCR that need to be met by all States irrespective of the maximum resources available to them.

through international assistance and cooperation”.<sup>298</sup> Similarly, the words “achieving progressively the full realization of” employed in article 2(1) of the ICESCR have been modified to “progressively enhancing”. The rationale is the same. The phraseology of ICESCR is specific to obligations of States under the said convention and its interpretation has developed in that context.<sup>299</sup> The obligation to fulfil the right to development contains both elements and hence the terms “progressively enhancing” have been employed so as to ensure that the interpretation is not bogged down or limited to the one developed by the CESCR.

5. The second sentence in paragraph (1) stipulating that “States Parties may take such measures through any appropriate means, in particular through the adoption of legislative measures”, is borrowed from the last part of article 2(1) of the ICESCR, and is especially included to highlight that the right to development is fully capable of being domestically legislated upon as well as being made justiciable or otherwise enforceable.<sup>300</sup>

**2. To this end, each State Party shall take all necessary measures at the national level, and shall ensure, inter alia, equality of opportunity[, including through digital inclusion where applicable,] for all human persons [individuals] and peoples in their access to basic resources, education, health services, food, housing, and employment, [and social security and protection,] and in the fair distribution of income, and shall carry out appropriate economic and social reforms with a view to eradicating all social injustices.**

*Commentary:*

*A. Consideration of the suggestions received:*

1. Argentina recommended adding a reference to the idea of progressivity in this paragraph. The EDG notes that this is not necessary since the paragraph begins with the words “to this end” connecting it with the idea of progressivity already enshrined in paragraph 1. As such, to avoid verbosity, the EDG recommends retaining the paragraph without repeating a reference to progressivity again.

2. Panama recommended replacing the word “human persons” with “individuals” which the EDG accepted. Panama also recommended adding “digital inclusion” in the list in this paragraph. The EDG agrees with the importance of digital inclusion, but for syntactic reasons, prefers adding the words “including through digital inclusion where applicable” after the word “access”.

3. The Caribbean Court of Justice recommended adding an encouragement or recommendation for the adoption of regional measures which contribute to the progressive enhancement of the right to development in this paragraph. The EDG notes that the context of this paragraph is inward focused. However, as noted previously, the word international, which is referred to in the previous paragraph, includes regional. The connector “to this end” addresses the recommendation made by the Caribbean Court.

4. Ecuador suggested adding the word “rights” before “equal opportunities”. The EDG considers that the “rights” dimension is specifically incorporated in the previous paragraph. Equality of opportunity itself being the right, it is repetitive in this paragraph and as such does not recommend it. Ecuador also suggested the following modifications to the text: “access to ~~resources~~, basic ~~services~~, education, ~~and~~ culture, science, health ~~services~~, food, ~~and~~ housing, employment ~~and~~ social security, as well as the fair distribution of income ~~and~~ territorial equity, and carry out appropriate economic and social reforms in order to eradicate all social injustices”. To avoid verbosity, repetition from other provisions, and to retain the context, the EDG recommends modifying the text as follows: “equality of opportunity, including through digital inclusion where applicable, for all individuals and

<sup>298</sup> Ibid, paragraph 13.

<sup>299</sup> For the specific connotation under ICESCR, see Ibid, paragraph 9.

<sup>300</sup> See article 22 of the African Charter on Human and Peoples’ Rights. Also see, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 276/03, 2009; and *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, 006/2012, 2017.

peoples in their access to basic resources, education, health services, food, housing, employment, and social security and protection”.

5. The Holy See recommended adding the words “and in accordance with domestic legislation” after “national level”. The EDG considers that this adds verbosity to the paragraph and is not necessary. In view of the language of the previous paragraph and the connector “to this end”, the EDG does not recommend adding the suggested words.

*B. Legal commentary on the text:*

1. Paragraph 2 of draft article 12 closely follows the text of article 8 of the DRTD which stipulates in its three paragraphs that “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices”. The text of draft article 12(2) suitably modifies this by adding important new elements. Thus, after the words “equality of opportunity”, “including through digital inclusion where applicable” has been incorporated in view of its importance in the digital age. In the list for which equality of opportunity in access is articulated, social security and protection have been added. Finally, considering a separate dedicated provision to equality of opportunity to women in draft article 16, that part of article 8 of the DRTD has been omitted here.

## Article 13

### Duty to cooperate

**1. States Parties reaffirm and shall implement their duty to cooperate with each other, through joint and separate action, in order to:**

**(a) Solve international problems of an economic, social, cultural, political, environmental, health-related, educational, technological or humanitarian character;**

**(b) End poverty in all its forms and dimensions, including by eradicating extreme poverty;**

**(c) Promote higher standards of living, full and productive employment, decent work, [entrepreneurship,] conditions of human dignity, and economic and[,] social[, cultural, technological and environmental] progress and development;**

**(d) Promote and encourage universal respect for human rights and fundamental freedoms for all, without discrimination of any kind.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested modifying the chapeau of this paragraph as follows: States Parties [~~reaffirm and~~] shall [~~implement their duty to~~] cooperate with each other, through joint and separate action, in order to”. The EDG recommends against modifying the text as suggested. As the legal commentaries below note, a principal intention of the words “reaffirm” and “implement their duty to cooperate” is to establish that international cooperation is a legally binding obligation on States under existing international law and that this convention does not create this norm anew. The suggested modification defeats this entire purpose.

2. In sub-paragraph (a), Panama recommended adding the word “climate” after “environment”. The EDG considers that the word “environment” is broadly used to include “climate” and as such a separate reference is not necessary.

3. With respect to sub-paragraph (c), the Russian Federation posed a question whether the duty to cooperate through joint and separate action applies to promoting higher standards of

living in other States as well. The legal commentaries below explain the scope of the duty to cooperate externally and collectively. It may be sufficient to note that the language of sub-paragraph (c) is drawn from articles 55(1) read with article 56 of the Charter of the United Nations and entails a legally binding obligation on all States.

4. China recommended adding the words “cultural and environmental” after “social”. Panama recommended adding the word “technological”. The EDG agrees with these suggestions since they strengthen the provision.

5. The EDG notes that during the first round of revisions, Ecuador had recommended inclusion of the words “develop and strengthen productive entrepreneurship”. The EDG noted in the commentaries to the first revised draft “the importance placed on “entrepreneurship” in SDGs 4.4 and 8.3 and considers that its inclusion strengthens the provision”. However, changes to the text were not reflected. As such, the EDG rectifies that error.

6. In sub-paragraph (d), Iran recommended modifying the text to read “the right to development as an integral part of human rights”. The EDG considers that this would duplicate draft article 12 and as such does not recommend it. Additionally, “human rights” includes the right to development.

*B. Legal commentary on the text:*

1. The duty to cooperate with each other is of primary importance to the right to development. The DRTD refers to it twice in the preamble and at least thrice in the substantive provisions. Article 3(2) thereof stipulates that “The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations”. Article 3(3) further stipulates that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights”. Similarly, article 6(1) declares that “All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion”. The duty to cooperate applies to all facets of the right to development and, as indicated earlier, runs through the entire draft convention like a golden thread binding together all its provisions. Because the realization of the right to development requires an enabling environment at both the national and international levels, the duty to cooperate is indispensable to the obligations to respect, protect and fulfil. Considering its pervasive and omnipresent nature, a separate and detailed provision is included in the draft convention.

2. Paragraph 1 of draft article 13 is formulated in a way that it reaffirms the legal normativity of the duty to cooperate in international law flowing from the Charter of the United Nations. It further incorporates an undertaking by States to implement this duty that they have undertaken in the Charter. Article 1(3) of the Charter stipulates that one of the purposes of the United Nations is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Article 55 gives shape to this institutional objective and contains a list of things that the United Nations is thus obliged to promote. Article 56 contains the pledge by States to “take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55”. In the DRTD, the very opening paragraph of the preamble refers to “the purposes and principles of the Charter of the United Nations relating to the achievement of international cooperation”. Paragraph 1 of draft article 13 therefore begins with the words “States Parties reaffirm and shall implement their duty to cooperate with each other, through joint and separate action, in order to”. The words “through joint and separate action” reflect the language of article 56 of the Charter. Sub-paragraph (a) reflects article 1(3) of the Charter with the addition of words “political, environmental, health-related, educational, technological” to reflect contemporary problems that need resolution through cooperation.

3. Sub-paragraph (b) is not part of article 55 of the Charter and can be seen as inherent in sub-paragraph (a), however, it has been added as a separate paragraph to reflect a core commitment of States as articulated in SDG 1 of the 2030 Agenda.

4. Sub-paragraph (c) of draft article 13 is based on article 55(1) of the Charter with the addition of words “full and productive employment, decent work” instead of just “full employment” to reflect evolution in international law as also reflected in the title of SDG 8. The word “entrepreneurship” has also been incorporated in view of the importance placed to it in SDGs 4.4 and 8.3. “Conditions of human dignity” have also been added to strengthen the provision along with “cultural, technological and environmental” before “progress and development” based on suggestions from various States and other stakeholders.

5. Sub-paragraph (d) reflects paragraph (c) of article 55 of the Charter of the United Nations.

**2. To this end, States Parties have primary responsibility, in accordance with the general principle of international solidarity described in the present Convention, for the creation of international conditions favourable to [for] the realization of the right to development for all, and shall take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society:**

**(a) To ensure that human [natural] and legal persons, groups and States do not impair the enjoyment of the right to development;**

**(b) To eliminate obstacles to the full realization of the right to development, including by reviewing international legal instruments, policies, and practices;**

**(c) To ensure that the formulation, adoption, and implementation of States Parties’ international legal instruments, policies and practices are consistent with the objective of fully realizing the right to development for all;**

**(d) To formulate, adopt and implement appropriate international legal instruments, policies and practices aimed at the progressive enhancement and full realization of the right to development for all;**

**(e) To mobilize appropriate technical, technological, financial, infrastructural and other necessary resources to enable States Parties, particularly in developing or least developed countries, to fulfil their obligations under the present Convention.**

*Commentary:*

*A. Consideration of the suggestions received:*

1. Ecuador suggested adding the word “appropriate” to qualify “international conditions” in the chapeau. The EDG considers that this may not be necessary since “favourable conditions for the realization of the right to development” can only imply appropriate conditions and not inappropriate conditions.

2. Panama recommended replacing the word “human” with “natural” in sub-paragraph (a). In light of parallel changes made, the EDG accepts this recommendation.

3. China recommended replacing the words “primary responsibility” with “major responsibility” in the chapeau. The EDG could not find a normative basis in international legal instruments for the words “major responsibility” in the context of this provision. To the contrary, the words “primary responsibility” are commonplace in legal instruments as also reflected in article 3 of the DRTD. As such, the EDG does not recommend the suggested modification.

4. With respect to sub-paragraph (a), the Russian Federation commented as follows: “We need some sort of a clarification, when we read 13. 2. (a) together with the heading in the chapeau of 13.2. We must understand who is responsible for what. In other words, it sounds as if the State Parties must ensure that individuals, legal entities, groups of individuals and States do not violate the exercise of the right to development. It is difficult to understand exactly what aspects would be governed by national laws and which would be covered by the international treaty”. The EDG does not consider that there is any vagueness in these provisions. The draft convention is clear that natural and legal persons have the duty to

*respect* the right to development, and in this respect, States have the duty to *protect* the right to development by ensuring that natural and legal persons do not impair or nullify it. As with any international human rights treaty, the norms and obligations are established by those instruments which must be translated into national law or policy by States. The assumption that aspects of human rights law are governed either by national laws or by international treaties, but not both, is incorrect.

5. With respect to sub-paragraph (b), Iran recommended adding the word “all” prior to “obstacles”. The EDG considers that this does not strengthen the provision since it is implicit in the text, and only makes it verbose. The Russian Federation suggested deletion of this sub-paragraph since “it has a broad interpretation that could potentially cover any legal obligations, including in the economic sphere in trade and commercial relations”. The EDG does not see how this is concern is compatible with the object and purpose of the convention, or for that matter, international human rights law. It is an obligation on States to ensure that obstacles to the realization of human rights, including the right to development, are eliminated in case they are violated as a result of international legal instruments, policies and practices, whether economic, commercial or otherwise. This includes, at the very least, reviewing those instruments, policies and practices. Nigeria commented that it did not agree with the wording but no alternative language was proposed nor any reasons were outlined. As such, the EDG recommends retaining the sub-paragraph as it stands since it reflects an inherent component of the duty to cooperate.

6. Regarding sub-paragraph (c), Argentina made the following observation: “it includes a reference to State parties in new wording. Then, when reading it with (d), it gives the impression that (c) covers (d) as well. Article 13.2 (c) in its new wording together with (d) subordinates the formulation, approval and application of all legal instruments to which the states parties are parties, as well as international policies and practices, to their compatibility with the right to development, thus becoming a sort of test of validity for the foreign policy of the states”. The EDG notes, firstly, that as the commentaries to the zero draft indicate, sub-paragraph (d) reflects the obligation recognized in article 10 of the DRTD and addresses the undertaking by States acting collectively to not stop at just ensuring compatibility of legal instruments, policies and practices with the objective of realizing the right to development as contained in sub-paragraph (c), but to specifically take positive steps. Secondly, the concern that sub-paragraph (d) “subordinates” the formulation, approval and application of legal instruments, policies and practices to their “compatibility” with the right to development is, in the view of the EDG, is not an accurate way of framing the norm in this sub-paragraph. All that it requires is that, since States Parties to the Convention have undertaken obligations to fully realize the right to development, their international legal instruments, policies and practices do not violate this obligation. It reflects the fundamental legal principle that doing so amounts to a violation of an international legal obligation owed by a State Party and hence amounts to an internationally wrongful act by that State Party. There is no larger problem that arises out of this sub-paragraph. It is fully in line with the basic principles of international law.

7. With respect to sub-paragraph (e), the Russian Federation commented that it is “essential to give an explanation of what constitutes the Developing or Least Developed Countries, bearing in mind that this list of countries could sometimes differ”. The EDG does not agree with this. International practice indicates that the term “Least Developed Countries” follows the list reviewed from time to time by the United Nations’ Committee for Development (CDP) based on clear criteria and indicators, which permits countries to graduate out or fall into the list.<sup>301</sup> State practice also demonstrates clearly that developing countries are those that do not self-identify as “developed” and are not within the LDC category. Indeed, there are numerous international treaties, for instance, WTO treaties or the Paris Climate Agreement, which employ these terms without providing a legal definition since they rely on the common understanding as described above.

#### *B. Legal commentary on the text:*

1. Paragraph 2 of draft article 13 gives effect to the duty to cooperate in the specific context of the realization of the right to development and underpins the third level of obligations on

<sup>301</sup> <https://www.un.org/development/desa/dpad/least-developed-country-category.html>

States for creating the enabling environment for realization of the right to development viz. States acting collectively in global and regional partnerships. Because international cooperation in the context of creating national conditions favourable to the realization of the right to development is clearly implicit in the territorial and extraterritorial obligations in draft articles 10, 11 and 12, paragraph 2 of draft article 13 focuses on the duty to cooperate for creation of enabling international conditions. Thus, it begins with the words “To this end, States Parties have primary responsibility, in accordance with the general principle of international solidarity described in the present Convention, for the creation of favourable international conditions for the realization of the right to development for all”. This reflects article 3(1) of the DRTD which is framed similarly. The words “in accordance with the general principle of international solidarity described in the present Convention” have been added to make a cross-reference to article 3(i) in view of the centrality of international solidarity to the duty of international cooperation. The following words “and shall take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society” precede a list of undertakings by States parties. The words “deliberate, concrete and targeted steps” are the precise terms used by the CESCR in describing the obligations of States under the ICESCR.<sup>302</sup> These are also used in Maastricht Principle 29 titled the “obligation to create an enabling international environment”, along with the words “separately and jointly” which have been incorporated in draft article 12. The terms “including through cooperation within international organizations and engagement with civil society” are drawn from similar words used in the provision on international cooperation in the CRPD.<sup>303</sup>

2. Sub-paragraph (a) enjoins States to cooperate “to ensure that natural and legal persons, groups and States do not impair the enjoyment of the right to development”. It highlights that the duty to respect and protect the right to development is not restricted to territorial and extraterritorial obligations of States, but also when States act collectively at the international level. The wording of sub-paragraph (b), “To eliminate obstacles to the full realization of the right to development, including by reviewing international legal instruments, policies, and practices”, reflects the language of article 3(3) of the DRTD noted above with appropriate modifications. Sub-paragraph (c) contains the words, “To ensure that the formulation, adoption, and implementation of States Parties’ international legal instruments, policies and practices are consistent with the objective of fully realizing the right to development for all”. The terms “formulation, adoption and implementation” are directly drawn from article 10 of the DRTD. This sub-paragraph addresses the requirement of ensuring that no international legal instrument, policy or practice undermines the right to development even though it may not be designed explicitly with the aim of the realization of the right to development. In other words, this provision enjoins on States Parties the obligation to ensure that their collective actions in areas such as environment, trade, finance, investment, aid, and the like do not militate against the objective of fully realizing the right to development for all. Sub-paragraph (d) reflects the obligation recognized in article 10 of the DRTD and addresses the undertaking by States acting collectively to not stop at just ensuring compatibility of legal instruments, policies and practices with the objective of realizing the right to development, but to specifically take positive steps to “formulate, adopt and implement appropriate international legal instruments, policies and practices aimed at the progressive enhancement and full realization of the right to development for all”. Sub-paragraph (e) is worded, “To mobilize appropriate technical, technological, financial, infrastructural and other necessary resources to enable States Parties, particularly in developing or least developed countries, to fulfil their obligations under the present Convention.”. The language of mobilizing resources is drawn directly from the 2030 Agenda which contains the commitment of States to this effect in order to achieve a number of SDGs.<sup>304</sup> Sub-paragraph (e) highlights that these commitments are not merely moral or political in nature but are an integral component of the duty upon States to cooperate internationally to enable States Parties to realize the right to development.

<sup>302</sup> CESCR, *General Comment No. 3*, paragraph 2.

<sup>303</sup> Article 32 of the CRPD uses the terms “as appropriate, in partnership with relevant international and regional organizations and civil society”. Although the term regional organization is used in article 32, it is avoided in draft article 13(2) because the term “international organization”, as defined in draft article 2, includes regional organizations.

<sup>304</sup> See A/RES/70/1, paragraphs 39 to 46, and 60 to 66, and SDGs 1a, 15b, 17.1, 17.3, 17.16

The terms “technical, technological, financial, infrastructural and other necessary resources” are aimed at naming the most important resources that need mobilization, but also at covering others that may be “necessary”. The objective of the resource mobilization “to enable States Parties” highlights the importance of creating an enabling environment internationally. The words “particularly in developing or least developed countries” highlight the element of equity required in international resource mobilization and reflect the “reaching the furthest behind the first” principle. The objective of enabling States Parties is to “fulfil their obligations under the present Convention”.

**3. States Parties shall ensure that financing for development and all other forms of aid and assistance given or received by them, whether bilateral, or under any institutional or other international framework, are in compliance with internationally recognized development cooperation principles and consistent with the provisions of the present Convention.**

*Commentary:*

A. *Consideration of suggestions received:*

1. There were no suggestions received for modification of paragraph 3.

B. *Legal commentary on the text:*

1. Paragraph 3 of draft article 13 addresses a specific aspect of the duty to cooperate internationally viz. ensuring that financing for development and all other forms of aid and assistance are consistent with the provisions of the draft convention. “Financing for development” is aimed at directly referencing the Addis Ababa Action Agenda adopted at the Third International Conference on Financing for Development (AAAA).<sup>305</sup> Considering that the AAAA is incorporated as an integral part of the 2030 Agenda, it is of direct relevance to the means of implementation goals and targets therein.<sup>306</sup> Paragraph 3 also references “all other forms of aid and assistance” to ensure its applicability to aid and assistance given under labels other than “financing for development”.<sup>307</sup> The paragraph also recognizes the obligation to ensure consistency with the draft convention of both the donors and recipients with the words “given or received by them”. This formulation allows conditions imposed by donors who may not be Parties to the draft convention, and which may yet clearly undermine the right to development in the recipient State Party, to be considered from the prism of the general international law on legality of conduct by a State or an international organization in aiding, assisting, directing, controlling or coercing another State (that is party to this convention) in breaching an international obligation of such other State. Finally, paragraph 3 covers such financing, aid or assistance “whether bilateral, or under any institutional or other international framework”. This ensures universal coverage, including financing received from international financial institutions.

**4. States Parties recognize their duty to cooperate to create a social and international order conducive to the realization of the right to development by, inter alia:**

**(a) Promoting a universal, rules-based, open, non-discriminatory, equitable, transparent and inclusive multilateral trading system;**

**(b) Implementing the principle of special and differential treatment for developing countries, in particular least developed countries, as defined in applicable trade and investment agreements;**

<sup>305</sup> Addis Ababa Action Agenda, the final text of the outcome document adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the UNGA in resolution 69/313 of 27 July 2015.

<sup>306</sup> A/RES/70/1, paragraph 62.

<sup>307</sup> For a discussion on how identical forms of aid or assistance may often be branded or rebranded under different labels, see Stiglitz, Joseph and Charlton, Andrew. 2013. ‘The Right to Trade: Rethinking the Aid for Trade Agenda’, in Mohammad Razzaque and Dirk te Velde (eds), *Assessing Aid for Trade: Effectiveness, Current Issues and Future Directions*, pp. 359–86. London: Commonwealth Secretariat; Mihir Kanade, *Multilateral Trading Regime and Human Rights*.

(c) Improving the regulation and monitoring of global financial markets and institutions, and strengthening the implementation of such regulations;

(d) Ensuring enhanced representation and voice for developing countries, including least developed countries, in decision-making in all international economic and financial institutions, in order to deliver more effective, credible, accountable and legitimate institutions;

(e) Enhancing capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, [relevant,] timely and reliable [disaggregated] data ~~disaggregated by income, gender [sex], age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts;~~

(f) Encouraging official development assistance, financial flows and foreign investment, including through but not limited to the implementation of any existing commitments, for States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes;

(g) Enhancing North-South, South-South, triangular and other forms of regional and international cooperation in all spheres, particularly on access to science, technology and innovation, and also enhancing knowledge-sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level and through existing and new mechanisms for global technology facilitation;

(h) Enhancing [mitigation actions and] adaptive capacity, strengthening resilience and [response, and] reducing vulnerability to[, ] climate change and extreme weather events, addressing the economic, social and environmental impacts of climate change [taking into account the imperatives of a just transition, equity, and the principles of common but differentiated responsibilities and respective capabilities in the light of national circumstances], and enhancing access to international climate finance[, technology transfer and capacity building] to support mitigation and adaptation efforts in developing and least developed countries, especially those that are particularly vulnerable to the adverse effects of climate change;

(i) Promoting the development, transfer, dissemination and diffusion of environmentally sound and human rights-compliant technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed;

(j) Eliminating illicit financial flows by combating tax evasion and corruption, reducing opportunities for tax avoidance, enhancing disclosure and transparency in financial [and property] transactions in both source and destination countries and strengthening the recovery and return of stolen assets;

[(k) Eliminating illicit arms flows by all necessary means in accordance with international commitments;]

~~(l)~~ [(l)] Assisting developing and least developed countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief and debt restructuring, as appropriate, and addressing the external debt of highly indebted poor countries to reduce debt distress;

~~(m)~~ [(m)] Facilitating safe, orderly and regular migration and mobility of people, including through the implementation of planned and well managed rights-based migration policies[, and the adoption of legislative and other measures to prevent and combat trafficking in persons, smuggling of migrants, and crimes against migrants].

