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**ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**Note by the Secretariat**

**The legal nature of the right to development and  
enhancement of its binding nature**

In paragraph 2 of its resolution 2003/83, the Commission on Human Rights requested the Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia, an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address. This was for submission to the Commission at its sixty-first session for its consideration and determination of the feasibility of those options. In the same resolution (para. 8) it asked the Office of the High Commissioner for Human Rights to provide all necessary support to the Sub-Commission on its work on the said concept document.

In accordance with this resolution, the Office commissioned the study “The legal nature of the right to development and enhancement of its binding status”, prepared by Professor Shadrack Gutto, Director, Centre for African Renaissance Studies, University of South Africa, Pretoria, which is transmitted herewith for the consideration of the Sub-Commission.

## **The legal nature of the right to development and enhancement of its binding status**

### **Summary**

General Assembly resolution 41/128 on the right to development represented a qualitative leap in the evolution of international human rights law and practice. It gave concrete expression to the objectives and principles contained in the Charter of the United Nations. The resolution advanced the meaning of the right to development by extending the meaning of the right beyond what had been achieved in 1981 when the right was recognized in the African regional human rights system.

The right to development is a self-standing right. It is also a composite of all other internationally recognized rights and freedoms. The key elements of the right include the requirement of direct participation by the people in development, the notion of sustainable development, the right to peace and security and the right and principle of self-determination. In many respects the right to development fulfils the principles of interdependence, interrelatedness and equality of rights.

The notion of sustainability of development in the right to development is introduced by the synthesis of evolving principles that have accompanied environmental and intergenerational concerns since 1987, culminating most recently with the affirmations at the World Summit on Sustainable Development (WSSD) held in Johannesburg from 26 August to 4 September 2002.

There appears to be a growing global consensus that the pursuit of the right to development must focus especially on poverty eradication and the narrowing of the gaps of inequality.

From a legal standpoint, there is no doubt that the right to development is clearly defined in the resolution and that it correctly identifies the rights holders (individuals and peoples as a collective) and those with responsibility or who have the duty to promote and protect the right (States, individuals and all peoples). However, the efficacy and legal standing of the right can be enhanced in a number of ways. These may include: (a) translation of the resolution into a treaty form, as a long-term goal; (b) the strengthening of implementation, enforcement and monitoring mechanisms, as ongoing short-, medium- and long-term goals; and (c) the introduction of sanctions, including the duty to provide effective redress to victims and survivors of violations and denial of the right.

In pursuing the right to development, it is prudent to take into account local and global contexts that provide enabling or disabling environments. In this regard, the current form of globalization presents both opportunities and obstacles that call for special attention. The objectives of fine-tuning and refinement of the “binding” status of the right to development will fail or succeed depending on these contexts.

### **Introduction: the notion of development**

1. Analysis and understanding of the right to development would be incomplete and deficient if not cast within some clear understanding of what “development” means. The reason for such an approach ought to be self-evident to anyone who is familiar with the rights discourse. This is not any different from the discussion of the right to equality, dignity, freedom of expression, assembly, education, etc. To understand and discuss these categories of rights one needs to have at least some conceptual clarity on what equality, dignity, free expression, assembly or education mean in the first place.
2. As explained in paragraphs 9 and 13 below, “development” at the very least refers to the pursuit and attainment of some generally agreed high standard of human progress and well-being - mental, moral, spiritual, intellectual and physical. It is also understood as progress and well-being for the present but which does not undermine the basis of progress for future generations.
3. Since development takes place in the context of material resources or the material world and the other natural forces of immaterial nature, there is necessarily an interrelatedness and interdependence between individual human progress and changes in the material conditions and the other natural forces of immaterial nature. Access to and the capacity and ability to utilize the resources are therefore relevant factors in determining human development. An added dimension is that the individual operates within societal environments - local and external. Individual human progress is therefore linked to the material world, but within a societal context.
4. Amartya Sen, a recent winner of the Nobel Prize in economic science, explains development as the expansion of freedom of choice for human beings, both in terms of “processes that allow freedom of actions and decisions, and the actual opportunities that people have, given their personal and social circumstances”.<sup>1</sup> He points out that the condition of poverty, for example, is not merely low-income status but rather the deprivation of capabilities for freedom of choice.<sup>2</sup> He goes on to postulate that development implies overcoming problems such as “persistence of poverty and unfulfilled elementary needs, occurrence of famines, and widespread hunger, violation of elementary political freedoms as well as basic liberties, extensive neglect of the agency of women, and worsening threats of our environment and the sustainability of our economic and social lives”.<sup>3</sup>
5. Sen’s approach and understanding of development challenges does not differ materially from those recognized in the United Nations Millennium Declaration of 2000<sup>4</sup> and the Millennium Development Goals.<sup>5</sup> Confronting poverty, improving on life expectancy, education and health, combating diseases, expanding access to clean water, sanitation and shelter, as well as improvement in the observance of basic human rights and democratic governance, are all important indicators for development. Such conceptualization implies that development is not only about economic growth and improvements in the physical and well-being of individuals. In addition, development refers to values, systems, processes and institutions of social and political governance.

