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The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?

Roman Girma Teshome*

ABSTRACT

The draft Convention on the Right to Development is being negotiated under the auspices of the Human Rights Council. This article seeks to explore the merits and the added value of the draft in terms of its normative contents particularly compared with its soft law predecessor—the *Declaration on the Right to Development*. It argues that the draft is a momentous step in the recognition of the right to development as a human right not only because it is binding, if adopted, but also contains concrete, detailed and implementable norms. While it maintained the abstract and aspirational formulation of norms under the Declaration to a certain extent, the draft also addresses some of the prevailing gaps and limitations of the Declaration.

KEYWORDS: the right to development, the Declaration on the Right to Development, the Draft Convention on the Right to Development, sustainable development, duty to cooperate

1. INTRODUCTION

On 20 January 2020, the UN Working Group on the Right to Development, which is mandated to oversee the drafting process of a binding treaty on the right to development by the Human Rights Council's Resolution,¹ released the first draft of the Convention on the Right to Development along with an extensive commentary.² The draft containing 36 Articles under five parts was prepared by an ad-hoc expert group led by Mihir Kanade.³ The draft is expected to go through a

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¹ Human Rights Council Resolution 39/9, The Right to Development, 25 September 2018, A/HRC/39/L.12; Human Rights Council Resolution 42/23, The Right to Development, 20 September 2019, A/HRC/42/L.36.

² Draft Convention on the Right to Development ('the Draft Convention'), 17 January 2020, A/HRC/WG.2/21/2; Draft Convention on the Right to Development with Commentaries ('the commentary'), 20 January 2020, A/HRC/WG.2/21/2/Add.1.

³ The Draft Convention, supra n 2, introduction (paras 9 & 10). Mihir Kanade is a professor of international law at the University for Peace. He is the member, Chair and Rapporteur of the drafting expert group established by the OHCHR upon the request of the Chair-Rapporteur of the Working Group on the Right to Development.

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long consultation and negotiation process given the contentious nature of the norms on the right to development. If the draft receives sufficient support from states and is adopted, the norms on the right to development will have a binding effect at the universal level for parties to it.

The normative contents of the draft Convention heavily draw on the existing human rights frameworks including, *inter alia*, the Universal Declaration of Human Rights (UDHR), the two Covenants and, most importantly, the 1986 UN Declaration on the Right to Development.⁴ As the drafters stressed in the commentary, '[n]o concepts, norms, rights or obligations have been created *de novo*.'⁵ The draft not only solidifies the interdependence between human rights and development but also eliminates one of the hurdles to the full realization of the right to development, i.e. the lack of a binding framework at the international level. The critical question, however, is whether or not the draft introduces concrete and implementable norms compared with its soft law precursor. In other words, to what extent does the draft address the gaps and limitations of the Declaration in terms of its normative contents? The current work seeks to explore these questions.

To this end, the article has three main parts apart from this introduction. Part 1 traces the evolution of the right to development in international law and the controversies surrounding it. In Part 2, the normative contents of the Declaration and its limitations will be explored with a view to providing points of comparison for the subsequent analysis of the draft Convention. Part 3, the principal section, analyses the norms incorporated in the draft Convention and comments on their novelty and their added value for the realization of the right to development.

2. BACKGROUND: THE RECOGNITION OF THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW

For decades, development and human rights had been regarded as isolated, sometimes even as competing, subjects.⁶ While some international instruments including the United Nations Charter have urged the simultaneous promotion of both development and human rights,⁷ this had not been positively welcomed for a long time. The past few decades, however, have witnessed an increasing acceptance of the inherent interdependence between the two subjects. The right to development and the human rights-based approach to development (HRBAD) were born from the recognition of this interdependence.

The effort to recognize the right to development as a human right dates back to the early 1970s when Keba M'baye, the former vice-president of the International Court of Justice (ICJ), coined the term.⁸ This also coincided with the time the call for the New International Economic Order (NIEO) started getting a stronghold in the global political economic discourse.⁹ The right to development, for the most part, emerged as a response to this call.¹⁰ The NIEO is born

⁴ The Commentary, *supra* n 2 at 2; Declaration on the Right to Development, GA Res 41/128, 4 December 1986, A/RES/41/128; Schrijver, 'A new Convention on the human right to development: Putting the cart before the horse?' (2020) 38 *Netherlands Quarterly of Human Rights* 84 at 89.

⁵ The Commentary, *supra* n 2 at 2.

⁶ Uvin, 'From the right to development to the rights-based approach: how "human rights" entered development' (2007) 17 *Development in Practice* 597 at 597.

⁷ Article 55 Charter of the United Nations 1945, 1 UNTS XVI; Alston and Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (2005); Final Act of the International Conference on Human Rights (The Proclamation of Teheran), (1968), A/CONF.32/41, at para 13.

⁸ Sengupta, 'Realizing the Right to Development' (2000) 31 *Development and Change* 553 at 555; Lindroos, *The Right to Development*, (1999), at 1 & 4. The emergence of development as a human right is rooted in the decolonization process and the call of the newly independent states for a 'new international economic order' (see Lindroos at 3)

⁹ Uvin, *supra* n 6 at 598; Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions*, (2012) at 36.

¹⁰ Salomon, 'International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice' in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 126; Bunn (2012), *supra* n 9 at 38.

from the discontent that the political independence obtained from the decolonization process did not translate into economic independence.¹¹ At the heart of the NIEO is the assumption that the post-war/postcolonial international economic and social order is inherently based on the Western hegemony, imperialism and neo-colonialism that side-line the interests of the global south states and perpetuate global inequalities.¹² Hence, the NIEO seeks to rectify these inequalities and disadvantages that hinder the economic independence of formerly colonized states by restructuring the global political economic order.¹³ Overall, the NIEO is a set of proposals, mainly by the newly independent states, that call for a more equitable international economic, financial and trade systems.¹⁴ These proposals were solidified by the adoption of the General Assembly Declaration on the NIEO¹⁵ and, subsequently, the Charter of Economic Rights and Duties of States.¹⁶ The notion of the right to development was positively welcomed and advocated for by the proponents of the NIEO as it provided a theoretical and legal basis for the reforms the NIEO proposes.¹⁷ As Ibhawoh puts it '[i]t represents a political desire to restructure the international political economy and allow the developing societies of the South to participate more effectively in decision-making on international economic matters'.¹⁸

However, the early efforts to recognize the right to development as a separate human right did not bear fruit mainly due to the ideological divide during the Cold War.¹⁹ In 1979, the UN Secretary-General concluded in his report, which laid the foundation for the subsequent development of the Declaration, that the right to development as a human right can be inferred from the existing norms and principles of international law recognized under numerous hard law and soft law frameworks.²⁰ Subsequently, the Human Rights Commission established a Working Group with the mandate of drafting the UN Declaration on the Right to Development, which was adopted in 1986 by a UN General Assembly Resolution.²¹ While the Declaration is a significant step in the recognition of the right to development, some commentators contend that it did very little to address the global economic power imbalance or concretely address the demands of the NIEO. As Uvin argues:

[the Declaration] was the kind of rhetorical victory that diplomats cherish: the Third World got its right to development, while the First World ensured that the right could never be interpreted as a greater priority than political and civil rights, that it was totally non-binding, and that it carried no resource-transfer obligations.²²

¹¹ Eide, 'Human rights-based approach in the age of economic globalization: background and prospects' in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 283.

¹² Bedjaoui, 'Towards a new international economic order', UNESCO, (1979), available at [last accessed 13 December 2021], at 12; Anghie, 'Inequality, Human Rights, and the New International Economic Order' (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 429 & 430.

¹³ Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance' (2011) 33 *Human Rights Quarterly* 76 at 90.

¹⁴ Declaration on the Establishment of a New International Economic Order, GA Res 3201, 1 May 1974, A/RES/S-6/3201 at para 4; Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1 at 3; Uvin, supra n 6 at 598.

¹⁵ Declaration on the NIEO, supra n 14. The Declaration does not specifically mention the right to development but it has significantly shaped the discourse on the right (see Bunn (2012), supra n 9 at 37).

¹⁶ Charter of Economic Rights and Duties of States, GA Res 3281 (XXIX), 12 December 1974, A/RES/39/163. The Charter enumerates concrete legal obligations—deemed quite ambitious—that should regulate international economic relations (see Bunn (2012), supra n 9 at 37).

¹⁷ Uvin, supra n 6 at 598.

¹⁸ Ibhawoh, supra n 13 at 89 & 90.

¹⁹ Sengupta, 'The Human Right to Development' in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 13; Sengupta (2000), supra n 8 at 555.

²⁰ Sengupta (2000), supra n 8 at 555; Lindroos, supra n 8 at p.4.

²¹ The Declaration on the Right to Development, supra n 4; Sengupta (2000), supra n 8 at 555.

²² Uvin, supra n 6, 598; Fukuda-Parr, 'The Right to Development: Reframing a New Discourse for the Twenty-First Century' (2012), 79 *Human Rights and the Global Economy* 839 at 839.

The Declaration was adopted by the overwhelming support of states.²³ This does not, however, imply a consensus as to the status, the justiciability and normative content of the right to development.²⁴ The status of the right to development as a human right had given rise to a considerable debate.²⁵ These debates range from its significance as a legal right to whether or not it is a legal right in the first place. Thus, '[t]he debate on the legal significance of the right ranges from hailing it as a major breakthrough in the history of human rights to debunking it as a distracting—if not dangerous—ideological initiative.'²⁶ Some commentators expressed a reservation that the recognition of the right to development might have the effect of '[diverting] attention from the pressing issues of human dignity and freedom.'²⁷ A consensus as to the status was finally reached with the adoption of the Vienna Declaration, which affirmed that 'the right to development, as established in the Declaration on the Right to Development, [is] a universal and inalienable right and an integral part of fundamental human rights.'²⁸ This is further reiterated in a plethora of soft law documents adopted subsequently,²⁹ such as the Rio Declaration on Environment and Development,³⁰ the Cairo Declaration of the International Conference on Population and Development³¹ and Copenhagen Declaration of Social Development.³² Hence, it is safe to conclude that the status of the right to development as a human right is widely, if not universally, accepted.

