



General Assembly

Distr: General
20 January 2020

English only

Human Rights Council
Working Group on the Right to Development
Twenty-first session
4–8 May 2020
Item 4 of the provisional agenda
**Review of progress made in the promotion and
implementation of the right to development**

Draft Convention on the Right to Development, with commentaries*

Chair-Rapporteur: Zamir Akram (Pakistan)

* The present document is being issued without formal editing.

GE.20-00793(E)



* 2 0 0 0 7 9 3 *

Please recycle



Introduction

1. The following text contains the draft convention on the right to development with commentaries, prepared by Mihir Kanade, on behalf of the Drafting Group referred to in the introduction of A/HRC/WG.2/21/2.

2. The 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*.

3. The content as well as structure of the 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”,¹ 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.

4. At the same time, the draft convention does not compartmentalize itself into strict models of treaty styles.² 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 States Parties.³ 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 States Parties to permit future development as needed. There are no benchmarks or quantifiable targets pertaining to development that are incorporated in the draft convention.

5. The draft convention also builds on the United Nations Declaration on the Right to Development, 1986 (DRTD).⁴ Every attempt has been made to adhere strictly 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 definition of “development” is provided in the substantive

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

² 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.

³ 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.

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

provisions. However, the process of development and its attributes have been described in the preamble in a similar fashion as the DRTD.

6. The scheme of the 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.⁵ 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.⁶ At the same time, the draft convention also adopts the contemporary three-pronged typology of obligations on States to respect, protect and fulfil human rights. In addition, the draft convention reaffirms existing obligations of international organizations and legal persons under international law.

7. The 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, special or remedial measures, gender equality, the contexts of indigenous and tribal peoples, 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 the draft convention by establishing two treaty bodies viz. the Conference of States Parties and a subsidiary Implementation Mechanism comprising experts. Part V contains the final provisions.

8. 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 Working Group on the Right to Development (hereinafter, WG-RTD), established by the erstwhile Commission on Human Rights in 1998 which continues to play an indispensable role in the promotion of the right to development under the auspices of the Human Rights Council.⁷ It also takes into account the recent 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

⁵ A/HRC/15/WG.2/TF/2/Add.2 and Corr.1

⁶ Ibid, annex, paragraph 1.

⁷ 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>

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”.⁸ 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.

9. Both the Conference of 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.

10. 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.

11. 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 strongly 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”.⁹ 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.¹⁰

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

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

¹⁰ See commentary to draft preambular paragraph seventeen.

Draft Convention on the Right to Development, with commentaries

Preamble

The States Parties to the present Convention,

Commentary

1. 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”.¹¹ The long evolutive trajectory of the right to development finally leading up to this draft convention has indeed witnessed all these stages that 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.¹² 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.

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

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

Commentary

1. The first paragraph of the draft preamble sets into motion the motivations for the convention by acknowledging 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”.¹³

2. “Common concern of humankind”, as a norm distinct from the notion of “common heritage of mankind”,¹⁴ is firmly established in international law,¹⁵ and in particular,

¹¹ 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.

¹² 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.

¹³ Koen de Feyter, *Towards a Framework Convention on the Right to Development*, at p.12.

¹⁴ 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.

¹⁵ 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_Concer

environmental law.¹⁶ It is incorporated in the 1992 Convention on Biological Diversity which affirms “that the conservation of biological diversity is a common concern of humankind”.¹⁷ It is also prominently referenced with relation to climate change in the 1992 United Nations Framework Convention on Climate Change,¹⁸ as well as the 2015 Paris Agreement on Climate Change.¹⁹ Several scholars have noted that human rights generally,²⁰ as well as specifically,²¹ 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,²² 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”.²³ Depicting an issue or goal as a common concern implies an agreement to recognize the very existence of a shared problem and a shared responsibility.²⁴ It thus serves as a justification for collective global action through international cooperation.²⁵ 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”.²⁶ 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.²⁷ 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

n.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>

¹⁶ 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 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”.

¹⁷ Preambular paragraph 3.

¹⁸ See preambular paragraph 1 acknowledging that “change in the Earth's climate and its adverse effects are a common concern of humankind”.

¹⁹ See preambular paragraph 11 acknowledging that “climate change is a common concern of humankind”.

²⁰ 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”.

²¹ 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.

²² Friedrich Soltau, “Common Concern of Humankind”, at p.205, 207.

²³ Dinah Shelton, “Common Concern of Humanity”, at p.37.

²⁴ 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.

²⁵ 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.

²⁶ Dinah Shelton, “Common Concern of Humanity”, at p.41.

²⁷ 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.

provisions to follow. They also incorporate duties for legal persons, including international organizations, while maintaining a strong balance with national sovereignty.

Concerned at the existence of serious obstacles to the realization of the right to development constituted, inter alia, by poverty, inequality within and across countries, climate change, colonization, neo-colonization, forced displacement, racism, conflicts, aggression and threats against national sovereignty, national unity and territorial integrity, and the denial of other human rights,

Commentary

1. After having acknowledged that realizing the right to development is a common concern of humankind in the previous paragraph, the second 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 and forced displacement.

Emphasizing that the right to development is an inalienable human right of all human persons and peoples, and that equality of opportunity for development is a prerogative both of nations and of individuals who constitute nations,

Commentary

1. The third draft preambular paragraph is almost identical to preambular paragraph 16 of the DRTD, except that “confirming” 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 economic, social, cultural, civil and political process that aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Commentary

1. As indicated in the introduction, like the DRTD, neither the preamble nor the substantive provisions of this draft convention *define* the term “development”. The fourth draft preambular paragraph adopts the structure of the preamble to the DRTD which also only broadly *describes* “development”.²⁸ 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.²⁹ 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”.³⁰ 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.

²⁸ The description of “development” in preambular paragraph 2 of the DRTD is in identical terms.

²⁹ See preambular paragraph (e) of the CRPD.

³⁰ *Ibid.*

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).³¹ The process itself is described as a “comprehensive economic, social, cultural, civil and political process”. The term “civil” is not present in the corresponding paragraph in the DRTD but has been added here to bring it in sync with draft article 4 which elaborates on the right to development. The commentary thereto explains the inclusion of the word “civil”. 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.³² The improvement of the well-being must be of “the entire population and of all individuals”. This comprehensive coverage is not only in sync with the right-holders of the right to development described in draft article 4 viz. every human person and all peoples, but is also a reflection of the “leaving no one behind” principle enshrined in the 2030 Agenda for Sustainable Development.³³ The basis of such constant improvement of the well-being is “their active, free and meaningful participation in development” 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,³⁴ as well as an insistence on equitable development, which reflects the “reaching the furthest behind the first” principle recognized prominently in the 2030 Agenda.³⁵ No particular necessity to tamper 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(e) and 22.

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

³¹ 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.

³² 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.

³³ 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.

³⁴ 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.

³⁵ A/RES/70/1, paragraphs 4 and 74(e).

1. The fifth paragraph of the draft preamble is identical to paragraph 10 of the annual resolution on the right to development adopted by the UNGA in December 2018.³⁶ 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 both the primary end and the principal means of sustainable development, and that the right to development cannot be realized if development is not sustainable,

Commentary

1. Draft preambular paragraph six 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”,³⁷ and has now become the dominant global imperative as incorporated in the 2030 Agenda.

2. Draft preambular paragraph six 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.³⁸ The interplay between the right to development and sustainable development can be explained as follows. The former gives proper shape, colour and texture to the latter by purposely stressing on the right and duty aspects of sustainable development.³⁹ 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 primary end and the principal means of development.⁴⁰ In the same vein, this paragraph recognizes that the realization of the right to development constitutes both the primary end and the principal 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(e) and 22 (especially) 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

1. The seventh paragraph of the draft preamble 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

³⁶ A/RES/73/166.

³⁷ 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.

³⁸ *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.

³⁹ See Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development”.

⁴⁰ Amartya Sen, *Development as Freedom*, at p. 36 and 53.

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.⁴¹

Recognizing that good governance and the rule of law at both the national and international levels is essential for the realization of the right to development, and that such realization is vital for ensuring good governance and the rule of law,

Commentary

1. Draft preambular paragraph eight recognizes the well-established relation between the need for good governance and the rule of law at the national as well as international levels on the one hand and favourable impacts on the realization of the right to development on the other hand.⁴² 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 good governance and the rule of law. 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 and the rule of law at the domestic levels.⁴³

Guided by all the purposes and the 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 or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction of any kind,

Commentary

1. Preambular paragraph nine commences the second 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 nine notes that States Parties, in adopting this convention, are guided by all 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.⁴⁴ 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.

⁴¹ 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”.

⁴² 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

⁴³ 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*.

⁴⁴ 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”.

3. The 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.⁴⁵ This is similar to the approach of paragraph (b) of the preamble to the CRPD.⁴⁶

Recalling the obligation of States under the Charter 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 of any kind,

Commentary

1. Draft preambular paragraph ten 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.⁴⁷ 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”,⁴⁸ which term is described already in draft preambular paragraph four.

Considering that, under the provisions of the Universal Declaration of Human Rights, everyone is entitled to a social and international order in which the rights and freedoms set forth in 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

1. Draft preambular paragraph eleven 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

⁴⁵ See draft article 8 and the commentary thereto.

⁴⁶ 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”.

⁴⁷ 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”.

⁴⁸ 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.