6. Since the mid-1980s, development has been more and more put within the context of proper environmental management. What this has done is to introduce two essential elements that need to be taken into account in understanding development. The elements are “sustainability” and “intergenerational equity”. “Sustainable development” has been defined as:

“... development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs”.<sup>6</sup>

This understanding of development was reinforced recently by the World Summit on Sustainable Development (WSSD)<sup>7</sup> in Johannesburg, South Africa. WSSD marked 10 years since the United Nations Conference on Environment and Development held at Rio de Janeiro in 1992.

7. Some national jurisdictions, like South Africa, have incorporated some elements of sustainable development within their legal systems. For example, the concept of intergenerational responsibilities, which accords with the African philosophy of *ubuntu*, is clearly expressed in the Bill of Rights under section 24 of the Constitution. The section reads:

“Everyone has the right ... (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

### **The right to development: legal recognition and meaning**

8. The right to development first received clear legal recognition and expression within the context of the African regional human rights system in 1981. In the principal African regional human rights instrument, the African Charter on Human and Peoples’ Rights,<sup>8</sup> article 22 reads:

“1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

9. The above provision is preceded by two others that underpin the socio-political and material basis for development. One is the right to self-determination in the economic, social, cultural and political sense<sup>9</sup> and the other is the right of people to control over their resources and wealth without undue spoliation and external domination.<sup>10</sup> The jurisprudence of the African Commission on Human and Peoples’ Rights with regard to the interplay of different categories of rights and implications for the right to development is quite definitive on the matter.<sup>11</sup>

10. Read contextually and within the broader framework of the corpus of rights and freedoms in the International Bill of Rights,<sup>12</sup> the right to development provision in the African Charter clearly refers to social, economic and cultural rights, as well as civil and political rights. It further introduces the “common heritage” norm that is typical of environmental rights. Furthermore, in the paradigm of rights and duties<sup>13</sup> commonly understood in Africa, although questioned by rights fundamentalists who believe that the entertainment of duties or responsibilities weakens adherence to rights, the right to development is necessarily linked to the duties that mutually exist between individuals and their families, communities and societies.

11. Early studies on the right to development naturally focused on the African Charter provisions.<sup>14</sup> But, even then, some scholars viewed the right as a derivative of the international community’s efforts to operationalize obligations under the Charter of the United Nations, especially early efforts such as the United Nations Conference on Trade and Development (UNCTAD), and the overall link between human rights and development.<sup>15</sup> Others argued that the right to development derived specifically from Article 55<sup>16</sup> of the Charter and that the African regional system only clarified it and gave it a regional legal recognition.<sup>17</sup>

12. What can only be described as a quantum leap was made in 1986 with the adoption by the General Assembly of resolution 41/128 of 4 December on the Declaration on the Right to Development. The Declaration was adopted by a vote of 146 to 1 (the United States of America) with 8 abstentions.<sup>18</sup> After affirming the inalienability of the right to development, the Declaration states<sup>19</sup> that by virtue of this right:

“1. ... 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”; [and]

“2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

13. The definition of the right to development in resolution 41/128 clearly expresses the right as a cross-cutting and straddling and also a self-standing and enabling right. It is also an “individual” and a “collective” right. These multiple features simply reflect the understanding of what development in a holistic sense means or imply. The resolution also expands the scope of the right beyond the first enunciation in the African Charter of 1981. It is therefore important to point out that the classification of resolution 41/128 under the section on “Social welfare, progress and development” in the official United Nations compilation of human rights instruments<sup>20</sup> may be for convenience only and should not be read to mean that the right falls into only “social” and “welfare” categories.

14. In addition to being a self-standing right and a right containing all other rights, the right to self-determination,<sup>21</sup> a recognized right in most international human rights instruments, and the right to peace and security<sup>22</sup> are two additional rights that resolution 41/128 expressly incorporates.

15. Resolution 41/128 places obligations on States, individually and collectively, to promote and protect the right to development.<sup>23</sup> It also places the responsibility on all peoples, individually and collectively, to contribute to the realization of the right to development.<sup>24</sup> The right therefore imposes responsibilities vertically<sup>25</sup> as well as horizontally.<sup>26</sup> In this regard, it is a progressive right that recognizes the sphere of rights in interpersonal relations and not only in relations between the State and the people. This is recognized as one of the main distinguishing features between traditional civil rights and modern human rights.<sup>27</sup>

16. As defined in the resolution, the right to development balances the obligations placed on people with the right of participation. Inclusive participation of people in development initiatives is a distinctive and core element in the definition of the right to development. Some commentators have correctly pointed out that failure of most development initiatives that impact on human rights in the past were because of the exclusion and alienation of the people from direct participation.<sup>28</sup> Meaningful people's participation in development necessarily implies meaningful connection to resources and opportunities as well as access to institutions and systems of social organization and governance. It is not enough for people to be passive beneficiaries of welfare and social benefits or to vote in elections.