The other debate regarding the right to development pertains to its justiciability³³—whether or not it can be claimed and enforced judicially. Some commentators, particularly positivists, argue that the right to development is not legally enforceable and, hence, cannot be considered as a human right.³⁴ Proponents of the right to development as a human right, however, contend

²³ Sengupta (2010), supra n 19 at p.13. The Declaration was adopted by 146 votes, 1 vote against and 8 abstentions (see Lindroos, supra n 8 at p.5). It is worth noting that while the United States cast the only negative vote, the abstaining states are also mostly Western countries, i.e. Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden and United Kingdom (Bunn (2012), supra n 9 at 44). This also reflects the ideological divide regarding the right to development.

²⁴ Sengupta (2000), supra n 8 at 555; Arts and Tamo, 'The Right to Development in International Law: New Momentum Thirty Years Down the Line?' (2016) 63 *Netherlands International Law Review* 221 at 222 & 230; Lindroos, supra n 8 at 6 & 7.

²⁵ Sengupta (2000), supra n 8 at p.556.

²⁶ Bunn, 'The Right to Development: Implications for International Economic Law' (2000), 15 *American University International Law Review* 1425, at 1426.

²⁷ Ghai, 'Whose Human Right to Development?' (1989) Human Rights Unit Occasional Paper, at 5–6; Bunn, supra n 26 at 1426.

²⁸ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/2, at para 10; Sengupta (2000), supra n 8 at 555–557; Sengupta (2010), supra n 19 at p.13; Lindroos, supra n 8 at p.6. The Declaration was adopted by a consensus of the representatives of 171 states present at World Conference on Human Rights, held in June 1993 (see World Conference on Human Rights, 14–25 June 1993, Vienna, Austria, available at <https://www.ohchr.org/E.N/ABOUTUS/Pages/ViennaWC.aspx> [last accessed 12 December 2021]). Nonetheless, it is important to note that the consensus has not been repeated in the subsequent Resolutions on the right to development adopted by the UN General Assembly, albeit most of them have obtained a significant support from states. For instance, the 2009 UN General Assembly Resolution, which reiterated the norms of the right to development and urged developed states to work to close the global income gap and meet their development assistance targets (see GA Res 64/172, 18 December 2009, A/RES/64/172), was adopted by votes of 133 in favour, 23 against and 30 abstentions (see voting records at UN General Assembly, Resolutions 64th session, <https://www.un.org/en/ga/64/resolutions.shtml> [last accessed 13 December 2021]). Similarly, the 2018 Resolution that addresses similar issues (see GA Res 73/166, 17 December 2018, A/RES/73/166) was adopted by votes of 148 in favour, 11 against and 32 abstentions (see voting records at UN General Assembly, Resolutions of the 73rd session, [last accessed 13 December 2021]). Thus, most of these resolutions have received more negative votes and abstentions than the Declaration. It is not clear, however, whether the negative votes reflect disagreement on the content of these Resolutions or a reservation on the status of the right as a human right. Given the consensus reached in Vienna as to the status of the right, it is safe to assume that most of these reservations pertain to the content of the Resolutions.

²⁹ Sengupta (2000), supra n 8 at 555 & 556; Sengupta (2010), supra n 19 at p.14.

³⁰ General Assembly, Rio Declaration on Environment and Development, 12 August 1992, A/CONF.151/26 (Vol. I), Principle 3.

³¹ UN Population Fund (UNFPA), Report of the International Conference on Population and Development (1995), A/CONF.171/13/Rev.1, Principle 3.

³² UN World Summit for Social Development, Copenhagen Declaration on Social Development, 14 March 1995, A/CONF.166/9.

³³ Sen, 'Human Rights and Development' in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 4 & 5.

that, on the one hand, the status or normative value of rights in general and the right to development in particular is not contingent on the possibility of judicial enforcement and, on the other hand, the right to development can, in fact, be judicially enforced as the experiences of some jurisdictions attest. For instance, Arjun Sengupta, the former UN Independent Expert on the Right to Development,³⁵ argues that ‘[the above positivist view] confuses human rights with legal rights: human rights precede law and are derived not from law but from the concept of human dignity. There is nothing in principle to prevent a right [from] being an internationally recognized human right even if it is not individually justified.’³⁶ Amartya Sen also argues that the effectiveness of a right is not solely based on justiciability or ‘coercive legislation.’³⁷ ‘[J]usticiability is only one of the ways of making a human right effective.’³⁸ There are other enforcement tools that can be equally effective under the circumstances, such as ‘social and political activism.’³⁹ Hence, the lack of justiciability alone does not deprive a right of its normative value or render it ineffective.

In addition, as can be deduced from the jurisprudence of the monitoring bodies of the African human rights system and some national courts, the right to development can indeed be enforced judicially in some contexts. In the *Endorois*⁴⁰ and *Ogiek*⁴¹ cases decided by the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights, respectively, the right to development has been invoked and applied. Moreover, progressive cases from national courts, particularly from South Africa and Colombia,⁴² have also affirmed that the judicial enforcement of the right to development is possible. Despite the potential challenges of judicially enforcing rights that have the nature of progressive realization and collective aspect,⁴³ the right to development and other ESC rights are not categorically nonjusticiable.

Apart from the above two issues, the normative content of the right to development and the state obligations it entails have also been—and still remain—contentious.⁴⁴ These debates particularly pertain to the duty of international cooperation and means of implementation of the right.⁴⁵ Developed countries fear that the right to development could be deemed as ‘the right to everything’ and used by developing countries to demand resource transfer.⁴⁶ Overall, it would not be surprising if these debates on the status, justiciability and normative contents of the right to development resurface during the negotiation process of the draft Convention, or even pose a significant threat to its adoption.

³⁴ Sengupta (2000), supra n 8 at 558; Bunn (2012), supra n 9 at 43 (one of the objections to the adoption of the Declaration on the right to development was that it cannot be enforced before the court of law and, hence, lacks a legal meaning).

³⁵ The Independent Expert was appointed by the Human Rights Commission to follow up on the implementation of the Declaration (see UN Commission on Human Rights Res 1998/72, (1998), E/CN.4/1998/72). The mandate of the expert was extended from 1998–2004.

³⁶ Sengupta (2000), supra n 8 at 558.

³⁷ Sen (2010), supra n 33 at 8.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 46th Ordinary Session of the ACHPR, 25 November 2009.

⁴¹ 006/2012, *African Commission on Human and Peoples’ Rights v. Republic of Kenya* (‘Ogiek case’), ACtHPR, 26 May 2017.

⁴² Liebenberg, ‘Masking a Difference: Human Rights and Development- Reflecting on the South African Experience’ in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn, (2010) at 209–44; *Republic of South Africa v. Grootboom*, Case No. CCT 11/00 2000 (11) BCLR 1169; *Minister of Health v. Treatment Action Campaign*, Case No. CCT 8/02 2002 (10) BCLR 1033; *Soobramoney v Minister of Health (KwaZulu-Natal)*, Case No. CCT 32/97 1997 (12) BCLR 1696; Sentencia C-175/09, Colombia: Corte Constitucional, 18 March 2009.

⁴³ Sen (2010), supra n 33 at 8.

⁴⁴ Sengupta (2010), supra n 19 at p.14.

⁴⁵ Arts and Tamo, supra n 24 at 224.

⁴⁶ Kerchmeier, ‘The right to development- where do we stand: the state of the debate on the right to development’, Dialogue on Globalization, occasional paper No.23, July 2006, at 12.

Despite the overwhelming support by which it is adopted and the subsequent consensus as to the status of the right to development, the Declaration is not binding. The adoption of a binding treaty on the right to development at the universal level would be a significant development. At the regional level, the right to development is provided under Article 22 of the African Charter on Human and Peoples' Rights,⁴⁷ which is the first and the only binding treaty that recognizes this right. However, aspects of the right to development are arguably recognized in several other human rights treaties.⁴⁸ Economic, social and cultural rights, such as the right to adequate standard of living,⁴⁹ the right to work⁵⁰ and the right to health,⁵¹ as well as certain civil and political rights directly or indirectly recognize this right. This is also evident in the fact that both the Declaration and the Draft Convention on the Right to Development heavily draw on the existing human rights norms as will be discussed below. However, this work focuses on the recognition of the right to development as a separate right and the corresponding human rights frameworks.

3. THE NORMATIVE CONTENTS OF THE RIGHT TO DEVELOPMENT AS RECOGNIZED UNDER THE DECLARATION

The Declaration enunciates important norms on the process and outcome of development. Nevertheless, besides being non-binding, the text of the Declaration has been criticized for being vague and inconsistent.⁵² The norms recognized under the Declaration appear to be more of policy guidelines than concrete and enforceable legal norms. According to Obiora, '... the Declaration is essentially the delineation of a broad framework with contents, which are yet to mature and crystallize into substantive law'.⁵³ It is important to note that the vagueness of the language of the Declaration partly reflects the controversies and uncertainties surrounding the right to development and the political compromise needed to accommodate those.⁵⁴ This section seeks to elucidate the relevant normative contents of the Declaration as well as highlight its gaps and limitations with a view to providing a point of comparison for the subsequent analysis of the draft Convention.

A. The Nature of the Right to Development

Article 1 of the Declaration sets out the main features of the right to development and the underlying premises on which it is based.⁵⁵ The provision reads:

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.⁵⁶

⁴⁷ Article 22 African Charter on Human and Peoples' Rights ('African Charter') 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴⁸ Bunn (2012), supra n 9 at 52.

⁴⁹ The right 'to the continuous improvement of living conditions' under Article 11 relates to the improvement of wellbeing the right to development seeks to achieve as will be discussed below (see Article 11 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; Lindroos, supra n 8 at 12).

⁵⁰ ICESCR, supra n 49 at Article 6.

⁵¹ *Ibid.*, at Article 12.

⁵² Lindroos, supra n 8 at 5; Obiora, 'Beyond the Rhetoric of a Right to Development' (1996) 18 *Law and Policy* 355 at 377; Ibhawoh, supra n 13, at p.77; Uvin, supra n 6 at 598.

⁵³ Obiora, supra n 52 at 378.

