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"Implementing the Nieuw-Principle right to development:
Combining Human Rights with State Rights"

Paper prepared by Mr. Paul J.I.M. de Waart

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1. DEFINITIONS OF THE RIGHT TO DEVELOPMENT

1.1. Introductory remarks

In the mid-seventies the (legal) concept of a new international economic order (NIEO) had provided a backdrop to developments in human rights.¹ Disenchanted by the conduct of developed countries, developing countries held UN resolutions establishing the so-called development decades to be non-committal. The 1974 Charter of Economic Rights and Duties of States (CERDS) did not mention these resolutions as impulses to genuine co-operation among states in the interest of developing countries.²

The NIEO-concept aimed too much at enhancing the position of states only, at the expense of the promotion of human rights and peoples' rights. The concept of the right to development overcomes this lack of balance by placing development in the context of human rights and peoples' rights as well. Apart from that the principle of affirmative action in favour of developing countries is now largely established.³

In 1986 a colloquium was held in Utrecht on the challenging topic *Restructuring the international economic order: the role of law and lawyers*.⁴ In the course of the colloquium a consensus emerged that the right to development⁵

- is an obligation of conduct as regards states;
- can provide the missing link between human rights and state rights and should be a guiding principle for legislation in that respect;
- does not give rise by itself to a new human right; however,
- enhances as a principle of human rights law the implementation of economic, social and cultural rights in particular.

The 62nd Conference of the International Law Association (ILA), held at Seoul in August 1986, approved the Declaration on the progressive develop-

¹ R. Rich, The right to development: a right of peoples? in J. Crawford (ed.), *The Rights of peoples*, Clarendon Press 1988, p. 42.

² UNGA res. 3281 (XXIX) of 12 December 1974, adopted by a roll-call vote of 120 votes to 6 votes and with 10 abstentions.

³ Rich, op. cit. n. 1, pp. 53 and 54.

⁴ P. van Dijk et. al. (eds.), *Proceedings of the Colloquium*, organized by the Department of International and Economic Law on June 12 and 13, 1986 on the occasion of the 350th anniversary of the University of Utrecht, Kluwer/NISER 1987.

⁵ Van Dijk, op. cit. n. 4, p. 257.

ment of principles of public international law relating to a New International Economic Order (Seoul Declaration).⁶ Moreover the UN General Assembly (UNGA) adopted on 4 December 1986 the Declaration on the Right to Development (hereafter referred to as Development Declaration) with a substantial majority.⁷

1.2. Legal context

One may properly speak of human rights of collectivities other than states.⁸ Corporate capacity has become an effective expression of collective dimensions of the behaviour of human beings. The corporate capacity of groups may be embodied in a people and that of a people⁹ in a state.

Developing states supported initially the idea of a right to development in the context of state rights only.¹⁰ The Seoul Declaration brings the right to development to the fore as a principle of both international law and human rights law. In the former case it relates to states; in the latter to collectivities other than states, in particular to peoples. Collectivities

⁶ ILA, Report of the sixty second conference, Seoul 1986, pp 2 - 12.

⁷ UNGA Res. 41/128, adopted by 146 votes to 1 (US) with 8 abstentions (Denmark, Federal Republic of Germany -FRG- Finland, Iceland, Israel, Japan, Sweden and UK). See P.J.I.M. de Waart, State rights and human rights as two sides of one principle of international law: the right to development, in Paul de Waart/Paul/Peters/Erik Denters (eds.), International law and development, Martinus Nijhoff Publishers 1988, pp. 371 - 373.

⁸ H.J. Burgers, The function of human rights as individual and collective rights, in Proceedings of a conference on human rights: rights of individuals - rights of peoples, at the Roosevelt Centre at Middelburg, June 1 - 3 1988 (forthcoming).

⁹ D. Makinson, Right of peoples: the point of view of a logician, in Crawford, op. cit. n. 1, p. 73. Makinson defines a people as a kind of collectivity, or group of human beings and a state as a kind of governing or administering apparatus.

¹⁰ J. Makarczyk, Principles of a new international economic order, Martinus Nijhoff Publishers 1988, p. 186; M. Bulajic, Principles of international development law, Martinus Nijhoff Publishers 1986, pp. 332 - 340; R.N. Kiwanuka, Developing rights: the UN Declaration on the Right to development, NILR 1988/3, p. 272. See, however, G. Abi-Saab, The legal formulation of a right to development, in R.-J. Dupuy (ed.), The right to development at the international level, Hague Academy of International Law/Sijthoff & Noordhoff 1980, pp. 168 -171; M. Sornarajah, The pursuit of nationalized property, Martinus Nijhoff Publishers, 1986, pp. 21 - 24.

do have rights. One may think of families, tribes, peoples and trade unions.

The right to development of collectivities other than states underlies the civil, political, economic, social and cultural rights of human beings. In that manner the right to development as a principle of international human rights law refers to indispensable conditions for an existence worthy of a human being.¹¹

The right to development as a collective human right underlies everyone's duties to the community in a democratic society in which alone, according to Article 29 of the Universal Declaration of Human Rights, the free and full development of everyone's personality is possible.¹²

The concept of the right to development as a human right has been opposed for fear of states claiming development as a human right themselves. However, it has been generally admitted that states have no human rights. Apart from that, there is no reason whatsoever to prevent the right to development from evolving as a principle of international law. Human rights are not only a major concern of international relations but also a growing domain of international law.¹³ The rationale of defining the right to development as a principle of international law is that such a principle interweaves interstate law and human rights law.

Human rights form part of any true social order as an indispensable means for balancing freedom, equality and fraternity at national and international levels. In this connection it is noteworthy that Article 19 of the 1981 African Charter on Human Rights and Peoples' Rights states:

All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.

In any event¹⁴

"the notion of rights of peoples, as embodied for example in the African Charter of Human Rights and Peoples' Rights, is firmly

¹¹ Burgers, op. cit. n. 8.

¹² The division of human rights in individual and collective rights was discussed at the Roosevelt Centre at Middelburg in the Netherlands on the occasion of the fortieth anniversary of the Universal Declaration of Human Rights. The conference was organized by the Netherlands UNESCO Commission on June 1 - 3, 1988.

¹³ L. Henkin, Human rights, in R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 8 (1985), p. 268.

¹⁴ Crawford, The Rights of peoples: some conclusions, op. cit. n. 1, p. 175.

entrenched within the interstate framework. As with human rights generally, the task for international lawyers is to understand the framework, to explain it -both its strength and weaknesses- to those seeking to rely on it, and to make it work, if possible in the interests of individuals and their communities, as well as in the interests of the governments whose primary domain it continues to be."

From the point of view of legal research it is worthwhile to mention that peoples' rights do lend themselves to empirical studies on¹⁵

- * the identification of those group rights not adequately recognized or protected in the context of existing principles and standards of human right.
- * the concept of discrimination in the light of the wealth of material available.
- * the concept of a people or group with a cultural identity of its own.

1.3. United Nations

1.3.1. *UN Commission on Human Rights*

Of all UN organs the UN Commission on Human Rights (UNCHR) has taken up most actively the study of the legal aspects of a NIEO, which mainly concerns the right to development. When in 1975 entry into force of the 1966 International Covenants on human rights came into sight the UNCHR decided to consider henceforth as a standing agenda-item with high priority the question of realization of the economic, social and cultural rights set forth in the Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), with special reference to human rights in developing countries.¹⁶

In its resolution 1987/23 of 10 March 1987 UNCHR requested the UN Secretary-General to circulate the Development Declaration to all governments, UN organs, international organizations (IGOs) and non-governmental organizations (NGOs) and to invite them to offer their opinions and views on the implementation of this Declaration.

The UN Secretary-General prepared an analytical compilation of comments and views on the implementation and further enhancement of the Development

¹⁵ I. Brownlie, *The rights of peoples in modern international law*, in Crawford, op. cit. n. 1, p. 16.

¹⁶ Res. 2 (XXXI) of 10 February 1975. Under this agenda item the Working Group of governmental experts on the right to development was established (res. 36 (XXXVII) of 11 March 1981).

Declaration on the basis of the following scheme:¹⁷

1. Significance of the Declaration and the relation to other international instruments
 - A Governments
 - B United Nations organs
 - C Specialized agencies
2. Factors affecting the realization of the right to development
 - A Respect for human rights, including self-determination
 - B International peace, security and disarmament
 - C New International Economic Order
3. Implementation of the Declaration at the national level
4. Implementation at the international level
5. The role of women in the implementation of the right to development
6. Evaluation system on the implementation and further enhancement of the right to development

On the basis of that scheme a number of governments, IGOs and NGOs submitted comments and views on the implementation of the Development Declaration.¹⁸ Moreover, the UN Secretary-General transmitted in 1989 a questionnaire to governments, UN organs and specialized agencies as well as to IGOs and NGOs, in order to elicit from them additional and more updated views on the subject of the implementation and further enhancement of the Development Declaration.¹⁹

¹⁷ Doc. E/CN.4/AC.39/1989/1 of 21 December 1988. See also doc. E/CN.4/AC.39/1988/L.2 of 18 December 1987. The 1988 recommendations of the UN Working Group of Governmental Experts on the Right to development include the study of

- *the right to development in order to ensure the full exercise and progressive enhancement of this right;
- *the legal aspects of the right to development as an inalienable human right;
- *the setting up of a monitoring, reviewing and co-ordinating mechanism within the UN system on measures to enhance and implement the right to development (see Doc. E/CN.4/1988/10, pp. 9 - 12).

¹⁸ Of the 23 comments and views of governments on the implementation and further enhancement of the Development Declaration 8 were given by governments which nominated governmental experts in the Working Group, i.e. Cuba, France, India, Iraq, Netherlands, Peru, USSR and Yugoslavia. The other experts were from Algeria, Bulgaria (originally Poland), Ethiopia, Panama, Senegal, Syria and USA. The latter state formally withdrew from the Working Group in December 1987).