*Commentary:*

*A. Consideration of suggestions received:*

1. Ecuador recommended that the words “inter alia” in the chapeau be deleted. The EDG does not recommend this. As noted in the legal commentaries below, paragraph 4 is intended to provide a non-exhaustive list, marked by the words “*inter alia*”.
2. Argentina recommended the specific naming of World Trade Organization. On a similar recommendation, the EDG had noted in the commentaries to the first revised draft that the multilateral trading system essentially refers to the system currently under the World Trade Organization. As such, there is no necessity of including the name of the organization. It also ensures that the Convention withstands the test of time, whatever the institutional framework is for the multilateral trading system.
3. The Russian Federation suggestion modifying paragraph (d) as follows: ~~Ensuring enhanced~~ [preventing any discrimination in] representation and voice ~~for~~ [in] developing countries, including least developed countries, in decision-making in all international economic and financial institutions, in order to deliver more effective, credible, accountable and legitimate institutions. The EDG notes that this negative framing dilutes the positive obligation to “ensure enhanced” and as such does not recommend this modification since it weakens the import. Additionally, the language is drawn directly from SDG 10.6 which represents consensually agreed language.
4. Egypt, with support from Iran, Pakistan, the Russian Federation, Nigeria, APG23 and Alliance Defending Freedom, recommended replacing the word “gender” in paragraph (e) with “sex”. The EDG notes that there was some divergence among States during the sessions of the WGRD with respect to the list of bases for possible disaggregation included in the draft article as contained in the first revised version. In view thereof, the EDG considers that it is best to delete specific reference to the several possible bases for disaggregation of data previously suggested. In addition, the EDG recommends adding the word “relevant” between “high-quality” and “timely” to reflect the fact that national contexts can be different.
5. In sub-paragraph (g), Panama recommended adding the words “digital cooperation” at the end. The EDG considers that this is implicit in the provision and does not add a new element. As such, it does not recommend adding to the text as it stands.
6. In sub-paragraph (h), South Africa made suggestions for substantive modifications as follows: “Enhancing [mitigation actions and] adaptive capacity, strengthening resilience and reducing vulnerability to climate change and [response to] extreme weather events [in the context of Just Transition], addressing the economic, social and environmental impacts of climate change [in accordance with equity, CBDR&RC in light of national circumstance] and enhancing [the provision of and] access to [new, additional, appropriate and at-scale] international climate finance [technology transfer and capacity building] to support mitigation and adaptation efforts in developing [and least developed] countries, especially those that are particularly vulnerable to the adverse effects of climate change”. It noted that “it is important to streamline this subparagraph to put it in line with the UNFCCC. Unless covered elsewhere in the chapeau this sub-clause is devoid of context that gives meaning to the right of development for developing countries and assumes everyone is equal. We need to cover all pillars and main elements of the UNFCCC, such as mitigation, adaptation, support, Loss and damage etc. Access to finance is just part of the problem as it is all about what type, scale, form etc the funding takes (most of this so-called support takes the form of loans that erode the right to development by exacerbating the debt crisis). Hence the need to add G77 climate finance language above. There are three parts to support – finance, technology and capacity building. All developing countries that need support have the right to it under the UNFCCC and when you start identifying sub-categories like LDCs it gets tricky as we will add Africa, others will oppose etc. The phrase “those that are particularly vulnerable” that is already in the text is the best way to avoid this problem”. Pakistan supported the recommendation by South Africa. The EDG studied the Paris Climate Agreement carefully and agreed with the overall recommendations by South Africa. For syntactic reasons and in line with the phrases employed in the Paris Climate Agreement, the following modified language is recommended: “Enhancing [mitigation actions and] adaptive capacity, strengthening resilience and [response, and] reducing vulnerability to[,] climate change and extreme weather events, addressing the economic, social and environmental impacts of climate change [taking into account the imperatives of a just transition, equity, and the principles of common but differentiated responsibilities and respective capabilities

in the light of national circumstances], and enhancing access to international climate finance[, technology transfer and capacity building] to support mitigation and adaptation efforts in developing and least developed countries, especially those that are particularly vulnerable to the adverse effects of climate change”.

7. In sub-paragraph (i), Ecuador recommended adding the word “inclusive”. For syntactic reasons, the EDG does not recommend this. The Russian Federation recommended deletion of the words “environmentally sound and human rights-compliant”. The EDG considers that this suggestion weakens the provision and as such does not recommend it.

8. South Africa suggested adding the word “property” in sub-paragraph (j) on the following ground: “studies show that while financial transactions are subject to strict vetting, a major loophole is property transactions, where much stolen wealth is invested. For subparagraph (j), under transparency and financial, South Africa wishes to include “property” for the transactions”. The EDG agrees with this recommendation. UNODC suggested deleting the words “strengthening the recovery and return of stolen assets”. Considering the importance of this action and its inclusion in SDG 16.4, the EDG does not recommend this deletion.

9. UNODC recommended adding a new paragraph to the following effect: “[Eliminating illicit arms flows by preventing, combatting and eradicating all forms of diversion of arms and ammunition, including their illicit manufacturing and trafficking, through the effective management of stockpiles, marking and record-keeping measures and tracing efforts to prevent unauthorized recipients, including criminals and terrorists, from acquiring arms and ammunitions, and to cooperate effectively with each with a view to investigate and prosecute these offences and bring perpetrators to justice.] As explanation, UNODC observed that “the reason for the above proposal is that SDG 16 of the Agenda for Sustainable Development on promoting peaceful and inclusive societies for sustainable development recognizes, in target 16.4, the negative impact of illicit financial and arms flows as impediments to development and commits Member States to “significantly reducing “illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime”. While the EDG agrees with the inclusion of a provision on illicit arms flows, it recommends keeping the paragraph simple and non-verbose as follows: “Eliminating illicit arms flows by all necessary means in accordance with international commitments”.

10. In sub-paragraph (k) of the first revised draft, now renumbered as sub-paragraph (l), CETIM made the following suggestion: “an important element is missing, namely the removal of the debt. Indeed, when we know the origin and the conditions under which the debts were contracted, it would be necessary, after a public audit, to eliminate certain odious debts. It is not enough to reduce or restructure them, but to eliminate them. Numerous studies show that a significant part of the debt is the result of either corruption or from dubious operations also called "odious debts". It is therefore important to include the elimination of debt in Article 13.4(k). Alternatively, a specific sentence could be added after paragraph (k) that would read the following: [Consideration should also be given to eliminating the odious and illegitimate portion of the debt following the completion of an audit]”. The EDG notes that elimination of debt, including odious debt, is already covered in the text of the paragraph as it stands. As such, the EDG does not recommend making the paragraph more verbose.

11. With respect to sub-paragraph (m), Iran recommended deleting the paragraph and replacing it with “Taking measures to provide, on the basis of bilateral, regional and international cooperation, humanitarian financing that is adequate, flexible, predictable and consistent, to enable developing host countries of the people on the move, to respond their longer-term development needs”. The EDG does not recommend this modification since it fundamentally changes the import of the paragraph. The Russian Federation recommended deleting the words “rights-based”. The EDG considers that this weakens the paragraph and as such does not recommend it. UNODC suggested adding the following text at the end “and legislative and other measures to prevent and combat trafficking in persons, smuggling of migrants and crimes against migrants, which continue to pose significant threats to the lives and well-being of migrants and other vulnerable groups” to reflect operative paragraphs 16, 60 and 61 of the Progress Declaration of the International Migration Review Forum adopted by the General Assembly in May 2022, and in line with the Global Compact for Safe, Orderly and Regular Migration. The EDG agrees with the suggestion and has modified the paragraph appropriately. It does not however, for contextual reasons, recommend adding the words

“which continue to pose significant threats to the lives and well-being of migrants and other vulnerable groups” since it is not apt as treaty language.

*B. Legal commentary on the text:*

1. While paragraphs 2 and 3 of draft article 13 are general, paragraph 4 goes into specifics. It begins with the words “States parties recognize their duty to cooperate to create a social and international order conducive to the realization of the right to development, *inter alia* by [...]”. The words “social and international order” reflect article 28 of the UDHR and draft preambular paragraph 3, and link this entitlement guaranteed to everyone, to the duty to cooperate for realizing the right to development. Paragraph 4 then provides a non-exhaustive list, marked by the words “*inter alia*”, of collective actions that States have already committed themselves to undertake under the 2030 Agenda. The targets listed in the 2030 Agenda which require collective action are an expression by States of their duty to cooperate enshrined in the Charter of the United Nations, the ICESCR and the DRTD, among other instruments. Paragraph 4 identifies the most important ones in a non-exhaustive manner. Thus, sub-paragraphs (a), (b), (c), (d), (e), (f), (g), (i), (l) and (m) sequentially reflect SDGs 17.10, 10.a, 10.5, 10.6, 17.18, 10.b, 17.6, 17.7, 17.4 and 10.7.<sup>308</sup> It may finally be highlighted that none of these sub-paragraphs constitute new obligations on States. Their inclusion in the draft convention merely alludes to the fact that operationalizing the right to development for realizing the 2030 Agenda, as with any development agenda at the international level, inheres the duty to cooperate. Sub-paragraph (h) is drawn from the Paris Climate Agreement which was adopted after the 2030 Agenda. Sub-paragraph (j) on illicit financial flows is drawn from SDG 16.4 and relies on the language of paragraphs 23 and 25 of the Addis Ababa Action Agenda for its text. Sub-paragraph (k) on illicit arms flows is also drawn from SDG 16.4 and is framed in a broad manner to refer to international commitments undertaken by States in various international agreements and UNGA resolutions.

## Article 14

### Coercive measures

**1. The use or encouragement of the use of economic or political measures, or any other type of measure, to coerce a State in order to obtain from it the subordination of the exercise of its sovereign rights in violation of the principles of the sovereign equality of States, the freedom of consent of States or applicable international law constitutes a violation of the right to development.**

**2. States Parties shall refrain from adopting, maintaining or implementing the measures referred to in paragraph 1.**

*Commentary:*

*A. Consideration of suggestions received:*

1. China reiterated its recommendation made during the first revision of the draft for retitling the article to “Unilateral coercive measures” and adding the word “unilateral” before “measure” in the text. The commentaries to the zero draft had explained that the term “coercive measures” rather than “unilateral coercive measures” was so done to accommodate those coercive measures imposed by two or more States collectively, whether through an international organization or not, that may also be illegal under international law resulting in violation of the right to development. As such, the EDG recommends continuation of the title as “Coercive measures” with no modifications to the text.

*B. Legal commentary on the text:*

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<sup>308</sup> For the sake of clarity, the term “least developed countries” in draft article 13(4)(b) and (e) refers to those countries identified as such by the Committee for Development Policy (CDP) of the ECOSOC. For the list and criteria, see: <https://www.un.org/development/desa/dpad/least-developed-country-category.html>

1. Draft article 14 specifically deals with “coercive measures” although the general prohibition to use them is implicit also in draft article 10. The title consciously does not restrict itself to “unilateral coercive measures”, which as discussed below is a topic that the Human Rights Council is already seized of, but to coercive measures in general. This is so done to accommodate those coercive measures imposed by two or more States collectively, whether through an international organization or not, that may also be illegal under international law resulting in violation of the right to development.

2. The need for a separate provision can be justified on the basis of the importance placed by States to the subject, especially of unilateral coercive measures, as well as due to its intrinsic connection with the right to development. Indeed, the UNGA has specifically stated that it “rejects all attempts to introduce unilateral coercive measures, and urges the Human Rights Council to take fully into account the negative impact of those measures, including through the enactment and extraterritorial application of national laws that are not in conformity with international law, in its task concerning the implementation of the right to development”.<sup>309</sup>

3. The legal basis for the general illegality of coercive measures under international law (unless taken under Chapter VII of the Charter of the United Nations) is that they constitute a direct violation of the Charter of the United Nations,<sup>310</sup> as well as the right of peoples to self-determination proclaimed in articles 1 of the ICCPR and the ICESCR. Especially in the context of unilateral coercive measures, their general illegality under international law, including international human rights law, has been reiterated by States on several occasions through resolutions at the UNGA and the Human Rights Council.<sup>311</sup> The Vienna Declaration also called upon all States “to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that create obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments in particular the right of everyone to a standard of living adequate for their health and wellbeing including food and medical care, housing and the necessary social services”.<sup>312</sup> Considering the integral and mutually reinforcing relationship between the right to self-determination and the right to development, such measures also necessarily constitute a violation of the latter. In this context, the UNGA has reaffirmed that unilateral coercive measures are a major obstacle to the implementation of the DRTD,<sup>313</sup> and while underlining “this fact”, has called upon “all States to avoid the unilateral imposition of economic coercive measures and the extraterritorial application of national laws that run counter to the principles of free trade and hamper the development of developing countries, as recognized by the open-ended Working Group on the Right to Development of the Human Rights Council”.<sup>314</sup> While the prohibition of coercive measures is implicit in the right of peoples to self-determination, customary international law also recognizes that “even economic measures not otherwise prohibited become unlawful if they coerce a State to take action in an area in which it has the right to decide freely”.<sup>315</sup>

4. As referenced above, the term “unilateral coercive measures” is a subject of the several resolutions adopted by the UNGA as well as the Human Rights Council on this issue specifically. In addition, the elaboration of the different dimensions thereof is a task that has

<sup>309</sup> A/RES/73/167, Paragraph 12.

<sup>310</sup> The UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the UNGA in resolution 2625 (XXV), annex; as well as article 32 of UNGA resolution 3281 (XXIX) stipulate that no State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign right.

<sup>311</sup> For instance, see UNGA resolution 72/168 of 19 December 2017, and Human Rights Council decision 18/120 of 30 September 2011 and resolutions 24/14 of 27 September 2013, 27/21 of 26 September 2014, 30/2 of 1 October 2015, 36/10 of 28 September 2017 and 37/21 of 23 March 2018.

<sup>312</sup> A/CONF.157/24 (Part I), paragraph 31.

<sup>313</sup> Resolution adopted by the UNGA on 17 December 2018, A/RES/73/167, paragraph 14 of the Preamble.

<sup>314</sup> *Ibid.*, paragraph 14 of the text.

<sup>315</sup> *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, Idriss Jazairy, A/HRC/30/45, 10 August 2015, paragraph 34.*

been set in motion by the Human Rights Council with the appointment of a “Special Rapporteur on the negative impact of the unilateral coercive measures on the enjoyment of human rights”,<sup>316</sup> who has explained that the term “unilateral coercive measures” is “understood as transnational, non-forcible coercive measures, other than those enacted by the Security Council acting under Chapter VII of the Charter of the United Nations”.<sup>317</sup> What its precise elements are, is however, a work in progress. For the purpose of a legally binding instrument, it is best therefore to rely on agreed and long-established language.

5. For the above reasons, including coverage of all illegal coercive measures whether unilateral or by two or more States collectively, paragraph 1 of draft article 14 incorporates *verbatim* the most well-known articulation of the principle as enshrined in the UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the UNGA in resolution 2625 (XXV) of 1970, which stipulates that “No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”.<sup>318</sup> The draft paragraph also incorporates the words “in violation of the principles of the sovereign equality of States and freedom of consent”. These words are drawn from the UN Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, adopted by the UN Conference on the Law of Treaties in 1968 as an annex to the VCLT.<sup>319</sup> It stipulates that the Conference “solemnly condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent”.<sup>320</sup>

6. In line with this, paragraph 1 of draft article 14 therefore stipulates that “The use or encouragement of the use of economic, political, or any other type of measures to coerce a State in order to obtain from it the subordination of the exercise of its sovereign rights in violation of the principles of the sovereign equality of States and freedom of consent constitutes a violation of the right to development”. This formulation highlights the applicability of the general illegality of coercive measures to the right to development. It may be noted that this general illegality is further reinforced by the fact that the paragraph speaks of measures to coerce “a State” rather than “a State Party” only. It should also be noted that this formulation is entirely compatible with the powers of the UNSC to take coercive measures under Chapter VII of the UN Charter. This is because measures by the UNSC against a State can neither be seen as “subordination of the exercise of its sovereign rights” nor can it be seen as constituting “violation of the principles of the sovereign equality of States and freedom of consent”. All members of the UN, upon joining the organization, “confer” on the UNSC the “primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”.<sup>321</sup> They also “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.<sup>322</sup> As such, the prior conferral of authority on the UNSC by a State to take coercive measures, including against itself, and agreement to abide by it is an act of the State exercising its sovereign powers and free consent. Resultantly, coercive action by the UNSC that complies with the UN Charter cannot legally be seen by a State as obtaining “the subordination of the exercise of its sovereign rights”. Additionally, for the same reasons, coercive action by the UNSC that complies with the UN

<sup>316</sup> See Human Rights Council Resolution 27/21 and Corr.1, adopted on 26 September 2014.

<sup>317</sup> *Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights*, A/HRC/39/54, 30 August 2018, paragraph 2.

<sup>318</sup> See also article 32 of UNGA resolution 3281 (XXIX)

<sup>319</sup> See, Final Act of the United Nations Conference on the Law of Treaties, A/CONF.39/26.

<sup>320</sup> *Ibid*, paragraph 1.

<sup>321</sup> UN Charter, article 24(1).

<sup>322</sup> *Ibid*, article 25. See also article 48(1) stipulating that “the action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine”.

Charter will not be in violation of the principles of sovereign equality of States or the freedom of consent (States consented to confer these powers upon the UNSC).

7. After having stated the general norm of international law in paragraph 1 applicable to all States, paragraph 2 of draft article 14 articulates the undertaking by States Parties to “refrain from adopting, maintaining or implementing such measures”. The threefold prohibition to adopt, maintain and implement follows the language of the latest resolution of the Human Rights Council on the negative impact of unilateral coercive measures on the enjoyment of human rights.<sup>323</sup>

## Article 15

### Specific and remedial measures

**1. States Parties recognize that certain ~~human persons~~ [individuals], groups and peoples, owing to their marginalization or vulnerability because of race, colour, sex, language, religion, political or other opinion, ~~nationality, statelessness,~~ national, ethnic or social origin, property, disability, birth, age or other status, ~~including as human rights defenders,~~ may need specific and remedial measures to accelerate or achieve de facto equality in their enjoyment of the right to development. Specific and remedial measures ~~can~~ [may] include~~[, among others,]~~ enabling the full, effective, appropriate and dignified participation of such ~~human persons~~ [individuals], groups and peoples in decision-making processes, programmes and policymaking that affect their full and equal enjoyment of the right to development, without subjecting them to structural, environmental or institutional constraints or barriers.**

*Commentary:*

#### *A. Consideration of suggestions received:*

1. The Holy See reiterated its suggestion to delete the word “remedial” in the title of this draft article. As the EDG has previously noted, the term “special measures” is in fact used in CEDAW,<sup>324</sup> ICESCR,<sup>325</sup> and CERD.<sup>326</sup> CRPD uses the term “specific measures”.<sup>327</sup> None of the core human rights treaties uses the terms “remedial measures”. However, the title of draft article 15 introduces this term in addition to the commonly used “special measures” to indicate that while some right-holders and States may need “specific measures” due to situations not necessarily resulting from denials of their rights or other injustices (for instance, children that are vulnerable owing to their age, or States that are vulnerable to natural hazards), some do need measures aimed at remedying historical injustices or marginalization (for instance, indigenous peoples, afro-descendants, or least developed countries with a colonial past). The essence of the right to development is that development is not a charity but a right. As such, measures which are aimed at providing assistance to those who have been denied their abilities to enjoy or realize the right to development ought not to be treated only as “special measures”, but as something they are entitled to as a matter of right. This is captured by the term “remedial measures”.<sup>328</sup> The Holy See also noted that “While recognizing that special/specific measures might need to be taken to ensure the “de facto equality” in the enjoyment of the right to development of certain persons and groups, the concept of “remedial measures” seems to consolidate the logic according to which such groups of persons enjoy rights per se, rather than in a derivative fashion, in virtue of the dignity of every human person. In practice, there is little evidence to suggest that “remedial measures” are effective in creating a true situation of equality. On the contrary, it is a subtle form of continuing discrimination (even if positive), which often results in reverse-

<sup>323</sup> A/HRC/40/L.5 adopted on 14 March 2019, paragraph 1.

<sup>324</sup> Article 4

<sup>325</sup> Article 10(3)

<sup>326</sup> Articles 1(4) and 2(2)

<sup>327</sup> Article 5(4)

<sup>328</sup> The Supreme Court of United States has acknowledged the close relationship between affirmative action and remedial purpose. See, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

discrimination concerning persons outside the category that enjoys such remedial measures)". The EDG does not agree with this logic. The Russian Federation preferred the term "special measures" rather than "specific measures". The EDG has noted in the commentaries to the first revised draft that the proposal to use "specific measures" was made by the Committee on the Rights of Persons with Disabilities which was accepted.

2. The Russian Federation and Panama recommended replacing the words "human persons" with "individuals" which the EDG accepts in line with other similar changes made in this second revised draft.

3. Egypt recommended modification of the paragraph as follows: "~~States Parties recognize that certain [human persons, groups and peoples, owing to their marginalization or vulnerability because of race, colour, sex, language, religion, political or other opinion, nationality, statelessness, national, ethnic or social origin, property, disability, birth, age or other status, including as human rights defenders, ]~~ individuals affected by discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status], may need specific and remedial measures to accelerate or achieve de facto equality in their enjoyment of the right to development". The EDG notes that this modification focuses only on individuals and not marginalization or vulnerability of particular groups of individuals or peoples. As such, the EDG does not recommend this change. The suggestion also modifies the focus of the paragraph on marginalization or vulnerability to one on "discrimination". As the commentaries to the zero draft had noted, this paragraph is aimed at ensuring measures not only to address those who are discriminated against, but also to those who are in a position of vulnerability such as children or persons with disabilities. As such, the EDG does not recommend making this change.

4. The EDG also notes Egypt's recommendation to delete the reference to human rights defenders in this paragraph. Similar suggestions were made by the Russian Federation and Nigeria. Nigeria observed that "there is no need to single out this group. Our position is that human rights defenders should neither enjoy more rights, nor be given a status different from other citizens in the country. One of the objectives is to ensure that no one is left behind, but at the same time, we should avoid expanding and redefining those grounds" and that "other status" is adequately broad enough. While the EDG does not agree with the position that this provision confers more rights to human rights defenders than other citizens in the country, it agrees to delete these words for the following reason. Egypt and Pakistan suggested limiting the paragraph to the list of statuses referred to in the ICCPR and the ICESCR. For reasons mentioned in the commentary on "consideration of suggestions received" under draft article 8, and to adopt a "prudent approach" as suggested by Pakistan, the EDG agrees to use the language of the ICCPR and the ICESCR but with the necessary addition of the words "age" and "disability" to account for the CRC and the CRPD which were adopted after the two covenants.

5. Finally, at the recommendation of the editors from the OHCHR's Document Management Section, the words "among others" after "include" have been deleted since they have the same meaning. Additionally, following their recommendation, the word "can" has been replaced with "may" and the word "enabling" has been deleted.

#### *B. Legal commentary on the text:*

1. Draft article 15 addresses the special needs of two categories of stakeholders who may need specific or remedial measures with respect to realization of the right to development. Paragraph 1 addresses the needs of some right-holders whereas paragraph 2 deals with needs of some States as duty-bearers. The provision is titled as "specific or remedial measures". In the same context as draft article 13, the term "special measures" is used in CEDAW,<sup>329</sup> ICESCR,<sup>330</sup> and CERD.<sup>331</sup> CRPD uses the term "specific measures", which is the one preferred in this draft article.<sup>332</sup> None of the core human rights treaties uses the terms

<sup>329</sup> Article 4

<sup>330</sup> Article 10(3)

<sup>331</sup> Articles 1(4) and 2(2)

<sup>332</sup> Article 5(4)

“remedial measures”. However, the title of draft article 15 introduces this term in addition to the commonly used “specific measures” to indicate that while some right-holders and States may need “specific measures” due to situations not necessarily resulting from denials of their rights or other injustices (for instance, children that are vulnerable owing to their age, or States that are vulnerable to natural hazards), some do need measures aimed at remedying historical injustices or marginalization (for instance, indigenous peoples, afro-descendants, or least developed countries with a colonial past). The essence of the right to development is that development is not a charity but a right. As such, measures which are aimed at providing assistance to those who have been denied their abilities to enjoy or realize the right to development ought not to be treated only as “specific measures”, but as something they are entitled to as a matter of right. This is captured by the term “remedial measures”.<sup>333</sup>

2. Paragraph 1 begins with a recognition by States Parties that “certain individuals, groups and peoples, owing to their marginalization or vulnerability because of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, age or other status, may need specific and remedial measures to accelerate or achieve *de facto* equality in their enjoyment of the right to development that certain human persons and peoples, owing to their age, disability, marginalization, vulnerability, indigeneity or minority status, may require special or remedial measures to accelerate or achieve *de facto* equality in their enjoyment of the right to development”. The list of statuses is drawn from the ICCPR and the ICESCR with the addition of words “age” and “disability” to bring it in sync with draft article 8. The use of “may need” indicates fluidity to respond to situations of specific needs as necessary rather than a rigid formulaic approach. The words “to accelerate or achieve *de facto* equality” are borrowed from article 5(4) of the CRPD.

**2. States Parties recognize that developing and least developed countries, owing to historical injustices, conflicts, environmental hazards, climate change or other disadvantages including of an economic, technical or infrastructural nature, may require specific and remedial measures through mutually agreed international legal instruments, policies, and practices for ensuring equal realization of the right to development by all human persons [individuals] and peoples. Such measures may, as appropriate, include:**

- (a) Recognition of common but differentiated responsibilities [and respective capabilities], taking into account different national circumstances;**
- (b) The provision of special and differential treatment;**
- (c) Preferential terms on trade, investment and finance;**
- (d) The creation of special funds or facilitation mechanisms;**
- (e) The facilitation and mobilization of financial, technical, technological, infrastructural, capacity-building or other assistance;**
- (f) Other mutually agreed measures consistent with the provisions of the present Convention.**

*A. Consideration of suggestions received:*

1. Panama recommended replacing the words “human person” with “individuals” in the chapeau, which the EDG accepts.

2. In the chapeau, South Africa recommended replacing “historical injustices” with “present and historical injustices”. The EDG agrees that many injustices are present as well, however, does not recommend adding it to the text of this legally binding instrument since it incorporates a statement on which consensus will be elusive. South Africa also suggested eliminating a reference to “least developed countries”. The EDG does not see any advantage of this recommendation and considers that the deletion weakens the objective of the provision. It may be noted that this term was introduced in the first revised draft in view of suggestions made by several respondents and it replaced the term “vulnerable countries”. South Africa also made the following observations: “‘May’ and ‘as appropriate’ adds a

<sup>333</sup> The Supreme Court of United States has acknowledged the close relationship between affirmative action and remedial purpose. See, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

subjective qualification that erodes the right under the UNFCCC to support. We do not need ‘remedial actions’, this is very patronising developed country language. The specific meaning of ‘through mutually agreed international legal instruments, policies and practices’ is unclear, it sounds subjective, donor-driven and open to abuse”. The explanation for these terms is provided in the legal commentary below. Suffice it to say that the intention of the words “through mutually agreed international legal instruments, policies and practices” is precisely to counter a donor-driven approach towards these measures, not to support it.