⁵⁴ Bunn (2000), supra n 26 at 1434.

⁵⁵ Independent Expert on the Right to Development (Arjun Sengupta), Study on the current state of progress in the implementation of the right to development ('report 1 of the independent expert'), 27 July 1999, E/CN.4/1999/WG.18/2, at para 36.

⁵⁶ The Declaration on the Right to Development, supra n 4, Article 1.

As it is evident from the wording, the right to development is both an individual and collective right.⁵⁷ The determination of the subjects of the right is one of the issues intensely debated during the adoption of the Declaration mainly due to the divergence of views between the North and the South on the issue.⁵⁸ The compromise reached was to recognize the right both as an individual and collective right—a right granted to ‘...every human person and all peoples.’⁵⁹ What the term ‘peoples’ constitutes for the purpose of the right to development has not been defined by the Declaration.

In the *Endorois* case, the African Commission gave an indication of the collective characteristics groups should possess to be regarded as ‘peoples’ for the purpose of the right to development and other collective rights stipulated under the Charter, i.e.

...a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy—especially rights enumerated under Articles 19 to 24 of the African Charter—or suffer collectively from the deprivation of such rights.⁶⁰

The African Court, on the other hand, gave a more simplistic and abstract definition in the *Ogiek* case. Accordingly, the term ‘peoples’ envisaged under the Charter ‘comprises all populations as a constitutive element of a state’ including ‘sub-state ethnic groups and communities’ forming the population.⁶¹ While these cases cannot be directly employed to interpret the Declaration, they provide interpretative guidance in understanding the term. Overall, based on these definitions, the term ‘peoples’ denotes a group of individuals that share certain common traits, such as territory, language and culture and can collectively exercise the right.

The other important feature of the right to development is that it applies to both the process and outcome of development.⁶² The outcome of development should be improving the well-being of the general population and this should be achieved with their participation in the process and proceeds of development. In other words, the right to development aspires to make both the process and outcome of development equitable.

The right to development also recognizes human rights both as a means and an end of development. The operational definition of the right forwarded by the Independent Expert on the right to development rightly captures this feature of the right. The definition reads:

The right to development is the right to a process of development, consisting of a progressive and phased realization of all the recognized human rights, such as civil and political rights, and economic, social and cultural rights (other rights admitted in international law) as well as the process of economic growth consistent with human rights standards.⁶³

Hence, on the one hand, the outcome of development should be progressing the realization of all sets of rights—from civil and political rights to economic, social and cultural rights.⁶⁴

⁵⁷ Ibid.; African Charter, supra n 47, Article 22.

⁵⁸ Lindroos, supra n 8 at p.30; the Global North states believed that human rights, including the right to development, are individual rights. On the other hand, the Global South states argued that the right to development is collective in nature.

⁵⁹ The Declaration on the Right to Development, supra n 4, Article 1; Lindroos, supra n 8 at 30.

⁶⁰ *Endorois* case, supra n 40 at para 151; Feyter, ‘The Declaration on the Right to Development Revisited’ (2013) 1 *Journal of National Law University* 15 at 21.

⁶¹ *Ogiek* case, supra n 41 at paras 197–9 and 208.

⁶² Sengupta (2010), supra n 19 at 23.

⁶³ Ibid., at 20; Report 1 of the Independent Expert, supra n 55, at para 47; Report of the Independent Expert on the Right to Development (Arjun Sengupta) (‘report 2 of the independent expert’), 17 August 2000, A/55/306, at para 16.

Comprehensive and inclusive development is an essential precondition for the protection of human rights as the realization of most rights is contingent upon the availability of resources.⁶⁵ On the other hand, development has to be carried out in accordance with human rights standards.⁶⁶ Overall, human rights have both ‘substantive and instrumental value’ in the attainment of development.⁶⁷

As will be discussed further below, the Declaration follows a human-centred approach. This is also evident from Article 2(1), which embraces the principle of putting humans at the centre of development. The provision states that ‘[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development.’⁶⁸

These features of the right to development also coincide with the ideals of the HRBAD.⁶⁹ Simply put, the HRBAD envisages that development programs and projects should be undertaken in accordance with human rights norms and standards.⁷⁰ It urges states and other stakeholders to integrate human rights norms in the planning and implementation of development programs.⁷¹ The HRBAD champions the protection and promotion of human rights both as a tool and end result of development. To this end, ‘[i]t seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.’⁷² Thus, this approach embodies the principles of access to information, public participation, accountability, transparency, non-discrimination and ‘do no harm.’⁷³ These principles and values of the HRBAD are embedded in the norms of the right to development.

B. Substantive Elements of the Right to Development

One of the main substantive elements of the right to development is popular participation.⁷⁴ Several Articles of the Declaration stipulate that ‘active, free and meaningful participation’ is an integral part of the right.⁷⁵ Nevertheless, the question is whether the participation requirement confers a collective decision-making power on the people concerned or a mere consultation is sufficient,⁷⁶ which the Declaration does not answer. Arguably, participation would not be ‘meaningful’ if it does not potentially influence decision-making.

The other important substantive element of the right to development is that it guarantees an equitable share in the fruits of development. This entails, according to Article 8 of the Declaration, ‘... equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.’⁷⁷ In other words, fair distribution of the benefits of development is expressed in equal access to public

⁶⁴ Sengupta (2010), supra n 19 at p.23.

⁶⁵ Ibid., at p.24; Beetham, ‘The Right to Development and its Corresponding Obligations’, in Andreassen and Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 102.

⁶⁶ Sengupta (2010), supra n 19 at 23.

⁶⁷ Ibid. at 24; Beetham, supra n 65 at 103 & 104.

⁶⁸ The Declaration on the Right to Development, supra n 4, preamble and Article 2(1); Arts and Tamo, supra n 24 at 231.

⁶⁹ Sengupta (2010), supra n 19 at 16.

⁷⁰ Report 2 of the Independent Expert, supra n 63 at para 19; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Principles and Guidelines for a Human Rights Approach to Development*, (2012), HR/PUB/06/12 at para 16; OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework*, (2004), HR/PUB/04/1.

⁷¹ Piovesan, ‘Active, free and meaningful participation in development’ in the United Nations, *Realizing the Right to Development* (Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development), (2013), HR/PUB/12/4, available at https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en [last accessed 12 December 2021] at 103.

⁷² Boesen and Sano, ‘The Implications and Value-added of the Human Rights-Based Approach’ in Andreassen and Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd edn (2010) at 50.

⁷³ OHCHR (2004), supra n 70 at 16–18; Report 2 of the Independent Expert, supra n 63 at para 19; Boesen and Sano, supra n 72 at pp. 51 & 52.

⁷⁴ Lindroos, supra n 8 at 45.

⁷⁵ The Declaration on the Right to Development, supra n 4, Articles 2(3), 1(1), and 8(2); Lindroos, supra n 8 at 45.

⁷⁶ Lindroos, supra n 8 at pp. 46 & 47.

services, such as health care, education and social security as well as the ability to make a living through decent work. Further, this ultimate end would not be achieved without the participation of vulnerable and marginalized groups in the process and proceeds of development and the ‘[eradication of] all social injustices.’⁷⁸ Thus, states should strive to address economic and social inequalities that side-line some from participating in a development process and hinder equal enjoyment of rights.

This norm of fair distribution of the benefits of development is grounded on the principles of social justice, particularly fair (re)distribution of resources.⁷⁹ Social justice, according to Rawls’ theory of justice, constitutes two major principles, i.e. equality and distributive justice.⁸⁰ The principle of equality, or ‘the principle of equal liberty’ in Rawls’ terms, demands the provision of equal rights and liberties for everyone, which also embodies the principle of non-discrimination.⁸¹ The second principle, namely ‘the difference principle’, envisages that social and economic inequalities are acceptable only if they are ‘to the greatest benefit of the least advantaged persons’⁸² or ‘attached to offices and positions open to all.’⁸³ Thus, while in principle, rights and socio-economic opportunities—the benefits of development in this case—should be distributed equally, inequalities, or differential treatments in human rights terminology, can be justified when it is for the good of those that are disadvantaged, i.e. distributive justice.⁸⁴ Hence, social justice embodies the principles of equality and non-discrimination as well as the need to address the economic and social marginalization of disadvantaged groups.⁸⁵ The norms incorporated in the Declaration reflect these principles of social justice to a certain extent.

The other important element of the right to development is self-determination.⁸⁶ Article 1(2) of the Declaration stipulates:

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.⁸⁷

As the provision also indicates, the right to self-determination in this context particularly involves the principle of sovereignty over natural resources, which entitles states and peoples to have control over the management and utilization of their natural resources.⁸⁸ This principle is rooted in the decolonization process and the quest of newly independent states to gain economic independence and control over their natural resources.⁸⁹ The right to self-determination is also

⁷⁷ The Declaration on the Right to Development, supra n 4, Article 8; Report 1 of the Independent Expert, supra n 55 at para 39.

⁷⁸ The Declaration on the Right to Development, supra n 4, Article 8; Report 1 of the Independent Expert, supra n 55 at para 39.

⁷⁹ Lindroos, supra n 8 at p.47; report 2 of the Independent Expert, supra n 63 at para 17.

⁸⁰ Rawls, *A Theory of Justice*, revised edition (1999) at 52 & 53.

⁸¹ *Ibid.* at 53.

⁸² Rawls, *A Theory of Justice*, (1971) at 302.

⁸³ Rawls (1999), supra n 80 at 53.

⁸⁴ *Ibid.*

⁸⁵ Piovesan, supra n 71 at 104.

⁸⁶ The Declaration on the Right to Development, supra n 4, Article 1(2).

⁸⁷ *Ibid.*

⁸⁸ Schrijver, ‘Self-determination of Peoples and Sovereignty over Natural Wealth and Resources’ in the United Nations, *Realizing the Right to Development* (Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development), (2013) HR/PUB/12/4, available at https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en [last accessed 12 December 2021] at 96. This principle is further elaborated in the Declaration on the Permanent Sovereignty over Natural Resources, which attributes this entitlement to both peoples and nations as well as enumerates the basic principles of this concept (UN General Assembly, Permanent sovereignty over Natural Resources, GA Res 1803 (XVII), 1962.).

reflected in the right to free and meaningful participation discussed above. Overall, the right to self-determination demands that people should have a say in the utilization of their resources in general and formulation and implementation of development programs in particular.