¹⁹ Doc. E/CN.4/1990/53 of 3 November 1989.

1.3.2. *UN Declaration on the Right to Development*

The UN General Assembly is aware that efforts to promote and protect human rights at the international level should be accompanied by efforts to establish a new international economic order. It strikes that according to the analytical compilation of comments and views on the implementation of the Development Declaration the right to development is closely linked to the establishment of a NIEO as a right of developing countries mainly.²⁰

The Development Declaration subscribes to this view. According to Article 1

- 1) 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.
- 2) The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to 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.

Article 2 states:

- 1) The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
- 2) All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
- 3) 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.

The Development Declaration deliberately²¹ takes a discreet stand on the

²⁰ Docs E/CN.4/AC.39/1989/1, pp. 19 - 23 and E/CN.4/AC.39/1988/L.2, pp. 7 - 8. Makarczyk, op. cit. n. 10, p. 186.

²¹ The Working Group of governmental experts on the right to development, spent quite some time on reaching a consensus on the present text, which differs from the formulation in the preamble of the successive UNGA resolutions since 1977 on alternative approaches and ways and means within the UN system for improving the effective enjoyment of human rights and

relationship between human rights and NIEO, as appears from the following texts:

(...) Aware that efforts to promote and protect human rights at the international level should be accompanied by efforts to establish a new international economic order (...) (Preamble)

States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and 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. (Article 3, paragraph 3)

The Development Declaration plainly recognizes that the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms. In conformity with that it stresses that equal attention and consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

Nevertheless, the intended balance between human rights and NIEO, which underlies the adoption of a right to development, is still somewhat in the air because the Development Declaration limits itself to the right to development as an inalienable human right. This limitation does not alter the fact that Article 3, paragraph 2 unambiguously voices the impact of international law:

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.

Most of the provisions of the Development Declaration already figure in other UNGA resolutions on related subjects such as social progress and development (res 2542 (XXIV) of 11 December 1968), permanent sovereignty over natural resources (res. 1803 (XXVII) of 14 December 1962), economic rights and duties of states (res. 3281 (XXIX) of 12 December 1974) and principles of international law concerning friendly relations and co-operation among states (res. 2625 (XXV) of 24 October 1970).

Hence it is said that the Development Declaration's only real contribution is the fact that the right to development is specifically elevated to the rank of a human right. According to that view the adoption of the

fundamental freedoms. According to these resolutions the continuing existence of an unjust international economic order constitutes a major obstacle to the realization of economic, social and cultural rights in developing countries.

Development Declaration does not constitute a major development in international law but still is a positive achievement, provided that right is given a concrete and specific content. This view, however, overlooks the true kernel of the right to development which is to combine human rights, peoples' rights and state rights within a single body of international law. In doing so the right to development limits the discretionary powers of states in the formulation, adoption and implementation of policy, legislative, administrative and other measures at the national and international level.

1.4. International Law Association

1.4.1. *Seoul Declaration*

At its 1986 Conference ILA expressed its deep concern about the development of international economic relations and the status of international co-operation in this field. The Conference considered it urgent to contribute to the improvement of the prevailing situation by the adoption of the above mentioned Seoul Declaration which includes the right to development. The pertinent Seoul Principle 6 states:

- 1) The right to development is a principle of public international law in general and of human rights law in particular, and is based on the right of self-determination of peoples;
- 2) By virtue of the right to development as a principle of human rights law, individuals and peoples are entitled to the results of the efforts of States, individually and collectively, to implement Articles 55 and 56 of the United Nations Charter in order to achieve a proper social and international order for the implementation of the human rights, set forth in the Universal Declaration of Human Rights, through a comprehensive economic, social, cultural and political process based upon their free and active participation;
- 3) The right to development as a principle of public international law implies the co-operation of States for the elaboration of civil, cultural, economic, political and social standards, embodied in the Charter of the United Nations and the International Bill of Human Rights, based upon a common understanding of the generally recognized human rights and of the principles of public international law concerning friendly relations and co-operation among States. These standards should be taken into account by States in the formulation, adoption and implementation of administrative, legislative, policy and other measures for the realization of the right to development at both national and international levels.

1.4.2. *Working programme NIEO Committee*

At its 63rd Conference held in Warsaw in 1988 the ILA recommended that the NIEO Committee continues its work on the issues identified in its Report including in particular

- a) problems relating to the implementation of the Seoul Declaration paragraphs 5 (permanent sovereignty), 6 (right to development), 11 (transfer of technology and 13 (dispute settlement);
- b) legal issues arising, in particular, in the context of the ongoing Uruguay Round of Multilateral Trade Negotiations, with a view to improving the legal frame-work for the participation of developing countries in the multilateral trading system and for preventing trade discrimination against developing countries;
- c) legal issues relating to money and finance focusing on global legal problems involved in the debt crisis such as contractual distribution of risks between parties to loan agreements, debt-equity swaps, institutional adjustment, conditionality, organizing private creditors and the role of public creditors.
- d) legal issues arising in the negotiations on the draft UN Code of Conduct on Transnational Corporations with a view to bridging existing divergent positions in the on-going negotiations.

From 14 to 17 March 1989 ILA's Pakistani Branch organized a a symposium on transfer of technology at Islamabad. This symposium focused attention on the need of transfer of technology on fair and reasonable commercial terms, the creation of indigenous technology and the strengthening of the local scientific and technological infrastructure.²²

The GATT Uruguay Round was highlighted at a seminar on the improvement of the legal framework of trade in services in Bergamo (21 - 23 September 1989), organized by the University of Bergamo under the auspices of the NIEO Committee. That seminar was preceded by a symposium on the outstanding issues in the Draft UN Code of Conduct on TNCs in the Peace Palace at the Hague (15 - 17 September 1989). The symposium was convened by the UN Centre on Transnational Corporations (UNCTC) and senior ILA Members.

1.4.3. *Research scheme on the right to development*

At Bergamo it was decided that the right to development will be discussed at a seminar in March 1991 in Calcutta, which will be organized by the Indian ILA branch and its Calcutta Centre in close co-operation with the

²² Katarina Benedik/P.J.I.M. de Waart, Promoting transfer of technology to the Third World through national legal policy and patent law: the cases of Pakistan and Yugoslavia, in D. Kokkini-Iatridou/F.W. Grosheide (eds.), *Eenvormig en vergelijkend privaatrecht (Uniform and Comparative Law)*, Koninklijke Vermande 1989, pp. 429 - 454.

NIEO Committee. Papers will be submitted on the basis of the following provisional research scheme:²³

1. Corresponding specific human rights and rights and duties of states
 - A The right of states to choose their development system
 - B The right of peoples to self-determination
 - C Formulating development policies as a legal duty of states, with due regard to
 - The right to participation of individuals and groups
 - The right of states to development assistance
 - Priorities within human rights policies with special reference to basic needs
 - The protection of environment
2. Effects upon international decision-making processes
 - A Food security
 - B Debt burden
 - C Trade
3. Monitoring, reviewing and co-ordinating mechanisms within the UN system.

A considerable number of Committee members, members of the working group on International Law and development of the European Association of Development Training and Research Institutes (EADI) and other experts have already shown their interest for submitting a paper on the basis of the above research scheme. Papers of other Committee members or other experts, will be welcome. In view of this, the present paper comments on the ILA research-scheme.²⁴

²³ The topics will be discussed both in plenary (corresponding rights and duties/monitoring, reviewing and co-ordinating mechanisms) and in group-meetings (effects upon international decision-making processes, for example, group A: food-security/trade; group B: debt burden/monetary issues).

²⁴ The research programme recommended at the 1987 Amsterdam seminar on international law and development selected the following topics in relation to the right to development:

What are the specific duties of states corresponding to the right to development?

Peoples and individuals as subjects of the right to development.

Research into specific problems areas where the right to development may affect international decision-making processes, including treaty-making (see International law and development, op. cit. n. 7, p. 406).

2. RELATED SEOUL PRINCIPLES

2.1. Structure of the Seoul Declaration

According to Seoul Principle 12 all the Seoul Principles are interrelated in their interpretation and application and each principle should be construed in the context of the other principles. This implies that the right to development is not a separate NIEO-principle.²⁵ Its substance depends on that of the other principles and vice versa. However, the right to development has also an independent meaning.

The other NIEO-principles mainly concern the conduct of states in international economic relations. This holds also true for equity, solidarity and equality as outstanding principles of behaviour. The right to development as a NIEO-principle confronts states with the necessity of upholding in their behaviour equity, equality and solidarity in the interest of individuals and peoples. It embodies the entitlement of individuals and peoples to an international order which provides for a just and adequate realization of the universally recognized human rights. In that respect the right to development is result-oriented both as a principle of human rights law and as a principle of international law.

2.2. Equity, solidarity and equality

2.2.1. *Equity*

The Seoul Declaration lists equity among the principles of public international law relating to a NIEO:

Without ensuring the principle of equity there is no true equality of nations and States in the world community consisting of countries of different levels of development. A new international economic order should therefore be developed by the United Nations and international organizations, by treaties and by State-practice in conformity with the principle of equity, which means that this development should aim at a just balance between converging and diverging interests of developed and developing countries.

The principle of equity plays an important role in the NIEO discussion. It is an integral element in the interpretation of the law by international

²⁵ Paul Peters/Nico Schrijver/ Paul de Waart, Responsibility of states in respect of the exercise of permanent sovereignty over natural resources: an analysis of some principles of the Seoul Declaration (1986) of the International Law Association, NILR 1989/3, pp. 285 - 314.

courts or arbitration tribunals and may be applied by them to supplement the law. However, the NIEO-discussion on equity has little to do with the role of the judge and the proper limits of his discretion.²⁶ That discussion stresses the need to promote the economic development of developing countries by the creation of new legal rules. Thus the principle of equity is quite pertinent to the right to development without rendering it superfluous. For the right to development as a NIEO-principle is not only a matter of equity but also of self-determination of peoples.