3. The Holy See recommended deleting “remedial”. For reasons as set out in the commentary to paragraph 1 above, the EDG does not recommend its deletion.

4. The Caribbean Court of Justice recommended adding the words “small island developing States” after “least developed countries”. The EDG considers that these countries are encompassed within the categories of developing and least developed. Additionally, the paragraph is not focused only on climate change and as such, it is recommended to retain the language as it stands.

5. In sub-paragraph (a), the EDG introduced the term “and respective capabilities” after “common but differentiated responsibilities” to align it with the language of draft article 13(4)(h) and the Paris Climate Agreement.

6. In sub-paragraph (e), Panama recommended adding the words “digital cooperation”. The EDG, for syntactic reasons, does not recommend this. Additionally, it is covered in the text of the paragraph as it stands.

#### *B. Legal commentary on the text:*

1. Paragraph 2, by and large, follows a similar structure and addresses the special needs of “developing and least developed countries”. Taken together with the further qualifications represented by the words “owing to historical injustices, conflicts, environmental hazards, climate change, or other disadvantages including of an economic, technical or infrastructural nature”, the paragraph permits adequate room for fluidity to respond to context-specific needs rather than impose a formulaic template. The words “may require specific and remedial measures” further accentuate this fluidity and room for reaching appropriate balance in negotiations. What is important is that such balance must be achieved “through mutually agreed international legal instruments, policies and practices” and not on the basis of what the provider of these specific or remedial measures considers appropriate. The terms “for ensuring equal realization of the right to development by all individuals and peoples” highlight again that the principal right-holders are individuals and peoples, and States only exercise their right as against other States on behalf of the right-holders to whom they owe the duty. The words “equal realization” also underline the objective for these measures, that is, addressing the deprivation of the right to development by some because of specific situations. The paragraph also then incorporates a list of possible measures by stipulating that “such measures may, as appropriate, include”. The use of words “such measures” is employed to connect the list to follow as *in fact* belonging to the specific or remedial measures referred to in the first sentence of that paragraph. The word “may” signifies that this is not a mandatory list of measures that must always be taken to address the disadvantages of the States referred to therein. The word “as appropriate” further highlights the fact that some of these measures may be inapplicable in a particular context. The word “includes” signifies a non-exhaustive list. The list of measures in sub-paragraphs (a) to (f) themselves are already prevalent in various regimes. For instance, “common but differentiated responsibilities and respective capabilities in the light of national circumstances” is a legal principle inherent to environment and climate change law,<sup>334</sup> whereas special and differential treatment is an intrinsic component of WTO law.<sup>335</sup> Preferential terms on trade, investment and finance, establishment of special funds or facilitation mechanisms similar to the one for technology in the 2030 Agenda,<sup>336</sup> or facilitation and mobilization of other types of assistance

<sup>334</sup> See the United Nations Framework Convention on Climate Change, 1992, as well as the follow-up action thereto, including the Paris Agreement, 2015.

<sup>335</sup> For an overview, see: World Trade Organization, *Special and Differential Treatment*, available at [https://www.wto.org/english/tratop\\_e/dev\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/dev_e/dev_special_differential_provisions_e.htm)

<sup>336</sup> A/RES/70/1, SDG 17.6 and paragraph 70.

are already parts of several current policies and practices. The structure of the paragraph underlines that from a right to development perspective, these are not charity or privilege but essential requisites for the relevant States to be able to realize their right to development duties. The final sub-paragraph “other mutually agreed measures consistent with the provisions of this Convention” is a residual provision that permits the inclusion of any other measures if they are mutually agreed and are consistent with the convention.

## Article 16

### Equality between men and women

*Commentary:*

**1. States Parties, in accordance with their obligations under international law, shall ensure full [substantive] equality for all [between] women and men, and shall adopt measures, including through legislation and temporary special measures as and when appropriate, to end all forms of discrimination against all women and girls everywhere so as to ensure their full and equal enjoyment of the right to development.**

*Commentary*

#### *A. Consideration of suggestions received:*

1. Panama and Argentina recommended reverting back to the title of “gender equality” as employed in the zero draft. The EDG notes that the modification to “Equality between men and women” was explained in the commentaries to the first revised draft as follows:

The EDG notes that the objective of this draft article, as reflected in the substantive provisions, is addressing discrimination against women and girls specifically, and not gender inequality in a broader sense. The intention is to place a spotlight on compliance with obligations undertaken by States Parties under CEDAW, as indicated in the commentaries to the 17 January 2020 Draft Convention. The overall obligation of States not to discriminate on the basis of sexual orientation and gender identities are incorporated in draft articles 8 and 15(1). As such, the EDG agrees with the critique that the title of this draft article which speaks to gender equality is not in sync with the limited focus on women and girls in the substantive paragraphs to follow. For this reason, the EDG modified the title to “Equality of men and women” as drawn from the text of CEDAW. In terms of the usage of “gender equality” in the substantive paragraphs below, the National Alliance of Women’s Organizations, United Kingdom, urged that the word be eliminated in favour of an explicit reference to “all women and girls”. It opined that this change of wording strengthens the purpose of the paragraph. It further noted that “the use of the term ‘gender’ has changed over time. Its original intention was to ensure that women and girls were not excluded from roles traditionally ascribed to men and to recognise discrimination based on sex. Overtime this term has been used differently. In some cases it reduces the rights of women and girls”. In light of this valid argument, and for reasons stated above, the EDG also recommends eliminating references to the “gender equality” from the substantive provisions below.

As such, the EDG recommends retaining the title as it stands.

2. Egypt, the Russian Federation, Nigeria, Iran and Alliance Defending Freedom recommended deletion of the word “full” in the phrase “full equality for all women and men”. They also recommended deletion of the word “all” before women and men and using the words “equality between women and men” to reflect the title of the draft article. It was also recommended that the words “all” and “everywhere” be deleted from “discrimination against women and men everywhere”. The word “everywhere” was recommended for deletion on the ground that it introduces extraterritorial obligations on States. The EDG notes that the words “full equality between men and women” is drawn from CEDAW,<sup>337</sup> and the words “all” and “everywhere” are incorporated from SDG 5.1 which represents consensual language. However, the EDG considered the observations made by the aforementioned

<sup>337</sup> See preambular paragraphs 11 and 14 of CEDAW.

respondents that the words “full” and “all” are superfluous and the word “everywhere” is subject to misinterpretation. Bearing in mind that “all” women and men are indeed covered within the objectives of this paragraph, the EDG agrees to delete this word in the interest of ensuring consensus. With respect to the word “full equality”, the EDG recommends replacing it with the word “substantive equality” in view of the elaboration of this obligation on States under CEDAW by the Committee on the Elimination of Discrimination Against Women.<sup>338</sup> The EDG also recommends adding the word “legislation” in the phrase “shall adopt measures, including through temporary special measures as and when appropriate” to read “shall adopt measures, including through legislation and temporary special measures as and when appropriate” since the concept of equality includes both formal and substantive equality as discussed in the legal commentary below. This is also in line with the recommendation made by the Caribbean Court of Justice to add the word “legislation” before “temporary special measures”.

*B. Legal commentary on the text:*

1. Draft article 16 is entitled “equality between men and women” and is necessitated to ensure non-discrimination against women in the draft convention. Paragraph 1 begins with a reaffirmation of existing obligations of States related to ensuring substantive equality between women and men and continues with an undertaking to take measures specifically with respect to the right to development. The reaffirmation relates to “their obligations under international law” to “ensure substantive equality between women and men”. The core human rights treaty for gender equality is CEDAW and the Committee thereunder has produced several substantive general recommendations elaborating on its content. The aforesaid language employed in draft article 16 is straightforward and fully in line with CEDAW as commented upon by its Committee. Further qualifications are not necessary because the CEDAW Committee has explained on numerous occasions that the obligations on States with respect to equality between women and men entail both *de jure* (or formal) and *de facto* (or substantive) equality.<sup>339</sup>

2. The undertaking to take measures, “including through legislation” reflects that formal equality is incorporated in the obligation of States under CEDAW along with substantive equality as noted above. The undertaking to take measures, “including through [...] temporary special measures as and when appropriate”, reflects the language of article 4(1) of CEDAW,<sup>340</sup> which has been amply elaborated upon by the CEDAW Committee.<sup>341</sup> The rest of draft article 16 very closely follows SDG 5 of the 2030 Agenda, which undoubtedly articulates the key obligations on States under international law with respect to equality between women and men into achievable goals and targets. The words “to end all forms of discrimination against women and girls” are drawn from SDG 5.1. The words “so as to

<sup>338</sup> See, for instance, Committee on Elimination of Discrimination Against Women, General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), Thirtieth session (2004); Committee on Elimination of Discrimination Against Women, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010;

<sup>339</sup> For instance, see CEDAW, *General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)*, Adopted at the Thirteenth Session, 2004, paragraph 6; *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2019, paragraphs 16 and 24; *General recommendation No. 29 on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, CEDAW/C/GC/29, 30 October 2013, paragraphs 8 and 47.

<sup>340</sup> Article 4(1) stipulates that “Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved”.

<sup>341</sup> General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), Adopted at the Thirteenth Session, 2004

ensure their full and equal enjoyment of the right to development” brings in the context of the right to development.

**2. To that end, States Parties shall adopt appropriate measures, individually and jointly, inter alia:**

**(a) To prevent and eliminate all forms of violence and harmful practices against all women and girls in the public and private spheres online and offline, including trafficking [in persons] and [all forms of] sexual and other types of exploitation;**

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

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

**(d) To incorporate and mainstream [a] gender perspectives into the formulation, adoption, and implementation of all national laws, policies and practices and international legal instruments, policies, and practices;**

**(e) To ensure equal and equitable access to, and control over, the resources necessary for the full realization of the right to development by women and girls everywhere;**

**(f) To ensure equal and equitable access to quality education and services necessary for the full realization of the right to development by women and girls everywhere;**

**(g) To realize the women, [and] peace and security agenda and ensure the full, effective and meaningful participation of women in the prevention and resolution of armed conflicts and in peacebuilding for the maintenance and promotion of peace and security at all levels.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of this entire paragraph because it “might end up being discriminatory in its effect because we are talking about women and girls. But we are speaking about concepts such as combatting violence. We think it is necessary to combat violence against all individuals, and we understand that women and girls are subjected to violence more often than men. However, we think that this reference should be universal”. The EDG does not consider that a special provision on combating violence against women and girls detracts from ensuring there is no violence against other individuals. It is well-known that discrimination and violence against women and girls is one of the major obstacles to the realization of the right to development. The disproportionate impact on them is the very reason why CEDAW was adopted. As such, the EDG recommends against deletion of this paragraph.

2. The Russian Federation also recommended deletion of the references to “online and offline” in sub-paragraph (a) on the ground that “there is no clear understanding of when a person working on his computer is online and when he is offline”. The EDG could not agree with this point of view. The inclusion of these words was recommended by UNESCO during the first round of revisions and the EDG agreed that online sexual and other forms of exploitation of women and girls is a major factor contributing to the violation of their right to development. The fact that there might be no clear line between online and offline does not merit its deletion since both are referred to in the paragraph covering their respective and overlapping spheres.

3. It may be noted that in the commentary to the first revised draft, the EDG had observed, based on records provided by the Secretariat, that Egypt had supported the comments by the Russian Federation on this draft paragraph. Egypt submitted during the second round of revisions that they had in fact not supported the stand by the Russian Federation and requested that the record be corrected. As such, the EDG corrects the record and notes that Egypt did not support the comments by the Russian Federation on this paragraph.

4. Egypt and Nigeria, in line with similar recommendations made in paragraph 1 by few other States and civil society organizations, suggested the deletion of the word “all” before “women and girls” in sub-paragraph (a), (c). In view of the observations made by the EDG in the commentaries to paragraph 1 above, the word “all” was deleted in corresponding places in the sub-paragraphs under paragraph 2.

5. In sub-paragraph (a), the UNODC recommended slight modification of the words “including trafficking and sexual and other types of exploitation” to “including trafficking [in persons] and [all forms of] sexual and other types of exploitation”. The EDG agrees that this suggested wording more accurately follows the language of international legal instruments on this topic, especially the UN Trafficking in Persons Protocol.<sup>342</sup>

6. Paraguay recommended modifying sub-paragraph (a) as follows: To [take actions to] prevent, [denaturalize] and eliminate all forms of violence and harmful practices against all women and girls in the public and private spheres online and offline, including trafficking and sexual and other types of exploitation”. The EDG does not recommend this modification. The words “take action” are superfluous in view of the opening sentence of paragraph 2 requiring taking of appropriate measures. The word “denaturalize” is not present in any international legal instrument related to this topic and as such is not recommended.

7. In sub-paragraph (b), the Caribbean Court of Justice recommended replacing the words “all levels” with “national, regional and international levels”. The EDG has noted previously that “all levels” includes all the three levels as well as local levels, and as such, does not recommend making the text verbose. The Court also recommended adding the word “social” to the list of “political, economic, cultural and public life” to reflect the language of article 3 of CEDAW which stipulates that “States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”. The EDG notes that although there is some overlap between the words “social life” and “public life”, the latter also assumes a more formal level of participation. As such, the EDG accepts this suggestion.

8. Argentina recommended that in sub-paragraph (c), the word “empowerment” be replaced with “autonomy”. It noted that “we consider empowerment to be inappropriate because it is seen as alien to the reality of the regions of the global south”. The EDG could not agree with this observation. Empowerment of women and girls, including in the global south, is an important global imperative as reflected in the Beijing Declaration and Platform of Action which was aimed at “empowerment of women”,<sup>343</sup> as well as the title of SDG 5 and targets 5.b and 5.c thereunder.

9. In sub-paragraph (d), Iran recommended that the words “mainstream gender perspectives” be replaced by “mainstream relevant perspectives” to avoid confrontation

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<sup>342</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.

<sup>343</sup> “Empowerment” is referred to 43 times in the Beijing Declaration, available at <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

between delegates on this topic. Nigeria recommended replacing the aforesaid text with “mainstream the principle of equality between men and women”. The Russian Federation recommended eliminating the plural form of the text and replacing it with “mainstream a gender perspective”. Alliance Defending Freedoms suggested the words “mainstream the perspectives of women and girls”. The EDG considered all these comments and recommends using the long-standing consensually agreed language from the Beijing Declaration and Platform of Action, where the words “mainstream a gender perspective” are used 41 times.<sup>344</sup> Identical words are used in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,<sup>345</sup> as well as in the 2030 Agenda.<sup>346</sup>

10. The Russian Federation recommended the deletion of the word “everywhere” in sub-paragraph (e). Similarly, Nigeria recommended the same for sub-paragraph (f). For reasons outlined in the commentaries to paragraph 1 related to a similar recommendation, the EDG agrees to eliminate the word.

11. APG23 recommended that sub-paragraph (f) be modified as follows to reflect article 5 of the UNESCO Declaration on Cultural Diversity: “To ensure equal and equitable access to quality education and [training that fully respect their cultural identity and] services necessary for the full realization of the right to development by women and girls. The EDG acknowledges the importance of respect for cultural identity in the context of education and training but fears that the inclusion of these words in the specific context only of a provision on women and girls may become counterproductive. . To avoid misinterpretation and implementation of the provision that may be contrary to the objective of ensuring equality between women and men, for instance, when educational curricula that suppresses the rights of girls and women may be justified on the ground of cultural identity, the EDG recommends against its incorporation here.

12. With reference to sub-paragraph (g), the Russian Federation noted that “we find the reference to women, peace and security agenda, categorically unacceptable, since it transfers a specific item of the agenda of the UN Security Council into a future binding document. We must respect the division of labour within the UN system”. The EDG notes that the inclusion of this paragraph was recommended during the first round of revisions by the National Alliance of Women’s Organizations (UK) and Soroptimist International based on paragraph 57 of CSW65. The EDG does not agree that inclusion of this paragraph based on resolutions of the UN Security Council detracts from its powers. To the contrary, it heeds to the call by the UN Security Council to ensure operationalization of the women, peace and security agenda by all countries and actors. It ensures harmonization of international law and as such, the EDG recommends retaining this sub-paragraph. The EDG also notes that based upon the recommendation of the editors from the OHCHR’s Document Management Section, the phrase “women, peace and security agenda” has been replaced with “women and peace and security agenda” in line with the practice followed for UN documents.

13. Ecuador recommended adding two sub-paragraphs. The first reads as follows: “Ensure access to employment and decent wages without discrimination based on race, ethnicity, age, nationality; as well as maternity, disability, sexual preferences, among others”. The EDG notes that the context of this article is equality between women and men and as such, this suggestion does not fit appropriately here. The second suggestion was to add the following: “The member states shall establish the conditions to ensure equal rights between men and

<sup>344</sup> See, Outcome of the Fourth World Conference on Women, stating in paragraph 79 that “an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively”.

<sup>345</sup> Article 2(1)(c) requires States to “integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life”.

<sup>346</sup> See, paragraph 20 of the 2030 Agenda stipulating that “The systematic mainstreaming of a gender perspective in the implementation of the Agenda is crucial.”

women through the creation and operation of comprehensive protection systems for development”. The EDG considers that this is already covered in the text as it stands. Paraguay recommended adding the following sub-paragraph: “to strengthen public institutions for the implementation of gender equality policies in plans, programs and projects with the provision of sufficient budgetary and human resources”. The EDG considers this language to be too specific for the purpose of a legally binding instrument. International human rights law permits States a variety of means to realize their normative obligations and as such, the EDG does not recommend its addition.

*B. Legal commentary on the text:*

1. Paragraph 2 begins with the *chapeau*, “to this end, States Parties undertake to take appropriate measures, separately and jointly, *inter alia*”. “To this end” signifies that the list of measures to follow are necessary to ensure the equal realization of the right to development by women and girls. “*Inter alia*” indicates that this list is not exhaustive, but that at least the ones mentioned there are mandatory. The words in sub-paragraph (a), “To prevent and eliminate all forms of violence and harmful practices against all women and girls in the public and private spheres online and offline, including trafficking in persons and all forms of sexual and other types of exploitation” combine SDGs 5.2 and 5.3 with suitable modifications.<sup>347</sup> Sub-paragraph (b) is a fuller and more comprehensive version of SDG 5.5,<sup>348</sup> and also addresses discrimination faced by women often within legal persons. Sub-paragraph (c) corresponds to SDG 5c.<sup>349</sup> The undertaking contained in sub-paragraph (d) to “incorporate and mainstream a gender perspective in the formulation, adoption and implementation of all national laws, policies and practices and international legal instruments, policies and practices” follows from the commitment to this effect first made by States in 1995 at the Beijing Declaration and Platform for Action.<sup>350</sup> Almost identical obligations are recognized in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.<sup>351</sup> Sub-paragraph (e) uses the words “to ensure equal and equitable access to, and control over, the resources necessary for the full realization of the right to development by women and girls” and reflects the overall principle of *de jure* and *de facto* gender equality in gaining access to such resources as are necessary to realize the right to development. Sub-paragraph (f) seeks to “ensure, in a manner respectful of cultural identities, equal and equitable access to quality education and services necessary for the full realization of the right to development by women and girls everywhere”. It reflects key commitments under CEDAW and the Beijing Declaration and Platform of Action. The words “in a manner respectful of cultural identities” have been incorporated in line with article 5 of the UNESCO Declaration on Cultural Diversity. Finally, sub-paragraph (g) incorporates the very important women, peace and security agenda led by the UN Security Council since the adoption of Resolution 1325. It operationalizes the directives of the UN Security Council and stipulates as follows: “to realize the women, peace and security agenda and ensure the full, effective and meaningful participation of women in the prevention and resolution of armed conflicts and in peacebuilding for the maintenance and promotion of peace and security at all levels”.

<sup>347</sup> SDG 5.2 aims to “Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation”, whereas SDG 5.3 aims to “Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation”.

<sup>348</sup> SDG 5.5 aims to “Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life”.

<sup>349</sup> SDG 5.c aims to “Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels”.

<sup>350</sup> See, Outcome of the Fourth World Conference on Women, stating in paragraph 79 that “an active and visible policy of mainstreaming a gender perspective into all policies and programmes should be promoted so that before decisions are taken an analysis is made of the effects on women and men, respectively”.

<sup>351</sup> Article 2(1)(c) requires States to “integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life”.

## Article 17

### Indigenous Peoples

1. **Indigenous Peoples have the right to freely pursue their development in all spheres, in accordance with their own needs and interests. They have the right to determine and develop priorities and strategies for exercising their right to development.**
2. **In accordance with international law, States Parties shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.**
3. **States Parties shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.**

*Commentary:*

*A. Consideration of suggestions received:*

1. Paraguay, Ecuador, Argentina and the Caribbean Court of Justice made certain recommendations for modifying the language of the paragraphs while retaining their core essence. The EDG considers that these suggestions do not substantially modify or improve the provisions. The paragraphs as they stand draw on agreed language from the UNDRIP, as noted in the legal commentaries below, and as such it is not prudent to alter the same and subject them to avoidable negotiations. Additionally, the EDG draws satisfaction from the comments of the Expert Mechanism on the Rights of Indigenous Peoples which were incorporated in the first round of revisions. For these reasons, the EDG recommends adhering to the agreed language from UNDRIP and does not recommend modifications in the this draft article.

*B. Legal commentaries to the text:*

1. Draft article 17 addresses the right to development of indigenous peoples. A specific provision is necessitated in view of the prominent inclusion of the right to development in the UNDRIP as well as the fact that jurisprudence from regional courts on violations of the right to development (from the African system),<sup>352</sup> or of elements that directly constitute violations of the right to development as defined in this draft convention (from the Inter-American system),<sup>353</sup> have mostly emerged, as pointed out below, in the context of indigenous peoples.
2. The UNDRIP does not define the term “indigenous” in acknowledgement of the diversity of contexts associated with peoples around the world who identify themselves as such and

<sup>352</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 276/03, 2009, at paragraphs 269-298; See also, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, 006/2012, 2017, paragraphs 209–211.

<sup>353</sup> Among other cases, see: *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of August 31, 2001; *Yakye Axa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of June 17, 2005; *Yatama v. Nicaragua*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgement of June 23, 2005; *Moiwana Community v. Suriname*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgement of June 15, 2005; *Sawhoyamaya Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of March 29, 2006; *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations and Costs, Judgement of November 28, 2007; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-American Court of Human Rights, Merits and Reparations, Judgement of June 27, 2012; *Case of the Kaliña and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of November 25, 2015.

with varied names. It has generally been accepted now that “indigenous peoples may be referred to in different countries by such terms as ‘indigenous ethnic minorities’, ‘aboriginals’, ‘hill tribes’, ‘minority nationalities’, ‘scheduled tribes’, or ‘tribal groups’”.<sup>354</sup> In view of the aforesaid, draft article 17 makes no attempt to define “indigenous peoples” in view of the existence of significant jurisprudence and practice on their various dimensions. In terms of the substantive rights themselves, draft article 17 reproduces the agreed language from the UNDRIP. Paragraph 1 begins with the words “Indigenous peoples have the right to freely pursue their development in all spheres, in accordance with their own needs and interests”. These reflect article 3 of the UNDRIP. The second sentence of paragraph 1 is identical to article 23 of the UNDRIP.

3. Paragraph 2 addresses a fundamental principle of the rights of indigenous and tribal peoples recognized in both ILO C.169 and the UNDRIP viz. the right to free, prior and informed consent.<sup>355</sup> This right is directly related to their entitlement to participate in, contribute to and enjoy development, that is, their right to development. The language itself is identical to article 19 of the UNDRIP.