C. State Obligations the Right to Development Entails

One of the salient features of the right to development, as envisaged in the Declaration, is the nature of obligations it entails. Unlike most human rights norms that put the sole responsibility on states, the obligation to ensure the realization of the right to development is borne by all concerned stakeholders, i.e. individuals, states and the international community.⁹⁰ Accordingly, the duty bearers of the right to development include ‘all human beings’ who, pursuant to the Declaration,

...have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community...and they should therefore promote and protect an appropriate political, social and economic order for development.⁹¹

Hence, individuals privately as well as collectively as members of the community have a responsibility for development, which requires them to actively take part in development activities and maintain the protection of fundamental rights along the way.⁹² This appears to be more of a moral responsibility rather than a legal obligation.

The primary responsibility to take necessary steps in order to realize the right, however, rests on states.⁹³ The obligation of states under the Declaration is formulated as complementary to individuals’ efforts; states are obliged to create a conducive environment for the realization of the right rather than actually realizing it per se as this can only be achieved by individuals themselves.⁹⁴ Accordingly, the obligations of states include, *inter alia*, formulating appropriate national and international development policies,⁹⁵ facilitating popular participation⁹⁶ and promoting the realization of all human rights.⁹⁷ Nevertheless, the Declaration is quite vague and abstract in its formulation of state obligations, among others; they do not ‘... necessarily translate easily into concrete implementation obligations.’⁹⁸

In addition to their obligations at the domestic level, states also have a duty to cooperate as members of the international community in order to facilitate the realization of the right.⁹⁹ The duty to cooperate aims to address inequities and disparities in the international economic order, which led to the advent of the right to development as discussed before. Here is where the salient feature of the right to development lies— ‘its potential challenge to existing political and economic global arrangements.’¹⁰⁰ The Declaration gives heightened attention to the duty to cooperate—both in the preamble and text—and explicitly recognizes promoting the NIEO as one of its underlying objectives.¹⁰¹ The Declaration particularly underlines the importance of

⁸⁹ Schrijver (2013), *supra* n 88 at 95–97.

⁹⁰ Sengupta (2000), *supra* n 8 at 563 & 564.

⁹¹ The Declaration on the Right to Development, *supra* n 4, Article 2(2); Arts and Tamo, *supra* n 24 at 232.

⁹² The Declaration on the Right to Development, *supra* n 4, Article 2(2); Sengupta (2000), *supra* note 8 at 563.

⁹³ Arts and Tamo, *supra* n 24 at p.232.

⁹⁴ Report 1 of the Independent Expert, *supra* n 55, at para 41.

⁹⁵ The Declaration on the Right to Development, *supra* n 4, Articles 2(3) and 4(1).

⁹⁶ *Ibid.*, Article 2(3).

⁹⁷ *Ibid.*, Article 6.

⁹⁸ Arts and Tamo, *supra* n 24 at 232.

⁹⁹ The Declaration on the Right to Development, *supra* n 4, Article 4(1).

¹⁰⁰ Salomon, ‘Legal Cosmopolitanism and the Normative Contribution of the Right to Development’ (2008), LSE Law, Society and Economy Working Papers 16/2008, at 2 & 4; Fukuda-Parr, *supra* n 22, at 841.

‘effective international co-operation’ in complementing the development endeavours of developing countries,¹⁰² albeit it does not clarify what effective cooperation looks like. This is based on the conviction that ‘. . . national development efforts in which human rights can be realized require an international enabling environment.’¹⁰³ The international community particularly needs to cooperate in technology transfer, investment and access to markets, among others.¹⁰⁴ This is usually facilitated by bilateral and multilateral processes and agreements,¹⁰⁵ which are political in nature. This international cooperation must be undertaken by giving due regard to the overriding principles of international relations, i.e. sovereign equality, interdependence and mutual interest.¹⁰⁶ The duty to cooperate, although it is not novel to the Declaration,¹⁰⁷ is one of the highly controversial norms of the Declaration.¹⁰⁸ It is yet to be regarded as a concrete legal obligation as it is contingent on states’ political willingness and diplomatic relationships. Moreover, the Declaration does not enumerate the specific and concrete steps states need to take to fulfil this duty.

4. THE DRAFT CONVENTION ON THE RIGHT TO DEVELOPMENT

The draft Convention draws on the principles and norms recognized under the Declaration. It reaffirms the main features and conceptual underpinnings of the right to development elucidated above. More specifically, the draft recognises: development both as a process and outcome;¹⁰⁹ the human person as a principal participant and beneficiary of development;¹¹⁰ and the individual and collective aspect of the right.¹¹¹ For the most part, the substantive elements of the right to development incorporated under the draft are also similar to that of the Declaration, albeit the draft introduces some minor changes and additions. Pursuant to Articles 4 and 5 of the draft, the right to development encompasses three main entitlements, i.e. participation in the development process, a fair share in the fruits therefrom and self-determination.¹¹² These entitlements are guaranteed to ‘every human person and all peoples’ maintaining both an individual and collective nature of the right.¹¹³ Similar to its soft-law predecessor, the draft Convention does not define what the term ‘peoples’ entails.

Nevertheless, the two instruments differ in the political and conceptual foundation on which they are based. As discussed before, the Declaration was adopted against the backdrop of the NIEO and the postcolonial historical context. It explicitly refers to the need to establish a NIEO both in the preamble and Article 3(3) — a provision on the duty to cooperate —,¹¹⁴ albeit a more extensive incorporation of the NIEO principles in the text of the Declaration was rejected.¹¹⁵

¹⁰¹ The Declaration on the Right to Development, supra n 4, Article 3(3) and preamble. This is attributable to the historical and political context in which it was adopted as discussed before.

¹⁰² *Ibid.*, Article 4(2).

¹⁰³ Salomon (2010), supra n 10 at 122 & 123.

¹⁰⁴ Sengupta (2010), supra n 19 at 40 & 41.

¹⁰⁵ *Ibid.* at 41; For instance, in 2002’s World Summit on Sustainable Development, developed countries have vowed to give 0.7 per cent of their GNP for development assistance, albeit they rarely meet that (see Salomon (2010), supra n 10 at 123 & 124; Sengupta (2010), supra n 19 at 41). Moreover, in some cases, the distribution of development assistance by developed countries is politically motivated (see Bunn (2000), supra n 26 at 1454).

¹⁰⁶ Declaration on the Right to Development, supra n 4, Articles 3(3).

¹⁰⁷ The duty to cooperate is also recognized in several other international frameworks including the UN Charter and the ICESCR (see UN Charter, supra n 7, Articles 55 & 56; ICESCR, supra n 49, Article 2(1); Arts and Tamo, supra n 24 at 234).

¹⁰⁸ Arts and Tamo, supra n 24 at 234.

¹⁰⁹ The Draft Convention, supra n 2, Preamble.

¹¹⁰ *Ibid.*, Articles 3(a) and 4.

¹¹¹ *Ibid.*, Article 4.

¹¹² *Ibid.*, Articles 4 & 5. However, the draft Convention has more detailed norms on the right to self-determination vis-à-vis the right to development than the Declaration.

¹¹³ *Ibid.*; The Commentary, supra n 2 at 29.

¹¹⁴ The Declaration on the right to development, supra n 4, preamble and Article 3(3).

On the other hand, the draft Convention does not explicitly mention the NIEO neither in the preamble nor in the text. While the discourse on the NIEO is not as prominent as it was when the Declaration was adopted, which partly explains the omission, the systemic problems that gave it impetus are still prevalent. However, as will be further discussed below, some of the norms of the draft Convention, particularly those on the duty to cooperate, in fact, reflect the ideals of the NIEO.

The draft, however, introduces important changes and additions. It is also more detailed and extensive compared to the Declaration. This work seeks to engage with the main normative changes and additions the draft has introduced. Nonetheless, it is important to note that the Declaration and the draft Convention are distinct frameworks, particularly in terms of their legal authority, and, hence, not directly comparable. Thus, the analysis in the subsequent section should be understood in light of this distinction.

It is worth noting here that there has been a debate on the viability of a binding treaty on the right to development.¹¹⁶ Some scholars argue that a stand-alone treaty is neither feasible nor desirable since the norms on the right to development are already recognized in the existing human rights frameworks and a binding treaty might not receive sufficient support from states in order to come into effect.¹¹⁷ This pursuit might rather run the risk of eroding the progress achieved in the recognition of the right to development, or as Schrijver puts it, 'putting the cart before the horse'.¹¹⁸ Others contend that a binding treaty on the right to development is not only necessary but also long overdue.¹¹⁹ The current article does not directly engage with this debate; instead, it explores what values the norms incorporated in the Convention add to the existing frameworks and norms on the right to development, particularly to the Declaration. This is predicated on the premise that the merits of the draft Convention should be assessed based on not only its legal authority—whether or not a binding treaty is viable—but also to what extent its normative contents add to the existing frameworks. Accordingly, the article has identified five main normative changes the draft has introduced, i.e. a shift from the human-centred approach to sustainable development, detailed norms on states obligations, detailed norms on duty to cooperate, the addition of the obligation of international organizations and establishing a monitoring body, which will be elucidated in the subsequent sections.

A. From the Human-Centred Approach to Sustainable Development

Development has been a highly contentious subject. The understanding of development, particularly in the UN system, has undergone three distinct stages.¹²⁰ In the early days, development had been solely associated with economic growth or an increase in Gross National Product (GNP).¹²¹ For instance, in the 1960s, the terms 'development', 'economic development' and 'growth' were attributed to a similar meaning and used interchangeably.¹²² This 'straightforward view of development as an upward climb',¹²³ however, did not result in '... fair distribution of

¹¹⁵ Bunn (2012), supra n 9 at 55.

¹¹⁶ Feyter, 'Towards a Framework Convention on the Right to Development', April 2013, available at <https://archive.globaipolicy.org/component/content/article/211-development/52393-towards-a-framework-convention-on-the-right-to-development.html> [last accessed 13 December 2021] at 3.