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 human rights treaties, 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

1. Paragraph twelve of the draft preamble, in the same vein as preambular paragraph (d) of the CRPD, then recalls provisions of all the international human rights treaties without specifically listing them all.⁴⁹ 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),⁵⁰ considering its universal endorsement as the focal human rights instrument on the subject, the specific incorporation of the right to development therein,⁵¹ 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 2018.⁵² 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, adopted by the General Assembly on 4 December 1986,

Commentary

1. Draft Preambular paragraph thirteen then 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 of 1992, the Vienna Declaration and Programme of Action of 1993, the Cairo Programme of Action of the International Conference on Population and Development of 1994, the Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development of 1995, the Beijing Declaration and Platform for Action of 1995, the United Nations Millennium Declaration of 2000, the Monterrey Consensus of the International Conference on Financing for Development of 2002, the World Summit Outcome of 2005, the United Nations Declaration on the Rights of Indigenous Peoples of 2007, the outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals of 2010, the 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 of 2012, the outcome document of the United Nations Conference on Sustainable Development “The future we want” of 2012, the quadrennial comprehensive policy review of operational activities for development of the United Nations system of 2012, the SIDS Accelerated Modalities of Action (SAMOA) Pathway of 2014, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development of 2015, ‘the 2030 Agenda for Sustainable Development and the Sustainable Development Goals of 2015, the Paris Agreement on Climate Change of 2015, the Sendai Framework for Disaster Risk Reduction 2015–2030 of 2015 and the New Urban Agenda, adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), of 2016,

⁴⁹ See also first preambular paragraph of the ICMW.

⁵⁰ United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007.

⁵¹ *Ibid.*, preambular paragraph 6 and article 23.

⁵² A/RES/73/165

Commentary

1. Draft preambular paragraph fourteen then moves to the other important 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, adopted by the General Assembly on 8 September 2000,

Commentary

1. Paragraph fifteen of the draft preamble then specifically makes a note of the Millennium Declaration of 2000 from which emanated the Millennium Development Goals (MDGs). One of the stated objectives of this Declaration was “making the right to development a reality for everyone”.⁵³ The MDGs, of course, have been replaced by the SDGs incorporated in the current 2030 Agenda, which in turn states that this agenda is grounded in the Millennium Declaration.⁵⁴ The draft paragraph is identical to paragraph 6 of the annual resolution on the right to development adopted by the UNGA in December 2018.⁵⁵

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

1. Paragraph sixteen of the draft preamble recalls all the resolutions adopted specifically on the right to development annually by the UNGA, 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.⁵⁶

Recalling also , in particular, resolution 48/141 of 7 January 1994 adopted by the General Assembly, 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, resolution 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 resolution 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, civil, political, economic, social and cultural rights, including the right to development,

Commentary

1. Draft preambular paragraph seventeen specifically highlights three landmark resolutions adopted by the UNGA that have played pivotal roles in the evolution of the

⁵³ A/RES/55/2, paragraph 11.

⁵⁴ A/RES/70/1, paragraph 10.

⁵⁵ A/RES/73/166

⁵⁶ See draft preambular paragraph fourteen.

right to development. The first is UNGA 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.⁵⁷ The existence of the right to development section in the OHCHR is the direct result of this mandate. The second is UNGA Resolution 52/136 of 12 December 1997 affirming that the inclusion of the DRTD in the International Bill of Human Rights would be an appropriate means of celebrating the fiftieth anniversary of the Universal Declaration of Human Rights.⁵⁸ Although not entirely unanimous,⁵⁹ 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.⁶⁰

Bearing in mind 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 of 1981, the Arab Charter on Human Rights of 2004, the Human Rights Declaration of the Association of Southeast Asian Nations of 2012, and 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,

Commentary

1. Paragraph eighteen of the draft preamble then 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 1981,⁶¹ the Arab Charter on Human Rights of 2004,⁶² and the ASEAN Human Rights Declaration of 2012.⁶³ 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.⁶⁴

2. In addition to the instruments, the words "subsequent practices relating 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.⁶⁵

Bearing in mind also the obligations of States pertaining to integral development in the Charter of the Organization of American States of 1948, and to progressive development in the Inter-American Convention on Human Rights of 1969,

Commentary

1. In continuation of reference to the regional systems, paragraph nineteen of the draft preamble singles out the Inter-American system of human rights for mention. An

⁵⁷ A/RES/48/141, paragraph 4(c). See also preambular paragraphs 3 and 4, as well as paragraph 3(c) in the operative part.

⁵⁸ A/RES/52/136, paragraph 17.

⁵⁹ 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>

⁶⁰ A/RES/60/251, paragraph 4.

⁶¹ Article 22

⁶² Article 37

⁶³ Articles 35-37

⁶⁴ 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>

⁶⁵ Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155: 331-52, article 31(3)(b).

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”.⁶⁶ Similarly, the Inter-American Convention on Human Rights of 1969 incorporates obligations pertaining to “progressive development”.⁶⁷ The draft preambular paragraph has been drafted in a plain manner as only “bearing in mind” these “obligations of States” (rather than framing it in the language of rights) pertaining to “integral development” and “progressive development”.

Considering 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 its three dimensions, namely, economic, social and environmental, in a balanced and integrated manner and in harmony with nature,

Commentary

1. Draft preambular paragraph twenty 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.⁶⁸ In addition, sustainable development must also be achieved in “harmony with nature”.⁶⁹ 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.⁷⁰ 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(e) and 22.

Recognizing that the human person 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

1. Draft preambular paragraphs twenty-one until twenty-six reflect the third part of the preamble corresponding to the objectives that are sought to be achieved through the convention. Paragraphs twenty-one and twenty-two 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. This draft paragraph is identical to 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 human person and peoples. The explanation for the inclusion of “peoples” is elaborated in the commentary to draft article 3(a).

Recognizing also that all human persons and peoples are entitled to a national and global environment conducive to just, equitable, participatory and human-centred development, respectful of all human rights,

Commentary

⁶⁶ Chapter VII entitled “integral development”, including its articles 30 to 52, resonate almost entirely with the right to development and this draft convention.

⁶⁷ Article 26

⁶⁸ A/RES/S-19/2. See also the preamble and paragraph 2 of the 2030 Agenda, A/RES/70/1.

⁶⁹ 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/>

⁷⁰ A/RES/66/288, paragraphs 8, 9.

1. Draft preambular paragraph twenty-two 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.⁷¹ 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.

Bearing in mind that States have the primary responsibility, through cooperation, for the creation of national and international conditions favourable to the realization of the right to development,

Commentary

1. After having focused on the right-holders and their entitlement in the previous two paragraphs, draft preambular paragraphs twenty-three and twenty-four now turn to States as the duty-bearers. Thus, while the previous paragraph recognized that all human persons and peoples are entitled to a national as well as international enabling environment for the realization of the right to development, this paragraph, “bears in mind” 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.⁷²

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

Commentary

1. Paragraph twenty-four of the draft preamble is a recognition of the principle in existing international law that everyone – whether a State or an international organization or some 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.⁷³ 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,

Commentary

1. After having elaborately laid down the history, evolution, and context for the draft convention in the previous paragraphs, draft preambular paragraphs twenty-five and twenty-six 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.⁷⁴

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,

⁷¹ A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, paragraph 18 and annex, paragraph 1.

⁷² Also see article 10 of the DRTD.

⁷³ A/RES/53/144 of 9 December 1998.

⁷⁴ 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.

Commentary

1. Draft preambular paragraph twenty-six 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 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:

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 and all peoples everywhere, and to guarantee its effective operationalization and full implementation at the national and international levels.

Commentary

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*”.⁷⁵ This requirement to take into account the object and purpose of a treaty reflects the teleological or functional approach to interpretation,⁷⁶ signifying that the terms of a treaty are to be interpreted in a way that advances the latter’s aims.⁷⁷ 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”.⁷⁸

2. The object and purpose of a treaty may be determined in various ways, most prominently, by resorting to its preamble,⁷⁹ and in some cases, also to its title.⁸⁰ Although rare, few treaties do explicitly and separately articulate their purpose as part of the substantive provisions.⁸¹ 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 bring it in sync with the language of VCLT. It may be stressed that entitling the draft provision in this fashion does not necessarily exclude consideration of other means of

⁷⁵ Article 31.

⁷⁶ M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff Publishers, 2009, at p.427.

⁷⁷ O. Dörr, *Vienna Convention on the Law of Treaties*, Oliver Dörr and Kirsten Schmalenbach (eds.), Berlin, Springer, 2018, at p.584.

⁷⁸ See also: *Reservations to the Convention on Genocide, Advisory Opinion*, I.C.J. Reports 1951, p.15, at p.24.

⁷⁹ 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.

⁸⁰ 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.

⁸¹ 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.

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,⁸² also serves to indicate the overall context within which the treaty is being established.⁸³ 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 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”.⁸⁴ 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,⁸⁵ – 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.⁸⁶ The UNGA has also time and again called for operationalizing the right to development at the national and international levels.⁸⁷ 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.⁸⁸

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 human person 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

⁸² Makane Moïse Mbengue, “The Notion of Preamble”.

⁸³ 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”.

⁸⁴ 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.

⁸⁵ *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.

⁸⁶ 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.

⁸⁷ A/RES/55/2, paragraph 11; A/RES/73/166, paragraphs 2, 10(c) and (d).

⁸⁸ 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.

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.⁸⁹

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.⁹⁰ Both these conventions focus on specific categories 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,⁹¹ as well as in paragraph four of the draft preamble.