4. Paragraph 3 is based on article 32 of the UNDRIP. Its context is different from the previous paragraph which is limited to legislative or administrative measures in line with article 19 of the UNDRIP. Paragraph 3, on the other hand, relates to the obligation to obtain free, prior and informed consent of indigenous peoples prior to approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

## Article 18

### **[Measures to] Prevention and suppression of [combat] corruption**

**States Parties recognize that corruption presents a serious obstacle to the realization of the right to development. To this end, States Parties shall, [in accordance with international law,] individually and jointly:**

- (a) Promote and strengthen measures to prevent and combat corruption;**
- (b) Promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;**
- (c) Promote integrity, accountability and the proper management of public affairs and public property;**
- ~~(d) Ensure financial integrity and transparency in international financial architecture, taxation, and transactions.~~**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. The Russian Federation and UNODC recommended modifying the title to replace the word “suppression” with “combat” to reflect the language of the UN Convention against Corruption. The EDG agrees with this recommendation and has modified the title accordingly.

2. In the chapeau of this draft article, UNODC recommended adding the words “in accordance with the United Nations Convention against Corruption”, before “individually and jointly”. The EDG considers that to accommodate future evolution of international law

<sup>354</sup> World Bank, *Operational Policy 4.10 – Indigenous Peoples*, adopted in July 2005 and revised in April 2013, available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b0822f89d5.pdf>

<sup>355</sup> See, *Saramaka People v. Suriname*, paragraphs 133-137, 143, 147-158; *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, paragraph 226; *Kichwa Indigenous People of Sarayuku v. Ecuador*, paragraphs 159-208.

in this field, a more general phrase “in accordance with international law” is more appropriate.

3. Ecuador, UNODC and CETIM suggested minor modifications to the text of sub-paragraphs (a) to (c). The EDG considers that it is most prudent to adhere to the agreed language in international law as drawn from sub-paragraphs (a) to (c) of article 1 of the UN Convention against Corruption, and as such, does not recommend modifications.

4. The Russian Federation and UNODC recommended deletion of sub-paragraph (d). While the Russian Federation opined that the wording is too vague, the UNODC observed that the substance of this sub-paragraph is already covered under sub-paragraphs (a) and (c), and that taxation may not *per se* fall strictly as a corruption related issue. South Africa also commented that it might be better to restrict this article to the context of corruption. The EDG considers that it is prudent to adhere to the three sub-paragraphs of article 1 of the UN Convention against Corruption as reflected in sub-paragraphs (a) to (c) of this draft article. As such, it agrees to delete sub-paragraph (d) noting that its language is not present in any international legal instrument but was incorporated based on certain suggestions received during the first round of revisions.

*B. Legal commentary on the text:*

1. Draft article 18 is titled “Measures to prevent and combat corruption” and is necessitated as a result of the centrality of challenges brought by corruption to the realization of the right to development. Draft preambular paragraph 14 of this convention indeed identifies corruption as a major obstacle to the realization of the right to development. In line with this, the draft article begins with the words “States Parties recognize that corruption presents a serious obstacle to the realization of the right to development”. It follows by the words “to this end, States Parties shall, in accordance with international law, individually and jointly”. The reference to international law is not limited to only the United Nations Convention against Corruption, but also to resolutions of the Human Rights Council recognizing the negative impact of corruption on the enjoyment of human rights.<sup>356</sup>

2. The three sub-paragraphs under this draft article are *verbatim* reproduction of the corresponding sub-paragraphs in article 1 of the UN Convention against Corruption and reflect agreed language at the international level. They are also comprehensive enough to accommodate the different dimensions and methods of corruption within their fold.

## Article 19

### Prohibition of limitations on the enjoyment of the right to development

**States Parties recognize that the enjoyment of the right to development may not be subject to any limitations except insofar as they may result directly from the exercise of the limitations on other human rights applied in accordance with international law.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation took note of the explanation provided by the EDG to its concerns related to this draft article in commentaries to the first revised draft but noted that further clarification may be needed. Argentina commented that the provision may be too broad. Iran reiterated its recommendation during the first round of revisions to delete all the words after “limitations”. The EDG draws attention to the legal commentaries below where the rationale for the text of this draft article is explained in detail. The EDG notes that the language is clear and does not recommend any modifications thereto.

*B. Legal commentary on the text:*

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<sup>356</sup> For instance, see Resolution on the negative impact of corruption on the enjoyment of human rights, A/HRC/RES/47/7, 26 July 2021.

1. Draft article 19 tackles the issue of limitations on the enjoyment of the right to development. Limitations are permitted under both the ICCPR and the ICESCR. However, considering that the right to development is principally about the right to participate in, contribute to and enjoy development, and because what development entails varies according to contexts and priorities of the right-holders, it is difficult, and perhaps impossible, to precisely articulate the permissible limitations. Any attempt to do so for reasons such as “promoting the general welfare in a democratic society” or “interests of national security or public order” would result in such vagueness that it may threaten the very essence of the right to development. In addition, because development itself can be seen as “promoting the general welfare in a democratic society” or even “interests of public order”, it is unclear how these objectives might be neatly and properly invocable as a limitation of the right to development. At the same time, as incorporated in draft article 4, the right to development exists only insofar as development is *indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms*. This language requires consistency of development policies and practices with all other human rights and fundamental freedoms. Considering this, it is clear that a limitation on one of those other human rights imposed by States in accordance with what is permitted under international law, may directly lead to limiting the right to development as well. But, because the limitation of the other human right might be permissible under the relevant international law, there would be no inconsistency between development and the said human right.

2. For these reasons, draft article 19 takes a pragmatic approach and stipulates that the enjoyment of the right to development may not be subject to any limitations, “except insofar as they may result directly from the exercise of limitations on other human rights applied in accordance with international law”. This avoids prescribing any imprecise and ultimately unworkable limitations directly on the right to development but acknowledges that it may in practice still be limited if a State Party exercises limitation on some other human right in accordance with international law. To cite just one instance, a limitation on the right to liberty of movement may be legally imposed by a State to protect national security or public health in accordance with the ICCPR.<sup>357</sup> This may also then result in limitation on the right to participate in, contribute to or enjoy development in some form or the other. This would not be a violation of the Convention. Finally, it may be noted that the words “may result directly from” ensure that indirect and tenuous linkages with limitations on another human right cannot be used to justify limitations on the right to development.

## Article 20

### Impact assessments

**1. States Parties undertake to take appropriate steps, individually and jointly, including within international organizations, to establish legal frameworks for conducting prior and ongoing assessments of actual and potential risks and impacts of their national laws, policies and practices, and international legal instruments, policies and practices, and of the conduct of legal persons that they are in a position to regulate to ensure compliance with the provisions of the present Convention.**

**2. States Parties shall take into account any further guidelines, best practices or recommendations that the Conference of States Parties may provide with respect to impact assessments.**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. There were no suggestions received for modification of draft article 20.

##### *B. Legal commentary on the text:*

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<sup>357</sup> ICCPR, article 12(3).

1. Draft article 20 addresses one of the most important mechanisms for ensuring an enabling national and international environment conducive to the realization of the right to development viz. impact assessments. The indispensability of human rights impact assessments has been explored in various respects,<sup>358</sup> including for the realization of the right to development.<sup>359</sup> The Expert Mechanism on the Right to Development has observed that “operationalizing the right to development requires that States, individually and jointly, conduct prior and ongoing assessments of the actual and potential risks and impacts of their laws, policies and practices at national and international levels, as well as of the conduct of legal persons that they are in a position to regulate, including businesses, to ensure compliance with the right to development”. A human rights impact assessment may be understood as a structured process for identifying, understanding, assessing and addressing the potential or actual adverse effects of laws, policies or practices, and serves to ensure that these are consistent with international human rights law.<sup>360</sup> It has been pointed out that “as they entail broad participation, transparency and accountability, human rights impact assessments also help democratize resource mobilization and spending policies”.<sup>361</sup> These are of central importance to the right to development. Since the right to development requires not only participation and contribution to development by all persons and peoples but also enjoyment, the only way to ensure that the contrary is not being or will not be achieved is through impact assessments. Also, since development as a right must be consistent with all other human rights, assessment of the actual and potential impacts on all human rights becomes indispensable.

2. The language of paragraph 1 of draft article 20 imposes no particular format or template for States Parties on how they wish to implement obligations related to impact assessment. The provision begins with the words “States Parties undertake to take appropriate steps, individually and jointly, including within international organizations, to establish legal frameworks”. The undertaking is to take steps to establish legal frameworks, leaving adequate flexibility to States to devise mechanisms for impact assessments appropriate to different contexts, including management of available resources. This also leaves flexibility to States to determine the thresholds for conduct of impact assessments and the rigour with which it must be conducted in different contexts. For instance, a large-scale project to construct a dam requiring displacement of large number of farmers and affecting access to water of indigenous communities in the nearby areas may require a much more rigorous and comprehensive impact assessment as compared to many smaller projects. What is binding, however, is that States should take steps to establish such legal frameworks. As is the case with interpretation of the obligation to take steps in the ICESCR discussed earlier, steps taken under paragraph 1 of draft article 20 must also be deliberate, concrete and targeted. The words “individually and jointly, including within international organizations” indicate that impact assessment is not only relevant to creation of enabling national conditions but also to establishment of international conditions favourable to the realization of the right to development. This entails joint action by States, including within international organizations. The importance of jointly taking steps to establish legal frameworks for impact assessment of legal instruments, policies and practices of international organizations cannot be overemphasized. Because international organizations have independent legal personality under international law, actions taken under the framework of such organizations may be attributable to their member States only under limited circumstances. This necessitates separate impact assessments, especially when legal instruments, policies or practices are adopted by international organizations in areas of finance and trade. However, the draft article does not adopt an unnecessarily rigid language which might have indicated that

<sup>358</sup> *Guiding Principles on human rights impact assessments of trade and investment agreements*, Report of the Special Rapporteur on the right to food to the 19th session of the Human Rights Council, Olivier De Schutter, Addendum, UN Doc. A/HRC/19/59/Add.5 (19 December 2011); *Guiding Principles on Human Rights Impact Assessment of Economic Reforms*, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, A/HRC/40/57, 19 December 2018; Olivier de Schutter and others, “Commentary to Maastricht Principles”, principle 14.

<sup>359</sup> Mihir Kanade, *Multilateral Trading Regime and Human Rights*.

<sup>360</sup> *Guiding Principles on Human Rights Impact Assessment of Economic Reforms*.

<sup>361</sup> *Ibid*, paragraph 6.

establishment of legal frameworks for impact assessments at international organizations are always necessary. The term “appropriate steps” gives enough room to States to make pragmatic decisions on suitability of actions.

3. The words “for conducting prior and ongoing assessment of actual and potential risks and impacts” indicate that assessment must be prior in case of laws, policies and practices not yet adopted or implemented, but those that have already been set in motion must also be assessed on an ongoing basis. Additionally, the assessment must be of both actual and the potential risks and impacts.

4. Paragraph 1 of draft article 20 covers two objects of impact assessment. The first is indicated by the words “of their national laws, policies, and practices and international legal instruments, policies and practices”. As commented upon earlier, the terms laws/legal instruments, policies and practices collectively entail a comprehensive coverage of mechanisms through which States can individually or jointly impact upon human rights. The second object is captured by the words “and of the conduct of legal persons which they are in a position to regulate”. This relates directly to the obligation of States to protect human rights when they are threatened by legal persons. The qualification in that phrase highlights that States are expected to establish legal frameworks over those legal persons that they are in a position to regulate.<sup>362</sup>

5. The final words of paragraph 1 of draft article 20, “to ensure compliance with the provisions of this Convention”, indicate the ultimate purpose of impact assessments. It is important to point out that the impact assessments contemplated in this formulation do not exclude any human right. This is because, as noted earlier, the right to development requires consistency of development with all other human rights and fundamental freedoms. As such, an impact assessment for ensuring “compliance with the provisions of this Convention” necessarily requires an assessment of impacts on all human rights.

6. Paragraph 2 of draft article 20 requires States Parties to “take into account” any “further guidelines, best practices or recommendations that the Conference of the States Parties may provide with respect to impact assessments”. The functions of the Conference of the States Parties are addressed in draft article 25(2). This paragraph is incorporated to indicate that the Conference of States parties may pay special attention to “impact assessments” considering their vital role in realization of the right to development, and also to ensure that States Parties pay particular attention to any guidelines, best practices or recommendations that may be produced by the Conference of the States Parties.

## Article 21

### Statistics and data collection

**1. States Parties undertake to collect appropriate information, including statistical and research data ~~from official and other sources~~, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:**

**(a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for privacy online and offline;**

**(b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.**

**2. The information collected in accordance with the present article shall be disaggregated, as appropriate, and used by the State Party to assess the implementation of its obligations under the present Convention and to identify and address the obstacles to the full realization of the right to development.**

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<sup>362</sup> See commentary to draft article 11.

**3. States Parties shall assume responsibility for the dissemination of these statistics in a manner consistent with the objective of fully realizing the right to development for all.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation recommended deletion of this draft article, but in the alternative, made certain suggestions for modification. Thus, in the chapeau of paragraph 1, it recommended deletion of the words “from official and other sources”. China made a similar suggestion. The EDG notes that in the commentaries to the first revised draft, it had noted as follows with reference to a suggestion to incorporate the words now being recommended for deletion, which in fact the EDG had not accepted: “The EDG notes that the language of this paragraph is identical to article 31 of CRPD. There is no compelling reason to modify this agreed language in a human rights treaty. Additionally, the undertaking to collect appropriate information applies to all sources”. In light thereof, and to adhere to agreed language drawn from the CRPD, the EDG accepts the recommendation to delete the words “from official and other sources”.

2. The Russian Federation also recommended deletion of the words “online and offline” for the same reasons as considered earlier in these commentaries. The EDG reiterates that although the line between online and offline privacy may not always be clear, respect for privacy online is an important contemporary matter within human rights law. As such, the reference to online and offline privacy only strengthens the provision by making its coverage comprehensive. There is no further problem that emerges from the fact that there might be some overlaps between online and offline privacy. The EDG therefore reiterates its agreement with UNESCO for incorporation of these terms in the context of this provision.

3. Ecuador recommended the insertion of words “consistent with national plans and programmes” after the words “present Convention” in paragraph 2. The EDG does not consider that this adds any new element since the words “as appropriate” are broad enough to ensure consistency with national plans and programmes for development.

*B. Legal commentary on the text:*

1. Draft article 21 is an almost *verbatim* reproduction of article 31 of the CRPD, also identically titled. Only minor modifications that are necessary for applying the context of the right to development have been introduced. One such modification is qualifying the words “respect for privacy” in sub-paragraph (a) of paragraph 1 with the words “online and offline”. Not much commentary is therefore necessary. Only two points may, however, be made. Firstly, the objective of statistics and data collection is quite different from the objective of impact assessment covered in draft article 20, although the information gathered in the latter may be useful for the former. Impact assessments are issue-specific and may relate to impacts of a particular law, policy or project. Draft article 21 aims at gathering statistics and data in a manner that can be used by States “to formulate and implement policies to give effect to the present Convention”, assess the implementation of their overall obligations under the Convention and to gain a comprehensive picture of the “obstacles” that need to be addressed for the realization of the right to development for all human persons and peoples to whom they owe a duty. Secondly, the provision does not require duplication of efforts made by States to collect statistics and data for their implementation reports under the 2030 Agenda or other global development agendas, or even under national development plans. No such separate venture is necessary. As long as existing statistics and data collection efforts can be made compatible with draft article 21 and generally with the right to development, and there is indeed a legal basis in the draft convention for this, the provision does not impose any cumbersome additional burden on States Parties.

## Article 22

### International peace and security

1. States Parties reaffirm their existing obligations under international law to promote the establishment, maintenance and strengthening of international peace and security in consonance with the principles and obligations contained in the Charter of the United Nations, including the peaceful settlement of disputes.
2. To that end, in accordance with international law, States Parties undertake to pursue collective measures with the objective of achieving general and complete disarmament under strict and effective international control so that the world's human, ecological, economic, and technological resources can be used for the full realization of the right to development for all.
3. States Parties undertake to promote peace and inclusive societies within their territories for the full realization of the right to development for all.

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation, during the 23<sup>rd</sup> session of the WGRTD, reiterated its recommendation to delete paragraph 2 of this draft article. The EDG has already addressed in detail the concern raised by the Russian Federation in the commentaries to the first revised draft. For those reasons, the EDG does not recommend deleting this paragraph. The legal commentaries below explain the normative justification for this paragraph.
2. The Holy See recommended deletion of the words “inclusive societies” in paragraph 3, while appreciating the inclusion of this paragraph on the whole. It opined that “inclusive societies” is not contextual to the draft article. The EDG could not agree with this observation. The title of SDG 16 begins with the words “Provide peaceful and inclusive societies for sustainable development”. Lack of inclusive societies is one of the principal threats to peace and to the right to development.
3. The UNODC recommended adding the words “significantly reduce illicit arms flows” as an undertaking in paragraph 3 before the words “promote peace”. The EDG considers that it is most prudent to retain the language of paragraph 3 broad rather than incorporating only one specific mechanism for promoting peace. As such, it recommends retaining the language as it stands.

*B. Legal commentary on the text:*

1. Draft article 22 is necessitated in view of article 7 of the DRTD which stipulates that “All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries”. Draft article 22 is split into three paragraphs to ensure precision and compatibility of language with already existing obligations of States under international law.
2. In paragraph 1, States Parties “reaffirm their existing obligations under international law”. These obligations are articulated in the following words: “to promote the establishment, maintenance and strengthening of international peace and security in consonance with the principles and obligations contained in the Charter of the United Nations, including the peaceful settlement of disputes”. This is similar to the opening portion of article 7 of the DRTD. The only addition is of the words “in consonance with the principles and obligations contained in the Charter of the United Nations” to reinforce principles such as non-intervention, prohibition of the threat or use of force, sovereign equality of States, amongst others, as well as the concrete obligations undertaken by States related to peace and

security.<sup>363</sup> The words “including peaceful settlement of disputes” reflect the cardinal principles and obligations of States related thereto as enshrined in articles 1(1), 2(3) and 33 of the Charter.

3. Paragraph 2 corresponds with the references to “general and complete disarmament” incorporated in article 7 of the DRTD as an objective that States “should do their utmost to achieve”. The terms “general and complete disarmament”, in turn, are a direct reference to the language of article VI of the Nuclear Non-Proliferation Treaty which was adopted in 1968 and came into force in 1970.<sup>364</sup> Paragraph 2 has been formulated in a manner compatible with the nature of a legally binding instrument rather than as a declaration of expected conduct by States. At the same time, it does not seek to create new obligations or go beyond the existing law and practice on this subject.

4. Paragraph 2 begins with the words “to that end” to connect it with the content of paragraph 1. It ensures that the reference to general and complete disarmament is understood in the overall context of States’ obligations to maintain international peace and security and is also interpreted in consonance with the Charter of the United Nations which establishes certain roles for its principal organs with respect to disarmament. The specific undertaking incorporated is “to pursue collective measures with the objective of achieving general and complete disarmament under strict and effective international control”. This may be contrasted with article VI of the Nuclear Non-Proliferation Treaty which stipulates that “Each of the Parties to the Treaty undertakes to pursue negotiations in good faith [...] on a Treaty on general and complete disarmament under strict and effective international control”. Although the language of “strict and effective international control” is included in paragraph 2, the main focus of the provision is not on pursuing negotiation on a potential treaty but rather on “pursuing collective measures”. This formulation does not limit options of States to only pursuing a global treaty. The words “collective measures” indicate the reality that although the objective of general and complete disarmament undoubtedly ought to be pursued, any success therein will be dependent on collective action being taken by all armed States. A failure to comply with this provision would therefore generally be collective, and not of any individual State.

5. The final words of paragraph 2 break away from the language of the last part of article 7 of the DRTD which expects States to ensure that the resources released by disarmament are used for comprehensive development, *in particular that of the developing countries*. It is unlikely that a similar provision can be introduced in a legally binding instrument. As such, paragraph 2 employs the terms “for the full realization of the right to development for all”. The words “so that the world’s human, ecological, economic and technological resources can be used” are drawn, with the necessary addition of the words “ecological” and “technological”, from article 26 of the Charter of the United Nations, which authorizes the Security Council with responsibility to formulate plans for establishment of a system for the regulation of armaments.<sup>365</sup>

6. Paragraph 3 of this draft article is based on the commitment by States under SDG 16 to promote peace and inclusive societies within their territories. The words “promote peace and inclusive societies” reflects the title of SDG 16. The paragraph establishes the indispensability of promoting peace and inclusive societies within the territories of States Parties for the realization of the right to development. As the 2030 Agenda notes in its preamble, States recognized that “we are determined to foster peaceful, just and inclusive societies which are free from fear and violence. There can be no sustainable development without peace and no peace without sustainable development”. The same applies to the realization of the right to development.

<sup>363</sup> It may be noteworthy in this context that article 103 of the UN Charter establishes the superior normative hierarchy of obligations thereunder over obligations under any other international agreement.

<sup>364</sup> Treaty on the Non-Proliferation of Nuclear Weapons, UNTS 729: 161.

<sup>365</sup> Article 26 of the Charter stipulates that “In order to promote the establishment and maintenance of international peace and security *with the least diversion for armaments of the world’s human and economic resources*, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Art. 47, plans to be submitted to the Members of the UN for the establishment of a system for the regulation of armaments”.

## Article 23

### Sustainable development

States Parties, individually and jointly, undertake to ensure that:

(a) Laws, policies and practices relating to development at the national and international levels are aimed at and contribute to the realization of sustainable development, [in a manner] consistent with ~~the Parties'~~ [their] obligations under international environmental law, climate change law, and human rights law;

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

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

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation, the Holy See, Egypt and Iran expressed discomfiture with the delineation of international law into environmental law and climate change law in the second part of paragraph (a). Suggestions were made for referring only to international law. The EDG agrees with these recommendations and suggests the following words instead “in a manner consistent with their obligations under international law”.

2. Ecuador recommended inserting in paragraph (a) the words “the human right to access and use water”. The EDG does not consider it helpful to identify only one human right in the larger context of this provision and as such, does not recommend its incorporation.

3. Iran recommended adding the words “taking into account different national realities, capacities and levels of development and respecting national policies and priorities; and in accordance with common and differentiated development” at the end of paragraph (a). The EDG notes that this is superfluous since the words “in a manner consistent with their obligations under international law” already cover these principles.

4. Ecuador recommended adding the words “in line with the national plans and programmes” at the end of paragraph (c). The EDG does not recommend adding such a text that may weaken the import of the provision or provide a reason to dilute the obligations contained in this convention. Additionally, the provision applies to both national and international levels.

*B. Legal commentary on the text:*

1. Draft article 23 addresses one of the biggest voids in the DRTD, that is, the lack of any reference to sustainable development. This absence is unsurprising because it was only in 1987 – one year after the adoption of the DRTD – that the expression “sustainable development” was co-opted and popularized in global policy making for the first time by the World Commission on Environment and Development, also popularly known as the Brundtland Commission.<sup>366</sup> Since then, sustainable development has been incorporated in several landmark Declarations, including most importantly, the 2030 Agenda. It has also been incorporated as a part of the institutional objective of the World Trade Organization in the preamble of its constituting instrument,<sup>367</sup> and in several substantive provisions of the Paris

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<sup>366</sup> World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987.

<sup>367</sup> Marrakesh Agreement Establishing the World Trade Organization, stipulating in its first preambular paragraph that “The Parties to this Agreement [...] Recognizing that their relations in the field of trade and economic endeavor should be conducted [...] in accordance with the objective of sustainable development, [...] agree as follows”.

Climate Agreement.<sup>368</sup> Although in the past there have been debates on the precise scope and content of sustainable development, not least because of its intrinsically evolutive nature, they have not stopped its incorporation in international instruments, including in a wide range of investment agreements.<sup>369</sup> The fact that the 2030 Agenda, through its consensually adopted 17 SDGs and 169 targets gives content to the concept of sustainable development, has meant that a common understanding on what it entails in the present context has emerged. Naturally, these goals and targets may change over time.

2. The draft convention has already previously highlighted the importance of sustainable development in paragraphs 12 and 19 of the preamble as well as in paragraph (g) of draft article 3. These are respectively part of the context for the draft convention and the general principles that should guide implementation by States Parties. Draft article 23 incorporates the obligations on States directly and opens with the statement, “States Parties, individually and jointly, undertake to ensure that”. Paragraph (a) recognizes the obligation on States to ensure laws, policies and practices related to development at the national and international levels “are aimed at and contribute to the realization of sustainable development”. They must discharge this obligation in a manner consistent with their obligations under international law.

3. Paragraph (b) requires States Parties to ensure that “their decisions and actions do not compromise the ability of present and future generations to realize their right to development”. This inter-generational dimension of sustainable development follows the 1992 Rio Declaration,<sup>370</sup> and the 1993 Vienna Declaration.<sup>371</sup>

4. Paragraph (c) runs in the other direction of ensuring that “the formulation, adoption and implementation of all such laws, policies and practices aimed at realizing sustainable development shall be made fully consistent with the provisions of this Convention and other obligations for realizing sustainable development in international law”. This obligation is meant to ensure that States do not implement their existing sustainable development plans, whether under the 2030 Agenda or others, in a manner that contravenes the right to development or their corresponding duties, nor do they formulate or adopt new ones in a manner inconsistent with the draft convention.