¹¹⁷ Schrijver (2020), supra n 4 at 91 & 92; Feyter, supra n 116 at 3.

¹¹⁸ Schrijver (2020), supra n 4 at 92.

¹¹⁹ Feyter, supra n 116 at 4.

¹²⁰ Lindroos, supra n 8 at 40.

¹²¹ Ibid.; Obiora, supra n 52 at 361; Esteva, 'Development' in Wolfgang Sachs (ed.), *The Development Dictionary: A Guide to Knowledge As Power*, 3rd edn, (2019), at 8.

¹²² Report of the UN Secretary-General, 'The emergence of the right to development' in the United Nations, *Realizing the Right to Development* (Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development), (2013), HR/PUB/12/4, available at https://www.un-ilibrary.org/economic-and-social-development/realizing-the-right-to-development_49006c2a-en [last accessed 12 December 2021], at 7; Lindroos, supra n 8 at 40.

growth nor an appreciation of the non-material facets of human development.¹²⁴ In the 1970s, the focus shifted to human welfare as it became evident that a mere economic growth does not guarantee 'development' in a broader sense of the term.¹²⁵ Accordingly, the ultimate end of development should be a continuous improvement of 'the well-being of the entire population' who should also be the main participants and beneficiaries of development.¹²⁶ This human-centred approach challenges the traditional conception that equates development with only economic growth.

The Declaration describes what 'development' constitutes in the Preamble, which reflects the human-centred or 'anthropocentric' approach.¹²⁷ The relevant paragraph of the Preamble reads:

... development is 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[.]¹²⁸

Hence, this description coupled with Article 1 of the Declaration enunciates what development should achieve—improvement of well-being and the realization of human rights—and how that should be achieved—with the participation of the persons/people concerned in the process of development and the fruits therefrom.¹²⁹ Pursuant to the Independent Expert on the Right to Development, 'well-being' in this context should be construed broadly and it '... extends well beyond the conventional notions of economic growth to the expansion of opportunities and capabilities to enjoy those opportunities.'¹³⁰ Moreover, development comprises social, cultural and political development in addition to the traditionally recognized economic growth.¹³¹ A similar approach is followed under Article 22 of the African Charter.¹³² The African Commission has also affirmed this in the *Endorois* case—a case concerning an involuntary removal of the indigenous people concerned from their ancestral land¹³³—underscoring that the outcome of development should be empowering and improving the capabilities and choices of the people involved.¹³⁴ This interpretation closely aligns with the Nobel Laureate Amartya Sen's capability approach, which significantly shaped the contemporary understanding of development.¹³⁵ According to this approach, development should be measured by its effect in expanding individual capabilities—'a person's freedom to choose between different ways of living.'¹³⁶ Overall, the Declaration follows the human-centred approach to development, which seeks to make humans the main participants and beneficiaries of development.

In the 1990s, a new approach or conception of development emerged, i.e. sustainable development, due to the need to accommodate environmental and social justice concerns.¹³⁷ Pursuant

¹²³ Harris, 'Basic Principles of Sustainable Development', (2000) Global Development and Environment Institute Working Paper No. 00-04, June 2000, at 5.

¹²⁴ Lindroos, supra n 8 at 40.

¹²⁵ *Ibid.*; Esteve, supra n 121 at 9–11.

¹²⁶ Lindroos, supra n 8 at 40 & 4; Esteve, supra n 121 at 11.

¹²⁷ Arts and Tamo, supra n 24 at 231; Lindroos, supra n 8 at 41.

¹²⁸ The Declaration on the Right to Development, supra n 4, Preamble.

¹²⁹ *Ibid.*, Preamble and Article 1.

¹³⁰ Report 1 of the Independent Expert, supra n 55 at para 47; Report 2 of the Independent Expert, supra n 63 at para 22.

¹³¹ The Declaration on the Right to Development, supra n 4, Preamble and Article 1; Lindroos, supra n 8 at 41; Sengupta (2010), supra n 19 at 16.

¹³² African Charter, supra note 47, Article 22.

¹³³ *Endorois* case, supra n 40 at para 2.

¹³⁴ *Ibid.* at para 283.

¹³⁵ Sen's capability approach is later used by the Independent Expert to interpret the Declaration.

¹³⁶ Amartya Sen, 'Development as Capability Expansion' (1989) 19 *Journal of Development Planning* 41 at 44.

¹³⁷ Lindroos, supra n 8 at 41; Harris, supra n 123 at 5.

to the popular definition of the concept adopted by the World Commission on Environment and Development¹³⁸ in its report, 'Our Common Future', '[s]ustainable development is development which meets the needs of the present without compromising the ability of future generations to meet their own needs.'¹³⁹ Thus, sustainable development aims to achieve 'intergenerational equity' in the pursuit of development.¹⁴⁰ This abstract concept is further dissected in the subsequent frameworks and academic works. Overall, sustainable development encompasses three 'interdependent and mutually reinforcing' components, i.e. economic, environmental and social sustainability, commonly referred to as 'the three pillars of sustainable development'.¹⁴¹

Similar to the Declaration, the draft Convention also contains a description of what development constitutes rather than a definition of what development is.¹⁴² The relevant preambular paragraph of the draft is almost a verbatim copy of the paragraph of the Declaration quoted above. Accordingly, development is an inclusive process that is aimed at improving 'the well-being of the entire population and of all individuals' with their participation in the process of development and the fruits therefrom.¹⁴³ This is grounded on the human-centred approach described above.¹⁴⁴ Besides, the draft Convention explicitly adopted the human-centred approach under Article 3(a) as one of the underlying principles on which the right to development is based.¹⁴⁵ The provision stipulates, 'the human person and people are the central subjects of development and should be the active participants and beneficiaries of the right to development'.¹⁴⁶ The only departure of the draft from the Declaration in this regard is the addition of the term 'people'. As the drafters explained, the rationale behind this is that '... development should not only be human person-centred, but where development is related to traditional lands, natural resources or other rights that belong to a particular "people" which cannot be reduced to individual rights, then development must also be people-centred'.¹⁴⁷ Hence, the draft adopts the human (and people)-centred approach to development similar to its soft-law predecessor.

The draft Convention, however, moves a step further and addresses environmental concerns by adopting sustainable development as one of the guiding principles of the right to development.¹⁴⁸ Article 3(e) of the draft underscores the inextricable interdependence between the right to development and sustainable development stating that 'development cannot be sustainable if its realization undermines the right to development, and the right to development cannot be realized if development is unsustainable'.¹⁴⁹ The draft does not define what sustainable development means nor does it describes its constituent elements. Nonetheless, Article 22 of the draft obliges states not to act in such a way that compromises the 'intergenerational equity', which sustainable development aims to achieve, by mirroring the Brundtland report's definition

¹³⁸ World Commission on Environment and Development, also called 'Brundtland Commission' after its chair, the then Prime Minister of Norway Gro Harlem Brundtland, was established by the UN General Assembly in 1982. The Commission, which constitutes members from developed and developing countries, worked to harmonize development needs and environmental concerns, which result in the publication of the famous document—Our Common Heritage—in 1987.

¹³⁹ World Commission on Environment and Development, *Our Common Future (Brundtland report)*, (1987).

¹⁴⁰ Kates, Parris, and Leiserowitz, 'What is Sustainable Development? Goals, Indicators, Values, and Practice', (2005) 47 *Environment: Science and Policy for Sustainable Development* 8 at 10 & 11.

¹⁴¹ The Johannesburg Declaration on Sustainable Development, 4 September 2002, para 5; The Declaration was adopted during the 2002 World Summit on Sustainable Development.

¹⁴² The Commentary, supra n 2 at 7.

¹⁴³ The Draft Convention, supra n 2, Preamble.

¹⁴⁴ The Commentary, supra n 2 at 7.

¹⁴⁵ The Draft Convention, supra n 2, Article 3(a).

¹⁴⁶ Ibid.

¹⁴⁷ The Commentary, supra n 2 at 24.

¹⁴⁸ The Draft Convention, supra n 2, Article 3(e).

¹⁴⁹ Ibid., Article 3(a).

mentioned above.¹⁵⁰ Moreover, the commentary refers to the pertinent international law and policy frameworks including the Sustainable Development Goals (SDGs) and Rio Declaration,¹⁵¹ which help to understand what sustainable development constitutes. The provision also requires states to take legal, policy and practical measures that advance the ends of sustainable development in accordance with the norms of the Convention.¹⁵² Hence, these provisions ‘... [address] one of the biggest voids in the [Declaration], that is, the lack of any reference to sustainable development’.¹⁵³ This is one of the important normative additions of the draft Convention.

However, the draft does not go beyond this brief reference to sustainable development. It fails to put forward concrete environmental obligations in relation to the process and outcome of development. The pursuit of ‘development’ has proven to be one of the main factors contributing to environmental degradation and climate change problems. As the ICJ remarked in the *Gabčíkovo-Nagymaros Dam case*, there is a ‘need to reconcile economic development with the protection of the environment’.¹⁵⁴ On the other side of the coin, climate change and environmental degradation are impediments to the realization of the right to development as the draft also acknowledges in the preamble.¹⁵⁵ Hence, environmental goals should not only inform the process of development but also be used to assess the outcome of development. The draft, nevertheless, comes short of fully appreciating these environmental concerns and imposing concrete obligations on states to rectify those concerns. Particularly given the context in which the Convention is drafted, i.e. the growing environmental problems the world is facing and the urgent need to address them, one would reasonably expect the draft to set forth more concrete and detailed norms in this regard. The last two decades have witnessed alarming environmental concerns that arguably could not have been conceived during the drafting of the Declaration. As Feyter explained this sentiment, ‘[t]here can be little doubt that if the Declaration on the Right to Development were written today, it would include the environmental dimension of the right to development’.¹⁵⁶ Thus, it comes as a surprise that the framework on the right to development ‘written today’ does not adequately address the environmental aspects of development. Moreover, there have been extensive discussions and a plethora of legal and policy documents on environmental issues on which the draft Convention could draw. This would have been a good opportunity to turn the environmental commitments enunciated in these policy and soft law documents to treaty obligations.