6. The terms “by every human person 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 to 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 paragraph twenty-five 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. “National and international levels” follows the essence of paragraphs twenty-two, twenty-three and twenty-four of the preamble, and more specifically, the language of article 10 of the DRTD.⁹² 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.

⁸⁹ 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.

⁹⁰ Article 2(2).

⁹¹ Preambular paragraph 2 and article 2(3)

⁹² 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”.

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 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.

Commentary

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”.⁹³ International law typically distinguishes between two categories of “person” – “natural person” and “legal person”.⁹⁴ “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.⁹⁵ Such is also the case with the DRTD.⁹⁶ The term “legal person” thus generally has a non-human connotation.

3. Although, unlike the “human 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.⁹⁷ 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.

⁹³ 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.

⁹⁴ *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.

⁹⁵ 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.

⁹⁶ Preambular paragraph 13, articles 1(1) and 2(1).

⁹⁷ See commentary to draft article 7.

The term “entity” is used to signify in the most neutral manner “something that exists separately from other things and has its own identity”.⁹⁸ 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 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,⁹⁹ and as such, qualify as “legal persons”.¹⁰⁰ Corporations are the most well-known legal persons incorporated under municipal or domestic law, and international law has long recognized this status.¹⁰¹ 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 human person, a people, or a State”. The exclusion of “human 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.¹⁰² 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, human 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.¹⁰³ 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”.¹⁰⁴ The ILC then proceeds to discuss their shortcomings and adopts its

⁹⁸ See the entry for “entity” in the Oxford Learner’s Dictionary, online version, available at <https://www.oxfordlearnersdictionaries.com/definition/english/entity?q=entity>

⁹⁹ *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949: 174, at pp.178-179.

¹⁰⁰ 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”).

¹⁰¹ 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)*.

¹⁰² *Ibid*, *Draft Articles on Diplomatic Protection*, articles 1 and 13, and commentaries thereto.

¹⁰³ For instance, see draft articles 8 (b), (c) and (d), and 20(2).

¹⁰⁴ ILC, Commentaries to article 2(a) of DARIO, paragraph 3.

own definition.¹⁰⁵ Secondly, definitions of “international organization” appear to be limited to the respective instruments where they are incorporated and may not be applicable to others.¹⁰⁶ 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”.¹⁰⁷ Thirdly, it is indispensable to incorporate a definition in this draft convention because it permits international organizations to become parties.¹⁰⁸ 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.

8. Paragraphs (c) and (d) of draft article 2 define two specific entities established by States at the United Nations viz. the Working Group on the Right to Development and the High-Level Political Forum on Sustainable Development. Both entities are referenced in draft article 24.

Article 3 – General principles

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

(a) Human person and people-centred development: the human person and people are the central subjects of development and should 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 accountability, empowerment, participation, non-discrimination, equality and equity;

(c) Human rights-based approach to development: development is a human right and should be realized as such and in a manner consistent with and based on all other human rights;

(d) Self-determined development: the right to development and the right to self-determination are integral to each other and mutually reinforcing;

(e) Sustainable development: development cannot be sustainable if its realization undermines the right to development, and the right to development cannot be realized if development is unsustainable;

(f) The right to regulate: the 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;

(g) International solidarity: the realization of the right to development requires an enabling national and international environment created through a spirit of unity among individuals, peoples, States and international organizations, encompassing the union of interests, purposes and actions and the recognition of

¹⁰⁵ Ibid.

¹⁰⁶ Ibid, paragraph 3.

¹⁰⁷ Ibid, paragraph 1.

¹⁰⁸ See draft articles 28 and 29 and the commentaries thereto.

different needs and rights to achieve common goals; this principle includes the duty to cooperate;

(h) Universal duty to respect human rights: everyone has the duty to respect human rights, including the right to development;

(i) Right and responsibility of individuals, groups and organs of society to promote and protect human rights: 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, 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

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,¹⁰⁹ and substantive provisions.¹¹⁰ 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.

2. There are examples of “general principles” being incorporated in both framework conventions,¹¹¹ and standard conventions.¹¹² 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.¹¹³ 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

¹⁰⁹ 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.

¹¹⁰ 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.

¹¹¹ 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.

¹¹² 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.

¹¹³ 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”.

purpose of the convention as stipulated in its article 1 and in implementing the other provisions thereof.¹¹⁴

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 object and purpose of the present Convention and to implement its provisions, the Parties shall be guided by, inter alia, 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.

5. Paragraph (a) of draft article 3 is titled “Human person and people-centred development”. The description states that “the human person and people are the central subjects of development and should 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 is mentioned as the central subject of development while the term “people” 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 people.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ Paragraph (a) therefore incorporates both human person and people-centred development as the principle which should guide implementation.

¹¹⁴ 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.

¹¹⁵ Article 1(1) of DRTD.

¹¹⁶ See, UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples*, Paris, 1989, SHS.89/CONF.602 /7.

¹¹⁷ 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.

¹¹⁸ 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

6. Paragraph (b) is titled “Universal 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 lists these principles as accountability, empowerment, participation, non-discrimination, equality, and equity. There is ample documentation on the content of each of these principles and they do not require further elaboration in draft article 3.¹¹⁹ It may be noted that although draft article 3 does not explicitly mention the principles of “leaving no one behind”¹²⁰ and “reaching the furthest behind the first”¹²¹ incorporated in the 2030 Agenda, they are inherent to each of these principles, particularly to the principles of non-discrimination, equality and equity. 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.

7. The principle in paragraph (c) is entitled “Human rights-based approach to development”. Human Rights Based Approach to Development (HRBA) – sometimes also referred to as “rights-based development” – is the principal normative framework adopted by the United Nations system, governments, development aid agencies and NGOs the world over 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.¹²² This paragraph highlights that laws, policies and practices related to development must incorporate a human rights-based approach founded on the fundamental principle that “development is a human right and should be realized as such and, in a manner, compatible with all other human rights”.¹²³ The two elements of this principle – that development is a human right and that its realization must be compatible with all other human rights – are central as a guide for the implementation of almost every obligation contained in the draft convention, including those related to conducting impact assessments and implementation of development agendas.¹²⁴ Any approach to development incompatible with this principle is simply not human rights-based.

8. Paragraph (d) 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

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

¹¹⁹ 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; 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>

¹²⁰ A/RES/70/1, paragraphs 4, 48 and 72

¹²¹ Ibid, paragraphs 4 and 74(e)

¹²² 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.

¹²³ For a discussion on HRBA to Development that is founded on the right to development in the context of the SDGs, see: Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development”.

¹²⁴ 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>

recognition in the Charter of the United Nations.¹²⁵ 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. The description in this paragraph states that “the right to development and the right to self-determination 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, 14 and 12(2).

9. Paragraph (e) underscores the importance of the principle of sustainable development in the implementation of obligations under the draft convention. The principle is explained in simple, straight-forward and uncontroversial terms: “development cannot be sustainable if its realization undermines the right to development and the right to development cannot be realized if development is unsustainable”. The symbiotic relationship between sustainable development and the right to development has been noted in paragraphs six and twenty of the preamble to the draft convention as well as in draft article 22.

10. Paragraph (f) 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”,¹²⁶ or “governance space”,¹²⁷ to realize sustainable development. It is inherent to State sovereignty and is guaranteed under customary international law.¹²⁸ International trade law has long incorporated this principle, albeit not explicitly by that name and perhaps not entirely adequately,¹²⁹ by permitting States to take certain measures that would otherwise violate their free trade obligations if such regulation is necessary to protect public morals,¹³⁰ necessary to protect human, animal or plant life or health,¹³¹ or relates to the

¹²⁵ Article 1(2)

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ 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.

¹²⁹ 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.

¹³⁰ 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

conservation of exhaustible natural resources.¹³² 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.¹³³ 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.¹³⁴ 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 that may, on balance, undermine the exercise of this right in favour of lopsided protections to foreign investments and investors.

11. Paragraph (g) incorporates “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. 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

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.

¹³¹ Article XX(b) of GATT 1947 and Article XIV(b) of GATS.

¹³² Article XX(g) of GATT 1947.

¹³³ 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;

¹³⁴ 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”.

topic.¹³⁵ 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 2017.¹³⁶ 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”.¹³⁷ The draft declaration notes that international solidarity consists of preventive solidarity, reactive solidarity and international cooperation.¹³⁸ It further recognizes the right to international solidarity as a human right.¹³⁹ The current independent expert, Mr. Obiora Okafor, has endorsed the draft declaration,¹⁴⁰ and has noted that “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”.¹⁴¹ 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 (f) 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 “realization of the right to development requires an enabling national and international environment created through 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. This principle includes the duty of international cooperation.” 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. International solidarity is to the duty of international cooperation what human dignity is to human rights.

12. Paragraph (h) is titled as “Universal duty to respect human rights” and stipulates that “everyone has the duty to respect human rights, including the right to development”. 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 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 (h) 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.

13. Paragraph (i) 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 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

¹³⁵ E/CN.4/RES/2005/55, adopted on 20 April 2005.

¹³⁶ Annex of report A/HRC/35/35 of the Independent Expert on human rights and international solidarity, Virginia Dandan.

¹³⁷ *Ibid*, article 1

¹³⁸ *Ibid*, article 2

¹³⁹ *Ibid*, article 4

¹⁴⁰ 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 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”.