17. Participation has become a universal key element in the pursuit of sustainable development. Multilateral initiatives such as the New Partnership for Africa's Development (NEPAD), for example, place a premium on principles of people's ownership of, and participation in, development, as in the partnership's founding statement:

“47. The *New Partnership for Africa's Development* centres on African ownership and management. ... The agenda is based on national and regional priorities and development plans that must be prepared through participatory processes involving the people.”

“202. ... It is a pledge to promote peace and stability, democracy, sound economic management and people-centred development ... .”<sup>29</sup>

18. The independent expert on the right to development has highlighted the principle of participation by pointing to the process of development as central in understanding the right to development.<sup>30</sup> In other words, it is not only the outcome or product that matters but also how the outcome or product is achieved. Participation strengthens the sense of ownership, develops human capacity and personality, and increases the level of people's control over their lives. Since the right to development also incorporates the realization of all other rights, as defined above, it means that the participatory principle applies equally to efforts of promoting and protecting all the rights. Moreover, as it straddles all other rights, the right to development falls neatly within the letter and spirit of the principles contained in the Vienna Declaration and Programme of Action.<sup>31</sup> Section 1, paragraph 5, of the Declaration provides in part that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

19. By emphasizing the connectivity of rights and the need to avoid artificial hierarchies within them, the Vienna Declaration is not by any means challenging the importance of each single recognized right or freedom, nor is it precluding reasonable prioritization of measures

directed at confronting human rights challenges. Universalism, one of the basic principles of human rights, does not mean “sameness” and total disregard for diversity and differences in circumstances on the ground.

### **Recent developments with regard to legal definition of the right to development**

20. It is important that human rights not be idealized and understood as operating in a world constructed on the basis of justice and real equality, although justice and equality are central values and goals that development must aspire to realize. Realities of existing class and gender inequalities, to name but a few forms of universal social differentiations, should inform the construction and meaning of all rights and freedoms. Looked at from this perspective, it becomes important to refer to the recent boost to the refinement of the right to development that focuses on gender inequalities. The recently adopted Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa provides an elaborate provision on the right to “sustainable development” that has important implications to the continued development of the right to development. Article 19 reads:<sup>32</sup>

“Women shall have the right to fully enjoy their right to sustainable development. In this connection, the States Parties shall take all appropriate measures to:

- (a) Introduce the gender perspective in the national development planning procedures;
- (b) Ensure participation of women at all levels in the conceptualization, decision-making, implementation and evaluation of development policies and programmes;
- (c) Promote women’s access to and control over productive resources such as land and guarantee their right to property;
- (d) Promote women’s access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
- (e) Take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
- (f) Ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.”

### **The realization of the right to development**

21. The right to development is universal in two senses. First, the definition has neither a geographical nor a cultural limitation or specificity. Second, the right is relevant to challenges that face developing as well as developed countries. From this perspective, “development” is a continuous and an ever-evolving process. However, the low level of development of material

resources and institutions of governance in some “Third World” countries means that aspects of the right add challenges to those societies.<sup>33</sup> In this regard, universalism does not mean uniformity or lack of differentiation. There are always different contexts within which universally recognized rights are interpreted and applied.

22. The duty of realization takes the form of activities of promotion and/or protection. Recently, concepts and principles fitting under the umbrella of human rights approaches to development have emerged and are being adopted and applied by States and regional and international organizations and institutions.<sup>34</sup> Whether the measures are for promotion or protection, monitoring implementation is of critical importance. Monitoring also applies to strategies directed at mainstreaming human rights in the development process.

23. With specific reference to the right to development, a rights approach would entail predicting, auditing and undertaking impact assessment of all activities designed to promote or protect all facets of “development”. This has to be continuous and to run throughout the life circle of the activity: before, during and after. Unfortunately, unlike “environmental impact assessment” that has been refined and is applicable in several jurisdictions, human rights impact assessment is still in its infancy.