B. Detailed Norms on State Obligations

The draft explicitly adopts the tripartite typology of state obligations, i.e. duty to respect, protect and fulfil, under Article 8, which lays down the general obligations of states.¹⁵⁷ The provision also obliges states to undertake these obligations ‘... without discrimination of any kind on the basis of race, colour, sex, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, age or other status’.¹⁵⁸ This is based on the formulation

¹⁵⁰ Ibid., Article 22(b).

¹⁵¹ The Commentary, supra n 2 at 9, 69, & 70; UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1. The Rio Declaration also affirms the intergenerational aspiration of sustainable development stating that ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’. (See Rio Declaration, supra n 30, Principle 3). The Declaration further enumerates environmental measures states need to take domestically and internationally to achieve this goal.

¹⁵² The Draft Convention, supra n 2, Article 22(a) & (c).

¹⁵³ The Commentary, supra n 2 at 69.

¹⁵⁴ *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ Reports 1997, 7 at para 140; Bunn (2012), supra n 9 at 145.

¹⁵⁵ The Draft Convention, supra n 2, preamble.

¹⁵⁶ Feyter, supra n 60 at 24.

¹⁵⁷ The Draft Convention, supra n 2, Article 8.

¹⁵⁸ The Draft Convention, supra n 2, Article 8(1).

of the general state obligation under some of the core human rights treaties.¹⁵⁹ The explicit inclusion of the obligation of non-discrimination is one of the additions the draft made to the Declaration, albeit this is a well-established norm of international human rights law.

The subsequent provisions of the draft further spell out what obligations to respect, protect and fulfil entail in relation to the right to development, which include both immediate and progressive obligations. These provisions build on the interpretation of the UN treaty bodies, particularly the Committee on Economic, Social and Cultural Rights (CESCR),¹⁶⁰ and principles and guidelines adopted by expert groups, such as the Maastricht Guidelines.¹⁶¹

The obligation to respect requires states to refrain from engaging in any conduct—whether it is an act or omission—that ‘[n]ullifies or impairs the enjoyment and exercise of the right to development within or outside their territories.’¹⁶² Thereby, the duty to respect also applies extraterritorially as long as the state is in a position to impact the enjoyment of the right outside its territory through its acts or omissions. As the drafters explained in the commentary:

... the obligation to refrain clearly arises in this construction when the State concerned has the capability, through its conduct, to deny the right to development anywhere. In other words, it is the power to deny the enjoyment of the right, irrespective of where the denial is felt, that brings with it the obligation to refrain from such adverse conduct.¹⁶³

Thus, the draft adopted a functional model to extraterritorial application of human rights, which is broader than the personal model—‘power or effective control’ on right holders—adopted by the Human Rights Committee in General Comment 31.¹⁶⁴ According to the functional model, what matters is a state’s capability to deny or interfere with the right through its actions or omissions even if it does not necessarily have an effective control or power over the person.¹⁶⁵ A similar model is adopted by the Human Rights Committee in relation to the right to life; the Committee explained under General Comment 36 that:

... a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction . . . This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by its military or other activities in a direct and reasonably foreseeable manner.¹⁶⁶

The functional model, thus, extends a state’s obligations to territories where the activities of the state can directly and foreseeably impact the enjoyment of rights. The Maastricht Principles

¹⁵⁹ The Commentary, supra n 2 at 40 & 41.

¹⁶⁰ Ibid.

¹⁶¹ Ibid. at 44; International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997.

¹⁶² The Draft Convention, supra n 2, Article 10(a); The Commentary, supra n 2 at 44; Maastricht Guidelines, supra n 161 at para 6.

¹⁶³ The Commentary, supra n 2 at p. 45. The drafters have drawn on the interpretation of the extraterritorial application of state obligation by the Human Rights Committee and the CESCR (see The Commentary, supra n 2 at 45).

¹⁶⁴ Human Rights Committee, General Comment No 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, at para 10; Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Treaty*, (2011) at 173 & 175–176; *Lopez Burgos v Uruguay*, *Saldias de Lopez (on behalf of Lopez Burgos) v Uruguay*, Merits, UN Doc CCPR/C/13/D/52/1979, paras 12.1–12.3.

¹⁶⁵ Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *The Law and Ethics of Human Rights* 47 at 67 & 68; Milanovic, ‘Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations’, EJIL:Talk, Blog of the European Journal of International Law, 16 March 2021, available at <https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/> [last accessed 13 December 2021].

¹⁶⁶ Human Rights Committee, General comment No 36: Right to Life (art. 6), 3 September 2019, para 63.

on the extraterritorial application of economic, social and cultural rights also employ a similar model in addition to the personal model.¹⁶⁷ Accordingly, a state's extraterritorial obligation arises in 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory'.¹⁶⁸ Hence, these frameworks can also be used to aid the interpretation of the extraterritorial obligations envisaged under the draft. Overall, states have an obligation to respect the enjoyment of the right to development within and outside their territories where they have the capability to impact the enjoyment of the right.

The duty to respect further obliges states not to engage in activities that impair the ability of other states or international organizations to fulfil their respective obligations in relation to the right to development.¹⁶⁹ This is predicated on a well-established norm of international law that requires states to cooperate—and evidently not inhibit each other—in ensuring universal respect for human rights, which is provided under the UN Charter and the international bill of rights.¹⁷⁰ States should not also assist or compel, intentionally or with full knowledge of the circumstances, other states and international organizations to infringe the right to development.¹⁷¹

The duty to protect, as stipulated under Article 11 of the draft, requires states to take all necessary measures in order to prevent the infringement of the right to development by third parties, i.e. private actors and other states.¹⁷² The provision further states that such obligation arises under three conditions. The first condition is when the third party 'conduct originates from or occurs on the territory of the State Party'.¹⁷³ This is particularly relevant when the state party had to protect right-holders from the conduct of another state and its agents. Since the principle of state sovereignty does not permit a state to regulate the conduct of other states in their own territories, save for exceptional cases, the duty of a state to protect right-holders from the conducts of other states is only limited to cases where such conduct occurs in its territory.¹⁷⁴ In other words, a state should not stay idle when its territory is being used for activities that impair the right to development.¹⁷⁵ This draws on an already established norm of international law 'that no State must allow its territory to be used by another State or its agents for committing illegal activities, if the former State knows or ought to have known about such unlawful activity'.¹⁷⁶ Hence, a state party has a duty to take necessary measures to prevent the impairment of the right to development by the conduct of other states when such conduct occurs in its territory and it knows or should have known about such conduct. This is also what the term 'they are in a position to regulate' under the introductory paragraph of Article 11 signifies.¹⁷⁷

The second condition where the obligation to protect arises is when the natural or legal person responsible for the conduct that interferes with the right to development has the nationality of the state concerned.¹⁷⁸ The final condition is when a legal person or a business

¹⁶⁷ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011, at paras 8(a) & 9(b).

¹⁶⁸ *Ibid.* at para 9(b); Schutter, Eide, Khalfan, Orellana, Salomon, & Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084 at 1108 & 1109 (foreseeability in this context entails that the state knows or should have known the human rights impacts of its conduct).

¹⁶⁹ The Draft Convention, supra n 2, Article 10(b).

¹⁷⁰ The Commentary, supra n 2 at 46; UN Charter, supra n 7, Article 55; Universal Declaration of Human Rights 1948, GA Res 217A (III), A/810 at 71 (1948), Article 30; Article 5(1) International Covenant on Civil and Political Rights 1966, 999 UNTS 171; ICESCR, supra n 49, Article 5(1).

¹⁷¹ The Draft Convention, supra n 2, Article 10(c)&(d).

¹⁷² The Draft Convention, supra n 2, Article 11; Maastricht Guidelines, supra n 161 at para 6.

¹⁷³ The Draft Convention, supra n 2, Article 11(a).

¹⁷⁴ The Commentary, supra n 2 at 48.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*; *Corfu Channel Case*, I.C.J. Reports 1949, 4.

¹⁷⁷ The Draft Convention, supra n 2, Article 11; the Commentary, supra n 2 at 48.

is domiciled in the state concerned, i.e. 'having its place of incorporation, statutory seat, central administration or substantial business interests in that State Party'.¹⁷⁹ This is a reiteration of the duty to protect vis-à-vis businesses envisaged under the Guiding Principles on Business and Human Rights, which requires states to take measures in order to prevent human rights violations by corporations domiciled in their jurisdiction.¹⁸⁰

These conditions also have extraterritorial application. The state has a duty to protect where the conducts of third parties under the above three situations impair the enjoyment of the right to development not only within its territory but also outside its territory.¹⁸¹ For instance, if a corporation conducting business activities in the territory of the state adversely affects the realization of the right to development outside the territory of the state through such activities, a state's duty to protect is engaged. Hence, states' extraterritorial obligations encompass both negative and positive obligations.

The third piece in the tripartite typology, obligation to fulfil, requires states to take more proactive steps in order to progressively enhance the right to development. This embodies both obligations of conduct and result. The first paragraph of Article 12 of the draft provides that:

Each State Party undertakes to take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to their obligations to respect and protect the right to development . . . or to those obligations contained in the present Convention that are of immediate effect. States Parties may take such measures through any appropriate means, including in particular the adoption of legislative measures.¹⁸²

This provision heavily emulates the formulation and content of the general state obligation enunciated under Article 2(1) of the ICESCR save for the term 'maximum of available resources',¹⁸³ which, according to the drafters, is specific to the nature obligations socio-economic rights entail.¹⁸⁴ Nevertheless, when it comes to the duty to fulfil, the right to development very much resembles socio-economic rights as its fulfilment can also be resource-intensive. In fact, the commentary also acknowledges the resource implication of the right to development vis-à-vis duty to fulfil.¹⁸⁵ Thus, the rationale for not using the term 'maximum of available resources' or the line the drafters are trying to draw between the nature of state obligations the two sets of rights entail by avoiding to use the term is not very clear.

States also have a right, which is exercised against other states on behalf of their own people, and a duty to formulate and implement appropriate national development laws and programs in accordance with the norms of the Convention.¹⁸⁶ In other words, states not only have a duty to determine and implement their own development priorities and programs but also have an obligation to respect and refrain from interfering in the prerogative of other states to do the same. Specifically, states should not use aid, assistance, cooperation and trade or investment, among others, to undermine the rights of other states in this regard.¹⁸⁷ The draft also includes

¹⁷⁸ The Draft Convention, supra n 2, Article 11(b).