## Article 24

### Harmonious interpretation

**1. Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention. To that end, [States Parties reaffirm that] the United Nations and its specialized agencies are under an obligation to promote the right to development.**

*Commentary:*

#### *A. Consideration of suggestions received:*

1. The Russian Federation reiterated its concern regarding the last sentence in this paragraph. The Holy See recommended adding the words “States Parties recognize that” after the words “to that end”. The EDG, for reasons noted in the legal commentaries below, considers this sentence to be vital. However, it accepts the latter recommendation by the Holy See but prefers the words “States Parties reaffirm that”.

<sup>368</sup> Articles 2(1), 4(1), 6(1), (2), (4), (8), and (9), 7(1), 8(1), and 10(5).

<sup>369</sup> United Nations Economic and Social Commission for Asia and Pacific, *Sustainable Development Provisions in Investment Treaties*, Prepared by Majiao Chi, 2018, <https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf>

<sup>370</sup> A/CONF.151/26 Vol. I, annex 1, principle 3.

<sup>371</sup> A/CONF.157/24 (Part I), chap. III, paragraph 11.

*B. Legal commentary on the text:*

1. Draft article 24 is entitled “Harmonious interpretation” following the principle of harmonization elaborated by the International Law Commission in its study on the fragmentation of international law.<sup>372</sup> Explaining this principle, the ILC study noted that “it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.<sup>373</sup> In effect, the first part of paragraph 1 of draft article 24 does not introduce any new language and is a *verbatim* reproduction of articles 46 and 24 of the ICCPR and the ICESCR respectively. Its objective is twofold. Firstly, it aims to ensure that the provisions of the draft convention are not interpreted in a manner that has a restrictive effect on the rights and obligations of States under the Charter of the United Nations, or on the mandates of the United Nations or its organs or any of its specialized agencies. Secondly, and more fundamentally, it is a provision that requires harmonious interpretation of the draft convention and the constitutional documents of the United Nations and its specialized agencies.

2. The second part of paragraph 1 then asserts that “States Parties reaffirm that the United Nations and its specialized agencies are under an obligation to promote the right to development”. The words “to this end” signify that assertion of the obligation on the United Nations and its specialized agencies to promote the right to development is a result of harmonious interpretation and that this obligation is fully compatible with the draft convention, the Charter of the United Nations, and the constitutional documents of the specialized agencies, individually and taken together.<sup>374</sup> In other words, this sentence does not create any new obligations for specialized agencies but simply expresses a statement resulting from harmonious interpretation.

**2. The provisions of the present Convention shall not affect the rights and obligations of any State Party deriving from any existing international law, except where the exercise of those rights and the discharge of those obligations would contravene the object and purpose of the present Convention. The present paragraph is not intended to create a hierarchy between the present Convention and other international law.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deletion of this paragraph “because there are already existing bodies responsible for this”. The EDG notes that this paragraph is aimed at ensuring the objective of harmonious interpretation between different rights and obligations of States Parties under international law. It is aimed at establishing a normative rule which is then to be applied by existing or future relevant bodies. The fact that there might be existing bodies responsible for interpretation does not entail a clear and explicit incorporation of the rule of harmonious interpretation in this draft convention. As such, the EDG, for reasons also noted in the legal commentaries below, recommends retention of this paragraph.

2. The Holy See recommended deletion of the words “and the discharge of those obligations”. It opined that “The provisions of the present Convention could potentially affect the rights enjoyed in virtue of other international agreements, especially where the RTD is concerned, under the principle of *pacta sunt servanda* it would be inappropriate to assert that the obligations under other instruments are affected by this Convention. If this were to be the case, a *de facto* hierarchy of international agreements would be created, notwithstanding the final phrase of this article”. The EDG notes that the final phrase is not immaterial; it is vital

<sup>372</sup> See A/CN.4/L.682, paragraphs 37-43.

<sup>373</sup> International Law Commission, A/CN.4/L.702, 18 July 2006, Paragraph 14(4).

<sup>374</sup> Article 55 of the Charter of the United Nations imposes an obligation on the United Nations to promote “conditions of economic and social progress and development”, “solutions of international economic, social, health, and related problems”; and “universal respect for, and observance of, human rights and fundamental freedoms for all”. The specialized agencies of the United Nations are designated as such by virtue of and in accordance with articles 57, 63 and 64 of the Charter of the United Nations and are therefore bound by the Charter’s obligations. In any case, the specialized agencies (the agents) cannot undermine the mandate and obligations of the United Nations (the principal).

to the architecture of this paragraph and is at the core of the rule of harmonious interpretation. The legal commentaries below explain the normative basis for this. As such, the EDG does not recommend deleting the words as suggested.

*B. Legal commentary on the text:*

1. Paragraph 2 of draft article 24 highlights another dimension of the principle of harmonious interpretation, that is, the presumption against normative conflict in international law. In this respect, the ILC Study notes that:

in case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with the view of mutual accommodation and in accordance with the principle of harmonization.<sup>375</sup>

Article 24, paragraph 2 reflects this need for “mutual accommodation” and harmonization within the international legal order.

2. The objective of paragraph 2 of draft article 24 is threefold. First, it seeks to strengthen the principle of harmonious interpretation between this draft convention on the right to development and other international instruments, in particular, trade and investment agreements. Second, it seeks to prevent any hierarchy between the draft convention and other existing or future international treaties and ensures, at the same time, that the draft convention is not put in a position of subordination, in particular, when the right to development is at stake in the context of the interpretation or implementation of other international treaties. Third, it guarantees that the very object and purpose of the draft convention will not be defeated through the interpretation and application of other international treaties, in particular, in the field of trade and investment. This is the most pragmatic way to ensure that harmonious interpretation will always be sought to avoid any contradiction with the object and purpose of the draft convention when interpreting or applying other international treaties. This paragraph reflects some of the best practices that can be identified to foster harmonious interpretation in treaty-making at the international level. It takes inspiration from article 4(1) of the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity.<sup>376</sup> Article 24, paragraph 2 also reflects the constant trend for mutual supportiveness between international treaties that can be found in a great number of multilateral environmental agreements (MEAs),<sup>377</sup> but also in non-environmental treaties such as treaties in the field of health,<sup>378</sup> and culture.<sup>379</sup>

<sup>375</sup> A/CN.4/L. 702, 1, 7 et seq., para. 26. See also, paras. 27 and 28 thereof.

<sup>376</sup> Article 4 of the Nagoya Protocol is titled “Relationship with International Agreements and Instruments” and stipulates in paragraph 1 thereof that “the provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. This paragraph is not intended to create a hierarchy between this Protocol and other international instruments”.

<sup>377</sup> See, e.g., Preamble to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998; Preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000; Preamble to the Stockholm Convention on Persistent Organic Pollutants (POPs), 2001; Preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001.

<sup>378</sup> Article 2 of the WHO Framework Convention on Tobacco Control, 2003.

<sup>379</sup> Article 21 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

## Part IV

### Article 25

#### Conference of States Parties

##### 1. A Conference of States Parties is hereby established.

###### *Commentary*

###### *A. Consideration of suggestions received:*

1. Brazil suggested that the establishment of a Conference of States Parties was unnecessary, given the existence of the Expert Mechanism on the right of development, the mandate of the Special Rapporteur on the Right to Development and also the WGRD. On the other hand, South Africa observed that dilution of Part IV would be a “big disappointment”. The EDG notes that during the 23<sup>rd</sup> session of the WGRD, there was broad support from delegations on the structure of Part IV. There were indeed suggestions with respect to the Implementation Mechanism established under article 27 as a subsidiary body of the Conference of States Parties and those comments are addressed later in these commentaries. With respect to Brazil’s observations, the EDG notes that the legal commentaries to this draft article below explain the rationale behind the establishment of a *sui generis* architecture under Part IV of this draft convention which differs from existing human rights treaty bodies. The structure was designed by the EDG based on comments received from many States during the initial consultation process for elaborating the zero draft. The legal commentaries below also discuss the question of the three existing mechanisms and procedures related to the right to development. For those reasons, the EDG recommends retaining the structure as it stands, although with certain modifications as noted below.

###### *B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article are elaborated collectively at the end.

**2. The Conference of States Parties shall keep under regular review the effective implementation of the Convention and any related legal instruments that the Conference of States Parties may in [the] future adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To that end, the Conference of States Parties shall:**

**(a) Periodically examine reports by States Parties on the implementation of their obligations under the Convention and the obstacles that they face in the realization of the right to development, in the light of the object and purpose of the Convention. In this regard, the Conference of States Parties may refer such reports to the implementation mechanism contemplated under article 27 of the present Convention;**

###### *Commentary:*

###### *A. Consideration of suggestions received:*

1. Colombia observed that under this paragraph “States are required to submit periodic reports on compliance with and implementation of the Convention to the Conference of the Parties established by the Convention”. The EDG has already explained in the commentaries of both the zero draft and the first revised draft that States are not *required* to submit periodic reports. There is no specific provision *requiring* States Parties to report nor is there any timeframe indicated for how periodically States Parties may report. This silence is entirely intentional and indicates that the reporting envisaged is voluntary and not mandatory. The voluntary nature of reporting under this draft convention is in view of the voluminous human rights reporting that States Parties already engage in under other human rights treaties or mechanisms, including the Universal Periodic Review mechanism. Considering that the right to development requires development to be consistent with and based on all other human rights, it is likely that States Parties may have reported already on a particular issue

elsewhere, and hence, it would be prudent to leave reporting under this draft convention to the discretion and wisdom of each State Party.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article are elaborated collectively at the end.

**(b) Promote and facilitate the open exchange of information on measures adopted by States Parties to address the realization of the right to development, taking into account the differing circumstances, responsibilities and capabilities of States Parties and their respective obligations under the Convention;**

*Commentary*

*A. Consideration of suggestions received:*

1. Ecuador recommended adding the words “national plans and programmes” in this paragraph. The EDG does not recommend this since it is not necessary in view of the words “taking into account the differing circumstances, responsibilities and capabilities of States Parties”.

2. The Russian Federation suggested that this paragraph be deleted because of “duplication with UPR”. The EDG notes that the UPR process has different objectives since it focuses only on how States are individually realizing their obligations under human rights treaties with the objective of receiving recommendations from peers on how to improve their performance. The objective of the open exchange of information in this paragraph is broader so as to identify and share good practices and lessons learnt as well as to understand the obstacles emanating from national *and* international levels that States Parties face in realizing the right to development. It is aimed at facilitating the necessary information for States Parties to collectively discharge their duty to cooperate in realizing the right to development and eliminating obstacles thereto. It is also a necessary platform for discharging the functions under paragraph (c) and (f) below, amongst others. As such, the EDG does not agree that this paragraph is a duplication of the UPR process and as such strongly recommends retaining it.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article is elaborated collectively at the end.

**(c) Promote, develop and periodically refine, in accordance with the provisions of the present Convention, the methodologies and best practices for States Parties to assess the status of the realization of the right to development;**

**(d) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and governmental and non-governmental bodies;**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation suggested deleting this paragraph again on the ground that this is a duplication of the UPR. The EDG has already noted above that the functions and objectives of UPR are different. The Russian Federation also suggested that the functions envisaged in this paragraph be transferred to the Implementation Mechanism. The EDG notes that the structure of Part IV already permits the Conference of States Parties to shape the competencies of the Implementation Mechanism which can include the functions noted herein. At the same time, the Conference of States Parties ought to itself have the powers to seek and utilize the services and cooperation of, and information provided by, competent international organizations and governmental and non-governmental bodies, for instance, to make appropriate recommendations under paragraph (f) below. As such, the EDG recommends retaining this paragraph.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article are elaborated collectively at the end.

**(e) Consider and adopt regular reports on the status of implementation of the Convention, and ensure their publication;**

**(f) Make recommendations on any matters relevant to the implementation of the Convention, and ensure their publication;**

**(g) Exercise such other functions [within the scope of the Convention] as are required for the achievement of the object and purpose, as well as the aims, of the Convention.**

*Commentary*

*A. Consideration of suggestions received*

1. The Holy See recommended adding the words “within the scope of this Convention”. The EDG on the one hand considers that this is unnecessary since the functions of the Conference of States Parties established under this convention cannot be *ultra vires* the Convention. However, in order to ensure there is no room for misinterpretation, the EDG agrees to incorporate the terms in this paragraph as suggested.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article is elaborated collectively at the end.

**3. The first session of the Conference of States Parties shall be convened by the Secretary-General of the United Nations no later than six months after the entry into force of the present Convention. At its first session, the Conference of States Parties shall adopt its own rules of procedure, which shall include decision-making for matters [within the scope of its mandate that are] not already stated in the Convention.**

*Commentary*

*A. Consideration of suggestions received:*

1. The Russian Federation expressed concern about the phrase “which shall include decision-making for matters not already stated in the Convention” and recommended clarification. The EDG, therefore, adds the words “within the scope of its mandate that are” before “not already stated in the Convention” to avoid any misinterpretation.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article is elaborated collectively at the end.

**4. The Conference of States Parties shall meet in public sessions, except as otherwise determined by it, in accordance with its rules of procedure.**

**5. All States not party to the present Convention, specialized agencies, funds and programmes of the United Nations system, other international organizations, United Nations human rights mechanisms, regional human rights bodies, national human rights institutions and non-governmental organizations with consultative status with the Economic and Social Council may participate as observers in the public sessions of the Conference of States Parties. The Conference of States Parties may, in accordance with its rules of procedure, consider requests from, or may invite, other stakeholders to participate as observers.**

**6. The Conference of States Parties shall be held annually as part of the sessions on the Working Group on the Right to Development.**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation, Egypt and the Holy See, along with some other States as noted in the commentaries to the suggestions received for draft article 2, expressed reservation about the reference to the WGRTD in view of its uncertain future pursuant to establishment

of the Conference of States Parties under this convention. The EDG had in the commentaries to the zero draft explained the rationale for inclusion of a reference to the WGRTD. As reiterated in the commentaries to the first revised draft, paragraph 6, which then included a reference to the WGRTD, sought:

“to harmonize the role and mandate of the Conference of the States Parties with the existing WGRTD. It is likely that some States that may not be parties to the convention may still be interested in pursuing the realization of the right to development by non-conventional means and may want to participate actively in the WGRTD annual sessions. Likewise, States that are parties to the convention may also want to actively participate in the WGRTD sessions. In principle, it is prudent to ensure a close working relation between the two bodies without diluting their respective mandates, roles and independence. As such, paragraph 6 stipulates that “the Conference of the States Parties shall be held annually as part of the sessions of the Open-Ended Intergovernmental Working Group on the Right to Development”. The commentaries to the zero draft also suggested that an ideal template could be that the first two days of the week (Monday and Tuesday) in which the WGRTD annual sessions take place could be devoted to the Conference of the States Parties and the WGRTD could be held for three days thereafter (Wednesday to Friday). Since both are, in principle, open public sessions, this format will ensure the best working relation between the two bodies. Alternatively, the Conference of the States Parties could take place on the last two days of the preceding week (Thursday and Friday of the week before), although this may not be as financially efficient”.

2. The EDG notes that the original structure was suggested pursuant to advice from the Chair-Rapporteur of the WGRTD. However, the EDG defers to the comments from States referred to above and agrees to delete references to the WGRTD in the draft convention. The main concern of the EDG is to ensure that States that may not become parties to the convention are not excluded from participating in the collective processes to realize the right to development. Prior to the elaboration of the zero draft, at least two States indicated that they may not be in support of a convention since they already participate in the WGRTD in view of their interest in promoting the right to development. The EDG, however, notes that paragraph 5 above already envisages participation in the Conference of States Parties as observers for States that are not parties to the Convention. In view thereof, the EDG agrees to delete references to the WGRTD. Should the WGRTD, however, continue to exist pursuant to the actual establishment of the Conference of States Parties, the EDG recommends that the structure suggested above be considered.

*B. Legal commentary on the text:*

1. The legal commentary to the different provisions of this draft article are elaborated collectively at the end.

**7. Special sessions of the Conference of States Parties shall be held at such other times as it may deem necessary, or at the request of any State Party, in accordance with its rules of procedure.**

**8. The Conference of States Parties shall transmit its reports to the General Assembly, [and] the Economic and Social Council, ~~the Human Rights Council, the Working Group on the Right to Development and the high-level political forum on sustainable development.~~**

*Commentary:*

*A. Consideration of suggestions received:*

1. The Russian Federation, along with some other States referred to in the commentaries considering suggestions on draft article 2, recommended that the transmission of reports be done only to the General Assembly. Among the reasons provided were that the future of the WGRTD and the high-level political forum on sustainable development was uncertain, and that, along with the Human Rights Council, these were subsidiary bodies. The EDG agreed to delete a reference to the Human Rights Council since it is a subsidiary body of the General Assembly. Similarly, the EDG agreed to delete reference to the WGRTD since it is established by the Human Rights Council. Additionally, reference to the HLPF was also deleted since it is a subsidiary body of both the General Assembly and the ECOSOC.

However, given the functions of the ECOSOC and its work related to sustainable development, the EDG recommends retaining references to both the General Assembly and the ECOSOC in this paragraph.

*B. Legal commentary on the text:*

1. The legal commentary below relates to all paragraphs of draft article 25.
2. As indicated in the introduction, Part IV of the draft convention sets up a *sui generis* mechanism for implementation of the draft convention by establishing two treaty bodies viz. the Conference of the States Parties and the Implementation Mechanism. This structure departs from the traditional compliance, monitoring and enforcement mechanisms adopted vis-à-vis current core human rights treaties based on five main factors. *Firstly*, this *sui generis* mechanism takes into account the existence of the Intergovernmental Working Group on the Right to Development (WGRTD) that was established by the erstwhile Commission on Human Rights in 1998 and continues to play an important role in the promotion of the right to development under the auspices of the Human Rights Council.<sup>380</sup> It also takes into account the establishment of the expert mechanism by the Human Rights Council through resolution A/HRC/42/L.36 adopted on 27 September 2019 “to provide the Council with thematic expertise on the right to development in searching for, identifying and sharing best practices among Member States and to promote the implementation of the right to development worldwide”.<sup>381</sup> The treaty bodies set up under the draft convention as well as their mandates, as explained in the commentaries below, seek to avoid duplication with these existing mechanisms as much as practically and legally possible. At the same time, the *sui generis* mechanism also takes into account the fact that States Parties may, in the future, take decisions on the relevance of continuing with the WGRTD or the Expert Mechanism in view of the establishment of the Conference of States Parties and the implementation mechanism under this convention. *Secondly*, the mechanism established herein also takes into account the existence of a large number of human rights treaty bodies under the current core human rights treaties, especially the committees set up thereunder, in order to avoid duplication of efforts and ensure prudent use of available human and financial resources.<sup>382</sup> With the same objectives, the draft convention also remains conscious of the additional reporting that many States Parties may be partaking in under regional human rights systems or under related international processes such as the 2030 Agenda. *Thirdly*, the *sui generis* mechanism established in the draft convention not only seeks to avoid duplication with existing mechanisms, but also seeks to “add-value” to promotion of human rights in general by addressing elements which existing mechanisms do not necessarily focus on. In particular, this includes a significant focus on identifying and addressing the obstacles that States Parties may face in realizing their right to development. *Fourthly*, the mechanism is based on a non-adversarial, non-punitive, facilitative, co-ordinational and assistive model rather than an adversarial complaints-based model. This approach is entirely in sync with the duty to cooperate enshrined in draft article 13 as well as other provisions of the draft convention, and the principle of international solidarity encapsulated in paragraph (i) of draft article 3. *Lastly*, this mechanism while remaining largely *sui generis* and possessing its own unique character, also adopts at appropriate places the best features from human rights and other international treaties, especially those that are strongly based on cooperation.
3. Paragraph 1 of draft article 25 establishes the first and most important mechanism under the draft convention viz. the Conference of States Parties, which is also the title of the provision. Among the core human rights treaties, the CRPD,<sup>383</sup> and the CPED,<sup>384</sup> establish a

<sup>380</sup> See article 2(c) and the commentary thereto. For details regarding the mandate and programme of this working group, see: <https://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx>

<sup>381</sup> A/HRC/42/L.36, adopted on 27 September 2019, paragraph 29.

<sup>382</sup> The need to avoid duplication of efforts by States Parties in their reporting requirements, by the treaty bodies in their outputs, and by the OHCHR in their secretarial support, as well as the need to be prudent in using available finances to avoid wastage, featured prominently in several responses received to the questionnaire sent by the OHCHR to the international community prior to the commencement of the drafting process.

<sup>383</sup> Article 40

<sup>384</sup> Article 27

permanent Conference of States Parties. A similar Conference of States Parties is especially essential in the context of this draft convention in view of the cooperative approach embedded herein underlining the duty of States to cooperate internationally for realization of the right to development. However, unlike the CRPD and the CPED, the right to development does not have an institutional history of such a “conference” in the form of the WGRD, which has been the nodal body at the international level for monitoring and reviewing progress made in the promotion and implementation of the right to development. As such, the mandate of the Conference of States Parties under this draft convention must be *sui generis* such that it either replaces the WGRD should States proceed in that direction (as has been indicated by some States during the 21<sup>st</sup> and 23<sup>rd</sup> sessions of the WGRD), or works in close conjunction with the WGRD without diminishing the independent existence and important roles played by either body.

4. In line with the aforesaid, paragraph 2 of draft article 25 enumerates the mandate of the Conference of States Parties. Useful assistance where appropriate is drawn from the formulation of article 7 of the United Nations Framework Convention on Climate Change of 1992 which establishes its own Conference of the Parties. Thus, paragraph 2 begins with the principal role envisaged for the Conference of the States Parties to the effect that it “shall keep under regular review the effective implementation of the Convention and any related legal instruments that the Conference of States Parties may in the future adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention”.<sup>385</sup> As the text indicates, the main role involves two aspects. Firstly, it involves a review mandate for the “effective implementation of the Convention”. This review mandate also extends to any future instruments that the Conference of States Parties may adopt. This applies particularly to any future protocols adopted in accordance with draft article 26. Secondly, the role involves a decision-making mandate with respect to promotion of the “effective implementation of the Convention”. The sub-paragraphs thereunder go into the specifics of what this general mandate entails, signified by the words “to this end”.

5. Sub-paragraph (a) of paragraph 2 requires the Conference of the States Parties to “periodically examine reports by the States Parties”. There is no specific provision requiring States Parties to report nor is there any timeframe indicated for how periodically States Parties may report. This silence is entirely intentional and indicates that the reporting envisaged is voluntary and not mandatory. The voluntary nature of reporting under this draft convention is in view of the voluminous human rights reporting that States Parties already engage in under other human rights treaties or mechanisms, including the Universal Periodic Review mechanism. Indeed, this was flagged as a concern by numerous respondents to the questionnaire circulated prior to the elaboration of this draft convention. Considering that the right to development requires development to be consistent with all other human rights, it is likely that States Parties may have reported already on a particular issue elsewhere, and hence, it would be prudent to leave reporting under this draft convention to the discretion and wisdom of each State Party. Sub-paragraph (a) indicates the content of the reports that States Parties may submit for review. These include not just a report on the implementation of their Convention obligations as is traditionally the case, but also importantly, the obstacles they face in realizing the right to development in the light of the object and purpose of the Convention. This approach is not entirely novel but is especially pertinent in the context of this draft convention. Article 35(5) of the CRPD also stipulates that reports by the States Parties may indicate factors and difficulties affecting the degree of fulfilment of obligations under the CRPD.<sup>386</sup> However, the nature of obligations of States Parties thereunder is such that reporting on obstacles will generally have a dominant domestic focus. This draft convention, on the other hand, requires an equal focus on the establishment of an enabling environment at national and international levels. The indispensability of these elements to the very idea of the right to development necessitates attention to elimination of obstacles to its realization, as is prominently indicated in draft preambular paragraph 14 and articles 13(2)(b), 21(2). The obstacles a State Party may report may therefore include not just domestic ones, but also those that it considers as resulting directly and in sufficient scale from

<sup>385</sup> Similar formulation is found in article 7 of the UNFCCC for its Conference of the Parties.

<sup>386</sup> Of course, the role under the CRPD to review and comment on those is part of the monitoring function of the Committee established thereunder, and not with its Conference of the States Parties.

laws, policies and practices adopted by other States, individually or collectively, or by international organizations. The regular use of this mechanism will not only allow generation of holistic information that will enable the Conference of States Parties to perform its functions credibly, but will also provide information to States and international organizations, whether parties to the convention or not, that their actions have been perceived by the State Party concerned as posing obstacles in performance of obligations under the draft convention. The generation of this comprehensive information is a significant value-added over existing mechanisms under other treaty bodies and avoids duplication. It also catalyses awareness of factors necessary for informed international cooperation to realize the right to development for all. It is for this reason that the second sentence of sub-paragraph (a) envisages that the Conference of the States Parties may refer such reports to the expert body – the “implementation mechanism” – contemplated under draft article 27.