2.2.2. *Solidarity*

The Seoul Declaration attaches great importance to the formulation, adoption and implementation of policy, legislative and other measures at the national and international level. Such measures should take into account the principles of substantive equality and solidarity. Both principles reflect

- * interdependence of economic development
- * recognition that states have to be made responsible for the external effects of their economic policies
- * awareness that underdevelopment or wrong development of national economies is also harmful to other nations and endangers the maintenance of peace.

The solidarity principle actually states that without prejudice to more specific duties of co-operation,

all States whose economic, monetary and financial policies have a substantial impact on other States, should conduct their economic policies in a manner which takes into account the interests of other countries by appropriate procedures of consultation. In the legitimate exercise of their economic sovereignty, they should seek to avoid any measure which causes substantial injury to other States, in particular to the interests of developing States and their peoples.

The true kernel of the principle of solidarity is not the creation of specific obligations or benefits but the awareness of the international community of states to opt for public spirit deliberately.

2.2.3. *Equality*

Equality is highly esteemed by the Seoul Declaration. Three principles are devoted to it: Principles 8 (equality or non-discrimination), 9 (participatory equality) and 10 (substantive equality).

According to Principle 8

²⁶ M.W. Janis, Equity in international law, in Bernhardt, op. cit. n. 13, Instalment 7 1984, pp. 77 - 78.

equal cases have to be treated equally and that unequal cases have to be treated differently in proportion to those inequalities which are relevant in view of the objectives of internationally agreed rules and policies.

Principle 9 lays down that all states have the right to participate fully and effectively in the international decision-making process for the solution of world economic, financial and monetary problems. Substantive equality implies preferential and non-reciprocal treatment of developing countries. The developed states and international economic organizations should contribute to

the improvement of the terms of trade of developing countries inter alia by allowing greater access on more favourable conditions for their semi-finished and finished products to the markets of the developed countries, by contributing to the stabilization of export-prices of commodities by commodity agreements, by compensating financing of shortfalls in exports of commodities or by other appropriate means of economic and financial policy.

It may be questioned whether, and if so to what extent, the non-observance of the principles of substantive equality and solidarity in international economic relations may cause liability for activities not prohibited by international law and for ultra-hazardous activities.²⁷ The International Law Commission (ILC) has limited the scope of its work on international liability to transboundary problems pertaining to the physical environment, and to loss of injury arising from the physical uses of territory. For fear of retarding its work, it has excluded international liability for injurious consequences arising out of activities in the economic sphere not prohibited by international law. However, recent developments may encourage further thought in just such a direction:²⁸

International arrangements have begun to show an awareness on the part of industrialized developed countries that economic activity within their jurisdictions carried out in accordance with their own law and not prohibited by international law, and which have adverse economic effects on one or more developing countries, may call for co-operative action, either by way of policy modification or providing adjustment assistance to the affected countries, to minimize or eliminate those adverse effects.

²⁷ M. Bedjaoui, Responsibility of states: fault and strict liability, in Bernhardt, op. cit. n. 13, Instalment 10 (1987), pp. 358 - 362); G. Handl, Liability as an obligation established by a primary rule of international law: some basic reflections on the International Law Commission's work, in XVI NYIL (1985), p. 77. See also Peters et al. op. cit. n. 25.

²⁸ M.C.W. Pinto, Reflections on international liability for injurious consequences arising out of acts not prohibited by international law, in XVI NYIL (1985), pp. 44- 45.

2.3. Permanent sovereignty, common heritage and transfer of technology

2.3.1. *Permanent sovereignty over natural resources*

The principle of permanent sovereignty implies the national jurisdiction of a State over natural resources, economic activities and wealth without exempting it from the application of the relevant principles and rules of international law. Other NIEO principles themselves clearly draw the line for economic activities in general and for those affecting the environment in particular. The latter appears from the NIEO-principle common heritage of mankind:

The protection, preservation and enhancement of the natural environment for the present and future generations is the responsibility of all States. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in this field.

The interrelationship of the principle of permanent sovereignty and the other NIEO-principles requires further research on international responsibility and liability of states for injurious consequences arising out of exercising their²⁹

- * *right to regulate, exercise authority, legislate and impose taxes* in respect of natural resources enjoyed and economic activities exercised and wealth held in their own territories by foreign interests subject only to any applicable requirements of international law.
- * *discretionary power to nationalize, expropriate, exercise eminent domain over or otherwise transfer property, or rights in property, within its territory and jurisdiction subject to the principle of international law requiring a public purpose and non-discrimination; to appropriate compensation as required by international law, and to any applicable treaty, and without prejudice to legal effects flowing from any contractual undertaking.*

Implementation of the NIEO-principle right to development will imply the prevention of injurious consequences arising out of the exercise of the above mentioned right and discretionary power, such as:

- * substantial injury to the economy of other states;
- * damage to the environment of other states or of areas beyond the limits of national jurisdictions;
- * deterioration of terms of trade of developing countries;
- * lack of control of restrictive business practices;
- * nationalization which is discriminatory and not required by a public purpose;

²⁹ Peters, et al., op. cit. n. 25, pp. 292 - 294.

- * nationalization without appropriate compensation;
- * national or international measures continuing or even extending absolute poverty.³⁰
- * mass violations of human rights, set forth in the Universal Declaration of Human Rights.

2.3.2. *Common heritage of mankind*

According to Seoul Principle 7 the concept of the common heritage of mankind as a basic principle has entered into the corpus of public international law, to be specified by internationally agreed regimes for such areas, resources and values, the rational management of which is essential to mankind as a whole. The principle includes orderly and safe development and rational management of the resources of the areas in question and equitable sharing by States in the benefits derived therefrom. Moreover the protection, preservation and enhancement of the natural environment for the present and future generations

is the responsibility of all States. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in this field.

In this connection the benefits of science and technology should as a whole become the interest of mankind by right.

2.3.3. *The right to benefit from science and technology*

Seoul Principle 11 refers by itself only to the right of states to benefit from science and technology. However, Seoul Principle 6 on the right to development lays down that individuals and peoples are entitled to the results of the efforts of states, individually and collectively. In the context of the other Seoul Principles Principle 11 relates to the access of states and people(s) to science and technology.

Such access probably concerns science and internationally recognized property rights only. Secret technology might be difficult to include in a right to access as long as no internationally recognized duty urges its inventors or owners to make it known. Developing countries do apparently resign themselves to the existence of secret technology as a fact of life.

³⁰ Absolute poverty is defined as a condition of life so characterized by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency. See World Development Report 1980, the World Bank, August 1980, p. 32.

Appropriate leadership and policies aiming at promoting indigenization and domestication of imported technologies are essential to technology transfer.³¹ The experience of the NICS³² is that licensing is not sufficient to ensure genuine transfer of technology:³³

"The two requisites that are present in the NICS are missing in many developing countries: an adequate technological and infra-structural base and correct public policies on technology transfer."

Otherwise, there is no single, best industrialization model for developing countries to be derived from the limited experience of the NICs as regard the level of state influence or direct participation in the industrialization process. As buyers of technology, developing countries should develop a negotiating framework for technology importers in order to obtain foreign technology on terms and conditions which are as favourable as possible. The duration of the agreement should be kept as short as possible. However, the time needed to enable local personnel to absorb the technology should be decisive. In doing so it should not be overlooked that science and technology are cultural enterprises which exist in varying degrees in all societies to at least some extent.³⁴

2.4. *Pacta sunt servanda* and dispute settlement

2.4.1. *Pacta sunt servanda*

The issue on the rule of law prevented UNGA from adopting CERDS in 1974 by consensus. This explains that the first two Seoul principles lay down the primacy of the rule of law in international economic relations in general and of *pacta sunt servanda* in particular. Admittedly the latter principle refers explicitly to treaties and binding decisions of international economic organizations only. However, international contracts -i.e. contracts between states and foreign private parties- apparently are also

³¹ Benedik/De Waart, op. cit. n. 22.

³² The availability of natural resources and the corresponding level of economic development is reflected in the division of states in Low Income Countries (LICs), Middle Income Countries (LICs), Newly Industrializing Countries (NICs) and High Income Oil Exporting States (HIOES).

³³ H.X. Vo, The role of transnationals in technology transfer, reproduced in NCTT Tech Info: legislative and legal aspects No. 1987/18.

³⁴ A.O. Urevbu, Science, technology and African values., Impact of science on society, No 151, pp. 239 - 248.

implied. This follows from principles 5 (permanent sovereignty) and 13 (dispute settlement) in connection with 12 (interpretation and application).

Pacta sunt servanda is not only a principle of international law but also a principle common to all systems of internal law. Nevertheless, it is quite a different matter whether a state may invoke the provisions of its internal law as justification for its failure to perform an international contract.

The development of international economic relations and the status of international co-operation in that field are a cause for great concern. Discussions on a new international economic order have been creating for the last decade uncertainty whether a state-party to an international contract might release itself of its contractual obligations on account of its *jure imperii*, if necessary unilaterally.

In this connection it should be recalled that there is an important difference between a state entering into an international contract in violation of its national law and a state whose national law permits such an entering. In the latter case the international contract has created validly a legal relation between the parties concerned. In other words, the state cannot back out of its obligations unilaterally by merely invoking its *acta jure imperii*.

2.4.2. *Settlement of disputes*

In particular nationalization has given rise to quite some disputes. This may explain that settlement of disputes is one of the principal outstanding issues in the draft United Nations Code of Conduct on Transnational Corporations (TNC Code). The main questions are:³⁵

1. which authorities have competence to adjudicate disputes between states and entities of transnational corporations as a general rule?
2. what other dispute settlement procedures are permissible?