¹⁷⁹ Ibid.

¹⁸⁰ United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011), HR/PUB/11/04, at para 2; Ruggie, *Just Business: Multinational Corporations and Human Rights*, (2013).

¹⁸¹ The Commentary, supra n 2 at 48 & 49.

¹⁸² The Draft Convention, supra n 2, Article 12; Maastricht Guidelines, supra n 161 at para 6.

¹⁸³ ICESCR, supra n 49, Article 2(1).

¹⁸⁴ The Commentary, supra n 2 at 51.

¹⁸⁵ Ibid.

¹⁸⁶ The Draft Convention, supra n 2, Article 12(2); The Commentary, supra n 2 at 52.

¹⁸⁷ Ibid.

specific obligations of states with regard to certain protected groups, i.e. women and indigenous peoples.¹⁸⁸

Overall, the draft contains more detailed and concrete state obligations compared with the Declaration. As discussed before, one of the shortcomings of the Declaration is that its formulation of state obligations is abstract and vague, which does not readily translate into implementable and enforceable actions. The norms of the draft discussed above, at least partly, address this pitfall.

C. Duty to Cooperate Defined

One of the most important additions of the draft Convention pertains to the duty to cooperate. The draft contains more nuanced and concrete norms on what the duty to cooperate entails vis-à-vis the right to development. The duty to cooperate is not novel to the draft Convention; it is provided under several other hard law and soft law human rights instruments as mentioned before. Nonetheless, the norms incorporated under the draft give rise to concrete and implementable inter-state obligations. These norms combine one of the distinct features of human rights treaties—individuals as right-holders and states as duty bearers—with features of classical public international law treaties that are based on ‘inter-state reciprocal obligations’.¹⁸⁹ This inter-state aspect of the right to development had been—still is—a contentious subject. Developing countries that have been long advocating for an equitable global economic system have emphasized the need for international cooperation to rectify the global inequities in development.¹⁹⁰ This—its potential contribution to ‘restructuring the international economic order’¹⁹¹—is one of the main reasons the right to development has received strong support from these states.¹⁹² On the other hand, most Western states strongly resisted the recognition of the duty to cooperate as a concrete inter-state obligation since it does not align with a free market, capitalist and neoliberal ideologies.¹⁹³ The draft Convention addresses some of these debates, at least rhetorically.

Article 13(1) of the draft articulates the underlying objectives the duty to cooperate seeks to achieve, i.e. solving the economic, social, cultural and environmental challenges the world is grappling with, promoting better living conditions, promoting ‘cultural and educational cooperation’ and advancing the protection and realization of human rights.¹⁹⁴ This provision builds on the principles and norms of cooperation provided under the UN Charter.¹⁹⁵ Hence, to these ends, states need to ‘take deliberate, concrete and targeted steps’ not only individually but also jointly with other states to ensure the respect and progressive realization of the right to development as well as to eradicate or mitigate impediments of development.¹⁹⁶ The draft, however, evades explicitly mentioning the need to address the global political economic power imbalance and inequalities, which it is originally designed to mitigate, as one of the objectives of the duty to cooperate.

Article 13(4) of the draft Convention, arguably the most important and novel part of the norms on the duty to cooperate incorporated in the draft, further enumerates the specific actions states need to take ‘to create a social and international order conducive to the realization of

¹⁸⁸ The Draft Convention, supra n 2, Articles 15–17.

¹⁸⁹ The Commentary, supra n 2, at 2.

¹⁹⁰ Ibhawoh, supra n 13 at 83 & 91.

¹⁹¹ *Ibid.*, at 90.

¹⁹² Ngang, Kanga, and Gumede, ‘Introduction: the Right to Development in Broad Perspectives’ in Ngang, Kanga and Gumede (eds.), *Perspectives on the Right to Development*, (2018) at 2.

¹⁹³ Ibhawoh, supra n 13, at 97.

¹⁹⁴ The Draft Convention, supra n 2, Article 13(1).

¹⁹⁵ The UN Charter, supra n 7, Articles 1(3) and 55; the Commentary, supra n 2 at 54; UDHR, supra n 170, Article 22.

¹⁹⁶ The Draft Convention, supra n 2, Article 13(2); the Commentary, supra n 2 at 54.

the right to development'.¹⁹⁷ This non-exhaustive list of steps heavily draws on the SDGs the world has set to achieve in 2030.¹⁹⁸ One of these steps is that states need to strive to make the multilateral trading system '... universal, rules-based, open, non-discriminatory and equitable'.¹⁹⁹ States need to go beyond this and implement the 'principle of special and differential treatment for developing countries'.²⁰⁰ This aims to address the prevalent global inequalities in the international economic and social order.²⁰¹ While what the terms 'rule-based, open, non-discriminatory and equitable' entail has not been clarified in the commentary, the provision appears to recognize the structural problem in the global economic and trading system that privileges powerful states and undermines the interests of the least developed countries.²⁰² Thus, states are obliged not only to promote a non-discriminatory and equitable international trading system but also to assist developing countries in their effort to equitably participate in that system through 'positive discrimination'.

The draft also requires states to enhance 'the regulation and monitoring of global financial markets and institutions' and their implementation.²⁰³ The draft again emphasizes the need to promote the participation of developing countries in decision-making in these international economic and financial institutions.²⁰⁴ According to Article 13(4)(d) of the draft Convention, states need to take steps collectively to '[ensure] enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions'.²⁰⁵ It is unclear to what extent this can offset the economic capacity-based and ostensibly undemocratic voting system in the Bretton Woods Institutions—the World Bank and the International Monetary Fund (IMF).²⁰⁶ As Sarfaty noted regarding the World Bank's voting procedure:

Unlike the UN, where each country gets one vote, the Bank links voting power to members' capital subscriptions, which are based on a country's relative economic strength. Therefore, the Bank's governance structure is undemocratic as it correlates power with capital and reproduces colonial relationships between poorer and richer countries in the name of development.²⁰⁷

Similarly, the IMF also uses a quota system to determine states' voting power, which is based on their contribution to the capital of the IMF.²⁰⁸ Hence, there is an inherent inequality between states in decision-making within these financial institutions. This '... lack of equitable participation of developing countries in international decision and policy making (lack of democracy in global governance)' has been highlighted by global south states as one of the 'impediments to equitable development on a global scale'.²⁰⁹ It is not evident how far the call to

¹⁹⁷ The Draft Convention, supra n 2, Article 13(4).

¹⁹⁸ The Commentary, supra n 2 at 56; UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, A/RES/70/1.

¹⁹⁹ The Draft Convention, supra n 2, Article 13(4)(a).

²⁰⁰ Ibid., Article 13(4)(b).

²⁰¹ Singh, 'Operationalisation of "Duties" of States and Non-State Actors in the Draft Convention on the Realisation of the Right to Development', *OpinioJuris*, 11 December 2020, available at <http://opiniojuris.org/2020/12/11/operationalisation-of-duties-of-states-and-non-state-actors-in-the-draft-convention-on-the-realisation-of-the-right-to-developme nt/> [last accessed 13 December 2021].

²⁰² Salomon (2008), supra n 100, at 8.

²⁰³ The Draft Convention, supra n 2, Article 13(4)(c).

²⁰⁴ Ibid., Article 13(4)(d).

²⁰⁵ The Draft Convention, supra note 2, Article 13(4)(d).

²⁰⁶ Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank*, (2012) at 52.

²⁰⁷ Ibid.

²⁰⁸ Houtven, *Governance of the IMF: Decision Making, Institutional Oversight, Transparency, and Accountability*, (2002), at 5; the International Monetary Fund, Articles of Agreement, 1944, Article 3.

²⁰⁹ Submission in follow-up to HRC resolution 15/25 'The Right to development' Egypt on behalf of the Non-Aligned Movement (NAM); Feyter, supra n 60, at 26.

promote the participation of developing countries by the draft goes in addressing this systemic inequality. Given the frailty of the language used in the draft and the political resistance against such initiative, however, it is unlikely that it would lead to a significant change in redressing the power imbalance in these institutions. Moreover, a meaningful realization of these norms requires structural changes within international financial institutions, World Trade Organization and other relevant actors in the international economy. This might be beyond the reach of a framework adopted under the auspices of the UN unless it is backed by powerful states that yield greater leverage in these institutions.

The draft also recognizes ‘encouraging’—not akin to providing—development and financial assistance to developing countries as a legal obligation. According to Article 13(4)(e) of the draft, the duty to cooperate includes:

Encouraging official development assistance and financial flows, including foreign direct investment, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries, in accordance with their national plans and programmes.²¹⁰

In addition, the draft requires states to cooperate in the areas of technology transfer and migration.²¹¹

Overall, the duty to cooperate envisaged under the draft requires states to work towards making the international economic and financial system equitable by particularly emphasizing the need to promote equitable participation of developing and least developed countries in this system. This signifies an important step in addressing the call for a NIEO by global south states that led to the emergence of the right to development in the first place.²¹² As discussed before, the NIEO is a set of proposals that call for a more equitable international economic, financial and trade systems. These proposals particularly emphasize the need for addressing global inequalities by improving terms of trade, promoting development assistance and ensuring permanent sovereignty over natural resources, among others.²¹³ Thus, the provisions of the draft on the duty to cooperate, at least partly, reflect these proposals.

However, it would be too optimistic to infer that these provisions would fully achieve, or even practically contribute to, the purpose of the NIEO in restructuring the global political economic system. Given the staggering increase of income inequality between states in the last few decades and its direct impact on the enjoyment of all sets of rights, the need to promote shared international responsibility in fulfilling the right to development is particularly dire.²¹⁴ As Margot Salomon rightly argued, ‘[t]hese discrepancies in wealth and power reflect a human rights problem far beyond that which can be systematically remedied even by a good faith commitment of a poor state to fulfilling obligations at the domestic level, or by narrowly-framed extraterritorial obligations of states.’²¹⁵ Moreover, the ‘[w]idespread deprivation of economic, social and cultural human rights today is largely a consequence of a global system that structurally disadvantages half of the world population.’²¹⁶ In light of these contemporary

²¹⁰ The Draft Convention, *supra* n 2, Article 13(4)(e). As discussed before, developed countries often fail to meet their development assistance commitment. Moreover, states often resist to accept providing aid and other assistances as a legal obligation (see Bunn (2000), *supra* n 26 at 1453–1455). In light of this, the language used by this provision does not necessarily translate the provision of development assistance into a concrete legal obligation.