6. Sub-paragraph (b) mandates the Conference of the States Parties to act as the promotor and facilitator of an open exchange of information on measures adopted by the States Parties to address the realization of the right to development. This provision, along with the formulation of “taking into account the differing circumstances, responsibilities and capabilities of the States Parties and their respective obligations under the Convention”, is analogous to article 7(2)(b) of the UNFCCC. Sub-paragraph (c) then mandates the Conference of the States Parties to promote, develop and periodically refine “the methodologies and best practices for States Parties to assess the status of realization of the right to development”. This sub-paragraph, among other things, speaks to development of methodologies and best practices for conduct of impact assessments as contemplated by draft article 19(2). Sub-paragraph (d) requiring the Conference of States Parties to seek and utilize the services and cooperation of, and information provided by, competent international organizations and governmental and non-governmental bodies is drawn from, and is identical to, article 7(2)(l) of the UNFCCC. Sub-paragraph (e) is also a function of the Conference of States Parties related to reports but is distinct from sub-paragraph (a). While sub-paragraph (a) is about examination of periodic reports that may be submitted by States Parties, sub-paragraph (e) requires the Conference of States Parties to consider and adopt regular reports on the “status of implementation of the Convention” itself and ensure their publication. Sub-paragraph (f) is the mandate to “make recommendations on any matters necessary for the implementation of the Convention”. This includes “adoption of protocols or amendments” corresponding respectively to draft articles 26 and 32. Finally, sub-paragraph (g) is the residual clause permitting the Conference of States Parties to exercise such other functions as are required for the achievement of the object and purpose as well as the aims of the Convention.

7. Paragraph 3 provides the template for when and how the first session of the Conference of States Parties should be convened. It stipulates that “no later than six months after the entry into force of the present Convention, the first session of the Conference of States Parties shall be convened by the Secretary-General of the United Nations”. This part is identical to article 40 of the CRPD. Paragraph 3 then further requires that the Conference of States Parties shall adopt its own rules of procedure at the first session, and this shall include decision-making for matters within the scope of its powers that are not already stated in the Convention. This is drawn from article 7(3) of the UNFCCC.

8. Paragraphs 4 and 5 enshrine the open and participatory approach envisaged for the Conference of States Parties. Paragraph 4 incorporates a requirement that the Conference of the States Parties shall meet in public sessions. This reflects the importance of participation by all stakeholders inherent in the right to development. It also provides that an exception may be possible, however, this would require a specific determination by the Conference of States Parties to this effect in accordance with its rules of procedure. Paragraph 5 then builds on the previous paragraph and automatically permits participation in the public sessions of the Conference of the States Parties by “all States not parties to the present Convention, specialized agencies, funds and programmes of the United Nations system, other international organizations, United Nations human rights mechanisms, regional human rights bodies, national human rights institutions, and non-governmental organizations having consultative status with the Economic and Social Council”. The provision envisages for such participants the status of “Observers”. In addition, paragraph 5 leaves open the possibility to invite other stakeholders such as business corporations or civil society organizations that may

not have consultative status with the ECOSOC to participate as Observers, either *suo motu* or on receipt of requests to that effect.

9. Paragraph 6 provides that the Conference of States Parties shall be held annually. As noted earlier, this draft convention arises in a different context than other human rights treaties, such as the CRPD or the CPED, which also establish a Conference of States Parties. Unlike them, however, the right to development has a long-standing institutional history of such a “conference” in the form of the WGRTD which has taken place annually since its establishment. As such, the Conference of States Parties is envisaged to take place annually. As noted above, States may in the future decide to terminate the WGRTD in view of the establishment of the Conference of States Parties. Alternatively, they may continue with the WGRTD in addition to the Conference of States Parties. Should the latter eventuality occasion, in principle, it will be prudent to ensure a close working relation between the two bodies without diluting their respective mandates, roles and independence. In that case, although paragraph 6 does not stipulate that the Conference of the States Parties should be held annually as part of the sessions of the WGRTD, it may be prudent to do so. An ideal template could be that the first two days of the week (Monday and Tuesday) in which the WGRTD annual sessions take place could be devoted to the Conference of States Parties and the WGRTD could be held for three days thereafter (Wednesday to Friday). Since both are, in principle, open public sessions, this format will ensure the best working relation between the two bodies should they co-exist. Alternatively, the Conference of States Parties could take place on the last two days of the preceding week (Thursday and Friday of the week before), although this may not be as financially efficient.

10. Paragraph 7 then ensures that the Conference of States Parties is not restricted to only one annual meeting, but that “special sessions” can also be held “at such other times as it may deem necessary, or at the request of any State Party, in accordance with its rules of procedure”.

11. Finally, paragraph 8 of draft article 25 requires that the Conference of States Parties “shall transmit its reports” to the General Assembly and the Economic and Social Council. The reports contemplated in this paragraph refer especially to the proceedings and outcomes of the sessions of the Conference of States Parties but should be seen as also including any other reports it may adopt, such as those required to be produced under sub-paragraph (e) of paragraph 2 of this draft article. The word “shall transmit its reports” rather than “shall report” indicates that the Conference of States Parties is not subordinate to the other bodies mentioned and should not be treated as such.

## Article 26

### Protocols to the Convention

1. **The Conference of States Parties may adopt protocols to the present Convention.**
2. **The text of any proposed protocol shall be communicated to States Parties at least six months before consideration.**
3. **The requirements for entry into force shall be established by that instrument.**
4. **Decisions under any protocol shall be taken only by the States Parties to the protocol concerned.**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. There were no suggestions for modification of this draft article.

##### *B. Legal commentary on the text:*

1. Draft article 26 is entitled “Protocols to the Convention”. Current core human rights treaties do not contain a specific provision for protocols, although several of them have in fact been attached with optional protocols adopted subsequently. Draft article 26 is however

inspired by article 17 of the UNFCCC and is especially suitable herein in view of the specific reference in draft article 24(2)(f) to the role of the Conference of the States Parties in making recommendations on the adoption of protocols. Since this draft convention does not establish new obligations, nor does it provide any benchmarks or quantifiable targets, it is possible that States Parties may wish to adopt such protocols in the future. Similarly, since the draft convention does not establish a procedure for complaints by or on behalf of the right-holders, States Parties may wish to consider, at a future date, the possibility of adopting optional protocols on the lines of other human rights treaties. Paragraph 1 of draft article 26, therefore, provides for the possibility to adopt protocols and stipulates that the Conference of the States Parties shall be the forum.

2. Paragraph 2 establishes six months as the minimum reasonable period that States Parties may need to consider the text of any proposed protocol. This is similar to article 17(2) of the UNFCCC. Paragraph 3 provides that the requirements for the entry into force of any protocol shall be established by that instrument itself, thus leaving enough flexibility to States Parties. Paragraph 4 finally ensures that decisions under any protocol are taken only by the States Parties thereto, and not by the States Parties to the convention which may comprise a larger number. While paragraphs 3 and 4 are again drawn from articles 17(3) and (5) respectively of the UNFCCC, draft article 26 leaves out the requirement in article 17(4) of the UNFCCC to the effect that “only parties to the Convention may be parties to the Protocol”. There is no particular necessity to adopt an identical approach in the context of this draft convention. Whether to insist on this requirement in a specific future protocol is best left to the decision of the Conference of the States Parties in each specific instance.

## Article 27

### Establishment of an implementation mechanism

**1. At its first session, the Conference of States Parties shall establish an implementation mechanism to facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance with the provisions of the present Convention.**

*Commentary:*

#### *A. Consideration of suggestions received:*

1. Egypt, Panama, Pakistan and the Russian Federation recommended that the implementation mechanism be modelled on the lines of traditional committees under existing human rights treaty bodies and named as a committee. The EDG notes that the legal commentaries for draft article 25 and for draft article 27 below explain the rationale for digressing from the traditional models of committees under existing human rights treaty bodies. The right to development and its institutional evolution within the UN system is specific and unlike those related to other human rights treaties. The right to development is particular because of the long-standing existence of the WGRTD which meets annually, as well as the establishment of the Expert Mechanism on the Right to Development by the Human Rights Council in 2019. The Conference of States Parties has a more active role under this draft convention as compared with the Conference on States Parties under CRPD or CPED precisely because of its unique institutional history. Operationalizing the right to development also requires collective global action on a continual basis by States, taking into account current and emerging obstacles thereto, and this function cannot be relegated to a traditional committee of independent experts. Given this role of the Conference of States Parties, while it is important to establish a mechanism consisting of independent experts similar to committees under existing human rights treaties, it is more prudent to establish this mechanism of independent experts as an implementation mechanism that is a subsidiary body of the Conference of States Parties, with a more interactive role with the Conference rather than as an entirely autonomous body of experts such as the committees. In other words, the *sui generis* nature of the implementation mechanism under this draft convention is necessitated as a result of the institutional history related to the right to development, which is starkly different from other human rights treaties. Similar to the WGRTD, the future

existence of the Expert Mechanism may be subject to decisions by States at the Human Rights Council in light of the establishment of the Implementation Mechanism hereunder. The legal commentaries below discuss the possibilities as recommendations to States. For these reasons, the EDG recommends that this draft convention follow the *sui generis* model of a Conference of States Parties with an active policy role in implementation of the convention and a subsidiary implementation mechanism providing expertise, rather than a traditional committee.

*B. Legal commentary on the text:*

1. The legal commentary to this paragraph is elaborated together with other paragraphs below at the end.

**2. The implementation mechanism shall consist of independent experts, consideration being given to, inter alia, gender balance and equitable geographical representation, as well as to an appropriate representation of different legal systems. [Experts shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention.]**

*Commentary:*

*A. Consideration of suggestions received:*

1. Panama and APG23 recommended that the implementation mechanism should be created by the treaty itself and not left to the first session of the Conference of States Parties, and this should include a clear indication of the number of experts. The EDG had responded to a similar suggestion in the commentaries to the first revised draft. As noted above, the implementation mechanism is a *sui generis* body that is a subsidiary body of the Conference of States Parties. As such, while this draft article requires establishment of an independent mechanism, it does not provide for any details in terms of how many members it shall comprise. This is aimed at providing flexibility to the Conference of States Parties to make its own determination dependent on factors such as number of ratifications by the first session and the available secretarial and financial resources. However, the commentaries to the zero draft had also strongly suggested that the Conference of States Parties should take special care to avoid duplication. In particular, States Parties should take into account the existence of the Expert Mechanism on the Right to Development which comprises five independent experts to serve for a three-year period with the possibility of being re-elected for one additional period.<sup>387</sup> The commentaries had recommended that States Parties mandate the same expert mechanism to also act as the implementation mechanism under the draft convention, should States decide to continue with the Expert Mechanism in the future alongside the implementation mechanism. This will avoid duplication of efforts, fragmentation of the law, and conflicting interpretations, and will also ensure best use of human and financial resources.

2. The Russian Federation suggested that reference to gender balance may be discriminatory against the main criteria should be expertise. It suggested that “If gender balance is mentioned, it would be very important also to include some provisions of the UN Charter, such as 101, which mentions professionalism, competence, the experience of staff”. The EDG agrees to include these criteria and has incorporated the sentence “Experts shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention”, at the end of the paragraph. This language is identical to article 34(3) of the CRPD.

*B. Legal commentary on the text:*

1. The legal commentary to this paragraph is elaborated together with other paragraphs below at the end.

**3. The implementation mechanism shall:**

<sup>387</sup> For full details of the structure, see A/HRC/42/L.36, adopted on 27 September 2019, paragraph 29-34.

**(a) Adopt general comments or recommendations to assist in the interpretation or implementation of the provisions of the [present] Convention;**

*Commentary:*

*A. Consideration of suggestions received:*

1. Alliance Defending Freedom submitted a rather scathing critique of the role recognized in this sub-paragraph for the implementation mechanism to assist in the interpretation of the provisions of the Convention. Its comments are worth reproducing:

“The express recognition of an institutional competence on the part of the implementation mechanism to ‘assist in the interpretation of the provisions of the treaty’ has no precedent in any international human rights instrument adopted within the framework of the United Nations. In fact, for each of the core international human rights instruments there is a only recognized competence upon the relevant treaty bodies to prepare “comments”, “suggestions” or “recommendations” based exclusively on the examination of the reports and information received from the States Parties. Nowhere is provision made for such general comments or observations to apply evolutionary interpretations of treaty provisions, nor to bear a normative guidance role with regard to their implementation. It is well-known that rather than being mandated by the relevant treaties, the evolution of general comments into alleged “sources of evolutionary interpretation” of treaty obligations, took place as a result of the self-regulatory prerogatives accorded to treaty monitoring bodies under their respective constitutive instruments, and that in a number of cases such interpretations stand in flagrant contradiction with the established rules of interpretation of treaties as set forth in the Vienna Convention on the Law of Treaties and in customary international law. It is not by chance that States have often put on record their rejection of such documents. Without an express conferral of competence to consider the periodic reports submitted by States Parties, and in the absence of an explicit requirement that the content of general comments or recommendations be based on the information contained in such reports, the implementation mechanism would not only lack the necessary experience, but also the legitimacy to issue general comments or recommendations of any kind”.

The EDG does not agree with the submission that “in a number of cases” the interpretation provided by the committees under the treaty bodies “stands in flagrant contradiction with the established rules of interpretation of treaties”. Such blanket statements disparaging the work of the committees comprising renowned global experts from all regions of the world is unnecessary and uncalled for. The EDG also disagrees with the presumption that the authority to produce comments have been transgressed by the committees while providing interpretative guidance to States. The EDG also disagrees with the observation that “it is not by chance that States have often put on record their rejection of such documents”. To the contrary, practice and record demonstrates an overwhelming support by most States to the mandate and work of the committees in providing interpretative guidance although some States may, from time to time, disagree on some specific interpretations. The interpretative guidance by various committees have been employed by numerous courts at different levels, including the ICJ, as well as by the International Law Commission.<sup>388</sup> It is also important to note that the committees’ interpretations are not legally binding as sources of international law under article 38 of the Statute of the International Court of Justice (which represents the accepted sources of international law), although, considering that the comments are provided by renowned experts averaging 15 in number from different parts of the world, their

<sup>388</sup> Azaria, D. (2020). The Legal Significance of Expert Treaty Bodies Pronouncements for the Purpose of the Interpretation of Treaties, *International Community Law Review*, 22(1), 33-60. See also, in particular, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, at pp. 663-664, paragraph 66, where the ICJ observes as follows: “Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its “General Comments”. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty”.

comments rightly have high persuasive value.<sup>389</sup> Irrespective of the EDG's disagreement with the submission from Alliance Defending Freedoms noted above, it reiterates that the role of the implementation mechanism envisaged hereunder is distinct from the role that committees under human rights treaties play. The implementation mechanism is a subsidiary body of the Conference of the States Parties and it is for this reason that the role envisaged for the mechanism is "to assist" in the interpretation of the provisions of the Convention. In any case, the implementation function of this mechanism will be rendered nugatory if it did not have an interpretative role inasmuch as "all instruments receive meaning through interpretation".<sup>390</sup> For this reason, the EDG recommends retaining the paragraph as it stands with the addition of the word "present" before "convention" to ensure consistency.

*B. Legal commentary on the text:*

1. The legal commentaries to this paragraph are elaborated collectively at the end with other provisions of this draft article.

**(b) Review obstacles to the implementation of the Convention at the request of the Conference of States Parties;**

*Commentary:*

*A. Consideration of suggestions received:*

1. There were no suggestions received for modification of this paragraph.

*B. Legal commentary on the text:*

1. The legal commentary to this paragraph is elaborated collectively at the end with other provisions of this draft article.

**(c) Review requests by rights holders to comment on situations in which their right to development has been adversely affected by the failure of States to comply with their duty to cooperate, as reaffirmed and recognized under the ~~present~~ Convention;**

*Commentary:*

*A. Consideration of suggestions received:*

1. Iran and the Russian Federation suggested deletion of this entire paragraph so that the implementation mechanism would not have such a mandate. The Russian Federation raised concern regarding the fact that the paragraph provides the implementation mechanism the opportunity to consider situations of violations of rights under the convention not only in relation to States Parties, but also third States not participating in this Convention. Colombia observed that "the Convention creates a system of individual petitions, administered by the implementation mechanism, to which the holders of the right to development (individuals and peoples) can appeal when their right to development has been undermined by the failure of States to comply with their duty to cooperate". China also recommended deleting this paragraph.

2. In relation to the above, the EDG notes that it has already provided an explanation to the above in the commentaries to the first revised draft. As the commentaries to the zero draft had noted, the mandate contemplated in this sub-paragraph is not that of a typical complaint or communication procedure by right-holders against their States for individually failing to realize their right to development obligations internally. In fact, this is not a "complaints" or "communications" procedure where "petitions" or "appeals" can be submitted by rights holders. Nor is this a procedure where the implementation mechanism then determines the admissibility before making findings on violations through an adversarial or quasi-adjudicatory model that is followed by traditional committees empowered in this respect. The mandate to "review requests" is thus not a "communication" to the committees. The different choice of words is intentional. The review of requests envisaged in this paragraph is limited

<sup>389</sup> Ibid.

<sup>390</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para.447. Numerous paragraphs of this study highlight that it is impossible to implement a treaty without interpretation.

to those situations of violations which result from the failure of States to comply with “their duty to cooperate”. This focus on violations by States of their duty to cooperate is a significant value-added over existing mechanisms under the current core human rights treaties that do not focus on this aspect. The commentaries to the zero draft also explained that the term “States” rather than “States Parties” employed in sub-paragraph (c) is intentional so as to permit the implementation mechanism to also review situations of violations of rights under this convention resulting from failure by a non-Party State or States, either separately or jointly with States Parties, to comply with the general duty to cooperate under international law. International law permits this. The words “as reaffirmed and recognized under the present Convention” reflect the language of draft article 13 and reinforce the existence of the duty to cooperate both under general international law and under this draft convention. The EDG reiterates that the paragraph does not create a complaints mechanism at all where the State is a respondent, and its consent might become necessary. Rather the focus here is on the implementing mechanism “commenting” on situations where States fail in their duty to cooperate resulting in the right to development of the right-holders being adversely affected. The scope of these comments should be understood in the context of the following words in paragraph 1 – “facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance with the provisions of the present Convention”. This language excludes any process of naming and shaming, whether of States Parties or others. It also excludes holding of “hearings” or submission of “pleadings” that a traditional committee might do. Comments can relate to observations and suggestions on facilitating international cooperation by States in a manner that helps realize the right to development better. Finally, the precise scope and procedures with respect to this paragraph can be decided by the Conference of States Parties, which has the discretion to shape them in the manner necessary. As such, the EDG retains this paragraph.

*B. Legal commentary on the text:*

1. The legal commentary to this sub-paragraph is elaborated collectively at the end with other provisions in this draft article.

**(d) Undertake any other functions [within the scope of the Convention] that may be vested by the Conference of States Parties.**

*Commentary*

*A. Consideration of suggestions received:*

1. The Holy See recommended adding the words “and that lie within the purview of the Convention” at the end of this sentence. The EDG considers this to be superfluous in this provision since the Conference of States Parties cannot vest the implementation mechanism with functions that are *ultra vires* the Convention. Nevertheless, to avoid any misinterpretations, the EDG agrees to add the words “within the scope of the Convention] in line with parallel modification made in draft article 25(1)(g).

*B. Legal commentary on the text:*

1. The legal commentary is considered collectively at the end of the next paragraph.

**4. The Conference of States Parties shall adopt rules of procedure for the operation of the implementation mechanism.**

*Commentary*

*A. Consideration of suggestions received:*

1. There were no suggestions received for modification of the text.

*B. Legal commentary on the text:*

1. The legal commentary below relates to all the provisions of draft article 27.

2. Draft article 27 establishes the second entity envisaged in this convention viz. the “implementation mechanism”. It is a subsidiary body of the Conference of States Parties. This mechanism, unlike the Conference of States Parties, is conceived of as a mechanism comprising independent experts. Its basic objective is to act as the source of independent expertise necessary for effective implementation of the draft convention. Mechanisms with independent experts under the current core human rights treaties generally take the shape of “committees” that comprise, depending on the treaty concerned, anywhere between 10 to 25 independent members with expertise in the related theme. While the *sui generis* design of the implementation mechanism for this draft convention needs to borrow good practices from the mechanisms under current core human rights treaties, it also needs to be alive to certain crucial factors that necessitate a different approach herein. As explained in the commentaries earlier, it is prudent to design a mechanism that takes into account the unique institutional history of the right to development, avoids duplication with existing mechanisms, and ensures judicious use of human and financial resources that are in short supply. It also must assign functions to the implementation mechanism that are specific to the context of the right to development and hence may be different from those of the committees under the current core human rights treaties.

3. Paragraph 1 of draft article 27 thus mandates that the Conference of States Parties must, at its first session, establish an “implementation mechanism to facilitate, coordinate, and assist, in a non-adversarial and non-punitive manner, the implementation of and promotion of compliance with the provisions of this Convention”. The words “facilitate, coordinate, and assist, in a non-adversarial and non-punitive manner” stress on the cooperative approach to be adopted by the implementation mechanism, unlike an adversarial approach that an individual complaints or communications procedure may sometimes require the committees under current human rights treaties to adopt. While the provision requires establishment of an independent mechanism, it does not provide for any details in terms of how many members it shall comprise. This is aimed at providing flexibility to the Conference of the States Parties to make its own determination dependent on factors such as number of ratifications by the first session and the available secretarial and financial resources. However, it is strongly suggested that the Conference of the States Parties takes special care to avoid duplication. In particular, States Parties should take into account the establishment of the Expert Mechanism on the Right to Development by the Human Rights Council through resolution A/HRC/42/L.36 adopted on 27 September 2019 “to provide the Council with thematic expertise on the right to development in searching for, identifying and sharing best practices among Member States and to promote the implementation of the right to development worldwide”.<sup>391</sup> This expert mechanism comprises five independent experts to serve for a three-year period with the possibility of being re-elected for one additional period.<sup>392</sup> It is strongly recommended that States Parties mandate the same expert mechanism established under resolution A/HRC/RES/42/23 to also act as the implementation mechanism under the draft convention, should States decide in the future to continue with both bodies simultaneously. This will avoid duplication of efforts, fragmentation of the law, and conflicting interpretations, and will also ensure best use of human and financial resources.

4. Paragraph 2 stipulates that the implementation mechanism shall consist of “independent experts, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems and balanced gender representation”. Number of experts is not specified in this provision since paragraph 1 gives flexibility to the Conference of the States Parties to design a structure as it deems appropriate. The paragraph also stipulates, in line with the requirements for independent experts on committees of other core human rights treaties, that “experts shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention”. Although details of emoluments, facilities, privileges and immunities of the experts are also not incorporated, it is assumed that the Conference of States Parties will apply the same standards as applicable to members of the various committees under the human rights treaties as approved by the United Nations

<sup>391</sup> Paragraph 29.

<sup>392</sup> For full details of the structure, see A/HRC/RES/42/23, adopted on 27 September 2019, paragraph 29-34.

General Assembly. Nevertheless, as strongly suggested above, it would be ideal to mandate the expert mechanism comprising five experts as established by resolution A/HRC/RES/42/23 also as the independent mechanism for the convention, should States at the Human Rights Council decide in the future to retain the Expert Mechanism in addition to the implementation mechanism.

5. Paragraph 3 lays down the mandate of the implementation mechanism. Sub-paragraph (a) requires it to “adopt general comments or recommendations to assist in the interpretation or implementation of the provisions of the Convention”. The mandate to adopt “general comments” or “general recommendations” is similar to the role of various committees under the human rights treaties.<sup>393</sup> These can relate both to the interpretation of the provisions of the convention and to their implementation. Sub-paragraph (b) mandates the implementation mechanism to provide expert review of obstacles to the implementation of the convention at the request of the Conference of the States Parties. The review to be provided under this clause may be pursuant to general requests that the Conference of States Parties may make on matters requiring expert input (such as development of best practices, methodologies, guidelines etc.) as also upon receipt of specific requests under article 25(2)(a) emanating from referral of a State Party’s report. Sub-paragraph (c) mandates the implementation mechanism to “review requests by rights holders to comment on situations in which their right to development has been adversely affected by the failure of States to comply with their duty to cooperate as reaffirmed and recognized under the present Convention”. The mandate contemplated here is not that of a typical complaint or communications procedure by right-holders against their States for individually failing to realize their right to development obligations internally, which traditional committees are engaged in. Nor is this a procedure where the implementation mechanism then determines the admissibility of communications before making findings on violations through an adversarial or quasi-adjudicatory model that is followed by traditional committees empowered in this respect. The mandate to “review requests” is thus not a mandate to consider “communication” to the committees. The different choice of words is intentional. The review of requests envisaged in this paragraph is limited to those situations of violations which result from the failure of States to comply with “their duty to cooperate”. This focus on violations by States of their duty to cooperate is a significant value-added over existing mechanisms under the current core human rights treaties that do not focus on this aspect. The commentaries to the zero draft also explained that the term “States” rather than “States Parties” employed in sub-paragraph (c) is intentional so as to permit the implementation mechanism to also review situations of violations of rights under this convention resulting from failure by a non-Party State or States, either separately or jointly with States Parties, to comply with the general duty to cooperate under international law. International law permits this. The words “as reaffirmed and recognized under the present Convention” reflect the language of draft article 13 and reinforce the existence of the duty to cooperate both under general international law and under this draft convention. It may be worth reiterating that the paragraph does not create a complaints mechanism at all where the State is a respondent, and its consent might become necessary. Rather the focus here is on the implementing mechanism “commenting” on situations where States fail in their duty to cooperate resulting in the right to development of the right-holders being adversely affected. The scope of these comments should be understood in the context of the following words in paragraph 1 – “facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance with the provisions of the present Convention”. This language excludes any process of naming and shaming, whether of States Parties or others. It also excludes holding of “hearings” or submission of “pleadings”. Comments can relate to observations and suggestions on facilitating international cooperation by States in a manner that helps realize the right to development better. Finally, the precise scope and procedures with respect to this paragraph can be decided by the Conference of States Parties, which has the discretion to shape them in the manner necessary. Sub-paragraph (d) is the residual clause which authorizes the implementation

<sup>393</sup> For instance, article 40(4) of the ICCPR mandates the Human Rights Committee to issue “general comments”, whereas article 39 of CRPD, article 21 of CEDAW and article 45(d) of CRC mandate the committees thereunder to issue “general recommendations”.

mechanism to “undertake any other functions within the scope of this Convention that may be vested by the Conference of the States Parties”.