As to the first question, it is said that competent national courts or authorities should not be restricted to those of the host state only, since the jurisdiction of another state might be involved under the former sta-

³⁵ P.J.I.M. de Waart, International settlement of disputes arising from international contracts, in Proceedings of the Hague Symposium on the outstanding issues on the Code of Conduct on Transnational Corporations (forthcoming).

te's private international law. As to the second question, there is general consensus, that parties may agree to refer the dispute to other dispute settlement procedures.³⁶

Paragraph 59 of the proposed text of the draft TNC Code reflects these answers as follows:³⁷

Disputes between States and entities of transnational corporations, which are not amicably settled between the parties, shall be submitted to competent national courts or authorities. Where the parties so agree, or have agreed, such disputes may be referred to other mutually acceptable dispute settlement procedures.

According to Paragraph 59 of the proposed text of the draft TNC Code and Seoul Principle 13 it is beyond doubt that parties are allowed to apply dispute settlement of their own choice. Thus they confirm UNGA resolution 1803 (XVII), Paragraph 4 of which reads:

However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication;

The draft Code and Principle 13 have removed a controversy, generally considered at the time to be one of the main impediments to a consensus on CERDS. This controversy was whether Article 2, paragraph 2c CERDS reserves the freedom of choice of means for the settlement of disputes to states only. Article 2, paragraph 2c of CERDS states that a controversy on the question of compensation in the case of nationalization

shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

The CERDS formulation is said to have closed the door for free choice of means in international contracts, which was left open in the 1803 formulation. However, the challenged Article has never prevented states from entering into a treaty permitting international arbitration for the settlement of a dispute between a state, party to the treaty, and nationals of another state-party. In short, the wording of Article 2, paragraph 2c of CERDS has not affected the validity of the 1965 Convention on the settlement of investment disputes between States and nationals of other States

³⁶ Symposium on the outstanding issues on the United Nations Code of Conduct on Transnational Corporations, 15 - 16 September 1989, Peace Palace The Hague, Background paper No. 2, pp. 7 - 8.

³⁷ Doc. E/1988/39/Add.1 of 1 February 1988, p. 15. See also Report on the Hague Symposium on the United Nations Code of Conduct on Transnational Corporations 15 - 16 September 1989.

(ICSID Convention).

The ICSID Convention shows that the great majority of states do not oppose international settlement of disputes arising from international contracts. The convention has become a confidence inspiring measure in international economic relations.

3. OPINIONS ON THE RIGHT TO DEVELOPMENT

3.1. Governments

The FRG opposed the concept of the right to development embodied in the Development Declaration. Therefore it considered the question of its implementation to be immaterial. Taking into account discussions on the right to development in the Council of Europe, UNCHR and UNGA respectively it may be presumed that the replies of the FRG reflects opinions and views of states which have not yet submitted their views and opinions but which voted against (USA) the Development Declaration or abstained (Denmark, Finland, Iceland, Israel, Sweden, and UK).³⁶ Otherwise opinions and views do indicate that the right to development is not considered to be the sole or main concern of developing countries but is meaningful for all states.

3.1.1. CMEA members

- The right to development is a major element in the consolidation of the international legal order, the securing of the development of states and peoples, and the development and promotion of human rights.
- Development is closely bound up with the strengthening of peace and security, including economic security, and with disarmament.
- It is necessary to put an end to the practice of economic aggression.
- The right to development is closely related with generally accepted principles of international law such as self-determination and sovereignty.
- The right to development has an all-embracing character, encompassing development both of the individual and of the community as a whole.

3.1.2. OECD members

- The international community must be extremely cautious to avoid an interpretation which implies rights of states becoming a primary concern.
- It should be noted that the Development Declaration is focused clearly in the human rights context.
- the Development Declaration meets one of the main objectives, i.e. finding a synthesis between rights of individuals and rights of collectivities.
- A fundamental aspect of the question of development is the fulfilment of the basic needs for all and in particular for the most vulnerable groups of individuals in a society.

³⁶ It should be recalled that Japan also abstained because it did not support the Declaration on the Right to Development for procedural and conceptual reasons.

- It is desirable that all states ratify international human rights conventions, and accede to optional mechanisms for the handling of communications of complaints.
- A 'human rights impact statement' similar to an environmental impact statement, may be undertaken prior to the commencement of specific development projects or in connection with the preparation of an overall development plan or programme.
- The Committee on Economic, Social and Cultural Rights should have a specific role to play in considering ways and means of implementing the Development Declaration.

3.1.3. *Federal Republic of Germany*

- the Declaration contains a definition of development, that is unsatisfactory and hence unacceptable to several states;³⁹
- the observation that the right to development is an inalienable human right is unacceptable from the point of view of international law and hence incorrect;
- the right to development cannot be derived from any relevant source of international law; it is not enshrined in an internationally binding convention, nor can it be regarded as the product of customary international law or as a principle of law recognized by civilized nations;
- only the individual can be the beneficiary of a human right and only a state can be responsible for implementing it;
- no specific benefits or obligations between states can be derived from the duty of solidarity as a principle of international law;
- the right to development should not by its substance establish an entitlement by one state to obtain economic contributions of any kind from another state.

The willingness of the FRG government to participate in the quest for consensus on a right to development depends on the following considerations:

- The aim of all considerations should be to take account of the basic needs of each individual because their fulfilment also benefits society, the state and finally the international community.
- The protection of human rights, however, cannot be placed on a par with the satisfaction of basic needs.
- Even legitimate economic demands should be attained by more appropriate means than an erosion of human rights.
- The principle of international solidarity must not be merged with the sphere of human rights.
- Recognized human rights must not be qualified by the right to development.
- The substance of the right to development must be clearcut.

³⁹ The Japanese government also expressed the view that in order for the concept of the right to development to be viable, the Development Declaration should not be left ambiguous as to its definition and scope.

3.2. Non-state actors

3.2.1. *Intergovernmental organizations*

Under the auspices of UNESCO an international symposium on the education and better understanding of the concept of rights of peoples was held in Canberra, Australia, in August 1987. The aim of the symposium was to clarify the relationship between rights of peoples and human rights. The report of the symposium reveals strongly contrasting views whether the right to development had been recognized as a right of peoples in existing universal international instruments. According to one view, the Declaration deliberately stopped short of recognizing the right to development as a right of peoples, although its aim is to foster the development of peoples as well as of individuals. Others argued, however, that the Declaration has to be read in the context of the broader debate about the rights of peoples to development, and that it does affirm the right to development as both a human right and a right of peoples.⁴⁰

The UN Environmental Programme (UNEP) stressed that the right to development is inherent in its mandate with the term 'sustainable development' - in other words sound environmental management for sustained and sustainable development without which there can be no real and equitable economic growth, and thus, social justice. In UNEP's view, the right to development is dominated by two themes: interdependence and sustainability⁴¹

In the environmental context, interdependence rests on the facts of ecological linkages. They know no frontiers, they require co-operation, and they respond to common action. (...) Specific issues include the ozone layer, climate change, acid rain, marine pollution, freshwater resources, deforestation, genetic resources, desertification and the handling of chemicals and wastes. These and others are not limited or exclusive - they concern rich and poor, developed and developing, North and South. The interests of nations are increasingly interrelated. It is also accepted that economic development must be guided by environmental limits - not as a limit to growth, but as a set of boundaries within which there can be equitable and sustainable development.

The UN Centre on Transnational Corporations (UNCTC) considered the growing imbalance between foreign equity and foreign debt as an important aspect of the problems facing developing countries. Without a prompt solu-

⁴⁰ Doc. E/CN.4/AC.39/1989/1, p. 10.

⁴¹ Ibidem, pp. 16 and 23. See also the late Nagendra Singh, Sustainable development as a principle of international law, in *International law and development*, op. cit. n. 7, pp. 1 - 13.

tion to the debt problem, there can be little hope that foreign direct investment will increase to any significant extent.⁴²

If the debt crisis goes unresolved, demand conditions will remain depressed as countries attempt to generate trade surpluses large enough to meet their debt-servicing obligations; and foreign-exchange scarcities would most likely prompt policy-makers to restrict profit remittances and capital repatriation. (...) Relief for the low-income countries, whose debt is mostly to the Governments of the developed market economies, would necessarily have to come in the form of public funds.

According to the **World Food Programme (WFP)** the fact cannot be escaped that the eradication of poverty is fundamental to the achievement of all the other UN objectives. The 57th session (1988) of the **ILO Conference** called for new strategies of rural development as a means of generating employment in all regions and of alleviating mass poverty in the third world. **FAO** drew the attention to the need of ensuring access to land, water and other natural resources as a basic precondition for achieving a more equitable distribution of income and other economic assets.⁴³

WFP argued that the greatest principles of justice, well-being and harmony cannot thrive in an infected pool of mass poverty, disease and human misery. The right to development is threatened whenever poverty and hunger continue to thrive and defeat development efforts.⁴⁴

For the masses in the third world, development achieves meaning and material reality only if it results, above all, in poverty alleviation. The credibility of and support for the United Nations system in the developed countries will rest ultimately on the effective contribution it can make to eradicating, not just the symptoms, but the root causes of poverty and hunger in the world.

3.2.2. *Non-governmental organizations*

According to the **All Pakistan Women's Association** the Development Declaration enhances the vital social and economic rights of mankind.⁴⁵

As the right to development goes hand in hand with economic independence and development, priority must be given especially by governments to the establishment of a new international economic order. The Declaration could greatly enhance the status of women who, due to traditional attitudes, suffer economic hardships. In addition, the Declaration is a positive sensitive documentation of

⁴² Doc. E/CN.4/AC.39/1981/1, p. 22.

⁴³ Ibidem, pp. 24 and 45.

⁴⁴ Ibidem, pp. 23 - 24.

⁴⁵ Ibidem, p. 24.

a right which is the backbone of a new economic order.

The World Association for Christian Communication considered as crucial to the implementation of the right to development the cultural dimension, the communication dimension and the spiritual dimension. Thus the right to development should include the right to⁴⁶

- * protection and renewal of culture;
- * communicate;
- * access to information
- * explore spiritual experience;
- * worship according to one's beliefs and faith.