24. One of the strategies for realizing human rights objectives involves the integration of human rights norms, standards and principles into a range of activities and practices. Of recent, concepts and principles for integration going under the umbrella of human rights approaches to development have emerged and are being adopted and applied by States and regional and international organizations and institutions.<sup>35</sup> A rights-based approach is all-encompassing and increases the effectiveness of implementation of human rights in policy formulation, planning, law-making, budgeting, and practical translation of these into action. For example, the Office of the United Nations High Commissioner for Human Rights recently convened a high-level seminar on the right to development with participants from academia, United Nations agencies, the World Bank, the World Trade Organization, the International Monetary Fund and selected State representatives, with a view to evaluating progress in incorporating the right to development and human rights approaches in the development activities of all role players.<sup>36</sup>

25. Monitoring that involves evaluation and assessment of implementation is of critical importance.<sup>37</sup> Monitoring should also apply to strategies directed at mainstreaming human rights in the development process. Court decisions also require monitoring to ensure that they are implemented, or to ascertain compliance. This is of utmost importance given the general right in human rights standards to effective remedy for those whose rights have been violated or denied.<sup>38</sup> It is important to understand that the effectiveness of a remedy is not because a judicial forum pronounces on a matter or issue before it and directs a particular remedial action. Rather, it is how the remedy it directs is relevant and how it addresses the wrong caused by the violation or denial of a right. Decisions of courts of law should themselves be the subject of critical scrutiny from a human rights perspective.

26. Sometimes the rights-based approach to development is implemented or applied through a methodology popularly known as “mainstreaming”. This is clearly borrowed from the vocabulary of gender mainstreaming.<sup>39</sup> What human rights mainstreaming implies is total integration of comprehensive rights concerns in entire activities, from conception to



implementation and evaluation, as opposed to adding or appending rights as some secondary and separate activity from the main or primary activities. In other words, it is not mainstreaming to use human rights as some icing on the cake or as a side dish.

27. The South African Human Rights Commission and the Foundation for Human Rights in South Africa have recently taken a joint initiative to develop a methodology for human rights mainstreaming and approach in the field of education.<sup>40</sup> A similar exercise was carried out between the Commission and the South African Qualification Authority.<sup>41</sup> Such methodologies and others can be improved upon, adapted and creatively used to integrate all aspects of human rights, including the right to development, in various activities of human endeavour. Countries like Uganda, Sweden and Bosnia and Herzegovina also recently presented their experiences in mainstreaming the Millennium Development Goals (MDGs), an aspect of the right to development, in their national development policies.<sup>42</sup> South Africa's Deputy Minister of Finance also informed the high-level seminar that the country is alive to the need to integrate the right to development in its development policy.<sup>43</sup>

28. Even within the United Nations system, human rights mainstreaming is not yet fully understood or accepted, except at the higher levels - and perhaps only in theory. The reason for this seems to lie either in the uneven understanding and commitment to human rights among individuals and different agencies or competition for resources and the pressure to achieve divergent mandates. However, there are continuing efforts to encourage greater internalization and incorporation of rights approach in activities of all United Nations agencies.<sup>44</sup>

29. It is important to point out that from outside it appears that even within the United Nations system, human rights mainstreaming is not yet fully understood or accepted, except at the higher levels - and perhaps only in theory. The reason for this seems to lie either in uneven understanding and commitment to human rights among individuals and different agencies or on competition for resources and the pressure of achievement of divergent mandates.

### **Prioritizing poverty eradication and narrowing inequality gaps in the implementation of the right to development**

30. As expressed by Sen, and in a number of development policy commitments by the international community, poverty eradication is one of some of the most important objectives of the right to sustainable development. But poverty eradication alone may not be sufficient in creating social justice, equality and dignity for all. Equally important is the challenge of narrowing the gaps of inequalities that manifest along regions of the world and in terms of race, gender, class and other forms of social differentiation.

31. The pledge by the heads of State and Government in the United Nations Millennium Declaration states clearly that:

“We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.”<sup>45</sup>

32. Africa's regional development strategy, NEPAD, points to poverty as one of the major challenges facing the African people. This is despite the fact that Africa is a rich continent.<sup>46</sup> The contradiction lies in uneven development and inequality. A recent study by the World Bank also acknowledges that "Africa is not only poor, it also suffers from vast inequality in incomes, in assets (including education and health status), in control over public resources, and in access to essential services, as well as pervasive insecurity".<sup>47</sup> Africa's condition is replicated in many countries in the South, especially in Asia and Central and South America.

33. It becomes imperative that development conceived within the paradigm of the right to development is directed at poverty eradication as well as the promotion and protection of substantive equality in all relationships and spheres of life. This, however, does not mean that poverty eradication and the achievement of reasonable degrees of equality is all that the right to development is all about.