6. Paragraph 4 mandates the Conference of States Parties to adopt rules of procedure for the operation of the implementation mechanism.

## Part V

### Article 28

#### Signature

**The present Convention shall be open for signature by all States and international organizations at United Nations Headquarters in New York as of \_\_\_\_\_.**

#### *Commentary*

##### *A. Consideration of suggestions received:*

1. There were no suggestions received for modification of this draft article

##### *B. Legal commentary on the text:*

1. Part V contains provisions identical to articles 41 to 50 of the CRPD, with only necessary modifications that have been noted in the commentaries below.

2. Draft article 28 is identical to article 42 of the CRPD, except that the latter permits the possibility of regional integration organizations joining as parties in addition to States, whereas the draft convention broadens this possibility to permit all international organizations as defined in draft article 2(b) to join. Draft article 28, therefore, opens up the convention for signature of international organizations as well. As explained in the commentary to draft article 2(b), the term “international organizations” encompasses regional organizations, including regional integration organizations, as well.

### Article 29

#### Consent to be bound

**1. The present Convention shall be subject to ratification, approval or acceptance by signatory States.**

**2. Notwithstanding the obligations of international organizations existing under international law and the present Convention, the consent of signatory international organizations to be bound by the present Convention shall be expressed through an act of formal confirmation.**

**3. The present Convention shall be open for accession by any State or international organization that has not signed the Convention.**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. There were no suggestions for modification received on this draft article although there were concerns raised regarding the possibility of international organizations becoming parties to the draft convention. These concerns are addressed in the commentaries to the following draft article.

##### *B. Legal commentary on the text:*

1. Paragraph 1 of draft article 29 provides for the means of expressing consent to be bound by signatory States and lists ratification, approval or acceptance as the ones permitted.<sup>394</sup> Paragraph 2 permits signatory international organizations to join as parties through “an act of formal confirmation”.<sup>395</sup> The paragraph, however, begins as a non-obstante clause with the words “notwithstanding the obligations of international organizations existing under international law and the present Convention”. This is to ensure that no international organization is able to contend that it is not bound by the right to development obligations that it is otherwise bound by under general international law as well as provisions of the draft convention, simply because it has not become a party to this convention.<sup>396</sup> Paragraph 3 then permits accession also as a recognized means for expressing consent to be bound for those States or international organizations that may not have signed the convention.<sup>397</sup>

## Article 30

### International organizations

1. **International organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.**
2. **References to “States Parties” in the present Convention shall apply to such organizations within the limits of their competence.**
3. **For the purposes of article 30 [31], paragraph 1, and article 31 [33], paragraphs 2 and 3, any instrument deposited by an international organization shall not be counted.**
4. **International organizations, in matters within their competence, may [not] exercise their [a] right to vote in the Conference of States Parties [or for the purposes of article 33, paragraph 1], with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization may not exercise its right to vote if any of its member States exercises its right, and vice versa.**

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. China, the Russian Federation and Iran recommended deletion of this article. China reiterated that “it is not typical for international treaties to consider international organisations as Parties of exercising the right to vote. Therefore, it will be appropriate to refer only to States that hold the responsibility of implementation”. The Russian Federation expressed that it “cannot agree to create the opportunity to become parties to international conventions. We need to understand that they have different mandates. Looking at those organisations, they have their own obligations or mandates, they have their own nature, and we cannot put them all on the same level and treat them all the same way”. The EDG has already considered these concerns in the commentaries to the first revised draft. As it had noted, the effect of deleting this paragraph would be to exclude international organizations from having the possibility to be parties to the convention.
2. The commentaries to the zero draft provided the rationale behind inclusion of international organizations as possible parties. Draft article 30 corresponds almost identically to article 44 of the CRPD, with the difference that the latter covered only regional integration organizations whereas the present draft article applies to the broader category of international organizations. The CRPD is unique among all existing core human rights treaties, in that, it

<sup>394</sup> See, articles 11 and 14 of the VCLT.

<sup>395</sup> See, article 2(b bis) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, defining an “act of formal confirmation” as “an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty”.

<sup>396</sup> In particular, these refer to obligations contained in articles 7, 9 and 23(1) of this draft convention.

<sup>397</sup> See, articles 11 and 15 of the VCLT.

permits regional integration organizations to join as Parties. The justification for a legally binding instrument on the right to development permitting not just regional integration organizations but international organizations in general is strong. Regional integration organizations have a direct correlation with the subject matter of this draft convention. Indeed, the objectives of regional integration cannot in general be delinked from development. But the same can also be said about many international organizations, including international financial institutions, other specialized agencies and related organizations of the United Nations, as well as independent ones such as the WTO.<sup>398</sup> Clearly, therefore, there is significant value in international organizations being able to join as Parties to the convention. The EDG notes that there is in fact precedent for such an approach in practice. For instance, the European Union has become a party to the CRPD. The EDG further notes that the fact that international organizations may join the treaty does not put them at the same level as States Parties, as the Russian Federation contends. It merely permits them the possibility, by virtue of having independent legal personality, to join the treaty and accept the obligations thereunder.

3. Insofar as paragraph 4 is concerned which relates to the right to vote by international organizations, Egypt expressed concern over this permission. As noted above, China was also concerned regarding this paragraph. The EDG recognizes that unlike the CRPD which permits regional integration organizations to exercise a right to vote on behalf of its member States that are parties to the convention, the same logic may not be applicable in the current draft article since different international organizations may have overlapping membership of same States that may also be parties to this convention. As such, the EDG agrees with the recommendation to eliminate the possibility for international organizations to vote in the Conference of States Parties. It also recommends excluding the possibility of international organizations to vote for the purposes of amendment of the convention as per article 33, paragraph 1. At the same time, the EDG strongly recommends permitting international organizations the possibility of becoming parties and undertaking obligations as independent legal personalities in international law with critical role in realizing the right to development.

*B. Legal commentary on the text:*

1. Draft article 30 corresponds almost identically to article 44 of the CRPD, with the difference that the latter covered only regional integration organizations whereas the present draft article applies to the broader category of international organizations.

2. The CRPD is unique among all existing core human rights treaties, in that, it permits regional integration organizations to join as Parties. The justification for a legally binding instrument on the right to development permitting not just regional integration organizations but international organizations in general is strong. Regional integration organizations have a direct correlation with the subject matter of this draft convention. Indeed, the objectives of regional integration cannot in general be delinked from development.<sup>399</sup> But, the same can also be said about many international organizations, including international financial institutions, other specialized agencies and related organizations of the United Nations, as well as independent ones such as the WTO.<sup>400</sup> Clearly, therefore, there is significant value in international organizations being able to join as Parties to the convention.

3. The only major modification is that unlike the CRPD which permits regional integration organizations the right to vote on behalf of its member States with a number of votes equivalent to the number of such member States that are parties to the CRPD, this draft article

<sup>398</sup> The banks among the Bretton Woods institutions are “development banks” and the WTO’s institutional objective, as noted in the commentary to draft article 22, includes sustainable development.

<sup>399</sup> See for instance, Maurice Schiff and L. Alan Winters, *Regional Integration and Development*, Washington D.C., The World Bank, 2003; Dirk Willem te Velde, “Regional Integration, Growth and Convergence”, *Journal of Economic Integration*, Vol. 26, No. 1, March 2011, pp.1-28; Diane Desierto and David Cohen (eds.), *ASEAN Law and Regional Integration: Governance and the Rule of Law in Southeast Asia’s Single Market*, London, Routledge, 2016; Samuel Ojo Olorunfoba and Mammo Muchie (Eds.), *Innovation, Regional Integration, and Development in Africa Rethinking Theories, Institutions, and Policies*, Springer, 2019.

<sup>400</sup> The banks among the Bretton Woods institutions are “development banks” and the WTO’s institutional objective, as noted in the commentary to draft article 22, includes sustainable development.

does not permit international organizations the right to vote. This is because different international organizations can and do have overlapping membership of the same States. This means that although international organizations can become parties and assume obligations under the draft convention, they do not have the right to exercise a vote in the Conference of States Parties or for the purposes of amendment of the convention under article 33, paragraph 1.

## Article 31

### Entry into force

1. **The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.**
2. **For each State or international organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.**

#### *Commentary*

##### *A. Consideration of suggestions received:*

1. There were no suggestions received for modification.

##### *B. Legal commentary on the text:*

1. Draft article 31 related to “entry into force” is analogous to article 45 of the CRPD.

## Article 32

### Reservations

1. ~~Reservations incompatible with the object and purpose of the present Convention shall not be permitted.~~ [Reservations may be withdrawn at any time.]
2. ~~Reservations may be withdrawn at any time.~~ [Reservations incompatible with the object and purpose of the present Convention shall not be permitted.]

#### *Commentary:*

##### *A. Consideration of suggestions received:*

1. Argentina recommended reversing the order of the text so as to firstly admit the possibility of making reservations, and only then establishing restrictions on them according to their content. The EDG agrees with this recommendation.

##### *B. Legal commentary on the text:*

1. This draft article eliminates and forecloses any possible ambiguity as to the status of reservations that could be entered with respect to this Convention. Paragraphs 1 and 2 are wholly derived from the 1969 Vienna Convention on the Law of Treaties. They are also analogous to article 46 of the CRPD with a change in order of the paragraphs.

## Article 33

### Amendments

1. **Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified**

whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months of the date of such communication, at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties that have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of the present article that relates exclusively to articles 25, 26 and 27 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

*Commentary*

*A. Consideration of suggestions received:*

1. There were no suggestions for modification of the text received.

*B. Legal commentary on the text:*

1. Draft article 33 is identical to article 47 of the CRPD. Only necessary modifications in paragraph 3 related to cross-referenced provisions have been made. It may be noted that in accordance with draft article 30(4), international organizations do not have a right to vote on amendments.

## Article 34

### Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

*Commentary*

*A. Consideration of suggestions received:*

1. There were no suggestions for modifications received.

*B. Legal commentary on the text:*

1. Draft article 34 provides for the possibility of “Denunciation” and is identical to article 48 of the CRPD.

## Article 35

### Dispute settlement between States Parties

Any dispute between two or more States Parties with respect to the interpretation or application of the present Convention that has not been settled by negotiation may, upon agreement by the parties to the dispute be referred to the International Court of Justice for a decision [, unless another mode of dispute settlement is agreed upon by them].

*Commentary:**A. Consideration of suggestions received:*

1. Colombia observed that “the Draft Convention provides not only for a system of individual-State rights and obligations, but also for a scheme of reciprocal inter-State duties. Colombia would not be in the position of accepting clauses or agreements that grant jurisdiction to the International Court of Justice to resolve disputes regarding human rights obligations”. China noted that this provision does not reflect common practice or is not necessary and recommended its deletion. The EDG notes that these comments are contrary to the provisions of core human rights treaties. As was noted in the commentaries to the zero draft, similar language is indeed contained in dispute settlement provisions under article 30 of CAT, article 29 of CEDAW, article 22 of CERD, article 92 of ICMW and article 42 of CPED. However, it is important to note that unlike most of the core human rights treaties referenced above, draft article 35 does not require parties to accept compulsory jurisdiction of the ICJ. The legal commentaries below further explain that there is nothing mandatory about this provision and the jurisdiction of the ICJ applies only if so specifically agreed by parties. As such, the EDG recommends retaining the provision.

2. The Russian Federation recommended adding the words “unless the disputants agree to another mode of settlement”. The EDG considers this as superfluous in view of the words “upon agreement by the parties to the dispute”. Nevertheless, the EDG agrees to introduce the caveat suggested by way of an abundance of caution in deference to the suggestion made.

*B. Legal commentary on the text:*

1. Draft article 35 incorporates a procedure for dispute settlement between States Parties. In line with draft article 30, the reference to States Parties also includes international organizations that may be parties to the convention. As such, the procedure for dispute settlement contained herein applies to inter-State disputes, disputes between States and international organizations, as well as between international organizations, provided they are all parties to the convention.

2. Draft article 35 covers situations where any dispute arises “with respect to the interpretation or application of this Convention, that has not been settled by negotiation”. Similar language is contained in dispute settlement provisions under article 30 of CAT, article 29 of CEDAW, article 22 of CERD, article 92 of ICMW and article 42 of CPED. However, unlike most of the core human rights treaties referenced above, draft article 35 does not require parties to accept compulsory jurisdiction of the ICJ. Instead, it prescribes that the dispute “may” be referred to the ICJ for decision, but “only upon agreement by parties to the dispute”. It further qualifies this with the words “unless another mode of dispute settlement is agreed upon by them”. This cooperative approach rather than a traditional adversarial approach to dispute settlement, even though it is in the context of adjudication, is entirely in sync with the duty to cooperate enshrined throughout the draft convention. In addition, inter-State complaints regarding violations of the right to development are likely to relate to matters of inter-State relations in areas such as trade, finance, investment, or the environment, amongst others, which may be covered by specific dispute settlement mechanisms under special regimes or agreements. As such, pragmatism and the objective of avoiding fragmentation of dispute settlement procedures dictates that parties agree mutually before a dispute is brought before the ICJ under this draft convention.

**Article 36****Accessible format**

**The text of the present Convention shall be made available in accessible formats.**

*Commentary**A. Consideration of suggestions received:*

1. There were no suggestions for modification received.

*B. Legal commentary on the text:*

1. Draft article 36 corresponds to article 49 of the CRPD. Although its inclusion in the CRPD is directly related to the subject matter of that convention, accessibility also has direct relationship with the ability of all human persons and peoples to participate in, contribute to and enjoy development. Accessibility of format in this context would therefore not only relate to ensuring that persons with disabilities have access to the content of this convention, but also to ensuring that it is accessible to such categories as linguistic minorities, indigenous peoples, those with limited literacy, amongst others.

**Article 37****Depositary**

**The Secretary-General of the United Nations shall be the depositary of the present Convention.**

*Commentary**A. Consideration of suggestions received:*

1. There were no suggestions received for modification.

*B. Legal commentary on the text:*

1. Draft article 37 corresponds to article 41 of the CRPD.

**Article 38****Authentic texts**

**The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.**

*Commentary**A. Consideration of suggestions received:*

1. There were no suggestions for modification received.

*B. Legal commentary on the text:*

1. Draft article 38 is identical to article 50 of the CRPD.

**In witness thereof, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.**

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## Annex **Second revised text of the draft convention on the right to development in tracked changes**

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

#### **Preamble**

##### *The States Parties to the present Convention,*

[PP1] Guided by ~~all~~ the purposes and principles of the Charter of the United Nations, especially those relating to the achievement of international cooperation in solving international problems of an economic, social, cultural, environmental or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction of any kind,

[PP2] Recalling the obligation of States under articles 1 (3), 55 and 56 of the Charter of the United Nations to take joint and separate action in cooperation with the Organization for the promotion of higher standards of living, full employment and conditions of economic and social progress and development; solutions of international economic, social, health and related problems; international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all[, ] without distinction ~~as to race, sex, language or religion~~ [of any kind],

[PP3] Reaffirming ~~that, under the provisions of~~ the Universal Declaration of Human Rights [and recalling that, under its provisions,] everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized, and that everyone, as a member of society, is entitled to the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for her or his dignity and the free development of her or his personality,

[PP4] Recalling the provisions of all [international] human rights treaties, as well as other international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,

[PP5] Reaffirming the Declaration on the Right to Development, ~~adopted by the General Assembly on 4 December 1986,~~

[PP6] Recalling the reaffirmation of the right to development in several international declarations, resolutions and agendas, including the Rio Declaration on Environment and Development, the Vienna Declaration and Programme of Action, the Programme of Action of the International Conference on Population and Development, the Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development, the Beijing Declaration and Platform for Action, the Rome Declaration on World Food Security, adopted at the World Food Summit, the United Nations Millennium Declaration, the Durban Declaration and Programme of Action, the Monterrey Consensus of the International Conference on Financing for Development, the Declaration of Principles and Plan of Action, adopted at the World Summit on the Information Society, the Tunis Agenda for the Information Society, the 2005 World Summit Outcome, the United Nations Declaration on the Rights of Indigenous Peoples, the outcome document of the high-level plenary meeting of the General Assembly on the Millennium Development Goals, the Istanbul Programme of Action for the Least Developed Countries for the Decade 2011–2020, the outcome documents of the thirteenth session of the United Nations Conference on Trade and Development, held in 2012, the outcome document of the United Nations Conference on Sustainable Development entitled “The future we want”, the quadrennial comprehensive policy review of operational activities for development of the United Nations system, the SIDS Accelerated Modalities of Action (SAMOA) Pathway, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development, the 2030

Agenda for Sustainable Development ~~and the Sustainable Development Goals~~, the Paris Agreement on climate change, the Sendai Framework for Disaster Risk Reduction 2015–2030, the New Urban Agenda, adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), **[and]** the outcome documents of the fourteenth session of the United Nations Conference on Trade and Development,

*[PP7] Reaffirming* the objective of making the right to development a reality for everyone, as set out in the Millennium Declaration, ~~adopted by the General Assembly on 8 September 2000,~~

*[PP8] Recalling* the multitude of resolutions adopted by the General Assembly, the Commission on Human Rights and the Human Rights Council on the right to development,

*[PP9] Recalling* also, in particular, General Assembly resolutions 48/141 of 20 December 1993, in which the Assembly established the Office of the United Nations High Commissioner for Human Rights, with a mandate to promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for that purpose, 52/136 of 12 December 1997, in which the Assembly affirmed that the inclusion of the Declaration on the Right to Development in the International Bill of Human Rights would be an appropriate means of celebrating the fiftieth anniversary of the Universal Declaration of Human Rights, and 60/251 of 15 March 2006, in which the Assembly established the Human Rights Council, deciding that its work should be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, including the right to development,

*[PP10] Taking note* of the regional human rights instruments and the subsequent practices relating thereto that specifically recognize and reaffirm the right to development, including the African Charter on Human and Peoples' Rights, the Inter-American Democratic Charter, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Arab Charter on Human Rights, the Human Rights Declaration of the Association of Southeast Asian Nations, the American Declaration on the Rights of Indigenous Peoples, and the Abu Dhabi Declaration on the Right to Development,

*[PP11] Taking note also* of the obligations of States pertaining to integral development in the Charter of the Organization of American States, and to progressive development in the American Convention on Human Rights,

*[PP12] Taking into consideration* the various international instruments adopted for realizing sustainable development, including in particular the 2030 Agenda for Sustainable Development, which affirm that sustainable development must be achieved in **all its three** dimensions, ~~namely,~~ **[including]** economic, social and environmental, in a balanced and integrated manner and in harmony with nature,

*[PP13] Acknowledging* that the realization of the right to development is a common concern of humankind,

*[PP14] Concerned* at the existence of serious obstacles to the realization of the right to development comprising, inter alia, poverty in all its forms and dimensions, including extreme poverty, hunger, inequality in all forms and manifestations within and ~~across~~ **[among]** countries, climate change, health emergencies and health crises, colonization, neo-colonization, forced displacement, racism, discrimination, conflicts, foreign domination and occupation, aggression, threats against national sovereignty, national unity and territorial integrity, terrorism, crime, corruption, all forms of deprivation affecting the subsistence of peoples, and the denial of other human rights,

*[PP15] Emphasizing* that the right to development~~],~~ **which derives from the inherent dignity of all members of the human family,** is an inalienable human right of all ~~human persons~~ **[individuals]** and peoples, and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

*[PP16] Recognizing* that development is a comprehensive civil, cultural, economic, environmental, political and social process that is aimed at the constant improvement of the well-being of the entire population and of all peoples and individuals on the basis of their

active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

[PP17] *Acknowledging* that development is understood not simply in terms of economic growth, but also as a means ~~to~~ **[of]** widening people's choices to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples,

[PP18] *Reaffirming* the universality, indivisibility, interrelatedness, interdependence and mutually reinforcing nature of all civil, cultural, economic, political and social rights, including the right to development,

[PP19] *Recognizing* that the realization of the right to development constitutes an important end and an integral means of sustainable development, and that the right to development cannot be realized if development is not sustainable,

[PP20] *Considering* that peace and security at all levels is an essential element for the realization of the right to development and that such realization can, in turn, contribute to the establishment, maintenance and strengthening of peace and security at all levels,

[PP21] *Recognizing* that ~~good governance, accountability and the rule of law~~ **[the effective rule of law, good governance and accountability]** at all levels, including the national and international levels, and the realization of the right to development are mutually reinforcing,

[PP22] *Recognizing also* that the ~~human person~~ **[individual]** and peoples are the central subjects of the development process, and that development policy should therefore make them the main participants and beneficiaries of development,

[PP23] *Recognizing further* that all ~~human persons~~ **[individuals]** and peoples are entitled to a national and ~~global~~ **[international]** environment conducive to just, equitable and participatory development, centred ~~human persons and peoples, [on them and]~~ respectful of all human rights,

[PP24] *Acknowledging* that States have the primary responsibility, through cooperation, including engagement with civil society, for the creation of national and international conditions favourable to the realization of the right to development,

[PP25] *Recognizing* that every organ of society at the national or international level has a duty to respect the human rights of all, including the right to development,

[PP26] *Concerned* that, despite the adoption of numerous resolutions, declarations and agendas, the right to development has not yet been effectively operationalized,

[PP27] *Convinced* that a comprehensive and integral international convention to promote and secure the realization of the right to development, through appropriate and enabling national and international action, is essential.

Have agreed as follows:

## **Part I**

### **Article 1**

#### **Object and purpose**

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

## Article 2

### Definitions

For the purposes of the present Convention:

(a) “Legal person” means any entity that possesses its own legal personality under domestic or international law and is not a ~~human~~ **[natural]** person, a people or a State;

(b) “International organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality; international organizations may include, in addition to States, other entities as members;

~~— (c) — “Working Group on the Right to Development” means the entity established by the Commission on Human Rights in its resolution 1998/72 of 22 April 1998, as endorsed by the Economic and Social Council in its decision 1998/269 of 30 July 1998;~~

~~— (d) — “High-level political forum on sustainable development” means the entity established pursuant to the outcome document of the United Nations Conference on Sustainable Development (Rio +20) of 2012, as endorsed by General Assembly resolution 66/288 of 27 July 2012 and supplemented by Assembly resolution 67/290 of 9 July 2013.~~

## Article 3

### General principles

To achieve the object and purpose of the present Convention and to implement its provisions, the [States] Parties shall be guided by, inter alia, the principles set out below:

(a) Development centred on the ~~human person~~ **[individual]** and peoples: the ~~human person~~ **[individual]** and peoples are the central subjects of development and must be the active participants and beneficiaries of the right to development;

(b) ~~Universal~~ Principles common to all human rights: the right to development should be realized in a manner that integrates the principles of **[universality, inalienability, indivisibility, interdependence and interrelatedness of all human rights, as well as of]** equality, non-discrimination, empowerment, participation, transparency, accountability, equity, **[inclusion, accessibility,]** and subsidiarity;

(c) Human rights-based development: as development is a human right that is indivisible from and interrelated and interdependent with all other human rights, the laws, policies and practices of development, including development cooperation, must be normatively anchored in a system of rights and corresponding obligations established by international law;

(d) Contribution of development to the enjoyment of all human rights: development, as described in the present Convention, is essential for the improvement of living standards and the welfare of ~~human persons~~ **[individuals]** and peoples and contributes to the enjoyment of all **[other]** human rights;

(e) Principles of international law concerning friendly relations and cooperation among States: the realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations;

(f) Self-determined development: **[the priorities of]** development ~~is~~ **[are]** determined by individuals and peoples as rights holders **[in a manner consistent with the provisions of the present Convention]**. The right to development and the right to self-determination of peoples are integral to each other and mutually reinforcing;

(g) Sustainable development: development must be achieved in **[all]** its ~~three~~ dimensions, ~~namely~~ **[including]**, economic, social and environmental, in a balanced and integrated manner and in harmony with nature. The right to development must be fulfilled so

as to equitably meet developmental and environmental needs of present and future generations; and the right to development cannot be realized if development is unsustainable.