The Four Directions Council maintained that the United Nations Organization itself should set an example for the implementation of the Development Declaration, by undertaking to co-ordinate its own operational programmes in the fields of human rights and development. Consistent with the Declaration, any development activity should be designed:⁴⁷

- to achieve specific economic, social and cultural goals;
- to ensure the full participation of all affected sections of the national population in the planning, implementing, and the benefits of the project; and
- to prevent any interference with the human rights of persons affected by the project.

Thus United Nations participation in any development project should require a human rights impact assessment addressing⁴⁸

- (1) possible adverse effects of the project, temporary or longer term, on the full enjoyment of human rights by any sector of the national population;
- (2) targets for the contribution of the project to the achievement of economic, social and cultural rights for the population affected;
- (3) the establishment of national-level mechanisms for project monitoring and evaluation.

3.3. Publicists

Discussing the rights of peoples in modern international law Brownlie opposes the right to development because law invention should not cut out⁴⁹

"the real pioneering -the process of persuasion and diplomacy- and to put in its place the premature announcement that the new settlement is built."

⁴⁶ Ibidem, pp. 47 - 48.

⁴⁷ Ibidem, pp. 45 -46.

⁴⁸ Ibidem, p. 52.

⁴⁹ Brownlie, op. cit n. 15, pp. 14 - 15.

According to Rich the right to development⁵⁰

"remains a putative right not fully accepted into the body of generally accepted international law. It is part of the body of *lex ferenda* and not *lex lata*."

Crawford argues that notwithstanding its scanty recognition in international human rights treaties, the notion of a right to development as a human right is very much at the centre of the debate about peoples' rights.⁵¹ Apart from that development puts a moral claim on the political system to strengthen or add to existing legal entitlements of individuals and peoples.

Makarczyk is of the opinion that the Seoul Declaration has generalized the right to development by placing it in the universally understood context of human rights instead of the relations between developing and developed States.⁵²

Oppermann speaks of an international 'Sozialstaatsprinzip'.⁵³ He opposes the human rights' approach to the right to development but seems to support this right as an appeal to international treaty-making powers for introducing measures in favour of development assistance, the combating of poverty and the like.⁵⁴ This view may reduce the above mentioned difference of opinion on the right to development with the FRG to one on the relationship between international law and development.⁵⁵ In this connection it should be stressed that unlike the Development Declaration the Seoul Declaration speaks of the right to development as a principle of public international law in general and human rights law in particular. This principle should be

⁵⁰ Rich, op. cit. n. 1, p. 31. See also D. Türk and P.J.I.M. de Waart, The right to development: from *lege ferenda* to *lex lata*, in Newsletter SIM (Netherlands Institute of Human Rights 10 (1985), pp. 13 - 27.

⁵¹ Crawford, The rights of peoples: peoples or governments?, op. cit. n. 1, pp. 65 - 66.

⁵² Makarczyk, op. cit n. 10, p. 186.

⁵³ Th. Oppermann, Überlegungen zu einer neuen Weltwirtschaftsordnung: Die Seoul-Erklärung der International law Association zu den Prinzipien einer neuen Weltwirtschaftsordnung, in K.M. Meessen (ed.), Internationale Verschuldung und wirtschaftliche Entwicklung aus rechtlicher Sicht (International debts and economic development from a legal perspective), Nomos Verlagsgesellschaft 1988, p. 21.

⁵⁴ Ibidem.

⁵⁵ De Waart, Introductory reflections upon international law and development, in International law and development, op. cit. n. 7, pp. XXV - XXVI.

elaborated, of course, so that binding legal rules in respect of development emerge. Such elaboration is urgently needed to bridge⁵⁶

"the enormous gap between proclamation and performance, between human rights ideals and human rights realities."

3.4. Summary and conclusions

Apart from the comments of the FRG and Japan, the opinions and views of governments expressed a consensus that the concept of the right to development

- shows that development is necessary for a comprehensive realization of individual human rights;
- links the process of development and human rights;
- is a landmark in the promotion of international co-operation in the field of human rights and in the progressive development of international law;
- goes beyond previous UN decisions and recommendations concerning human rights and development by recognizing that failure to observe human rights -civil and political rights as well as economic, social and cultural rights- represents an obstacle to development;
- provides a legal basis for co-operation where developing countries lack sufficient resources and need assistance from other countries.⁵⁷

The government of the FRG considers the observation that the right to development is an inalienable human right, unacceptable from the point of view of international law. In this connection it should be stressed that unlike the Development Declaration the Seoul Declaration speaks of the right to development not as a full-fledged human right but as a principle of public international law in general and human rights law in particular. This principle should be elaborated, of course, so that binding legal rules in respect of development emerge.

It may be acknowledged to the FRG government that the true kernel of the principle of solidarity is not the creation of specific obligations or benefits but the awareness of the international community of states to opt for public spirit deliberately. However FRG's view that the right to

⁵⁶ Th. C. van Boven, United Nations and human rights: a critical appraisal, in A. Cassese (ed.), UN law/fundamental rights: two topics in international law, 1979, p. 120.

⁵⁷ Admitting that international co-operation for development is quite important, Japan believed that such co-operation should not be conceptualized in the context of rights and duties of states.

development cannot be derived from any relevant source of international law and does not embody any entitlement to development assistance is contestable.⁵⁸

Opinions of states and non-state actors reflect an increasing conviction that the right to development is no empty concept. The traditional division of human rights in civil and political rights on the one hand and economic, social and cultural rights on the other does not take into account the comprehensiveness of dynamic societies.

Since Vattel mankind has been saddled with a fatal notion of two separate systems of natural law: one for states and one for individuals.⁵⁹ Thus the opinion could take root that states are ends in themselves and not means to promote and protect human dignity. Due to this misconception people felt an urgent need for human rights to defend their human dignity against states.

The right to development underlies a growing awareness that Vattel's natural law for states is unable to cope with the problem of establishing an international economic system which effectively promotes and protects human rights. The Seoul Declaration rightly expresses the view that states in the legitimate exercise of their economic sovereignty should seek to avoid any measure which causes substantial harm to other states and their peoples.

⁵⁸ See para. 4.3.1.

⁵⁹ E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite & aux affaires des nations & des souverains*, 1758. See P.P. Remec, *The position of the individual in international law according to Grotius and Vattel*, Martinus Nijhoff 1960, pp 237 - 245.

4. CORRESPONDING SPECIFIC RIGHTS AND DUTIES OF STATES

4.1. The right of states to choose their development system

Development is said to be a grand amorphous goal that can be used to cover a multitude of official sins.⁶⁰ Human rights violations are seldom committed for their own sake, but as a means to achieve other goals.⁶¹ Ideology is the main cause of gross, systematic violations of human rights. It excludes by definition a plurality of opinions within a state and at the regional level. For the rest civil and political rights are being violated all over the world regardless the prevailing ideology and/or the level of economic progress.

Whatever one may think of NIEO, every right-minded person must agree that the one-sided pushing of one economic system or another has deteriorated into ideology with serious harms to development as a comprehensive process. Both free market economies and centrally planned economies, centralized and decentralized political systems may glory in success or may fail in establishing the proper priorities in human rights policies. Moreover, there is⁶²

a vast difference between democracy as a form of government -the democratic state- and democracy as a way of life. Democracy as a form of government provides no guarantee that all rights and freedoms set forth in the Universal Declaration of Human Rights will be respected.

Unlike a democratic government a democratic way of life cannot confine itself to respect for political participation and freedom of speech, press, assembly and association. The realization of such rights largely depend on securing a majority. There is such a thing as tyranny of the majority.⁶³ Majorities do not automatically know everything in dealing with cultural traits which the members of groups in pluralist societies hold in common,

⁶⁰ J. Donnelly, Human rights, individual rights and collective rights, in op. cit. n. 8.

⁶¹ C. Medina Quiroga, The battle of human rights: gross, systematic violations and the Inter-American system, pp. 15 - 16.

⁶² P. Humphrey, Political and related rights, in Th. Meron (ed.), Human rights in international law: legal and political issues, 1984, p. 173.

⁶³ Ibidem.

such as language, religion, a common history, national symbols.⁶⁴

According to the International Court of Justice⁶⁵

(...) adherence by a State to any particular doctrine does not constitute a violation of international customary law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. (...) The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system."

Of course, any people may choose only political systems that do not tolerate or even sanction violations of human rights.⁶⁶ The right to development does not justify or support the claim of any ideology to absolute power. Neither can this right serve as a standard excuse of any regime for any violation of human rights, let alone for the most brutal and systematic violations.

4.2. The right of peoples to self-determination

Both the Seoul Declaration and Development Declaration relate development to the right of peoples to self-determination. The right to self-determination is not vested in a government but in the people concerned.⁶⁷ It is closely linked to the right of peoples to freely dispose of their natural wealth and resources subject to relevant provisions of both International Covenants on Human Rights. Self-determination includes the right of a people to choose its roads to development.⁶⁸

States may not exercise their permanent sovereignty over natural wealth and resources in such a way that substantial harm will be caused to other states. This appears from both Principle 3 paragraph 2 of the Seoul Decla-

⁶⁴ P.R. Baehr, Human rights and peoples' rights, in op. cit. n. 8.

⁶⁵ Case concerning military and paramilitary activities in and against Nicaragua, ICJ Reports 1986, p. 108. See H. Hohmann and P.J.I.M. de Waart, Compulsory jurisdiction and the use of force as a legal issue: the epoch-making judgment of the International Court of Justice in Nicaragua v. United States of America, Netherlands International Law Review 1987/2, pp. 186 - 189.

⁶⁶ Makinson, op. cit. n. 9, p. 86.

⁶⁷ Crawford, op. cit. n. 1, p. 164 - 165.