### **The global context and major challenges to effective realization and implementation of the right to development**

34. The pursuit of the right to development takes place within a global context that is not particularly human rights-friendly. A climate of hegemony of the global capitalist neo-liberal economic paradigm that reinforces the marginalization of Third World countries through debt burdens and unfair trade relations, amongst others, prevails. Some of the critics of globalization in its current form include leading economists who have worked for the international financial institutions that are responsible for and oversee the inappropriate economic models and prescriptions.<sup>48</sup>

35. It is not only individual experts who find the current form of globalization problematic. Regional initiatives such as Africa's NEPAD programme,<sup>49</sup> as well as the General Assembly, have pointed out that globalization has some positive elements but also factors that have very negative impact on poor developing countries.<sup>50</sup>

36. It is impossible for individual poor countries to confront the oligarchies that exercise power in the global arena. This is especially the case as far as debt is concerned. The weak are threatened by punitive measures that the international financial oligarchies may visit on those who offend them by defaulting on debt-servicing as well on repayments. These oligarchies consist of a coalition of powerful industrialized States and the international financial institutions they control. Debt is therefore a major political economy issue - it is not a simple contractual arrangement between two parties with equal power. It is for this reason that the "debt trap" or the "debt crisis" can only be pursued through multilateral international solidarity initiatives.

37. Development in poor countries also suffers from negative terms of international trade and investment. Rules and decisions made by official and non-official bodies and forums, such as the World Trade Organization, the G7+1 and the World Economic Forum, determine, to a large extent, the space within which "development" or "underdevelopment" may occur. Recent battles between those who seek fair terms of trade from the "South" and those who seek to maintain the vastly unequal terms of trade from the "North" have led to solidarity groupings in the South such as the G20+ and the recently formed G3, consisting of Brazil, India and South Africa. Social movements that oppose the current forms of globalization include the World Social Forum.

### **Towards enhancement of the binding legal status of the right to development**

38. Within the strict normative hierarchy of international law, the General Assembly's resolution on the right to development, resolution 41/128, like all other such declarations or resolutions, belongs within what some international lawyers regard as a space somewhere just above "soft law" - legal principles, norms and standards adopted at international diplomatic conferences. This comes below "hard law" - "treaty law", customary international law and general principles of international law.<sup>51</sup> This hierarchical characterization appears to be based on or informed by textual interpretation of sources or categories of international law as expressed in the Statute of the International Court of Justice.<sup>52</sup> Writing about "soft law", Dugard states:

"Lawyers are accustomed to drawing a clear distinction between law and non-law. Hence the importance for rules for identifying the point at which a practice on the part of states becomes a customary rule of law. Today it is suggested that there is 'something' in between that merits the attention of lawyers: 'soft law'. These are imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organizations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'.<sup>53</sup>

39. There seems to be consensus among a significant number of international lawyers that General Assembly resolutions or declarations are not just soft law. The "binding" force of such declarations or resolutions is, however, not deemed to be at the same level as that of agreements that fall within the category of treaties, as contemplated in the Vienna Convention on the Law of Treaties.<sup>54</sup> In Brownlie's opinion:

"A resolution not in itself binding may prescribe principles of international law and be, or purport to be, merely declaratory. However, the mere formulation of principles may elucidate and develop the customary law. When a resolution of the General Assembly touches on subjects dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter: obvious examples are the Universal Declaration of Human Rights and the Declaration on the Granting of Independence to Colonial Countries and Peoples contained in resolutions of the General Assembly. Resolutions on new legal problems provide a means of corraling and defining the quickly growing practice of states, while remaining hortatory in form."

40. The above view is supported by a number of international law experts from different legal traditions and regions of the world.<sup>55</sup> It can therefore be safely stated that General Assembly resolutions, especially those that directly link to the letter and spirit of the Charter of the United Nations, like resolution 41/128, have some appreciable legal authority that "bind" States. The fact that even countries that had abstained from voting for the resolution in 1986, like Sweden, can today openly align themselves with the instrument and attempt to integrate its core elements into the national development policies, plans, and practices is very instructive.<sup>56</sup>

41. The concept of "binding" in relations that create legal obligations needs to be understood not only by lawyers but more importantly by the general public. Existing international and regional human rights instruments - treaties - have different elements that make them binding. The expression of consent through signatures and ratifications or accessions by States parties is

but one element. This is the reason why voting for resolutions and declarations is deemed to be another form of expression of willingness to abide by the requirements set out in such instruments.

42. The starting point is that a legal instrument that purports to be binding must clearly define a right and the corresponding responsibilities or obligations with sufficient degrees of clarity. Such a definition must point out the rights holders as well as the obligation or duty holders. There is no doubt that resolution 41/128 meets these requirements.

43. The next requirement is a clear identification of how States may or have expressed their intention to be associated with the instrument. This is where votes, signatures, ratification or accession, become relevant. But these are not the only means of verifying State behaviour. As has been explained above, there are other ways of determining consent or intention by States to be bound. There is such thing as State practice that may be expressed at national, regional or international level in different forums or forms, including a State's involvement in agreements with other States or in its policies, plans, budgetary allocations, authoritative judicial pronouncements, etc. Judged by these traditions, resolution 41/128 appears to enjoy a reasonable degree of acceptance in the practice of States even in instances in which the right may not be specifically mentioned or incorporated. The fact that the right is self-standing as well as a sum-total of other rights necessarily means that it is perhaps its self-standing aspects alone that may not enjoy universal expression in State practice. But, even its self-standing attribute is often incorporated in development initiatives that fall short of specifically mentioning the right. This was evident at the high-level seminar where some States and several international agencies claimed to be implementing the right to development even in instances where this is not explicitly stated. Adding a requirement that the right to development be specifically mentioned in the formulation of policies and related activities would certainly enhance the binding status of the right.

