

CHAPTER 3 THE NATURE OF THE RIGHT TO DEVELOPMENT

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3.1 Introduction

This chapter answers the following question: What is the nature or substance of the RTD?

The RTD is one of the most contentious issues in the human rights discourse. Located in the third generation human right or solidarity rights, the RTD was first introduced in 1972 by Keba M'baye, the Chief Justice of Senegal (later a judge at the International Court of Justice

(ICJ)) in his address at the International Institute of Human Rights in Strasbourg, France.⁴⁵⁶ As mentioned in the introductory chapter of this work, this was followed by several international undertakings aiming to incorporate the right in global standards.⁴⁵⁷ Nevertheless, the right remains controversial. While developing countries base their claim for resources transfer on the RTD perceived as a fundamental right, developed countries believe the right is a myth.⁴⁵⁸

The aim of this chapter is to examine the nature of the RTD and to look at its implementation mechanisms. Focusing on the right at a global level, this chapter is a background to the next one that looks at the right in the African human rights system.

The chapter is divided into five parts including this introduction. The second part examines the content of the RTD, the third part focuses on the controversy on the right in academic arenas and at the UN level; the fourth one focuses on its implementation by looking at the duty bearers on the one hand and the right holders on the other and the fifth and final part provides concluding remarks.

3.2 The content of the RTD

This subsection investigates the substance and the nature of the RTD. It provides a brief overview of the right as described by the UNDRTD. However, a thorough analysis of the right will be the feature of the subsections addressing the controversy on the right,⁴⁵⁹ as well as its implementation.⁴⁶⁰ Article 1 of UNDRTD defines the RTD as:

⁴⁵⁶ K M'baye 'Le droit au développement comme un droit de l'homme' (1972) 5 *Revue des droits l'homme* 505 - 534.

⁴⁵⁷ Examples: Human Right Commissions Resolutions 4 (XXXIII) of 21 February 1977, 4 (XXXV) of 2 March 1979, 36 (XXXVII) of 11 March 1981, and 1985/44 of 14 March 1985.

⁴⁵⁸ E.S Nwauche and J.C. Nwobike 'Implementing the right to development' (2005) year 2, No 2 *Sur International Journal of Human Rights* 93.

⁴⁵⁹ Sec 3.3.

⁴⁶⁰ Sec 3.4.

1. an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to 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.

According to this provision, the RTD has five main characteristics:

- The RTD is inalienable.
- It is a process securing the right to participation.
- It is a process in which all human rights and fundamental freedoms should be realised
- It is an individual and collective right.⁴⁶¹
- The RTD underlines the right of people to self-determination.

3.2.1 The RTD as an ‘inalienable’ human right

The word ‘inalienable’ of the first paragraph of the 1986 UNDRTD underscores the importance of the RTD that cannot be encroached upon, that cannot be bargained away. It derives from the natural law theory discussed earlier. Apart from the 1986 UNDRTD, the inalienable character of the RTD is also underlined by, the 1994 International Conference on Population and development (ICPD).⁴⁶² Accordingly, the RTD cannot be set aside for any reason including the lack of development. The right is inherent to the nature of mankind and should be fulfilled in a sustainable manner. In this register, human beings are the subject of development, hence there is a rejection of the theory of ‘developmentalism’⁴⁶³ characterized by free market and profit seeking at all cost.

⁴⁶¹ This will be discussed under the section allocated to the discussion on the right holders; sec 3.4.2.

⁴⁶² ICPD, principle 3.

⁴⁶³ Baix (2007) 132.

However, the RTD loses its inalienable character when the state is at the same time duty bearer and beneficiary of the right. In this context as will be seen while analysing the concept of people in the African human rights system, people's rights are easily sacrificed by the state.

3.2.2 The right to participation as a cornerstone of the RTD

Though the RTD incorporates all human rights and freedoms, the prescription on the right to participation⁴⁶⁴ is clearly spelt out through the expression 'every human person and people are entitled to participate'.⁴⁶⁵ Participation is the cornerstone of development. The entitlement to participate ensures that no one is left out on any ground, whatsoever. The right to participation underscores the prohibition of discrimination and highlights the need for transparency and accountability in the development process. Women,⁴⁶⁶ youth,⁴⁶⁷ indigenous groups⁴⁶⁸ should be part of the process and be part of the sharing of the benefit of development. In fact, the right to participation builds on article 21 of Universal Declaration according to which:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives
- (2) Everyone has the right of equal access to public service in his country
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures

⁴⁶⁴ This right will be further discussed in chapter 4 through the *Endorois* case and chapter 6 while looking at the prospect for the RTD in Cameroon and South Africa.