⁶⁸ Ibidem, pp. 84 - 87.

ration and Article 3 paragraph 3 of the Development Declaration. Peoples may not dispose of their natural wealth and resources to the detriment of other peoples. Reference may be made to the restrictions on the right to self-determination in cases of secession. In any society, pluralist or otherwise, a government should represent all peoples belonging to its territory. As long as this is the case no people in such a territory may claim by virtue of the right to development the right to self-determination and proceed to the use of armed force.⁶⁹

4.3. Formulating development policies as a legal duty of states

4.3.1. *The right of states to development assistance*

International development strategy is defined as the whole of the measures agreed among governments in the UN system to reach economic and social development targets. This definition offers no opinion on the role of international law in general and human rights law in particular in drafting and implementing that strategy. Even important international legal instruments like the UN Charter, GATT, IMF Articles of Agreement, OECD Convention and the International Covenants on Human Rights⁷⁰ define basic

⁶⁹ UNGA Res. 2625 of 24 October 1970, Principle of equal rights and self-determination of peoples, para 2: Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which could 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

⁷⁰ According to Article 55 of its Charter the UN shall promote conditions of economic and social progress and development.

The basic objectives of GATT include the raising of standards of living and the progressive development of the economies of all contracting parties. As of 1965 the relationship between trade and development laid down in Part IV (Articles XXXVI - XXXVIII). By virtue Article XXXVIII the contracting parties shall collaborate jointly, within the framework of GATT and elsewhere to further the objectives of this new part.

The IMF Articles of Agreement reckon among the Fund's purposes the giving of confidence to members by making the general resources of the Fund temporarily available to them under adequate safeguards thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international property. Members have recognized that the essential purpose of the international monetary system is to provide a framework that sustains sound economic growth (Articles I and IV).

objectives or goals of development in general terms without specifying adequately which means are to be used to achieve which goals.⁷¹

Some hold that human rights are merely instrumental to the goals of development, while others think the other way round. The truth lies midway, as appears from the scope and content of the 1948 Universal Declaration of Human Rights and the 1966 International Covenants. They convey the message that the ultimate effectiveness of any development strategy must largely depend on a proper balance between state rights and human rights.

It is still questioned whether states have a right to development assistance. In its 1984 analytical study of principles and norms relating to a New International Economic Order the UN Institute for Training and Research (UNITAR) states:⁷²

In fact, in spite of a certain regularity in the flows of assistance, it is difficult to maintain that they have given place to a concrete normative proposition, specific as to their content (level) or individualized as to their destination (or beneficiaries). In other words, though each developed country devotes a certain amount of resources each year to development assistance, and each developing country receives every year from diverse resources a certain amount of assistance and may rely on it, it is not legally possible yet to assert that there is a legal obligation resting on the former with a corresponding right in favour of the latter.

The *OECD Convention* considers that economic strength and prosperity are essential for the attainment of the purposes of the United Nations, the preservation of individual liberty and the increase of the general well-being. The aims of the organization include the contribution to sound economic expansion in Member as well as non-member countries in the process of economic development. In pursuit thereof Members have agreed that they will, both individually and jointly contribute to the economic development of both Member and non-member countries in the process of economic development by appropriate means and, in particular, by the flow of capital to those countries, having regard to the importance to their economies of receiving technical assistance and of securing export markets (Articles 1 and 2).

Both 1966 *International Covenants on human rights* state that all peoples have the right to self-determination by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

⁷¹ In their comments on the right to development as chairman and rapporteur of Subcommittee I respectively judge **Lachs** and prof. **VerLoren van Themaat** regretted the confusion to which the interrelationship between goals and means has led in both theory and practice. According to the former "in the area of development, the indications are too general and no specific details are laid down."

⁷² Doc. A/39/504/Add. of 23 October 1984, p. 94. See also Bulajić, op. cit. n. 10, p. 240 - 245.

UNITARs view was shared, by the International Court of Justice:⁷³

The cessation of economic aid, the giving of which is more of a unilateral and voluntary nature, (...).

However, it will be remembered that with a view to create conditions of stability and well-being the UN shall promote:⁷⁴

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Thus the UN Charter deals with these issues not only as purposes by themselves but also as a means of states to the end of creating conditions of stability and well-being.

The NIEO-principle right to development goes the other way round by recognizing that human beings and peoples have a claim on states, demanding that the latter keep their pledge to take action within the UN for the achievement of the purposes set forth in Article 55.

The UN Charter, ICESCR, the Lomé Conventions and the growing awareness that human rights have become an important factor development co-operation in the context of bilateral foreign policy, provide a suitable legal framework for founding the entitlement of developing countries to development assistance, at least for alleviating absolute poverty. The NIEO-principle right to development reflects anyhow the emerging *opinio juris sive necessitatis* to withdraw the alleviation of absolute poverty from the ambit of the poor relief, also by virtue of customary international law.⁷⁵

4.3.2. *Establishing priorities within human rights policies*

Principle 6 of the Seoul Declaration implies that states may establish priorities within their human rights policies. States do need some discretionary powers in respect of policy-making and decision-making on the realization of human rights both internally and externally.

Establishing priorities in human rights policies takes an enormous continuous effort to establish and secure a common understanding of the

⁷³ ICJ Reports 1986, p. 138.

⁷⁴ UN Charter, art. 55.

⁷⁵ Hohmann/De Waart, op. cit. n. 65, p. 189.

generally recognized human rights and of the principles of public international law relating to a new international economic order. The need of this effort underlies the NIEO-principle right to development.

The notion of a right to development as a human right is very much at the centre of the debate about peoples' rights.⁷⁶ It will be of great importance when by virtue of the right to development human rights in general and economic, social and cultural rights in particular will have an impact on establishing priorities within policy, legislative and other measures at the international level.

⁷⁶ Crawford, The rights of peoples: peoples or governments?, op. cit. n. 1, pp. 65 - 66.

5. EFFECTS UPON INTERNATIONAL DECISION-MAKING PROCESSES

5.1. Securing development

The NIEO-principle right to development elaborates the linkage between human rights and development.⁷⁷ In doing so it precludes any dichotomy whatsoever between development and human rights.⁷⁸ The states parties to the 1966 International Covenants on human rights have recognized that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. The creation of such conditions in respect of economic, social and cultural rights requires international assistance and co-operation.

The NIEO-principle right to development poses a claim of individuals and peoples towards states and IGOs that development will be secured as⁷⁹

a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

To that end States should take steps, individually and collectively⁸⁰ -i.e. through IGOs- to ensure that policy, legislative, and other measures are being formulated, adopted and implemented at the national and international levels to

- eliminate the massive and flagrant violations of these rights (Development Declaration, Article 5);
- establish, maintain and strengthen international peace and security (Development Declaration, Article 7);
- ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income (Development Declaration, Article 8 para 1; Seoul Declaration, Principle 4, para 3);
- realize effective international co-operation to promote more rapid development of developing countries by providing them with appropriate means and facilities (Development Declaration, Article 4 para 2; Seoul Declaration, Principle 3 para 3);

⁷⁷ Doc. E/CN.4/AC.39/1988/L.2, para 6.

⁷⁸ G. Triggs, The rights of peoples and individual rights: conflict or harmony? in Crawford, op. cit. n. 1, pp. 154 - 55.

⁷⁹ Development Declaration, Preamble paragraph 2.

⁸⁰ Development Declaration, art. 4 para 4 and art 9.

- incorporate the promotion of human rights in international co-operation (Development Declaration, Articles 3 para 1 and 6, para 1; Seoul Declaration, Principle 6);
- formulate international development policies and to provide developing countries with appropriate means and facilities to foster their comprehensive development (Development Declaration, Article 4; Seoul Declaration, Principle 6);
- encourage popular participation in all spheres as an important factor in development and the full realization of human rights (Seoul Declaration, Principle 6).

In doing so the NIEO-principle right to development limits the discretionary powers of states in respect of adopting development strategies.

The right to development reflects a growing awareness among states of the close links between human rights and development as there are between human rights and self-determination. In practice they sometimes get into conflict with each other, i.e. when and where the right to self-determination is implemented but the people concerned is not benefitting from human rights for individuals.⁸¹

5.2. Guidelines for priorities

According to the Dutch Human Rights and Foreign Policy Advisory Committee there is a direct connection between the promotion of human rights and development:⁸²

"However, the promotion of human rights and development cooperation are not always natural bed partners. The effects of development aid on the recipient country can even run counter to respect for human rights. This can for example be the case where aid contributes directly or indirectly to the maintenance of repressive structures."

The Committee advocates a more explicit assessment of a developing country's policy on participation, democracy and the realization of other civil and political rights. In doing so the Committee fully endorses the view that the promotion of these rights may not be seen as separate from the promotion of social, economic and cultural rights.

For gauging the situation as regards economic social and cultural

⁸¹ Judge **Lachs** in his letter to the present author of 10 February 1989.

⁸² Dutch Human Rights and Foreign Policy Advisory Committee, Development Cooperation and Human Rights, report 1987, pp. 3 and 12-13.

rights the followings points may be taken into account:⁸³

- * a government's policy on socio-economic reforms to benefit poor population categories;
- * policy on literacy, education, health, food supplies and housing of poor population groups;
- * policy on the distribution of wealth, particularly in countries in which a considerable proportion of the population lives below subsistence level and/or purchasing power is declining;
- * policy on the self-organization of poor population categories (co-operatives, trade unions etc.)
- * the position of minorities
- * the position of women.

The international human rights system reflects the following guidelines regarding the establishment of priorities within these government's policies:⁸⁴

- * States may never derogate from the rights recognized as non-suspendable by Article 4 of the UN Covenant on Civil and Political Rights.
- * States may never invoke national security to justify measures limiting the other human rights, including economic, social and cultural rights, to prevent merely local or relatively isolated threats to law and order or aimed at suppressing opposition to the systematic violation of these rights or at perpetrating repressive practices against its population.
- * Limitations to everyone's rights and freedoms shall meet the just requirements of morality, public order and the general welfare in a democratic society.
- * Developing countries have a certain freedom of manoeuvre as regards granting economic rights to non-nationals.
- * Human rights which are closely linked with the satisfaction of basic needs enjoy priority.
- * Giving priority to the fulfilment of basic needs does not mean, however, that the protection of human rights is on a par with the satisfaction of basic needs.