1998.¹⁴² This Declaration is also commonly known as the UN Declaration on Human Rights Defenders.¹⁴³ 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”.¹⁴⁴ Similarly, the second sentence focuses on the roles and responsibilities as enshrined in article 18(3) of the 1998 Declaration.¹⁴⁵

Part II

Article 4 – The right to development

1. Every human person and all peoples have the inalienable right to development by virtue of which they are entitled to participate in, contribute to and enjoy economic, social, cultural, civil and political development that is consistent with and based on all other human rights and fundamental freedoms.

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

Commentary

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 human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” 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 much 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 human person and all peoples have the inalienable right to development”. The right-holders – “every human person and all peoples” – identified in article 1(1) need no tampering with and the phrase has therefore been retained in draft article 4. 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.¹⁴⁶ This dual framing is

¹⁴¹ Ibid, paragraph 4.

¹⁴² A/RES/53/144 of 9 December 1998.

¹⁴³ For a discussion, see <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

¹⁴⁴ 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”.

¹⁴⁵ 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”.

¹⁴⁶ See OHCHR, *Frequently Asked Questions on the Right to Development*.

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 regional institutions, to ensure that “in no case may a people be deprived of its own means of subsistence”.¹⁴⁷

4. A dominant feature of article 1(1) of the DRTD is its incorporation of what the right to development specifically entitles the right-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. economic, social, cultural, civil and political, 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. As such, paragraph 1 of draft article 4 incorporates the phrase “economic, social, cultural, civil and political development”.

6. The final part of paragraph 1 of draft article 4 is a slight 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.¹⁴⁸ 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

¹⁴⁷ ICCPR, article 1.

¹⁴⁸ 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.

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.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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,¹⁵³ 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.¹⁵⁴ 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 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 consistent with and based on all other human rights and fundamental freedoms". This formulation avoids the meta-right trap. The words "consistent with" highlight that right-holders are entitled to development that does not violate any of their human rights. The words "based on" reflect and reinforce the central importance of the principle of human rights-based approach to development contained in draft article 3(c). 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.

¹⁴⁹ Ibid.

¹⁵⁰ E/CN.4/RES/1998/72, 22 April 1998.

¹⁵¹ Amartya Sen, *Development as Freedom*.

¹⁵² 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.

¹⁵³ 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.

¹⁵⁴ 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.

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 consistent with and based on all other human rights and 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.

10. Paragraph 2 of draft article 4 recognizes the right of every human person 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 four 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.¹⁵⁵

Article 5 – Relationship with the right 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 resources based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.

4. 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.

5. States shall take resolute steps 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, 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.

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.

¹⁵⁵ 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.

Commentary

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 (d) 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.¹⁵⁶ 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 to self-determination”.

2. For the same reason, the text of draft article 5 appropriately 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.

3. 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.

4. Paragraph (3) of draft article 5 is almost identical 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 “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

¹⁵⁶ See commentary to draft article 3(d).

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.

5. Paragraph (4) of draft article 5 stipulates that “The States Parties to the present Convention, including those having responsibility for the administration of Non-Self-Governing, 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”. It corresponds (with elimination of reference to Trust Territories) to the third paragraph of articles 1 of the ICCPR and the ICESCR.

6. Paragraph (5) of draft article 5 corresponds almost *verbatim* to article 5 of the DRTD, with the exception 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.

7. Paragraph (6) incorporates a cardinal principle 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 1970.¹⁵⁷ The 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.¹⁵⁸

Article 6 – Relationship with other human rights

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

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

Commentary

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, 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”.¹⁵⁹ This principle is commonly invoked in the context of relationship between

¹⁵⁷ 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.

¹⁵⁸ 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.

¹⁵⁹ 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.

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 is not novel. Like draft article 6, CRPD articles 10 and 12 also reaffirm existing principles because of their contextual importance.¹⁶⁰

3. 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 “cannot be realized by nullifying or impairing any other human right”. 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”.¹⁶¹ 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”.¹⁶² 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, 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).

4. 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 the all other human rights, that is “the full range of civil, cultural, economic, political and social rights”.

Article 7 – Relationship with the general duty of everyone to respect human rights under international law

Nothing in the present Convention may be interpreted as implying for any human or legal person, people, group or State 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. To that end, States Parties agree 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.

Commentary

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 21st 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

¹⁶⁰ 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”.

¹⁶¹ A/CONF.157/24 (Part I), chap. III, paragraph 10.

¹⁶² See for instance, A/RES/73/166, Para 2 and 10(c)

national and global levels.¹⁶³ 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 human and legal persons under international law have been a subject of debate among scholars.¹⁶⁴ Diverse arguments have been made based on both treaty and customary international law as sources. There appears to be consensus that 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.¹⁶⁵ 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 human 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.¹⁶⁶ Some scholars have interpreted this absence to contend that international law does not restrict human rights duties only to States,¹⁶⁷ while others have noted that not much should be read into the absence considering that the UDHR was meant to be non-binding.¹⁶⁸ 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”.¹⁶⁹ This statement also acknowledges that non-state actors, in this case individuals, have duties to

¹⁶³ 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*.

¹⁶⁴ 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.

¹⁶⁵ Adam McBeth, *Every organ of society*, *ibid.* p.52.

¹⁶⁶ Andrew Clapham, *Human Rights Obligations of Non-State Actors*, at p.34.

¹⁶⁷ Adam McBeth, *Every organ of society*.

¹⁶⁸ John H. Knox, “Horizontal Human Rights Law”, *American Journal of International Law*, Vol 102, No.1, 2008, pp.1-47, at p.30.

¹⁶⁹ ICCPR and ICESCR, fifth preambular paragraph.

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”.¹⁷⁰ 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”.¹⁷¹ 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”.¹⁷² Articles 28 and 29 then incorporate a series of duties on 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”.¹⁷³ In terms of international organizations, there is no doubt that several of them do already contain duties with relation to human rights.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶ 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 human 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 human and legal persons to protect and fulfil human rights can be gathered from these

¹⁷⁰ American Convention on Human Rights, article 30(1). In this respect, also see the American Declaration on the Rights and Duties of Man, 1948.

¹⁷¹ *Ibid*, article 30(2).

¹⁷² African Charter of Human and Peoples’ Rights, article 27(2).

¹⁷³ 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.

¹⁷⁴ 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.

¹⁷⁵ 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.

¹⁷⁶ 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.

instruments.¹⁷⁷ 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”.¹⁷⁸ 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 rights of others.¹⁷⁹ Article 5(1) of the Covenants is derived from article 30 of the UDHR.¹⁸⁰ 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”.¹⁸¹ 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”.¹⁸²

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.¹⁸³

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.¹⁸⁴ 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”.¹⁸⁵ “Abuse of rights” refers “to the harmful exercise of a right by its holder in a manner that is

¹⁷⁷ 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.

¹⁷⁸ See also article 30 of the UDHR and article 18 of the European Convention on Human Rights.

¹⁷⁹ 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.

¹⁸⁰ 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”.

¹⁸¹ 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.

¹⁸² *Ibid.*

¹⁸³ John H. Knox, “Horizontal Human Rights Law”, at p. 31.

¹⁸⁴ 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.

¹⁸⁵ 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”.

manifestly inconsistent with or contrary to the purpose for which such right is granted/designed”.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ If there is no specific right which its right-holder is abusing or intends to abuse, the provision is inapplicable.¹⁸⁹ In other 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”.¹⁹⁰ 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”.¹⁹¹ 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.¹⁹² 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.¹⁹³ 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

¹⁸⁶ *Miroļubovs 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.

¹⁸⁷ *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.

¹⁸⁸ *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.

¹⁸⁹ For extensive jurisprudential analysis of this proposition see, European Court of Human Rights, *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

¹⁹⁰ *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], ECHR Nos. 41340/98 and 3 others, 2003-II, paragraph 99.

¹⁹¹ *German Communist Party (KPD) v. Germany*, no. 250/57, European Commission decision of 20 July 1957.

¹⁹² Manfred Nowak, *UN Covenant on Civil and Political Rights*, at p.115.

¹⁹³ 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.

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.¹⁹⁴

8. The second argument is that even if article 5(1) is not restricted to abuse of rights but to abuse of anything in 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”.¹⁹⁵ 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). 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*,¹⁹⁶ 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”.¹⁹⁷ 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 Convent”.

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”.¹⁹⁸

10. In light of the aforesaid, draft article 7 is entitled “Relationship with the general duty of everyone to respect human rights under international law”. The use of the word “duty” closely follows the language of the UDHR, the two Covenants, the African Charter on Human and Peoples’ Rights and the American Convention on Human Rights.¹⁹⁹ First part

¹⁹⁴ 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.

¹⁹⁵ John H. Knox, “Horizontal Human Rights Law”, at p.31.

¹⁹⁶ CCPR, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981).

¹⁹⁷ *Ibid*, paragraph 12.3.

¹⁹⁸ A/RES/53/144.