⁴⁶⁵ The 1986 UNDRTD, art 1.

⁴⁶⁶ ICPD, principle 4; Beijing Declaration, art 13.

⁴⁶⁷ ICPD, principle 6.13.

⁴⁶⁸ ICPD principle 14; Declaration on indigenous people, art 41.

This provision clearly highlights the importance of participation to any society. In the same vein, building from article 25 of the ICCPR⁴⁶⁹ and the common article 1 of the two 1966 Covenants, the importance of the right to participation was underscored by the 1990 African Charter for Popular Participation in Development and Transformation⁴⁷⁰ which aimed to ensure a meaningful participation of African peoples to Africa's development.⁴⁷¹

Drawing from the natural law theory according to which all human beings are created with natural rights, it could be argued that the right to participation is an inalienable human right and sits well with the RTD, though it is important to note that participation without sufficient resources will not lead to the achievement of the RTD

⁴⁶⁹ Art 25 of ICCPR reads: 'Every citizen shall have the right and the opportunity without any of the distinctions mentioned in articles 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country'.

⁴⁷⁰ The African Charter for Popular Participation in Development and Transformation; UN doc. A/45/427 of 22 August 1990.

⁴⁷¹ Art 3 reads: 'The Conference was organized out of concern for the serious deterioration of the human and economic conditions in Africa in the decade of the 1980s, the recognition of the lack of progress in achieving popular participation and the full appreciation of the role popular participation plays in the process of recovery and development'. According to article 4, the objectives of the African Charter for Popular Participation for Development and Transformation were to:

- 'a) Recognise the role of people's participation in Africa's recovery and development efforts
- b) Sensitise national governments and the international community to the dimensions, dynamics, processes and potential of a development approach rooted popular initiatives and self-reliant efforts
- c) Recommend actions to be taken by governments, the United Nations system as well as the public and private donors agencies in building environments for authentic popular participation in the development process and encourage people and their organizations to undertake self-reliant development initiatives.'

The African Charter for Popular Participation for Development and Transformation will be further discussed in chapter 5 of this study.

3.2.3 The RTD as a composite human right

The article under study underscores the composite character of the RTD by underlining that not only does development have to deal with economic, social, cultural and political wellbeing, but it is also a process in which no human right or freedom should be forgotten. It includes ‘all human rights and fundamental freedoms’. In other words, economic, social and cultural rights as well as civil and political rights are the substance of the RTD. Prior to the 1986 UNDRTD, the ACHPR which is the only instrument in which the RTD is binding, clearly underlined the composite character of the RTD which includes economic, social and cultural rights with a strong stance for respect of freedoms. Its article 22 reads:

1. All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development

Accordingly, the RTD far from been based on favour or charity, but is an entitlement. However, as will be demonstrated in the next chapter, this seems to be a case for disagreement on the right in question because some members of the international community like the United States of America (USA) for example want to associate the RTD with charity, humanism, and matter of foreign policy.

Similar to the 1986 UNDRTD and the ACHPR, the Vienna Declaration recognises and exposes the composite aspect of the RTD in these words:

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the right to development, as a universal and inalienable human right and an integral part of fundamental human rights.⁴⁷²

⁴⁷² Vienna Declaration, part I, para 10.

Put differently, the Vienna Declaration which was universally approved recognises that the RTD implies a process ensuring the realisation of ‘all human rights and fundamental freedoms’. More importantly paragraph 5 of the Vienna Declaration reads:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The composite character of the RTD should be understood from Baxi’s perspective which argues that the vital factor is the ‘organic linkage between human rights’ and not the individual recognition of each human right.⁴⁷³ He goes on to show that the liberal concept of ‘rights’ is rather confusing in the context of the RTD where the ‘emphasis is placed on a large number of ‘neighbouring rights’ considered indispensably interlinked to the task of the realisation of the right to development’.⁴⁷⁴ The composite feature of the RTD could also be understood within the context of Sen’s capability theory discussed earlier. In this perspective, realising the RTD entails empowering people through various freedoms including from fear and from want. Other human rights are straightforward and the RTD is not, hence the controversy on the nature of the RTD which is multifaceted.⁴⁷⁵

In terms of duties, as will be discussed later, the state is the primary duty bearer of a composite right, but should be assisted by the international community through cooperation.