44. International law is also premised on the understanding that, with or without being a State party to a treaty, a State may nevertheless be bound by obligations arising from a treaty if the treaty in question merely codifies norms or rules of customary international law.<sup>57</sup> "Binding" in this instance simply means that States may be required to account for obligations that attach to States in the particular instrument. Whether all the contents and objectives of the right to development qualify as expressions of customary international law may be debatable. There is, however, little doubt that human progress through active participation will find few opponents.

45. Beyond the three criteria and attributes above, the binding nature of an instrument lies in a number of implementation or enforcement processes and procedures mediated through varying institutional mechanisms. It is typical in "binding" international and regional human rights instruments for States to be required to implement or enforce the norms and standards at the domestic sphere and generally through cooperation with other States. Except for the high seas and outer space, the world is carved up into national territories in which all people live. All rights are exercised or transmitted to people within one or more national territories. As a recent study of the effectiveness of the United Nations human rights treaty system correctly observed: "The success or failure of any international human rights system should be evaluated in accordance with its impact on human rights practices on the domestic or country level."<sup>58</sup> Indeed, it has been pointed out that the Declaration on the Right to Development imposes

obligations on States, individuals and all peoples to implement the right to development. The Declaration actually directs States on how they are expected to meet their obligations in article 10.

46. It should be understood, however, that whether States implement or enforce their obligations is not satisfied merely at the level of formal expression in an instrument. Implementation and enforcement, the real evidence of whether a “binding” instrument is binding or not in practice, depends on the deployment of a number of tools for monitoring and enforcement processes, procedures and mechanisms, as well as their effectiveness. At the regional and international levels these include one or a combination of the following: independent experts; special rapporteurs; periodic State reports;<sup>59</sup> quasi-judicial individual or group complaints or communications procedures; quasi-judicial inter-State communications or complaints procedures; ad hoc fact-finding missions; procedures pursuant to Economic and Social Council resolutions 1235 (XLII) and 1503 (XLVIII); and permanent and ad hoc judicial forums.

47. In addition to all the above attributes of binding nature of international human rights instruments, compliance is greater where sanctions for failure to meet the minimum agreed levels of achievement are clearly defined and effectively and fairly applied. The other side of the coin is that effective remedies for the victims and survivors of violations and denial are put in place. The mere adoption of implementation and enforcement mechanisms do not guarantee effective redress to victims and survivors. The violation and denial of the right to development is so far reaching and debilitating to individuals and communities that some thought ought to be given to questions of sanctions and remedies.

48. The resolution has so far utilized the mechanism of an independent expert and the less formalized, indirect mainstreaming methods. This is certainly not adequate. It is imperative that the implementation and enforcement be enhanced. In doing so, it is realistic to expect that the introduction of some of the mechanisms identified under paragraph 55 as well as the introduction of sanctions and remedies suggested in paragraph 56 above would require additional State undertaking and commitment.

49. In other words, an additional or enhanced accountability mechanism is desirable but such a mechanism may require an additional level of State commitment. It is, however, doubtful that mechanisms such as State reporting or ad hoc fact-finding missions that have the potential of impacting positively on the level of implementation would necessarily require additional commitment on the part of States. It is the translation of the resolution into a treaty form, the introduction of judicial or quasi-judicial complaints or communications procedures or the introduction of sanctions for defaulters that would necessitate further indication of consent by States.

### **Some broad conclusions and major recommendations**

50. It is suggested that adjustments be made to the traditional approach to the right to development by introducing the element of sustainability. The implication is that we move away from the term “the right to development” (RD) to a new term of “the right to sustainable development” (RSD). There is no need to formally tamper with the revision of the text of the

resolution for this to happen since legal terms are interpreted contextually and within a historical context. What is important is consistent usage of the new term at national, regional and international levels.

51. In enhancing the “binding” status of the right to development, additional accountability mechanism is desirable provided it is understood that such a mechanism may require States’ consent. State reporting procedures or ad hoc fact-finding missions would not necessarily require additional commitment on the part of States but translation of the resolution into a treaty form, the introduction of judicial or quasi-judicial complaints or communications procedures, provision of remedies to victims and survivors and the introduction of sanctions for defaulters would necessitate further indication of consent by States.

### Notes

<sup>1</sup> A. Sen, *Development as Freedom* (New York, Alfred A. Knopf, 1998) p. 17.