¹⁹⁹ The Guiding Principles on Business and HRs endorsed by the Human Rights Council attempt to make a distinction between “duty” and “responsibility” whereby the former is seen as a binding obligation whereas the latter only as a non-legal code of expected conduct. See, the Guiding Principles in annex to report A/HRC/17/31, and the endorsement by the Human Rights Council in its resolution 17/4 of 16 June 2011. The distinction between “duty” and “responsibility”, as can be seen from the language of provisions considered here, is not backed by legal instruments and has therefore been criticized by scholars. See for instance, Wesley Cragg, “Ethics, enlightened self-interest, and the corporate responsibility to respect human rights: a critical look at the justificatory foundations of the UN framework”, *Business Ethics Quarterly*, Vol. 22, No.1, 2012, pp. 9–36; Surya Deva, “Treating human rights lightly: A critique of the consensus rhetoric and the language employed by the Guiding Principles”, in S. Deva & D. Bilchitz (Eds.), *Human Rights Obligations of Business: Beyond the*

of the draft article is an almost identical replication of article 5(1) of the ICCPR and ICESCR. The only difference is that instead of “person” employed in the latter, paragraph 1 disaggregates it to “human 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 that 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 undertake to respect, protect and fulfil the right to development for all without discrimination of any kind on the basis of race, colour, sex, gender, language, religion, political or other opinion, 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 ensure that public authorities and institutions at all levels act in conformity with the present Convention.

Commentary

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,²⁰⁰ general obligations provisions are also present in the ICCPR,²⁰¹ the ICESCR,²⁰² and the CRC.²⁰³ 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 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

Corporate Responsibility to Respect?, Cambridge, Cambridge University Press, 2013, pp.78-104. Whatever might be the appropriateness of this distinction in the specific context of a non-binding non-legal document such as the Guiding Principles, it is clear that a binding treaty must use language that is rooted in international legal instruments.

²⁰⁰ Article 4

²⁰¹ Article 2(1).

²⁰² Article 2(2).

²⁰³ Article 2(1).

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.²⁰⁴

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”.²⁰⁵ The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of human rights.²⁰⁶ 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.²⁰⁷ Third parties include “individuals, groups, corporations and other entities as well as agents acting under their authority”.²⁰⁸ The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of human rights.²⁰⁹ 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.²¹⁰ 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.²¹¹ 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.²¹² The CESCR has continually thereafter reiterated the basic typology of respect, protect and fulfil.²¹³ 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,²¹⁴ and to fulfil,²¹⁵ including raising levels of awareness about the Covenant among public officials, State agents and the population at large.²¹⁶ 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 discussed by the OHCHR, regional human rights courts and in scholarly publications.²¹⁷ Because international human rights

²⁰⁴ CESCR, *General Comment No. 12: The right to adequate food (Article 11)*, E/C.12/1999/5, 12 May 1999, paragraph 15.

²⁰⁵ CESCR, *General Comment No. 15: The Right to Water (Articles 11 and 12)*, E/C.12/2002/11, 20 January 2003, paragraph 25.

²⁰⁶ *Ibid.*, paragraph 21.

²⁰⁷ *Ibid.*, paragraph 23.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*, paragraph 26.

²¹⁰ *Ibid.*, paragraph 25.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ 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.

²¹⁴ 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.

²¹⁵ *Ibid.*, paragraph 7.

²¹⁶ *Ibid.*

²¹⁷ 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

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.²¹⁸

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.²¹⁹ 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 the present 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, gender, 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.²²⁰ 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 exceptions are "gender" and "age". Both terms are, however, included in the draft article since they are referred to in several other provisions of the CRPD.²²¹ In addition, the CRC recognizes numerous rights of the child in connection with their age, including the right to

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.

²¹⁸ 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; 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.

²¹⁹ 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.

²²⁰ See article 2(1) of CRC and article 4(1) of CRPD.

²²¹ For references to gender, see preambular paragraph (s) and articles 16 and 25 of CRPD. For references to age, see in particular preambular paragraph (p) and articles 7, 8, 13 and 16.

participate in matters and decisions affecting them (which is an essential component of the right to development).²²²

7. Paragraph 2 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 similar to paragraph (d) of the general obligations provision in article 4 of the CRPD.²²³ 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.

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 that State’s or that other international organization’s obligations with regard to the right to development.

Commentary

1. 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 undertake to refrain from conduct, whether expressed through law, policy or practice, that:

(a) Nullifies or impairs the enjoyment and exercise of the right to development within or outside their territories;

(b) 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;

(c) Aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, another State or 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 the State Party 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

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 the present Convention” incorporated in draft article 8. The title and first three paragraphs of draft article 10 follow, in general, part 3 of

²²² For instance, see CRC, articles 9, 23 and 31.

²²³ It stipulates that “to this end, States Parties undertake: [...] (d) [...] to ensure that public authorities and institutions act in conformity with the present Convention”.

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”,²²⁴ whereas Principle 21 is titled “indirect interference”.²²⁵ 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.²²⁶ 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.²²⁷ 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.

3. Paragraph (a) of draft article 10 follows the language of Maastricht Principle 20 but modifies its exclusive context of extraterritoriality to now read – “within or outside their territories”. 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,²²⁸ as well as the commentary to Maastricht Principles 19,²²⁹ 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*

²²⁴ 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.

²²⁵ 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.

²²⁶ See, RSIWA, article 2 as well as commentary thereto.

²²⁷ 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).

²²⁸ 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.

²²⁹ Olivier de Schutter and others, “Commentary to the Maastricht Principles”.

*to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner.*²³⁰

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. To reflect this international law position, 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, that nullifies or impairs the enjoyment and exercise of the right to development within or outside their territories”. 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.

4. 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 to respect.²³¹ There is, thus, strong basis in international law for the incorporation of these words to explain what the prohibition on States relates to.²³² 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.²³³

5. 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.²³⁴ 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.

6. 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)

²³⁰ 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.

²³¹ 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.

²³² 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.

²³³ To avoid any possibility of confusion or misinterpretation, 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.

²³⁴ Olivier de Schutter and others, “Commentary to the Maastricht Principles”.

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

7. 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.²³⁵ 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.*²³⁶

8. 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 (RSIWA),²³⁷ and corresponding provisions in articles 58-60 of DARIO with respect to obligations of States to international organizations.

9. 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

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.

²³⁵ 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”.

²³⁶ CCPR, *General Comment No. 31*, paragraph 2.

²³⁷ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, 2001, vol. II, Part Two.

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.²³⁸ In other words, a State should not be allowed to misuse an international organization to escape responsibility by ‘outsourcing’.²³⁹ One important operative term in this paragraph is “circumvent”. According to the ILC, this implies “the existence of an intention to avoid compliance”.²⁴⁰ 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”.²⁴¹ 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”.²⁴²

Article 11 – Obligation to protect

States Parties shall adopt and enforce all necessary and appropriate measures, including administrative, legislative, investigative, judicial, diplomatic or others, to ensure that human or legal persons, groups or any other State or its agents they are 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 on the territory of the State Party;**
- (b) The human or legal person has the nationality of the State Party;**
- (c) The legal person conducting business activities, including those of a transnational character, is domiciled in the State Party, by virtue of having its place of incorporation, statutory seat, central administration or substantial business interests in that State Party.**

Commentary

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

²³⁸ 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.

²³⁹ 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.

²⁴⁰ DARIO, Commentary to article 61, paragraph 2, at p.99

²⁴¹ Ibid.

²⁴² Ibid, paragraph 7, p.99.

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.²⁴³

2. The words “to ensure that human 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 human and legal persons. The inclusion of the term “groups” follows the wording of article 30 of the UDHR and articles 5(1) of the ICCPR and the ICESCR, 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 or ought to have known about such unlawful activity.²⁴⁴ 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.²⁴⁵ 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 “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.

4. The specific circumstances listed in paragraphs (a) to (c) describe the individual 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), (b), and (c) of Maastricht Principle 25 which lists the bases for protection for States under the ICESCR. Two notable points may immediately be addressed. First, although the Maastricht Principles cover mostly the extraterritorial obligations of States, draft article 11 covers both territorial and extraterritorial obligations. Despite this, as explained below, there is no additional category of circumstances that need to be listed to address territoriality separately. Second, the list mentioned in Maastricht Principle 25 “recall the classic bases *allowing* a State, in compliance with international law, to exercise extra-territorial jurisdiction by seeking to regulate conduct that takes place outside its

²⁴³ 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*.

²⁴⁴ See, *Corfu Channel Case*, I.C.J. Reports 1949: 4. Also see, Olivier de Schutter and others, “Commentary to the Maastricht Principles”, p.36.

²⁴⁵ *Ibid.*

territory”. In other words, these are not bases that *require* a State to exercise extraterritorial jurisdiction, but those that *allow* a State to do so. This is especially the case with paragraph (d) of Maastricht Principle 25 which 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.

5. As explained in the commentary to the Maastricht Principles, its paragraphs (a), (b) and (c), 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 originates from or occurs 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 25.²⁴⁶ As with draft article 10, the term “conduct” includes both acts and omissions. Paragraph (b) of draft article 11 covers circumstances when “the human or legal person has the nationality of the State Party”,²⁴⁷ and does not refer to “groups” in view of their lack of formal legal personality. Paragraph (c) of draft article 11 is based on the analogous provision in paragraph (c) of Maastricht Principle 25 and article 7 of the revised draft of the “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.²⁴⁸ It is unlikely that the aforesaid draft LBI will substantially modify the basic principles of article 7 thereof, and considering that the relevant part of Maastricht Principle 25 is considered overwhelmingly by scholars as an accurate reflection of the bases of jurisdiction with respect to the obligation to protect extraterritorially, only minor modifications, if any, to the language of paragraph (c) of draft article 11 may need to be considered.

6. 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.²⁴⁹ 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 undertakes to take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to their obligations to respect and protect the right to development contained in articles 10 and 11 or to those obligations contained in the present Convention that are of immediate effect. States Parties may take such

²⁴⁶ 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

²⁴⁷ 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.