Baxi sheds some light on the nature and content of the RTD. While the human rights discourse debate on the place of civil and political rights (freedom) versus socio-economic rights (bread) in the RTD context, Baxi says ‘the issues is not really “ bread” and or

⁴⁷³ Baxi ‘The New International Economic Order, basic needs and rights: Note towards development of the right to development’ (1983) 23 *India Law Journal* 235.

⁴⁷⁴ Baxi (1983) 235.

⁴⁷⁵ The composite feature of the RTD underscores the indivisibility and interdependency of human rights elements of the RTD.

“freedom” but rather who has how much of each, for how long, at what cost to others and why [?].⁴⁷⁶ According to Baxi, the RTD should be informed by equity and fairness in the sharing of world resources; the main question should be centred on ‘redistribution, access and needs’.⁴⁷⁷

On a different note, Sengupta refers to the RTD as a vector of rights and correctly contends that the RTD will be on the right track if at least one element of the vector is realised while none of other elements are tempered with.⁴⁷⁸ This view sustained by this thesis is under furious attack by Jamie Whyte who argues that Sengupta’s view would imply that ‘Chinese’, whose civil rights are systematically violated, have experienced no development in the last ten years, or perhaps they have developed, but without their right to development improving’.⁴⁷⁹

In response to what Whyte sees as incoherence, this thesis, argues that, to be a constitutive element of the RTD, ‘economic growth must satisfy the basic conditions of facilitating the realisation of all other human rights.’⁴⁸⁰ Hence the need to ensure consistency between policies implemented to enhance economic growth with human rights standards.

This view is secured in Sen’s capability theory which also highlights the composite character of the RTD. In this register, the RTD is an empowering right through which other human rights are realised. It calls for the removal of ‘unfreedoms’. Accordingly, the realisation of the RTD goes through the realisation of the right to education, health, food and association which

⁴⁷⁶ U Baxi ‘Human rights, accountability and development (1978) 18 *Indian Journal of international law* 279 as quoted by Baxi (1984) 234.

⁴⁷⁷ Baxi ‘Human rights, accountability and development (1978) *Indian Journal of international law* 279 as quoted by Baxi (1984) 234.

⁴⁷⁸ Sengupta (2006) 17.

⁴⁷⁹ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol 11, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁸⁰ A Sengupta ‘Development cooperation and the right to development’ at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP12--Sengupta.pdf (accessed 20 October 2007) 4.

empower the poor to reach their potential, and such freedoms multiply people's choice in their realisation. According to the human capability theory, the RTD is consistent with article 28 of the UDHR and can be defined as a people's 'claims to social and economic arrangements that protect them from the worst abuses and deprivations, and that enable them to enjoy their security and dignity as human beings'.⁴⁸¹ It is the right to 'functionings' or the right to the things that a person can do or be.⁴⁸² Hence, assessing the RTD implies a critical examination of the overall development process. Such an examination should take into account the allocated financial resources, the planning and should give equal attention to development objectives and their strategies of implementation, without neglecting the causes of underdevelopment.⁴⁸³

As discussed in the previous chapter of this work, the capability theory shifts poverty from non rights (liberal theory) to rights and compels everyone, state or institution in a position to help to do so, as will be discussed in the section allocated to duty bearers. This is in line with the UNDP's perspective claiming that eradicating poverty is more than a major development challenge, but a human right one.⁴⁸⁴

From a different angle, the multidimensional character of the RTD does not serve the purpose of the RTD in question which is to eradicate poverty. This association of human rights renders the RTD vague, complicates its implementation and keeps it in a stage of mere rhetoric.⁴⁸⁵

⁴⁸¹ P Vizard 'Human Development capability association' the human development capability approach and human rights' (2006) 4, briefing note, available at <http://www.capabilityapproach.com/pubs/HumanRights100306.pdf> (accessed 8 January 2011).

⁴⁸² Nussbaum (1997) 285; also D, Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 10-17.

⁴⁸³ Alessandro Sitta 'The role of the right to development in the human rights framework for development' 21, available at http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf (accessed 10 September 2009).

⁴⁸⁴ UNDP Report 2005, 73.

⁴⁸⁵ E Bello 'Article 22 of the African Charter on Human and Peoples' Rights' in E Bello & B Adjibola (eds) *Essay in Honour of Judge Taslim Olawale Elias* (1992) 462.