<sup>2</sup> Ibid., at p. 20.

<sup>3</sup> Ibid., at p. xi.

<sup>4</sup> United Nations, *Human Rights: A Compilation of International Instruments* (two volumes) (United Nations, New York and Geneva, 2002, Sales No.: E.02.XIV.4); the Millennium Declaration resolution appears in volume 1 (First Part), Universal Instruments, at pp. 69-77.

<sup>5</sup> United Nations Development Programme, *Human Development Report 2003: Millennium Development Goals - A compact among nations to end human poverty* (New York, Oxford University Press 2003) pp. 1-13.

<sup>6</sup> World Commission on Environment and Development (the Brundtland Commission), *Our Common Future* (Oxford, Oxford Paperbacks, 1987) at p. 43.

<sup>7</sup> World Summit on Social Development, Johannesburg, South Africa, 2002; see Johannesburg Declaration on Sustainable Development and the Johannesburg Plan of Implementation, adopted at the Summit on 4 September 2002.

<sup>8</sup> Adopted by the Organization of African Unity in Nairobi, Kenya in 1981; entry into force on 21 October 1986.

<sup>9</sup> African Charter on Human and Peoples’ Rights, art. 20.

<sup>10</sup> Ibid., art. 21.

<sup>11</sup> *Communication 155/96, Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, decision of the African Commission on Human and Peoples’ Rights, Banjul, 27 October 2001.

<sup>12</sup> Comprising the Universal Declaration of Human Rights (adopted by General Assembly resolution 217 A (III) of 10 December 1948; the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force on 3 January 1976); and the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI) of 16 December 1966, entry into force on 23 March 1976).

<sup>13</sup> The issue of balancing rights and obligations, duties or responsibilities is often made to be controversial. This is despite the fact that the African Charter (Charter II), the Inter-American Convention on Human Rights (art. 32) and various international instruments such as General Assembly resolution 53/144 of 9 December 1998 on the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms do provide for them. See also, International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law - A Commentary* (International Council on Human Rights Policy, Geneva, 1999).

<sup>14</sup> See, for example, P. Nobel, "Notes on the right to development" in P. Nobel (ed.) *Refugees and Development in Africa* (Scandinavian Institute of African Studies, Uppsala, Sweden, 1987), pp. 47-52; and A. Dieng, "Background and growth of the right to development - the role of law and lawyers in development", in P. Nobel, op. cit., at pp. 55-60.

<sup>15</sup> V.P. Nanda, "Development as an emerging human right under international law", in *Denver International Journal of International Law and Policy*, vol. 25, Nos. 2-3 (1984), pp. 161-179; see also P. Alston, "The right to development at the international level", in R.-J. Dupuy (ed.) *Le droit de développement au plan international - The right to development at the international level* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980) p. 99 and K. M'baye, "Du droit au développement", in R.-J. Dupuy (ed.), op. cit., at p. 72.

<sup>16</sup> The Charter of the United Nations Article 55 reads: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (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 cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

<sup>17</sup> M. Bedjaoui, "Some unorthodox reflections on the 'right to development'", in F. Snyder (ed.), *International Law of Development: Comparative Perspectives* (Abingdon, United Kingdom, Professional Books, 1987) pp. 87-116.

<sup>18</sup> These abstentions were Sweden, Denmark, Iceland, the Federal Republic of Germany, Finland, Israel, Japan and the United Kingdom. See comments on the voting process in A. Rosas, "The right to development", in A. Eide, C. Krause and A. Rosas (eds.) *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, Netherlands, Martinus Nijhoff Publishers, 1995), pp. 247-255.

<sup>19</sup> General Assembly resolution 41/128, annex, art. 1.

<sup>20</sup> United Nations, *Human Rights: A Compilation of International Instruments* (two volumes), (United Nations, New York and Geneva, 2002, Sales No.: E.02.XIV.4); the resolution appears in volume 1 (First Part), Universal Instruments, at pp. 454-458.

<sup>21</sup> See Declaration on the Right to Development, article 1 (2).

<sup>22</sup> Declaration, art. 7.

<sup>23</sup> See Declaration, articles 2 (3), 3 to 6 and 8.

<sup>24</sup> See Declaration, article 2 (2).

<sup>25</sup> "Vertical responsibilities" are between the State and people. Here the relationship is viewed in terms of power relations, with the individual holding less power than the State. This assumption is certainly incorrect in situations where powerful individuals and corporations exercise greater economic power and influence than weak States.

<sup>26</sup> "Horizontal responsibilities" are between or among people. The underlying assumption here, which is often not reflected in real life, is that people possess equal power.

<sup>27</sup> R. Abella (1993), "From civil liberties to human rights: Acknowledging the differences", in K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-first Century - A Global Challenge* (Dordrecht, Netherlands, Martinus Nijhoff Publishers), pp. 61-71.