²⁴⁸ *Ibid.*

²⁴⁹ 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.

measures through any appropriate means, including in particular the adoption of legislative measures.

2. 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.

Commentary

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 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.²⁵⁰

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

²⁵⁰ 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”.

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.²⁵¹

4. For all the aforesaid reasons, draft article 12 stipulates that “Each State Party undertakes to take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to their obligations to respect and protect the right to development contained in articles 10 and 11 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,²⁵² 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 through international assistance and cooperation”.²⁵³ 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.²⁵⁴ 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, including in particular the adoption of legislative measures” is drawn 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.²⁵⁵

6. Paragraph (2) of draft article 12 explains another related dimension of the obligation to fulfil. 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

²⁵¹ 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.

²⁵² *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.

²⁵³ *Ibid*, paragraph 13.

²⁵⁴ For the specific connotation under ICESCR, see *Ibid*, paragraph 9.

²⁵⁵ 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.

the right-holders of the right to development.²⁵⁶ When States are identified in this provision as having 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.²⁵⁷ 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.

7. The undertaking that follows is “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”. 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 within or outside their territories”. 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 that 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.²⁵⁸ 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”.

Article 13 – Duty to cooperate

1. States Parties reaffirm and undertake to 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, environmental or humanitarian character;**
- (b) Promote higher standards of living, full employment, and conditions of economic and social progress and development;**
- (c) Promote solutions of international economic, social, health and related problems, and to promote international cultural and educational cooperation;**

²⁵⁶ 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*.

²⁵⁷ *Ibid.*

²⁵⁸ For a detailed analysis, see Mihir Kanade, *Multilateral Trading System and Human Rights*.

(d) Promote and encourage universal respect for human rights and fundamental freedoms for all, without discrimination on any ground.

2. To this end, States Parties recognize their primary responsibility for the creation of international conditions favourable to the realization of the right to development for all, and undertake to take deliberate, concrete and targeted steps, separately and jointly, including through cooperation within international organizations, and as appropriate, in partnership with civil society:

(a) To ensure that human and legal persons, groups and States do not impair the enjoyment of the right to development;

(b) To ensure that obstacles to the full realization of the right to development are eliminated in all international legal instruments, policies and practices;

(c) To ensure that the formulation, adoption and implementation of all 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 those with limited availability of or access to these resources, to fulfil their obligations under the present Convention.

3. States Parties undertake to 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 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 and equitable multilateral trading system;

(b) Implementing the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with relevant trade 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 in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions;

(e) Encouraging official development assistance and financial flows, including foreign direct investment, to 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;

(f) Enhancing North-South, South-South and triangular regional and international cooperation on and access to science, technology and innovation, and enhancing also knowledge-sharing on mutually agreed terms, including through improved coordination among existing mechanisms, in particular at the United Nations level, and through a global technology facilitation mechanism;

(g) Promoting the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms, including on concessional and preferential terms, as mutually agreed;

(h) Facilitating orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed rights-based migration policies.

Commentary

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 undertake to 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. Each of the four sub-paragraphs reproduces the language of the Charter. Sub-paragraph (a) reflects article 1(3) of the Charter. The only addition is the word “environmental” to reflect contemporary problems that need resolution through cooperation. Sub-paragraphs (b) to (d) reflect paragraphs (a) to (c) of article 55 thereof.

3. 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 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 recognize their primary responsibility for creation of international conditions favourable to the realization of the right to development for all”. This reflects article 3(1) of the DRTD which is framed in almost identical terms. The following words “and undertake to take deliberate, concrete and targeted steps, separately

and jointly, including through cooperation within international organizations, and as appropriate, in partnership 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.²⁵⁹ 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 as appropriate, in partnership with civil society” are drawn from similar words used in the provision on international cooperation in the CRPD.²⁶⁰

4. Sub-paragraph (a) enjoins States to cooperate “to ensure that human or 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 ensure that obstacles to the full realization of the right to development are eliminated in all international legal instruments, policies, and practices”, reflects the language of article 3(3) of the DRTD noted above. Sub-paragraph (c) contains the words, “to ensure that the formulation, adoption and implementation of all 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 those with limited availability of or access to these resources, 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.²⁶¹ 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. 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 those within limited availability of or access to these resources” 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 “fulfill their obligations under the present Convention”.

5. 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

²⁵⁹ CESCR, *General Comment No. 3*, paragraph 2.

²⁶⁰ 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.

²⁶¹ See A/RES/70/1, paragraphs 39 to 46, and 60 to 66, and SDGs 1a, 15b, 17.1, 17.3, 17.16.

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).²⁶² 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.²⁶³ 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”.²⁶⁴ 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.

6. 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 by, *inter alia* [...]”. The words “social and international order” reflect article 28 of the UDHR and draft preambular paragraph eleven, 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, the eight sub-paragraphs sequentially reflect SDGs 17.10, 10.1, 10.5, 10.6, 10.b, 17.6, 17.7, and 10.7.²⁶⁵ It may be stressed that the language of these sub-paragraphs is *verbatim* reproduction of the consensually agreed text of the 2030 Agenda and hence eliminates any scope for controversy or contest. 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.

Article 14 – Coercive measures

1. The use or encouragement of the use of economic, political, 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 and freedom of consent 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.

²⁶² 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.

²⁶³ A/RES/70/1, paragraph 62.

²⁶⁴ 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 Razaque 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*.

²⁶⁵ 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>.

Commentary

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”.²⁶⁶

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,²⁶⁷ 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.²⁶⁸ 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”.²⁶⁹ 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,²⁷⁰ 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”.²⁷¹ While the prohibition of coercive measures is implicit in the right of peoples to self-determination, customary international law also recognizes that

²⁶⁶ A/RES/73/167, Paragraph 12.

²⁶⁷ 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.

²⁶⁸ 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.

²⁶⁹ A/CONF.157/24 (Part I), paragraph 31.

²⁷⁰ Resolution adopted by the UNGA on 17 December 2018, A/RES/73/167, paragraph 14 of the preamble.

²⁷¹ *Ibid.*, paragraph 14 of the text.

“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”.²⁷²

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 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”,²⁷³ 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”.²⁷⁴ 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”.²⁷⁵ 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.²⁷⁶ 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”.²⁷⁷

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 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 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”.²⁷⁸ They also “agree to accept and

²⁷² *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.*

²⁷³ See Human Rights Council Resolution 27/21 and Corr.1, adopted on 26 September 2014.

²⁷⁴ *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.*

²⁷⁵ See also article 32 of UNGA resolution 3281 (XXIX).

²⁷⁶ See, Final Act of the United Nations Conference on the Law of Treaties, A/CONF.39/26.

²⁷⁷ *Ibid*, paragraph 1.

²⁷⁸ UN Charter, article 24(1).

carry out the decisions of the Security Council in accordance with the present Charter”.²⁷⁹ 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 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.²⁸⁰

Article 15 – Special or remedial measures

1. States Parties recognize that certain human persons, groups 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.

2. States Parties recognize that developing and vulnerable States, owing to historical injustices, conflicts, environmental hazards, climate change or other disadvantages, including of an economic, technical or infrastructural nature, may require special or remedial measures through mutually agreed international legal instruments, policies and practices for ensuring equal enjoyment of the right to development by all human persons and peoples. Such measures may, as appropriate, include:

- (a) Recognition of common but differentiated responsibilities, 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.**

Commentary

1. Draft article 15 addresses the special needs of two categories of stakeholders who may need special 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 “special or remedial measures”. In the same context as draft article 13, the term “special measures” is used in CEDAW,²⁸¹ ICESCR,²⁸² and CERD.²⁸³ CRPD uses the term “specific measures”.²⁸⁴

²⁷⁹ 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”.

²⁸⁰ A/HRC/40/L.5 adopted on 14 March 2019, paragraph 1.

²⁸¹ Article 4.

²⁸² Article 10(3).

²⁸³ Articles 1(4) and 2(2).

²⁸⁴ Article 5(4).

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 “special 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”.²⁸⁵ Beyond this acknowledgement, the draft article does not indicate which measures should be categorized as special or remedial, nor does it categorize particular right-holders or States as worthy of special measures and others of remedial measures.

2. Paragraph 1 begins with a recognition by States Parties “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 terms “age, disability, marginalization, vulnerability, indigeneity or minority status” are broad enough to accommodate every category that may need special or remedial measures. The use of “may require” indicates fluidity to respond to situations of special 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.

3. Paragraph 2, by and large, follows a similar structure and addresses the special needs of “developing and vulnerable States”. No attempt is made to rigidly compartmentalize or define the States that ought to be called as developing or vulnerable. 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 special or 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 special or remedial measures considers appropriate. The terms “for ensuring equal enjoyment of the right to development by all human persons and peoples” highlight again that the principal right-holders are human persons and peoples, and States only exercise their right against other States on behalf of the right-holders to whom they owe the duty. The words “equal enjoyment” 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 special 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 (e) themselves are already prevalent in various regimes. For instance, common but differentiated responsibilities is a legal principle inherent to environment and climate change law,²⁸⁶ whereas special and differential treatment is an

²⁸⁵ 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).