These guidelines are independent of a specific form of society or government. The interplay in any social and international order, including

⁸³ Ibidem p. 22. The checklist of six points was proposed by the Dutch Humanist Consultative Committee on Human Rights. See also Development Declaration, art. 8.

⁸⁴ Subrata Roy Chowdhury, Rule of Law in a state of emergency, the Paris minimum standards of human rights norms in a state of emergency, Pinter Publishers 1989; The implementation of the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly 2/1987. See also Netherlands Advisory Council for Development Cooperation, Recommendation on minimum international labour standards (No. 84), 1985. See also Jantine Fopma, Minimum international labour standards: the right to freely chosen work and the prohibition of forced labour, in International law and development, op. cit. n. 7, pp. pp. 305 - 317. Mrs Fopma was researcher in public international law at the Free University of Amsterdam. She prepared a thesis concerning the prohibition of forced labour. It is most regrettable that her life was suddenly cut short.

the market order, between freedom, equality and solidarity as legal principles should secure anyhow, that always at least everyone's basic needs will be met everywhere as a matter of right, barring temporary infringements caused by national disasters. Outlawing man-made infringements on basic needs resulting in absolute poverty is the bare minimum. For that purpose an elaboration of the basic needs' concept and the development of corresponding legal standards to denounce man-made infringements are urgently needed.

6. CONDITIONS AND MEANS FOR MONITORING, REVIEWING AND CO-ORDINATING MECHANISMS WITHIN THE UN SYSTEM

6.1. Conditions

6.1.1. *Development of human rights standards*

The Development Declaration and the Seoul Declaration embody a challenge to both researchers and politicians to elaborate the right to development as a principle of international law in general and human rights law in particular. An example of accepting this challenge by experts in international law offer the 1986 Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights.⁸⁵ The Limburg Principles interpret ambiguous phrases and terms in ICESCR.⁸⁶

Principle 102 states that the UN Committee on Economic, Social and Cultural Rights (ESCR Committee)

should develop, in co-operation with intergovernmental organizations and non-governmental organizations as well as research institutes an agreed system for recording, storing and making accessible case law and other interpretative material relating to international instruments on economic, social and cultural rights.

According to Principle 79 states parties

should, where possible, adopt clearly defined targets and indicators in implementing the Covenant. Such targets and indicators should, as appropriate, be based on criteria established through international co-operation in order to increase the relevance and comparability of data submitted by States parties in their reports.

The ESCR Committee is spelling out more clearly the normative content of economic, social and cultural rights so as to enable it the establishment of an effective monitoring system.⁸⁷ It is doing so through the procedure of drafting general comments and through the holding of an annual general discussion on the right(s) embodied in a single article.⁸⁸ The

⁸⁵ Doc. E/CN.4/1987/17.

⁸⁶ E.V.O. Dankwa and C. Flinterman, The significance of the Limburg Principles, in *International law and development*, op. cit. n. 7, pp. 278 - 279.

⁸⁷ Ph. Alston/B. Simma, Second Session of the UN Committee on Economic, Social and Cultural Rights, in *American Journal of International law* 3/1988, p. 606.

⁸⁸ Ibidem, p. 607.

purposes of the general comments are:⁸⁹

to make the experiences gained so far through the examination of (...) reports available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw the attention of States to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned.

Reports of IGOs on education, health services, food, housing and income provide indices for developing a generally acceptable standard of achievement.⁹⁰ Such standards are indispensable for assessing the conduct of states parties to the implementation of ICESCR.⁹¹

The Limburg Principles do not only intend to persuade states to take economic, social and cultural rights seriously but also to expose violations of these rights. Principle 72 reads:

A State party will be in violation of the Covenant, inter alia, if:

- it fails to take a step which it is required to take by the Covenant;
- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;
- it fails to implement without delay a right which it is required by the Covenant to provide immediately;
- it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
- it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
- it fails to submit reports as required under the Covenant.

It needs no argument that an exposure of violations of economic, social and cultural rights will be possible only on the basis of generally recognized international minimum standards of achievement.⁹² Such standards

⁸⁹ Ibidem, p. 606.

⁹⁰ See, for instance, World Development Report 1980, Part II: Poverty and development.

⁹¹ G.J.H. van Hoof/ B.G. Tazib, Supervision with the right to food and the role of the World Bank, in International Law and Development, op. cit. n. 7, pp. 325 - 335.

⁹² Fopma, op. cit. n. 84.

underlie the so-called basic-needs approach.⁹³

6.1.2. *Basic needs approach*

The realization of all human rights do cost money.⁹⁴ However, economic, social and cultural rights put more clearly a price-tag on the policy of the government and the social and international order than civil and political rights usually do. Therefore it is quite obvious that the availability of natural resources is of particular importance.⁹⁵

Development implies a continuous effort, not a definite result, at least beyond the level where the basic needs of all people have been met. The very rationale of solidarity as a legal principle lies in the firm belief that any international order should at least prevent that people are suffering from absolute poverty through no fault of themselves. This should be the case even in an international economic order, otherwise based on freedom and formal equality of states. Considering the concept of freedom, solidarity should leave as much room as possible for the economic, political and social concepts of states and individuals within states.⁹⁶ It will be remembered that the Development Declaration defines development as a process and not as a blueprint for the international (economic) order. Neither the free market system nor the centralized planning system may

⁹³ See ILO, Employment, growth and basic needs - a one-world problem, Geneva 1976.

⁹⁴ Katarina Tomasevski, Development aid and human rights, Pinter Publishers 1989. She argues that all human rights necessitate *both* political will and investment, on the part of *both* recipient and donor governments.

⁹⁵ Differences in economic systems coincide with membership of organizations such as CMEA and OECD. So far (December 1988) replies have been received from 23 states only, of which 1 state (Cuba) belongs to both CMEA and MICs. These states may be grouped on the basis of the aforesaid division as follows:

LICs	3: People's Republic of China (PRC), India, Pakistan;
MICs	6: Cuba, Iraq, Jamaica, Malta, Paraguay, Peru;
NICs	3: Brazil, Mexico, Yugoslavia;
HIOES	1: Qatar
CMEA	5: Byelorussian Republic, Cuba, Mongolia, Ukrainian SSR, USSR;
OECD	6: Australia, Federal Republic of Germany (FRG), France, Japan, Netherlands, Norway.

⁹⁶ F.A. Hayek, The mirage of social justice (Law, legislation and liberty: a new statement of the liberal principles of justice and political economy. vol. 2), 1976 p. 110.

pretend to hold the key to the problem of development.⁹⁷

The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

6.2. Means

6.2.1. Reports

It is under consideration that states will be asked to report periodically (triennially or quinquennially) on the implementation of the Development Declaration on the basis of a questionnaire. To that end an illustrative list of points to be included in such a report was prepared.⁹⁸ This list includes questions with regard to the articles of the Development Declaration such as:

1. Which are the essential elements of the content of the right to development in the context of the domestic socio-political and legal system (art. 1)?
2. Which are the essential features and objectives of the domestic development model and which are the main difficulties (domestic and international) encountered in the process of its realization (arts. 1 and 2)?
3. How is the duty of states to formulate appropriate development policies (art. 2, para. 3) being carried out and which are the main difficulties (domestic and international) in this process?
4. What are the main instruments guaranteeing equality of opportunity for all individuals in their access to basic resources and services (art. 8) and to the benefits resulting from development.
5. What steps are being taken to eliminate obstacles to the realization of the right to development, resulting from failure to observe civil and political rights as well as economic, social and cultural rights (art. 6, para 3, as well as arts. 2,3 and 5)?
6. What steps are being taken to encourage popular participation in all spheres (art 8., para 2)?
7. What steps should be taken to give effect to the duty of states to formulate international development policies of the right to development with a view to facilitating the full realization of the right to development (art. 4)?

⁹⁷ Limburg Principle 72.

⁹⁸ Doc. E/CN.4/1990/53 of 3 November 1989, Annex I.

8. What steps are being taken to contribute to the strengthening of international peace and security and particularly to the reduction of military spending (art. 7)?

The Limburg Principles pay ample attention to state-reports as a means for monitoring and reviewing the conduct of states in the field of human rights. Principle 74 urges governments to make their reports as meaningful as possible. For this purpose governments

should develop adequate internal procedures for consultation with the competent government departments and agencies, compilation of relevant data, training of staff, acquisition of background documentation, and consultation with relevant non-governmental and international institutions.

As for the implementation of the NIEO-principle right to development state-reports should indicate the efforts at the national and international level for the elaboration of civil, cultural, economic, political and social standards, embodied in the UN Charter and the International Bill of Human Rights, and of the principles of international law concerning friendly relations and co-operation among states. Moreover, these reports should reveal how states take these standards into account in the formulation, adoption and implementation of administrative, legislative, policy and other measures.

Human rights constitute universal standards applicable to the policy and conduct of governments.⁹⁹ Tomasevski rightly spreads the message that human rights should be applied throughout development aid, not only used to evaluate the performance of the recipient countries.¹⁰⁰ In the latter case, moreover, social and environmental criteria are applied to a minority of development projects and not at all to development programmes or to balance of payments support.¹⁰¹ Most aid remains evaluated by financial and technical criteria only due to the fact that human rights are improperly confined to preambles of human aid agreements. The so-called 'trickle-down' approach implicitly negates human rights as a means of development.¹⁰²

Human rights institutes in Canada Denmark, Finland, the Netherlands and Norway launched a human rights yearbook project. The yearbook presents an overall picture of the actual promotion and protection of civil, cultural,

⁹⁹ Tomasevski, op. cit. n. 94, p. 128.

¹⁰⁰ Ibidem, p. 200.

¹⁰¹ Ibidem, p. 150.