<sup>28</sup> See P. Ntsime, "Public participation is basis of sustainable development", *Mail & Guardian*, 27 February to 4 March 2004, pp. 32-33.

<sup>29</sup> New Partnership for Africa's Development (NEPAD), adopted in October 2001 in Abuja, Nigeria. NEPAD was adopted by the Assembly of Heads of State and Government of the Organization of African Unity in July 2001. (See [www.nepad.org.ng](http://www.nepad.org.ng).)

<sup>30</sup> See C. Duckett (ed.), *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development* (Geneva, Franciscans International, 2003) at paras. 36-56.

<sup>31</sup> See United Nations, *Human Rights: A Compilation of International Instruments*, vol. 1 (First Part), Universal Instruments, at pp. 43-68.



<sup>32</sup> Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the Assembly of Heads of State and Government of the African Union, at Maputo, Mozambique, in July 2003. (See [www.africa-union.org/Official\\_documents](http://www.africa-union.org/Official_documents).)

<sup>33</sup> N.J. Udombana, "The Third World and the right to development: agenda for the next millennium", in *Human Rights Quarterly*, vol. 22 (2000), pp. 753-787.

<sup>34</sup> B.I. Hamm, "A human rights approach to development", in *ibid.*, vol. 23 (2001), pp. 1005-1031.

<sup>35</sup> *Ibid.*, vol. 23 (2001), pp. 1005-1031.

<sup>36</sup> The seminar on "Global partnership for development: high-level seminar on the right to development" took place in Geneva on 9 and 10 February 2004. It was mandated by Commission on Human Rights resolution 2003/83, adopted by the Commission at its fifty-ninth session.

<sup>37</sup> Section 184 (3) of the Constitution of South Africa incorporates a mechanism for monitoring State compliance with social and economic rights by the South African Human Rights Commission. There is, however, no similar mechanism for the other rights and freedoms. Whether intended or not, this introduces an element of differentiation and hierarchical ordering of rights - the tendency that the Vienna Declaration of 1993 is seeking to discourage.

<sup>38</sup> "Everyone has right to effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law", Universal Declaration of Human Rights, article 8.

<sup>39</sup> See, for example, M. Were and J. Kiringai, *Gender Mainstreaming in Macro-economic Policies and Poverty Reduction Strategy in Kenya* (Nairobi, FEMNET, 2002).

<sup>40</sup> S. Le Motte, assisted by A. Keet, *Human Rights Inclusivity in the Curriculum: A Resource Book for Educators* (Pretoria, FHRSA, 2003).

<sup>41</sup> South African Human Rights Commission and South African Qualifications Authority, *Human Rights and the National Qualification Framework: A Guidebook* (Pretoria, EFHRSA, 2003).

<sup>42</sup> At the high-level seminar, see note 37 above.

<sup>43</sup> M. Mpahlwa, (2004), "Statement by the South African Deputy Minister of Finance to the high-level seminar on the right to development", delivered at the high-level seminar, see note 37 above.

<sup>44</sup> See note 37 above.

<sup>45</sup> United Nations Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, at paragraph 11.

<sup>46</sup> Note 30 above at paras. 9-41.

<sup>47</sup> World Bank, *Can Africa Claim the 21st Century?* (Washington D.C., World Bank, 2000), at p. 83.

<sup>48</sup> J. Stiglitz, *Globalization and its Discontents* (New York, W.W. Norton & Co., 2002) at pp. 6-16.

<sup>49</sup> Note 30 above, paras. 28, 31-34.

<sup>50</sup> See note 30 above, para. 5.

<sup>51</sup> D.J. Harris, *Cases and Materials on International Law*, 5th Edition (London, Sweet and Maxwell, 1998), pp. 58-65; J. Dugard, *International Law: A South African Perspective*, 2nd ed., (Cape Town, Juta, 2000), at pp. 32-36; and I. Brownlie, *Principles of Public International Law*, 4th ed., (Oxford, Clarendon Press, 1990) pp. 698-701.

<sup>52</sup> Article 38, paragraph 1, of the Statute of the International Court of Justice. The Statute is an integral part of the Charter of the United Nations.

<sup>53</sup> See Dugard, in note 30 above, at p. 36.

<sup>54</sup> The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980. Articles 11-18 prescribe different ways by which States may express “consent” to be bound by an agreement. See, Brownlie, *op. cit.*, at footnote 51.

<sup>55</sup> See, Harris, *op. cit.*, at his footnote 37, p. 58.

<sup>56</sup> See note 20 above.

<sup>57</sup> Article 38, Vienna Convention on the Law of Treaties.

<sup>58</sup> C. Heyns and F. Viljoen (eds.), *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague, Kluwer Law International, 2002), at p. 1.

<sup>59</sup> Often put in check by informal “shadow reports” submitted by civil society structures.

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