²⁸⁶ See the United Nations Framework Convention on Climate Change, 1992, as well as the follow-up action thereto, including the Paris Agreement, 2015.

intrinsic component of WTO law.²⁸⁷ Preferential terms on trade, investment and finance, creation of special funds or facilitation mechanisms similar to the one for technology in the 2030 Agenda,²⁸⁸ or facilitation and mobilization of other types of assistance 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 the present 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 – Gender equality

1. States Parties, in accordance with their obligations under international law, shall ensure full gender equality for all women and men, and undertake to take measures, including through 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 undertake to take appropriate measures, separately and jointly, inter alia:

a. To eliminate all forms of violence and harmful practices against all women and girls in the public and private spheres;

b. To ensure women’s full and effective 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 and public life, and within legal persons;

c. To adopt and strengthen policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels;

d. To mainstream gender perspectives in 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 resources necessary for the full realization of the right to development by women and girls everywhere.

Commentary

1. Draft article 16 is entitled “gender equality” and is necessitated to ensure gender mainstreaming in the draft convention. Paragraph 1 begins with a reaffirmation of existing obligations of States related to ensuring gender equality 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 full gender equality for all 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. Although the term “gender equality” itself became mainstream after the adoption of CEDAW and is therefore understandably not employed in the instrument, the Committee has defined it as synonymous with the terms “equality between men and women” employed on multiple occasions in CEDAW.²⁸⁹ “Full equality” is used in the preamble of CEDAW to

²⁸⁷ For an overview, see: World Trade Organization, *Special and Differential Treatment*, available at https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm

²⁸⁸ A/RES/70/1, SDG 17.6 and paragraph 70.

²⁸⁹ For instance, see CEDAW, *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 stating in paragraph 22 that “Inherent to the principle of equality between men and women, or gender equality, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices

signify the purpose that all its provisions collectively seek to achieve.²⁹⁰ Further qualifications are not necessary because the CEDAW Committee has explained on numerous occasions that the obligations on States with respect to gender equality entail both *de jure* (or formal) and *de facto* (or substantive) equality.²⁹¹

2. The undertaking to take measures, “including through temporary special measures as and when appropriate”, reflects the language of article 4(1) of CEDAW,²⁹² which has been amply elaborated upon by the CEDAW Committee.²⁹³ 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 gender equality into achievable goals and targets. The words “to end all forms of discrimination against all women and girls everywhere” correspond to SDG 5.1. The words “so as to ensure their full and equal enjoyment of the right to development” brings in the context of the right to development.

3. Paragraph 2 begins with the *chapeau*, “to that end, States Parties undertake to take appropriate measures, separately and jointly, *inter alia*”. “To that 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 eliminate all forms of violence and harmful practices against all women and girls in the public and private spheres” combine SDGs 5.2 and 5.3 without being as specific.²⁹⁴ Sub-paragraph (b) is a fuller and more comprehensive version of SDG 5.5,²⁹⁵ and also addresses discrimination faced by women often within legal persons. Sub-paragraph (c) corresponds to SDG 5c.²⁹⁶ The undertaking contained in sub-paragraph (d) to “mainstream gender perspectives 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.²⁹⁷ Almost identical obligations are recognized in the Protocol to the

without the limitations set by stereotypes, rigid gender roles and prejudices. States parties are called upon to use exclusively the concepts of equality of women and men or gender equality”.

²⁹⁰ CEDAW, preambular paragraphs 11 and 14.

²⁹¹ 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.

²⁹² 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”.

²⁹³ General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), Adopted at the Thirteenth Session, 2004

²⁹⁴ 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”.

²⁹⁵ 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”.

²⁹⁶ 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”.

²⁹⁷ 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”.

African Charter on Human and Peoples' Rights on the Rights of Women in Africa.²⁹⁸ Sub-paragraph (e) uses the words “to ensure equal and equitable access to resources necessary for the full realization of the right to development by women and girls everywhere” 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.

Article 17 – Indigenous and tribal peoples

1. Indigenous and tribal peoples have the right to freely pursue their economic, social and cultural development. They have the right to determine and develop priorities and strategies for exercising their right to development.

2. 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.

Commentary

1. Draft article 17 addresses the right to development of indigenous and tribal 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),²⁹⁹ or of elements that directly constitute violations of the right to development as defined in this draft convention (from the Inter-American system),³⁰⁰ have mostly emerged, as pointed out below, in the context of indigenous as well as tribal peoples.

2. The title of draft article 17 includes the words “indigenous” as well as “tribal”. This might appear odd considering that the latest international instrument on this topic is the UNDRIP adopted in 2007 whose title and provisions refer only to the term “indigenous” and not “tribal”. The UNDRIP also 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 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’”.³⁰¹ Despite this, draft article 17 consciously refers to tribal peoples in addition to indigenous peoples. This has been done in view of the very particular jurisprudence from the Inter-American Court of Human Rights rendered in the context of certain groups in Suriname – the N’djuka and Saramaka peoples – that are admittedly not indigenous to the region where they live since they were brought in during

²⁹⁸ 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”.

²⁹⁹ *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.

³⁰⁰ 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 Kalina and Lokono Peoples v. Suriname*, Inter-American Court of Human Rights, Merits, Reparations and Costs, Judgement of November 25, 2015.

³⁰¹ 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>

colonial times from parts of the African continent, but have settled on specific territories in Suriname for around two centuries in a way that their survival as peoples is dependent on that land.³⁰² They have followed their own traditional practices and customs and continue to identify themselves as peoples distinct from other sections of the society. In separate cases brought before the Inter-American Court, both communities accepted that they were not indigenous to the region, but claimed violations of similar rights instead as “tribal peoples”³⁰³ The Court agreed that although the N’djuka and Saramaka peoples were not indigenous, they were tribal and had similar rights.³⁰⁴ This jurisprudence and classification is in sync with the ILO’s Indigenous and Tribal Peoples Convention, 1989 (No. 169), a binding treaty. This Convention distinguishes between indigenous and tribal peoples but guarantees similar rights to both. Specifically, article 1(1) thereof stipulates that the convention applies to “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations” as well as to “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”.

3. In view of the aforesaid, draft article 17 incorporates both indigenous and tribal peoples while making no attempt to define them 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 and tribal peoples have the right to freely pursue their economic, social and cultural development”. These reflect article 3 of the UNDRIP. The second sentence of paragraph 1 is identical to article 23 of the UNDRIP.

4. 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.³⁰⁵ 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.

Article 18 – 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 limitations on other human rights applied in accordance with international law.

Commentary

1. Draft article 18 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

³⁰² See respectively, *Moiwana Community v. Suriname*; *Saramaka People v. Suriname*.

³⁰³ *Moiwana Community v. Suriname*, paragraphs 130-135; *Saramaka People v. Suriname*, paragraphs 79-86.

³⁰⁴ *Ibid.*

³⁰⁵ 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.

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 consistent with and based on 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 18 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.³⁰⁶ 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 19 – 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 assessment of actual and potential risks and impact of their national laws, policies and practices and international legal instruments, policies and practices, and of the conduct of legal persons which 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

1. Draft article 19 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,³⁰⁷ including for the realization of the right to development.³⁰⁸ 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.³⁰⁹ It has been pointed out that “as they entail broad participation, transparency and accountability, human rights impact assessments also

³⁰⁶ ICCPR, article 12(3).

³⁰⁷ *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.

³⁰⁸ Mihir Kanade, *Multilateral Trading Regime and Human Rights*.

³⁰⁹ *Guiding Principles on Human Rights Impact Assessment of Economic Reforms*.

help democratize resource mobilization and spending policies”.³¹⁰ 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 19 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 19 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 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 19 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.³¹¹

³¹⁰ Ibid, paragraph 6.

³¹¹ See commentary to draft article 11.

5. The final words of paragraph 1 of draft article 19, “to ensure compliance with the provisions of the present 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. It must also be based on human rights. As such, an impact assessment for ensuring “compliance with the provisions of the present Convention” necessarily requires an assessment of impacts on all human rights.

6. Paragraph 2 of draft article 19 requires States Parties to “take into account” any “further guidelines, best practices or recommendations that the Conference of States Parties may provide with respect to impact assessments”. The functions of the Conference of States Parties are addressed in draft article 24(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 States Parties.

Article 20 – Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, 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;

(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 to help to assess the implementation of States Parties’ 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.

Commentary

1. Draft article 20 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. 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 19, 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 20 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 20 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 21 – 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, 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 and economic resources can be used for the full realization of the right to development for all.

Commentary

1. Draft article 21 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 21 is split into two 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.³¹² The words “including the 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 1970.³¹³ 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

³¹² 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.

³¹³ Treaty on the Non-Proliferation of Nuclear Weapons, UNTS 729: 161.

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 and economic resources can be used” are drawn, with the necessary addition of the word “ecological”, 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.³¹⁴

Article 22 – 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 pursue and contribute to the realization of sustainable development;

(b) Their decisions and actions do not compromise the ability of 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.

Commentary

1. Draft article 22 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.³¹⁵ 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,³¹⁶ and in several substantive provisions of the Paris Climate Agreement.³¹⁷ 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.³¹⁸ The fact that the 2030 Agenda,

³¹⁴ 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 worlds 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”.

³¹⁵ World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987.

³¹⁶ 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”.

³¹⁷ Articles 2(1), 4(1), 6(1), (2), (4), (8), and (9), 7(1), 8(1), and 10(5).

³¹⁸ United Nations Economic and Social Commission for Asia and Pacific, *Sustainable Development Provisions in Investment Treaties*, Prepared by Majiao Chi, 2018,

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 six and twenty of the preamble as well as in paragraph (e) 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 22 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 that ‘laws, policies and practices relating to development at the national and international levels pursue and contribute to the realization of sustainable development’..