²¹¹ The Draft Convention, *supra* n 2, Article 13(4)(f), (g), & (h).

²¹² Ibhawoh, *supra* n 13 at 81 & 82.

²¹³ Declaration on the NIEO, *supra* n 14, at para 4; Gilman, *supra* n 14 at p.3.

²¹⁴ Salomon (2008), *supra* n 100 at 7 & 8; Eide, *supra* n 11 at 275.

²¹⁵ Salomon (2008), *supra* n 100 at 8.

²¹⁶ Salomon (2010), *supra* n 10 121.

challenges, the draft could have been more revolutionary in addressing structural problems in the global system despite the potential resistance, particularly from Western states. Similar to the Declaration, these provisions do not directly impose resource transfer or redistribution obligations on states. Thus, the draft did not push the envelope enough, albeit it appears to be progressive and detailed than its soft law predecessor. To what extent the norms on the duty to cooperate can make a difference in the global political economic order, therefore, depends on how these provisions will be developed by the jurisprudence and accepted by states.

Moreover, while the norms on the duty to cooperate incorporated under the draft Convention are relatively more concrete and detailed, they also use some subjective and abstract terms, such as ‘equitable’, ‘encouraging’ and ‘special treatment’, that do not lend themselves to proper implementation. Some of these norms appear to be more of policy guidelines than concrete legal norms; the fact these norms heavily draw on the SDGs might partly explain the choice of terminology and formulation. The draft does hardly provide an objective yardstick to measure the realization of these norms. Nor does the commentary provide interpretative guidance in this regard.

However, in any case, these norms are significant developments compared with the Declaration. The adoption of the provisions on the duty to cooperate is expected to be contentious as the duty to cooperate is a divisive subject and there is an ideological divide between the North and South on the subject. Thus, it would not be surprising if these provisions are watered down in the later versions of the draft.

D. The Obligation of International Organizations

One of the novelties of the draft Convention, at least compared with the Declaration, is that it contains obligations of international organizations with regard to the right to development. Article 9 of the draft Convention, which draws on the ILC Draft Articles on the Responsibility of International Organizations (DARIO),²¹⁷ provides:

... international organizations also have the obligation to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach that State’s or that other international organization’s obligations with regard to the right to development.²¹⁸

The commentary does not clarify what this obligation entails and how it applies in practice other than an indication that it heavily draws on Articles 14 to 18 of the DARIO.²¹⁹ Thus, it is imperative to resort to these provisions to understand the obligation of international organizations. According to these provisions, the responsibility of international organizations is engaged when they aid, assist, direct, control and coerce states or other international organizations to commit an internationally wrongful act—impairment of or interference with the right to development in this context—with the knowledge of the circumstances.²²⁰ They are also internationally responsible if they adopt decisions that force their members to engage in acts that will impair the right to development.²²¹ Hence, the obligation of international organizations envisaged under the draft mainly involves a negative duty to refrain from engaging in these acts.

²¹⁷ International Law Commission, Draft articles on the responsibility of international organizations (DARIO), 2011, A/66/10; the Commentary, *supra* n 2 at 43.

²¹⁸ The Draft Convention, *supra* n 2, Article 9.

²¹⁹ The Commentary, *supra* n 2 at 43.

²²⁰ DARIO, *supra* n 217, Articles 14–16.

²²¹ *Ibid.*, Article 17.

The draft defines an international organization as ‘... an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality; international organizations may include, in addition to States, other entities as members.’²²² This is a verbatim copy of the definition of international organizations envisaged under Article 2(a) of the DARIO.²²³ Thus, the obligation of international organizations described above should be understood in light of this definition. The draft also envisages that international organizations could become parties to the Convention ‘through an act of formal confirmation.’²²⁴

Whether and to what extent international organizations have human rights obligations is one of the prevailing uncertainties in international law.²²⁵ Indeed, international organizations are not directly bound by human rights treaties as they are not parties to these treaties.²²⁶ There is, however, a compelling argument that as entities possessing international legal personality,²²⁷ they are bound by obligations emanating from customary international law, general principles of law and the UN Charter.²²⁸ On the other hand, others contend that human rights are inherently state-centric that do not give rise to direct horizontal obligations and, hence, international organizations do not have formal obligations in international human rights law as it stands today.²²⁹ In the face of this uncertainty, the draft extends human rights obligations to international organizations by imposing a negative obligation to refrain from contributing to the violation of the right to development. Overall, the provision on the obligations of international organizations is one of the normative additions of the draft.

E. Establishing a Monitoring Body

The draft Convention envisages a distinct treaty monitoring mechanism by establishing two treaty bodies, i.e. the Conference of States Parties and the Implementation Mechanism.²³⁰ The Conference of State Parties is a political body consisting of representatives of state parties. The mandates of this body include, *inter alia*, examining state reports, preparing regular reports on the implementation of the Convention, adopting recommendations on issues relevant to the implementation of the Convention and adopting protocols to the Convention.²³¹ The Conference of State Parties is also mandated to ‘... establish an implementation mechanism to facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance with the provisions of the ... Convention.’²³² The Conference of State Parties is also left with a wide discretion to determine the composition of the monitoring mechanism and accord it with mandates not specifically listed under the Convention.²³³

The implementation mechanism, on the other hand, is an expert body consisting of independent experts from different parts of the world.²³⁴ The mechanism shall adopt general

²²² The Draft Convention, supra n 2, Article 2(b).

²²³ DARIO, supra n 217, Article 2(a).

²²⁴ The Draft Convention, supra n 2, Articles 27 & 28(2).

²²⁵ Verdirame, *The UN and Human Rights: Who Guards the Guardians?*, (2011) at 55; Sarfaty, ‘Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank’ (2009) 103 *American Journal of International Law* 647 at 657; Sarfaty (2012), supra n 206 at 58.

²²⁶ Sarfaty (2012), supra n 206 at 57; Sarfaty (2009), supra n 225 at pp.657 & 658.

²²⁷ Verdirame, supra n 225 at 59; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (World Health Organization Request), Advisory Opinion, ICJ Reports (1996) 66, 110 ILR 1.

²²⁸ Sarfaty (2012), supra n 206 at 57; Verdirame, supra n 225 at 73–75.

²²⁹ Clapham, *Human rights obligations of non-state actors*, (2011).

²³⁰ The Draft Convention, supra n 2, Article 24(1); The Commentary, supra n 2 at 72 & 73.

²³¹ The Draft Convention, supra n 2, Articles 24(2) & 25; The Commentary, supra n 2 at 73–76.

²³² The Draft Convention, supra n 2, Article 26(1).

²³³ The Commentary, supra n 2 at 77.

comments or recommendations to aid the interpretation of the Convention norms.²³⁵ It also has a mandate to '[r]eview requests by rights holders to comment on situations in which their right to development has been adversely affected by the failure of States to comply with their duty to cooperate, as reaffirmed and recognized under the . . . Convention'.²³⁶ This is distinct from the regular complaint procedures of most treaty bodies. The subject matter of the complaints by right holders stipulated under this provision is limited to issues that pertain to the duty to cooperate.²³⁷ Nonetheless, it is not clear from the draft or the commentary why the drafters opted to limit the subject matter of the complaints and whether this is just an inter-state procedure or individuals/groups can also bring cases. Moreover, in practice, this complaint procedure would be difficult to implement not only because the justiciability of duty to cooperate is highly controversial but also because it is hard to imagine how right holders—persons and people—are able to discern how their right is affected by the failure of states to cooperate. It is not also evident what 'commenting on situations' entails compared with, for instance, the 'views' adopted by the treaty bodies. These monitoring gaps can possibly be rectified in the additional protocols adopted to establish the monitoring mechanisms, if the draft Convention is adopted in its current form, as is the case in most human rights treaties.

The legal authority of the comments adopted by the implementation mechanism is also not clear, although it can reasonably be assumed that they will not be binding. Some of these mandates of the implementation mechanism resemble that of the treaty bodies of the core human rights treaties. Overall, establishing a treaty monitoring mechanism is one of the important additions of the Convention. However, the lack of a monitoring body under the Declaration does not come as a surprise since it is a soft law instrument.

5. CONCLUSION

This article has set out to explore the merits of the draft Convention on the right to development in terms of its normative contents. The draft is a momentous step in the realization of the right to development not only because it is binding but also contains more detailed and concrete norms compared with its soft law predecessor. While the draft heavily draws on the norms stipulated under the Declaration on the right to development and maintains the basic principles and conceptual underpinnings of the right to development envisaged therein, it has also introduced important normative changes and additions. This article has particularly identified five areas where these changes and additions are evident, i.e. a shift from the human-centred approach to sustainable development, detailed norms on states obligations, detailed norms on duty to cooperate, the obligation of international organizations and establishing a monitoring body.

Most of the norms envisaged under the draft are also more detailed, concrete and implementable, which aid the realization of the right to development. Hence, the draft goes a long way in addressing the normative lacunas and ambiguities of the Declaration. Nevertheless, this by no means implies that the draft is without shortcomings. To some extent, the draft also maintains the abstract and the seemingly policy guidelines formulation of the norms on the right to development. Moreover, in some areas, the draft is not progressive enough to the extent expected from a framework drafted in the contemporary context.

It is important to note here that this work is based on the zero draft of the Convention. This draft is expected to go through a long negotiation and re-drafting process, which might significantly change its contents and formulation.

²³⁴ *Ibid.*

²³⁵ The Draft Convention, *supra* n 2, Article 26(3)(a).

²³⁶ *Ibid.*, Article 26(3)(c).

²³⁷ The Commentary, *supra* n 2 at 78.