(h) Right to regulate: the realization of the right to development entails the right for States Parties, on behalf of the rights holders, to take regulatory or other related measures to achieve sustainable development on their territory in accordance with international law, and consistent with the provisions of the present Convention;

(i) National and international solidarity: the realization of the right to development requires an enabling national and international environment created through a spirit of cooperation and unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals everywhere. This principle includes the duty to cooperate with complete respect for the principles of international law;

(j) South-South **[and triangular]** cooperation as a complement to North-South cooperation: South-South **[and triangular]** cooperation **contribute to the realization of the right to development. They is [are]** not a substitute for, but rather a complement to, North-South cooperation, ~~and hence should not result in the reduction of North-South cooperation or hamper progress in fulfilling existing official development assistance commitments;~~

(k) Universal duty to respect human rights: everyone has the duty to respect all human rights, including the right to development, in accordance with international law;

(l) Right and responsibility of individuals, peoples, groups and organs of society to promote and protect human rights: in accordance with international law, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of the right to development at the national and international levels. Individuals, peoples, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the right to development can be fully realized.

## Part II

### Article 4

#### Right to development

1. Every ~~human person~~ **[individual]** and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to, and enjoy civil, cultural, economic, **[environmental,]** political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.

2. Every ~~human person~~ **[individual]** and all peoples have the right to active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

### Article 5

#### Relationship with the right of peoples to self-determination

1. The right to development implies the full realization of the right of all peoples to self-determination.

2. All peoples have the right to self-determination, by virtue of which they freely determine their political status and freely pursue the realization of their right to development.

3. All peoples may, in pursuing the realization of their right to development, freely dispose of their ~~natural~~ wealth and **[sustainably use their natural]** resources based upon the principle of mutual benefit, ~~sustainable development,~~ and international law. In no case may

a people be deprived of its own means of subsistence. Nothing in the present Convention shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their ~~natural~~ wealth and [natural] resources **[in a manner consistent with international law and the provisions of the present Convention]**.

4. The States Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations and international law.

5. States **[Parties]** shall take resolute action to prevent and eliminate massive and flagrant violations of the human rights of persons and peoples affected by situations such as those resulting from apartheid, all forms of racism and discrimination, colonialism, domination and occupation, aggression, **[foreign]** interference and threats against national sovereignty, national unity and territorial integrity, threats of war and the refusal to **[otherwise]** recognize the fundamental right of peoples to self-determination.

7. Nothing contained in the present Convention shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory, without distinction of any kind. **[Each State Party shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State.]**

## **Article 6**

### **Relationship with other human rights**

1. States Parties reaffirm that all human rights, including the right to development, are universal, inalienable, interrelated, interdependent, indivisible and equally important.

2. States Parties agree that the right to development is an integral part of human rights and ~~should~~ **[must]** be realized in conformity with the full range of civil, cultural, economic, **[environmental,]** political and social rights.

## **Article 7**

### **Relationship with the responsibility of everyone to respect human rights under international law**

Nothing in the present Convention may be interpreted as implying for any ~~human~~ **[natural]** or legal person, people, group or State any right to engage in any activity or perform any act aimed at the destruction, nullification or impairment of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. To that end, States Parties agree that all ~~human~~ **[natural]** and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development.

## **Part III**

### **Article 8**

#### **General obligations of States Parties**

1. States Parties shall respect, protect and fulfil the right to development for all, without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, ~~nationality, statelessness,~~ national, ethnic, or social origin, property, disability, birth, age or other status, in accordance with obligations set forth in the present Convention.

2. States Parties shall cooperate with each other in ensuring development and eliminating obstacles to development, encouraging full observance and realization of all human rights.
3. States Parties shall ensure that public authorities and institutions at all levels act in conformity with the present Convention.
4. States Parties recognize that each State has the right, on behalf of its peoples, and also the duty to formulate, adopt, and implement appropriate national development laws, policies and practices in conformity with the right to development and aimed at its full realization. To that end, States Parties undertake to refrain from nullifying or impairing, including in matters relating to cooperation, aid, assistance, trade or investment, the exercise of the right and discharge of the duty of every State Party to determine its own national development priorities and to implement them in a manner consistent with the provisions of the present Convention and international law.

## **Article 9**

### **General obligations of international organizations**

Without prejudice to the general duty contained in article 7, States Parties agree that international organizations also have the obligation to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach any obligation that the State or the latter organization may have with regard to the right to development.

## **Article 10**

### **Obligation to respect**

States Parties shall refrain from conduct, whether expressed through law, policy or practice, that:

- (a) Nullifies or impairs the enjoyment and exercise of the right to development;
- (b) Impairs the ability of another State or an international organization to comply with that State's or that international organization's obligations with regard to the right to development;
- (c) Aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, another State or an international organization to breach that State's or that international organization's obligations with regard to the right to development;
- (d) Causes an international organization of which it is a member to commit an act that, if committed by the State Party, would constitute a breach of its obligation under the present Convention, and does so to circumvent that obligation by taking advantage of the fact that the international organization has competence in relation to its subject matter.

## **Article 11**

### **Obligation to protect**

States Parties shall adopt and enforce all necessary, appropriate and reasonable measures, including administrative, legislative, investigative, judicial, diplomatic and others, to ensure that **human [natural]** or legal persons, peoples, groups, or any other State or agents that the State is in a position to regulate do not nullify or impair the enjoyment and exercise of the right to development within or outside their territories when:

- (a) Such conduct ~~originates from or~~ occurs, **[partially or fully]**, on the territory of the State Party;
- (b) The **human [natural]** or legal person has the nationality of the State Party;

(c) The State Party has the requisite legal duty under either domestic or international law to supervise, regulate or otherwise exercise oversight of the conduct of the legal person engaging in business activities, including those of a transnational character.

## Article 12 Obligation to fulfil

1. Each State Party shall take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to its obligations to respect and protect the right to development contained in articles 10 and 11 of the present Convention or to those obligations contained in the present Convention that are of immediate effect. States Parties may take such measures through any appropriate means, in particular through the adoption of legislative measures.

2. To this end, each State Party shall take all necessary measures at the national level, and shall ensure, inter alia, equality of opportunity[, **including through digital inclusion where applicable,**] for all ~~human persons~~ **[individuals]** and peoples in their access to basic resources, education, health services, food, housing, ~~and~~ employment, **[and social security and protection,]** and in the fair distribution of income, and shall carry out appropriate economic and social reforms with a view to eradicating all social injustices.

## Article 13 Duty to cooperate

1. States Parties reaffirm and shall implement their duty to cooperate with each other, through joint and separate action, in order to:

(a) Solve international problems of an economic, social, cultural, political, environmental, health-related, educational, technological or humanitarian character;

(b) End poverty in all its forms and dimensions, including by eradicating extreme poverty;

(c) Promote higher standards of living, full and productive employment, decent work, **[entrepreneurship,]** conditions of human dignity, and economic ~~and~~ **[,]** social, **cultural, technological and environmental** progress and development;

(d) Promote and encourage universal respect for human rights and fundamental freedoms for all, without discrimination of any kind.

2. To this end, States Parties have primary responsibility, in accordance with the general principle of international solidarity described in the present Convention, for the creation of international conditions favourable ~~to~~ **[for]** the realization of the right to development for all, and shall take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society:

(a) To ensure that ~~human~~ **[natural]** and legal persons, groups and States do not impair the enjoyment of the right to development;

(b) To eliminate obstacles to the full realization of the right to development, including by reviewing international legal instruments, policies, and practices;

(c) To ensure that the formulation, adoption, and implementation of States Parties' international legal instruments, policies and practices are consistent with the objective of fully realizing the right to development for all;

(d) To formulate, adopt and implement appropriate international legal instruments, policies and practices aimed at the progressive enhancement and full realization of the right to development for all;

(e) To mobilize appropriate technical, technological, financial, infrastructural and other necessary resources to enable States Parties, particularly in developing or least developed countries, to fulfil their obligations under the present Convention.

3. States Parties shall ensure that financing for development and all other forms of aid and assistance given or received by them, whether bilateral, or under any institutional or other international framework, are in compliance with internationally recognized development cooperation principles and consistent with the provisions of the present Convention.

4. States Parties recognize their duty to cooperate to create a social and international order conducive to the realization of the right to development by, inter alia:

(a) Promoting a universal, rules-based, open, non-discriminatory, equitable, transparent and inclusive multilateral trading system;

(b) Implementing the principle of special and differential treatment for developing countries, in particular least developed countries, as defined in applicable trade and investment agreements;

(c) Improving the regulation and monitoring of global financial markets and institutions, and strengthening the implementation of such regulations;

(d) Ensuring enhanced representation and voice for developing countries, including least developed countries, in decision-making in all international economic and financial institutions, in order to deliver more effective, credible, accountable and legitimate institutions;

(e) Enhancing capacity-building support to developing countries, including for least developed countries and small island developing States, to increase significantly the availability of high-quality, **[relevant, timely]** and reliable **[disaggregated]** data **by income, gender [sex], age, race, ethnicity, migratory status, disability, geographic location and other characteristics relevant in national contexts;**

(f) Encouraging official development assistance, financial flows and foreign investment, including through but not limited to the implementation of any existing commitments, for States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes;

(g) Enhancing North-South, South-South, triangular and other forms of regional and international cooperation in all spheres, particularly on access to science, technology and innovation, and also enhancing knowledge-sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level and through existing and new mechanisms for global technology facilitation;

(h) Enhancing **[mitigation actions and]** adaptive capacity, strengthening resilience and **[response, and]** reducing vulnerability to[, ] climate change and extreme weather events, addressing the economic, social and environmental impacts of climate change **[taking into account the imperatives of a just transition, equity, and the principles of common but differentiated responsibilities and respective capabilities in the light of national circumstances]**, and enhancing access to international climate finance[, **technology transfer and capacity building**] to support mitigation and adaptation efforts in developing and least developed countries, especially those that are particularly vulnerable to the adverse effects of climate change;

(i) Promoting the development, transfer, dissemination and diffusion of environmentally sound and human rights-compliant technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed;

(j) Eliminating illicit financial flows by combating tax evasion and corruption, reducing opportunities for tax avoidance, enhancing disclosure and transparency in financial **[and property]** transactions in both source and destination countries and strengthening the recovery and return of stolen assets;

**[(k) Eliminating illicit arms flows by all necessary means in accordance with international commitments;]**

~~—(k)~~ **[(l)]** Assisting developing and least developed countries in attaining long-term debt sustainability through coordinated policies aimed at fostering debt financing, debt relief

and debt restructuring, as appropriate, and addressing the external debt of highly indebted poor countries to reduce debt distress;

—~~(4)~~ **[m]** Facilitating safe, orderly and regular migration and mobility of people, including through the implementation of planned and well managed rights-based migration policies[, **and the adoption of legislative and other measures to prevent and combat trafficking in persons, smuggling of migrants, and crimes against migrants**].

## Article 14

### Coercive measures

1. The use or encouragement of the use of economic or political measures, or any other type of measure, to coerce a State in order to obtain from it the subordination of the exercise of its sovereign rights in violation of the principles of the sovereign equality of States, the freedom of consent of States or applicable international law constitutes a violation of the right to development.

2. States Parties shall refrain from adopting, maintaining or implementing the measures referred to in paragraph 1.

## Article 15

### Specific and remedial measures

1. States Parties recognize that certain ~~human persons [individuals]~~, groups and peoples, owing to their marginalization or vulnerability because of race, colour, sex, language, religion, political or other opinion, ~~nationality, statelessness~~, national, ethnic or social origin, property, disability, birth, age or other status, ~~including as human rights defenders~~, may need specific and remedial measures to accelerate or achieve de facto equality in their enjoyment of the right to development. Specific and remedial measures ~~can~~ **[may]** include, ~~among others~~, enabling the full, effective, appropriate and dignified participation of such ~~human persons [individuals]~~, groups and peoples in decision-making processes, programmes and policymaking that affect their full and equal enjoyment of the right to development, without subjecting them to structural, environmental or institutional constraints or barriers.

2. States Parties recognize that developing and least developed countries, owing to historical injustices, conflicts, environmental hazards, climate change or other disadvantages including of an economic, technical or infrastructural nature, may require specific and remedial measures through mutually agreed international legal instruments, policies, and practices for ensuring equal realization of the right to development by all ~~human persons [individuals]~~ and peoples. Such measures may, as appropriate, include:

- (a) Recognition of common but differentiated responsibilities **[and respective capabilities]**, taking into account different national circumstances;
- (b) The provision of special and differential treatment;
- (c) Preferential terms on trade, investment and finance;
- (d) The creation of special funds or facilitation mechanisms;
- (e) The facilitation and mobilization of financial, technical, technological, infrastructural, capacity-building or other assistance;
- (f) Other mutually agreed measures consistent with the provisions of the present Convention.

## Article 16 Equality between men and women

1. States Parties, in accordance with their obligations under international law, shall ensure ~~full~~ **[substantive]** equality ~~for all~~ **[between]** women and men, and shall adopt measures, including through **[legislation and]** temporary special measures as and when appropriate, to end all forms of discrimination against **all** women and girls ~~everywhere~~ so as to ensure their full and equal enjoyment of the right to development.
2. To that end, States Parties shall adopt appropriate measures, individually and jointly, inter alia:
  - (a) To prevent and eliminate all forms of violence and harmful practices against **all** women and girls in the public and private spheres online and offline, including trafficking **[in persons]** and **[all forms of]** sexual and other types of exploitation;
  - (b) To ensure women's full, equal, effective and meaningful participation and equal opportunities for leadership at all levels in the conceptualization, decision-making, implementation, monitoring and evaluation of policies and programmes in political, economic, **[social,]** cultural and public life, and within legal persons;
  - (c) To adopt and strengthen policies and enforceable legislation for the promotion of equality of opportunities and the empowerment of ~~all~~ women and girls at all levels;
  - (d) To incorporate and mainstream **[a]** gender perspectives into the formulation, adoption, and implementation of all national laws, policies and practices and international legal instruments, policies, and practices;
  - (e) To ensure equal and equitable access to, and control over, the resources necessary for the full realization of the right to development by women and girls ~~everywhere~~;
  - (f) To ensure equal and equitable access to quality education and services necessary for the full realization of the right to development by women and girls ~~everywhere~~;
  - (g) To realize the women, **[and]** peace and security agenda and ensure the full, effective and meaningful participation of women in the prevention and resolution of armed conflicts and in peacebuilding for the maintenance and promotion of peace and security at all levels.

## Article 17 Indigenous Peoples

1. Indigenous Peoples have the right to freely pursue their development in all spheres, in accordance with their own needs and interests. They have the right to determine and develop priorities and strategies for exercising their right to development.
2. In accordance with international law, States Parties shall consult and cooperate in good faith with the Indigenous ~~and tribal~~ Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
3. States Parties shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

## **Article 18**

### **[Measures to] P[re]vention and ~~suppression of [combat]~~ corruption**

States Parties recognize that corruption presents a serious obstacle to the realization of the right to development. To this end, States Parties shall, **[in accordance with international law,]** individually and jointly:

- (a) Promote and strengthen measures to prevent and combat corruption;
- (b) Promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) Promote integrity, accountability and **[the]** proper management of public affairs and public property;
- ~~(d) Ensure financial integrity and transparency in international financial architecture, taxation, and transactions.~~

## **Article 19**

### **Prohibition of limitations on the enjoyment of the right to development**

States Parties recognize that the enjoyment of the right to development may not be subject to any limitations except insofar as they may result directly from the exercise of the limitations on other human rights applied in accordance with international law.

## **Article 20**

### **Impact assessments**

1. States Parties undertake to take appropriate steps, individually and jointly, including within international organizations, to establish legal frameworks for conducting prior and ongoing assessments of actual and potential risks and impacts of their national laws, policies and practices, and international legal instruments, policies and practices, and of the conduct of legal persons that they are in a position to regulate to ensure compliance with the provisions of the present Convention.
2. States Parties shall take into account any further guidelines, best practices or recommendations that the Conference of States Parties may provide with respect to impact assessments.

## **Article 21**

### **Statistics and data collection**

1. States Parties undertake to collect appropriate information, including statistical and research data ~~from official and other sources~~, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:
  - (a) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for privacy online and offline;
  - (b) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.
2. The information collected in accordance with the present article shall be disaggregated, as appropriate, and used by the State Party to assess the implementation of its obligations under the present Convention and to identify and address the obstacles to the full realization of the right to development.
3. States Parties shall assume responsibility for the dissemination of these statistics in a manner consistent with the objective of fully realizing the right to development for all.

## **Article 22**

### **International peace and security**

1. States Parties reaffirm their existing obligations under international law to promote the establishment, maintenance and strengthening of international peace and security in consonance with the principles and obligations contained in the Charter of the United Nations, including the peaceful settlement of disputes.
2. To that end, in accordance with international law, States Parties undertake to pursue collective measures with the objective of achieving general and complete disarmament under strict and effective international control so that the world's human, ecological, economic, and technological resources can be used for the full realization of the right to development for all.
3. States Parties undertake to promote peace and inclusive societies within their territories for the full realization of the right to development for all.

## **Article 23**

### **Sustainable development**

States Parties, individually and jointly, undertake to ensure that:

- (a) Laws, policies and practices relating to development at the national and international levels are aimed at and contribute to the realization of sustainable development, **[in a manner]** consistent with ~~the Parties~~<sup>2</sup> **[their]** obligations under international ~~environmental law, climate change law, and human rights law;~~
- (b) Their decisions and actions do not compromise the ability of present and future generations to realize their right to development;
- (c) The formulation, adoption and implementation of all such laws, policies and practices aimed at realizing sustainable development are made fully consistent with the provisions of the present Convention and other obligations for realizing sustainable development in international law.

## **Article 24**

### **Harmonious interpretation**

1. Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention. To that end, **[States Parties reaffirm that]** the United Nations and its specialized agencies are under an obligation to promote the right to development.
2. The provisions of the present Convention shall not affect the rights and obligations of any State Party deriving from any existing international law, except where the exercise of those rights and the discharge of those obligations would contravene the object and purpose of the present Convention. The present paragraph is not intended to create a hierarchy between the present Convention and other international law.

## **Part IV**

### **Article 25**

#### **Conference of States Parties**

1. A Conference of States Parties is hereby established.
2. The Conference of States Parties shall keep under regular review the effective implementation of the Convention and any related legal instruments that the Conference of

States Parties may in **[the]** future adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention. To that end, the Conference of States Parties shall:

(a) Periodically examine reports by States Parties on the implementation of their obligations under the Convention and the obstacles that they face in the realization of the right to development, in **[the]** light of the object and purpose of the Convention. In this regard, the Conference of States Parties may refer such reports to the implementation mechanism contemplated under article 27 of the present Convention;

(b) Promote and facilitate the open exchange of information on measures adopted by States Parties to address the realization of the right to development, taking into account the differing circumstances, responsibilities and capabilities of States Parties and their respective obligations under the Convention;

(c) Promote, develop and periodically refine, in accordance with the provisions of the present Convention, the methodologies and best practices for States Parties to assess the status of the realization of the right to development;

(d) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and governmental and non-governmental bodies;

(e) Consider and adopt regular reports on the status of implementation of the Convention, and ensure their publication;

(f) Make recommendations on any matters relevant to the implementation of the Convention, and ensure their publication;

(g) Exercise such other functions **[within the scope of the Convention]** as are required for the achievement of the object and purpose, as well as the aims, of the Convention.

3. The first session of the Conference of States Parties shall be convened by the Secretary-General of the United Nations no later than six months after the entry into force of the present Convention. At its first session, the Conference of States Parties shall adopt its own rules of procedure, which shall include decision-making for matters **[within the scope of its mandate that are]** not already stated in the Convention.

4. The Conference of States Parties shall meet in public sessions, except as otherwise determined by it, in accordance with its rules of procedure.

5. All States not party to the present Convention, specialized agencies, funds and programmes of the United Nations system, other international organizations, United Nations human rights mechanisms, regional human rights bodies, national human rights institutions and non-governmental organizations with consultative status with the Economic and Social Council may participate as observers in the public sessions of the Conference of States Parties. The Conference of States Parties may, in accordance with its rules of procedure, consider requests from, or may invite, other stakeholders to participate as observers.

6. The Conference of States Parties shall be held annually ~~as part of the sessions on the Working Group on the Right to Development.~~

7. Special sessions of the Conference of States Parties shall be held at such other times as it may deem necessary, or ~~upon~~ **[at]** the request of any State Party, in accordance with its rules of procedure.

8. The Conference of States Parties shall transmit its reports to the General Assembly, **[and]** the Economic and Social Council, ~~the Human Rights Council, the Working Group on the Right to Development and the high-level political forum on sustainable development.~~

## Article 26 Protocols to the Convention

1. The Conference of States Parties may adopt protocols to the present Convention.

2. The text of any proposed protocol shall be communicated to States Parties at least six months before consideration.
3. The requirements for entry into force shall be established by that instrument.
4. Decisions under any protocol shall be taken only by the States Parties to the protocol concerned.

## **Article 27**

### **Establishment of an implementation mechanism**

1. At its first session, the Conference of States Parties shall establish an implementation mechanism to facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance with the provisions of the present Convention.
2. The implementation mechanism shall consist of independent experts, consideration being given to, inter alia, gender balance and equitable geographic representation as well as to an appropriate representation of different legal systems. **[Experts shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention.]**
3. The implementation mechanism shall:
  - (a) Adopt general comments or recommendations to assist in the interpretation or implementation of the provisions of the **[present]** Convention;
  - (b) Review obstacles to the implementation of the Convention at the request of the Conference of States Parties;
  - (c) Review requests by rights holders to comment on situations in which their right to development has been adversely affected by the failure of States to comply with their duty to cooperate, as reaffirmed and recognized under the **present** Convention;
  - (d) Undertake any other functions **[within the scope of the Convention]** that may be vested by the Conference of States Parties.
4. The Conference of States Parties shall adopt rules of procedure for the operation of the implementation mechanism.

## **Part V**

## **Article 28**

### **Signature**

The present Convention shall be open for signature by all States and international organizations at United Nations Headquarters in New York as of \_\_\_\_\_.

## **Article 29**

### **Consent to be bound**

1. The present Convention shall be subject to ratification, approval or acceptance by signatory States.
2. Notwithstanding the obligations of international organizations existing under international law and the present Convention, the consent of signatory international organizations to be bound by the present Convention shall be expressed through an act of formal confirmation.
3. The present Convention shall be open for accession by any State or international organization that has not signed the Convention.

## Article 30

### International organizations

1. International organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.
2. References to “States Parties” in the present Convention shall apply to such organizations within the limits of their competence.
3. For the purposes of article ~~30~~ **[31]**, paragraph 1, and article ~~31~~ **[33]**, paragraphs 2 and 3, any instrument deposited by an international organization shall not be counted.
4. International organizations, ~~in matters within their competence,~~ may **[not]** exercise ~~their [a] right to vote in the Conference of States Parties [or for the purposes of article 33, paragraph 1], with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization may not exercise its right to vote if any of its member States exercises its right, and vice versa.~~

## Article 31

### Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.
2. For each State or international organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

## Article 32

### Reservations

1. ~~Reservations incompatible with the object and purpose of the present Convention shall not be permitted. [Reservations may be withdrawn at any time.]~~
2. ~~Reservations may be withdrawn at any time. [Reservations incompatible with the object and purpose of the present Convention shall not be permitted.]~~

## Article 33

### Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months of the date of such communication, at least one third of States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of States Parties present and voting shall be submitted by the Secretary-General to the General Assembly for approval and thereafter to all States Parties for acceptance.
2. An amendment adopted and approved in accordance with paragraph 1 of the present article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties that have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of the present article that relates exclusively to articles 25, 26 and 27 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

### **Article 34**

#### **Denunciation**

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

### **Article 35**

#### **Dispute settlement between States Parties**

Any dispute between two or more States Parties with respect to the interpretation or application of the present Convention that has not been settled by negotiation may, upon agreement by the parties to the dispute, be referred to the International Court of Justice for a decision [, **unless another mode of dispute settlement is agreed upon by them**].

### **Article 36**

#### **Accessible format**

The text of the present Convention shall be made available in accessible formats.

### **Article 37**

#### **Depositary**

The Secretary-General of the United Nations shall be the depositary of the present Convention.

### **Article 38**

#### **Authentic texts**

1. The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

2. **In witness thereof, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.**

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