3. Paragraph (b) requires States Parties to ensure that “their decisions and actions do not compromise the ability of future generations to realize their right to development”. This inter-generational dimension of sustainable development follows the 1992 Rio Declaration,³¹⁹ and the 1993 Vienna Declaration.³²⁰

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 are made fully consistent with the provisions of the present Convention”. 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 23 – 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, 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 agreements, except where the exercise of those rights and obligations would contravene the object and purpose of this Convention. The present paragraph is not intended to create a hierarchy between the present Convention and other international agreements.

Commentary

1. Draft article 23 is entitled “Harmonious interpretation” following the principle of harmonization elaborated by the International Law Commission in its study on the fragmentation of international law.³²¹ 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”.³²² In effect, the first part of paragraph 1 of draft article 23 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.

<https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf>

³¹⁹ A/CONF.151/26 Vol. I, annex 1, principle 3.

³²⁰ A/CONF.157/24 (Part I), chap. III, paragraph 11.

³²¹ See A/CN.4/L.682, paragraphs 37-43.

³²² International Law Commission, A/CN.4/L.702, 18 July 2006, Paragraph 14(4).

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 “the United Nations and its specialized agencies are under an obligation to promote the right to development”. The words “to that 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.³²³ In other words, this sentence does not create any new obligations for specialized agencies but simply expresses a statement resulting from harmonious interpretation.

3. Paragraph 2 of draft article 23 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.³²⁴

Article 23, paragraph 2 reflects this need for “mutual accommodation” and harmonization within the international legal order.

4. The objective of paragraph 2 of draft article 23 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.³²⁵ Article 23, paragraph 2 also reflects the constant trend for mutual supportiveness between international treaties that can

³²³ 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).

³²⁴ A/CN.4/L. 702, 1, 7 et seq., para. 26. See also, paras. 27 and 28 thereof.

³²⁵ 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”.

be found in a great number of multilateral environmental agreements (MEAs),³²⁶ but also in non-environmental treaties such as treaties in the field of health,³²⁷ and culture.³²⁸

Part IV

Article 24 – 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 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 26 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 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, including, inter alia, the adoption of protocols or amendments;**
 - (g) Exercise such other functions 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 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**

³²⁶ 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.

³²⁷ Article 2 of the WHO Framework Convention on Tobacco Control, 2003.

³²⁸ Article 21 of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

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 of 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 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, 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

1. 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 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 and continued relevance of the Working Group on the Right to Development (WG-RTD) that was established by the erstwhile Commission on Human Rights in 1998 and continues to play an indispensable role in the promotion of the right to development under the auspices of the Human Rights Council.³²⁹ It also takes into account the recent 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”.³³⁰ 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. *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.³³¹ 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

³²⁹ 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>.

³³⁰ A/HRC/42/L.36, adopted on 27 September 2019, paragraph 29.

³³¹ 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.

convention, and the principle of international solidarity encapsulated in paragraph (g) 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.

2. Paragraph 1 of draft article 24 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,³³² and the CPED,³³³ establish a 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 have an institutional history of such a “conference” in the form of the WG-RTD, which continues to be 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 works in close conjunction with the WG-RTD without diminishing the independent existence and important roles played by either body.

3. In line with the aforesaid, paragraph 2 of draft article 24 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 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 future adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention”.³³⁴ 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 25. 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 that end”.

4. Sub-paragraph (a) of paragraph 2 requires the Conference of States Parties to “periodically examine reports by 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. 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. 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

³³² Article 40.

³³³ Article 27.

³³⁴ Similar formulation is found in article 7 of the UNFCCC for its Conference of the Parties.

of obligations under the CRPD.³³⁵ 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 two and articles 13(2)(b), 20(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 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 States Parties may refer such reports to the expert body – the “implementation mechanism” – contemplated under draft article 26.

5. Sub-paragraph (b) mandates the Conference of 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 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 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 (c) 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)(1) of the UNFCCC. Sub-paragraph (d) 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 (d) 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 (e) is the mandate to “make recommendations on any matters relevant to the implementation of the Convention”. This includes “the adoption of protocols or amendments” corresponding respectively to draft articles 25 and 31. Finally, sub-paragraph (f) 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.

6. Paragraph 3 provides the mechanism 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 not already stated in the Convention. This is drawn from article 7(3) of the UNFCCC.

³³⁵ 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.

7. 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 States Parties shall meet in public sessions. This is in sync with 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 States Parties by “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”. 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.

8. Paragraph 6 seeks to harmonize the role and mandate of the Conference of States Parties with the existing WG-RTD. 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 WG-RTD annual sessions. Likewise, States that are parties to the convention may also want to actively participate in the WG-RTD 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 States Parties shall be held annually as part of the sessions of the Working Group on the Right to Development”. An ideal template could be that the first two days of the week (Monday and Tuesday) in which the WG-RTD annual sessions take place could be devoted to the Conference of States Parties and the WG-RTD 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 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.

9. Paragraph 7 then ensures that the Conference of States Parties is not restricted to only one annual meeting as part of the WG-RTD annual sessions, but that “special sessions” can also be held “at such other times as it may deem necessary, or upon the request of any State Party, in accordance with its rules of procedure”.

10. Finally, paragraph 8 of draft article 24 requires that the Conference of States Parties “shall transmit its reports” to the General Assembly, 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. 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 25 – 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 such a session.**
- 3. The requirements for the entry into force of any protocol shall be established by that instrument.**
- 4. Decisions under any protocol shall be taken only by the States Parties to the protocol concerned.**

Commentary

1. Draft article 25 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 25 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 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 25, therefore, provides for the possibility to adopt protocols and stipulates that the Conference of 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 25 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 States Parties in each specific instance.

Article 26 – 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 equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems and balanced gender representation.

3. The implementation mechanism shall:

(a) Adopt general comments or recommendations to assist in the interpretation or implementation of the provisions of the 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 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.

Commentary

1. Draft article 26 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. Expert mechanisms 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 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.

2. Paragraph 1 of draft article 25 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 and promotion of compliance with the provisions of the present 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 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 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 States Parties takes special care to avoid duplication. In particular, States Parties should take into account the recent 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”.³³⁶ 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.³³⁷ It is strongly recommended that States Parties mandate the same expert mechanism established under resolution A/HRC/42/L.36 to also act as the implementation mechanism under the draft convention. This will avoid duplication of efforts, fragmentation of the law, and conflicting interpretations, and will also ensure best use of human and financial resources.

3. 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 States Parties to design a structure as it deems appropriate. 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 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/42/L.36 also as the independent mechanism for the convention.

4. 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

³³⁶ Paragraph 29.

³³⁷ For full details of the structure, see A/HRC/42/L.36, adopted on 27 September 2019, paragraph 29-34.

adopt “general comments” or “general recommendations” is similar to the role of various committees under the human rights treaties.³³⁸ 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 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 24(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 procedure by right-holders against their States for individually failing to realize their right to development obligations internally. The mandate to “review requests” 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 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. 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. Sub-paragraph (d) is the residual clause which authorizes the implementation mechanism to “undertake any other functions that may be vested by the Conference of States Parties”.

5. Paragraph 4 mandates the Conference of States Parties to adopt rules of procedure for the operation of the implementation mechanism.

Part V

Article 27 – 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

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 27 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 27, 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 28 – 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

³³⁸ 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”.

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

1. Paragraph 1 of draft article 28 provides for the means of expressing consent to be bound by signatory States and lists ratification, approval or acceptance as the ones permitted.³³⁹ Paragraph 2 permits signatory international organizations to join as parties through “an act of formal confirmation”.³⁴⁰ 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.³⁴¹ 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.³⁴²

Article 29 – 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, paragraph 1, and article 31, paragraphs 2 and 3, any instrument deposited by an international organization shall not be counted.

4. International organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, 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

1. Draft article 29 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 only other modification is in cross-referencing of provisions in paragraph 3.

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.³⁴³ But, the same can also be said about many international organizations,

³³⁹ See, articles 11 and 14 of the VCLT.

³⁴⁰ 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”.

³⁴¹ In particular, these refer to obligations contained in articles 7, 9 and 23(1) of this draft convention.

³⁴² See, articles 11 and 15 of the VCLT.

³⁴³ 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

including international financial institutions, other specialized agencies and related organizations of the United Nations, as well as independent ones such as the WTO.³⁴⁴ Clearly, therefore, there is significant value in international organizations being able to join as Parties to the convention.

Article 30 – 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

1. Draft article 30 related to “entry into force” is analogous to article 45 of the CRPD.

Article 31 – 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 24, 25 and 26 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

1. Draft article 31 is identical to article 47 of the CRPD. Only necessary modifications in paragraph 3 related to cross-referenced provisions have been made.

Article 32 – 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.

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.

³⁴⁴ 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.

Commentary

1. Draft article 32 provides for the possibility of “Denunciation” and is identical to article 48 of the CRPD.

Article 33 – 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.

Commentary

1. Draft article 33 incorporates a procedure for dispute settlement between States Parties. In line with draft article 29, 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 33 covers situations where any dispute arises “with respect to the interpretation or application of the present 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 33 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 the parties to the dispute”. 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 34 – Accessible format

The text of the present Convention shall be made available in accessible formats.

Commentary

1. Draft article 34 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 35 – Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Commentary

1. Draft article 35 corresponds to article 41 of the CRPD.

Article 36 – Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

Commentary

1. Draft article 36 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.