¹⁰² Ibidem, pp. 142, 150 and 153.

economic, political and social rights in major partner countries receiving aid from Canada, the Netherlands and the Nordic countries. The 1989 Yearbook on Human Rights in Developing Countries contains the following sections:¹⁰³

1. Government position on human rights
2. System of governance and the right to participation
3. Civil rights
 - 3.1. Life, liberty and integrity of person
 - 3.2. Administration of justice
 - 3.3. Freedom of movement
4. Socio-economic rights
5. Equality, non-discrimination, rights of peoples and minorities.

General guidelines for reporting on these topics were prepared by the six participating human rights research institutes in five like-minded donor countries.¹⁰⁴ It needs no argument that such reports should not be limited to receiving countries only. Article 16 of ICESCR on reporting applies to all states parties to that Covenant. However, the yearbook project is of great value for it gives supervisory bodies at the national and international level something to hold on to monitoring and reviewing the impact of development co-operation on the promotion and protection of human rights.

6.2.2. *Human rights impact statements*

The development of human rights standards should have priority, in particular in relation to the fulfilment of basic needs. This could be done on the basis of case studies on food, trade, debt, environment and the like. As mentioned above¹⁰⁵ human rights are violated all over the world regardless the level of development. This holds particularly true for civil and political rights. From that point of view it will not do that human rights impact statements would only cover the conduct of developing countries in that respect.¹⁰⁶ Development co-operation should not enable donor

¹⁰³ M. Nowak/Th. Swinehart, Human rights in developing countries, Yearbook 1989, N.P. Engel Publisher, 1989.

¹⁰⁴ Norwegian Institute of Human Rights, Oslo; Christian Michelsen Institute, Bergen, Norway; Danish Centre of Human Rights, Copenhagen; Abo Akademi Institute of Human Rights, Abo/Turku, Finland; Netherlands Institute of Human Rights, Utrecht; Human Rights Research and Education Centre, Ottawa, Canada.

¹⁰⁵ See para 4.1.

¹⁰⁶ Tomasevski, op. cit. n. 94, p. 200.

countries or agencies to enjoy a privileged position! Apart from that human rights impact statements might only have relevance if they relate to all parties involved.

All in all human rights impact statements may be meaningful if they are inserted in multilateral agreements, which contribute to achieving conditions for facilitating the observance of human rights in general and economic, social and cultural rights in particular. Such an insertion would be in conformity with the spirit of the letter of ICESCR. Negotiating a human rights impact statement prior to the commencement of specific projects might cause the losing of time unnecessarily.

A human rights impact statement in development agreements is pertinent subject to the following conditions:¹⁰⁷

- (1) the agreement itself must contribute to achieving the conditions needed to facilitate observance of human rights;
- (2) the existence of a satisfactory procedure for the settlement of disputes concerning the observance of human rights by an independent body;
- (3) the supervision on the enforcement of human rights must be based on reciprocity;
- (4) a violation of human rights does not constitute grounds for the immediate suspension or termination of the agreement, when the type of co-operation envisaged will in general benefit far more from a process of persuasion as a means of achieving the end in view.
- (5) parties to the agreement are also parties to the 1966 International Covenants on human rights or agree to apply those Covenants.¹⁰⁸
- (6) parties to the agreement have agreed upon the scope and content of the human rights concerned and the standards which will be applied in supervising the implementation of those rights.

Anyhow the possibility of applying standards will make or break the significance of human rights impact statements as means to apply development as a principle of international law relating to a NIEO.

¹⁰⁷ Minimum international labour standards, op. cit. n. 84, pp. 61 - 64 and 76. By way of example the successive Lomé Conventions may be analyzed on their suitability for inserting human rights standards. A future Lomé Convention may then incorporate more explicitly the connection between civil and political rights, and social and economic rights. The integrated fulfilment of both categories of rights should be one of the main aims of the Convention, which should also be used directly to promote civil and political rights. See Development Cooperation and Human Rights, op. cit. n. 82, pp. 6 and 40 - 42.

¹⁰⁸ Cf. the Joint Declaration of the Governments of UK and PRC on the question of Hong Kong of 26 September 1984. See International Legal Materials 1984/6, p. 1377: "The provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force."

7. CONCLUDING REMARKS

1. The right to development underlies a growing awareness that Vattel's natural law for states is unable to cope with the problem of establishing an international economic system which effectively promotes and protects human rights. The Seoul Declaration rightly expresses the view that states in the legitimate exercise of their economic sovereignty should seek to avoid any measure which causes substantial harm to other states and their peoples.
2. Opinions of states and non-state actors show an increasing conviction that the right to development is no empty concept. The traditional division of human rights in civil and political rights on the one hand and economic, social and cultural rights on the other does not take into account the comprehensiveness of dynamic societies.
3. The right to development is a dynamic concept. The core meaning of this concept refers to indispensable conditions for existence for an existence worthy of a human being. Such conditions may include interests belonging to collectivities of human beings other than states and their organizations (IGOs).
4. Unlike the Development Declaration the Seoul Declaration does not speak of development as a (human) *right*. It deals with the right to development as a *principle* of public international law in general and of human rights law in particular. Unlike the Seoul Declaration the Development Declaration defines development and that as a comprehensive process, not a result.¹⁰⁹ The right to development has this approach in common with economic, social and cultural rights. It is said that the latter rights differ in this respect from civil and political rights, which aim at securing a specific result.
5. The claim underlying the right to development pertains to the creation of stability and well being. Crawford wrongly concludes from earlier versions of Article 1 of the Development Declaration that development is only

¹⁰⁹ According to its Preamble the Development Declaration recognizes that development is a comprehensive economic, social, cultural and political process which aims at the constant improvement 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.

proclaimed as an individual right.¹¹⁰ For according to Article 1, para 1 of the Declaration the human right to development implies the full realization of the right of peoples to self-determination, "the clearest example of a peoples' right".¹¹¹

6. The right to development is not a separate NIEO-principle. Its substance depends on that of the other NIEO-principles of the Seoul Declaration. However, the right to development has also an important meaning of its own, i.e. combining human rights with state rights in order to limit the discretionary powers of states in respect of adopting development strategies. In doing so, it explains the rationale of the prohibition of secession of states. In any society, pluralist or otherwise, a government should represent all peoples belonging to its territory. As long as this is the case no people in such a territory may claim by virtue of the right to development the right to self-determination and proceed to the use of armed force.

7. A proper interplay between freedom, equality and solidarity as NIEO-principles will secure, that always at least everyone's basic needs will be met everywhere as a matter of right, barring temporary infringements caused by national disasters. Outlawing man-made infringements on basic needs resulting in absolute poverty is the bare minimum. For that purpose an elaboration of the basic needs' concept and the development of corresponding legal standards to denounce man-made infringements are urgently needed.

8. The interrelationship of the NIEO-principles requires further research on international responsibility and liability of states for injurious consequences arising out of exercising their rights and discretionary powers under international law in respect of choosing its economic system as well as its political, social and cultural systems.

9. The NIEO-principle right to development reflects the emerging *opinio juris sive necessitatis* to withdraw the alleviation of absolute poverty from the ambit of the poor relief. It embodies a legal claim of the poor-(est) people towards the international community as a whole, states, and even individuals to be saved from the scourges of malnutrition, illiteracy and disease.

10. A state violates economic, social and cultural rights, *inter alia*, when

¹¹⁰ Crawford, op. cit. n. 1, p. 173.

¹¹¹ Ibidem, p. 174. The Preamble of the Declaration on the Right to Development also indicates that the right to development has been posed as a peoples' right.

it wilfully fails to meet a generally accepted minimum standard of achievement, which is within its powers to meet. It needs no argument that an exposure of violations of economic, social and cultural rights will be possible only on the basis of generally recognized international minimum standards of achievement. Such standards underlie the so-called basic-needs approach.

11. Reports of IGOs on education, health services, food, housing and income provide indices for developing a generally acceptable standard of achievement. Such standards are indispensable for assessing the conduct of states parties to the implementation of ICESCR.

12. Establishing priorities in human rights policies takes an enormous continuous effort to establish and secure a common understanding of the generally recognized human rights and of the principles of public international law relating to a new international economic order. Individuals and peoples have a claim towards states that the latter adopt proper legislative, policy and administrative measures to that end at both the national and the international level in accordance with the will of its people in a democratic society.

13. Consistent with the NIEO-principle right to development, any development activity should be designed:

- to achieve specific economic, social and cultural goals;
- to ensure the full participation of all affected sections of the national population in the planning, implementing, and the benefits of the activity; and
- to prevent any interference with the human rights of persons affected by the activity.

14. A human rights impact assessment should address

- (1) possible adverse effects of the project, temporary or longer term, on the full enjoyment of human rights by any sector of the national population;
- (2) targets for the contribution of the project to the achievement of economic, social and cultural rights for the population affected;
- (3) the establishment of national-level mechanisms for project monitoring and evaluation.

15. Human rights standards may be inserted in international agreements subject to the following conditions:

- (1) the agreement itself must contribute to achieving the conditions needed to facilitate observance of human rights;
- (2) the existence of a satisfactory procedure for the settlement of disputes concerning the observance of human rights by an independent body;
- (3) the supervision on the enforcement of human rights must be based on reciprocity;
- (4) a violation of human rights does not constitute grounds for the

immediate suspension or termination of the agreement, when the type of co-operation envisaged will in general benefit far more from a process of persuasion as a means of achieving the end in view.

(5) parties to the agreement are also parties to the 1966 International Covenants on human rights or agree to apply those Covenants.

(6) parties to the agreement have agreed upon the scope and content of the human rights concerned and the standards which will be applied in supervising the implementation of those rights.

16. The research scheme on the right to development of ILA's NIEO Committee intends to contribute to the realization of the above conditions. It includes to that end an analysis of the scope and content of specific corresponding human rights and rights of states in respect of international economic order. A clarification of the interrelationship of human rights and rights and duties of states is urgently needed. Overlooking this interrelationship affects everyone's entitlement to a social and international order in which the universally recognized human right can be properly realized.