Sharing this view, Allan Rosas calls for a comprehensive clarification of the right.⁴⁸⁶ In other words, the significance of the RTD is unclear. The more the RTD is expanded to include all possible aspects of development, the more difficult it becomes to specify what would count as a violation or infringement of the right, since almost anything may count as such, and the responsibility of not fulfilling it becomes correspondingly diffused and unidentifiable. In other words, it does not help to have the entire planet packed with human rights if none of them can be fulfilled. In this light, Donnelly argues that ‘the paradox of rights is that the fewer you possess, the more important they become’,⁴⁸⁷ hence the argument that the content of the RTD should be narrowed down and not include all aspects of development, but rather focus on the context of ‘economic development’ which was at the origin of the right in question.⁴⁸⁸

The criticism of the composite aspect of the RTD and even its existence raises the questions of its justiciability and feasibility. In other words, the RTD is not justiciable and feasible. This is the liberal concept of ‘right’ secured in Dworkin’s philosophy which argues that rights are exclusively individual,⁴⁸⁹ or ‘individualistic, adversarial, and negative and therefore must be susceptible to a private judicial remedy’.⁴⁹⁰ This thesis disagrees and contends that political agitation/naming and shaming as well as public interest litigation (PIL) can assist in ensuring respect for collective rights.

On the first point, though the rule of law is necessary to enforce human rights, it is not the only road. In fact, social and political agitations can give birth to appropriate legislations and raise awareness on the issues in order to change the conditions. Supposing that there is no law

⁴⁸⁶ A Rosas ‘The right to development’ in Abjorn Eide, Catarina Kraus & A Rosas (eds) *Economic Social and cultural rights* (2001) 251.

⁴⁸⁷ Donnelly, quoted from J K Hansen & H-Otto Sano ‘The implications and value added of a right based approach’ in Andreassen & Marks (2006) 19.

⁴⁸⁸ D Bentham ‘The right to development and its corresponding obligations’ in Andreassen & Marks (2006) 83.

⁴⁸⁹ R Dworkin *Taking rights seriously* (1977) xi.

⁴⁹⁰ J M Woods ‘Justiciable social rights as a critique of the liberal paradigm’ (2003) 38 *Texas International Law Journal* 766.

or legislation involved, this study posits that social and political pressure, naming, awareness raising and disgracing are other ways to compel violators of human rights to stop their evil deeds and protect human dignity. The power of popular insurrection was seen in Ukraine during what was called the ‘Orange Revolution’ in 2006, when citizens, in the middle of winter, insurrected and forced the President of the Republic out of office without using a legal process. A similar situation happened in November 2008 in Thailand where the population peacefully forced the Prime Minister out of office without any legal process. According to the Nobel Prize winner Amartya Sen, the value of a human right is not linked to its feasibility.⁴⁹¹ In other words, the aptitude to make something a legal entitlement is not necessary to make that thing a human right.⁴⁹² Therefore, if the state lacks the capacity to establish a legal system to protect the RTD, it does not affect the nature of the right which is inherent to all human beings.

Standing against such views, Jamie Whyte argues that ‘Sen rejects the idea that the standard of human rights implies corresponding obligation, that if you have a proper claim to something, then some individual or institution is obliged to provide you with that something’.⁴⁹³ He further argues that Sen confounds the RTD with belief in this right.⁴⁹⁴ Before Whyte, this reasoning led Donnelly to reject the RTD because of its non justiciability. Accordingly, individuals cannot hold it against their states, or individual *qua* individual.⁴⁹⁵

⁴⁹¹ A Sen ‘Human rights and development’ in Andreassen & Marks (2006) 3.

⁴⁹² Sen (2006) 3.

⁴⁹³ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol1, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁹⁴ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol1, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁹⁵ J Donnelly ‘In search of the unicorn: the jurisprudence and politics of the right to development’ (1985) 15 *California Western International Law Journal* 485.

This thesis posits that human rights should not be confounded with legal rights because human rights precede law and derived from the concept of human dignity.⁴⁹⁶ Human rights are first and foremost ‘commitments to social ethics’.⁴⁹⁷ To use Sen’s words,

[t]he validity of these rights can be questioned only by showing that they will not survive public scrutiny, but not – contrary to a common temptation – by pointing to the fact that in many repressive regimes that prevent open public discussions in one way or another, these rights are not taken seriously.⁴⁹⁸

Why hide behind the justiciability of the RTD to claim that it is not a right? Is there any international court to sue states that do not comply with the provision of the ICESCR or the ICCPR? For instance, according to the ICESCR, education should be free, but various African countries are still charging school fees. At national level, the provisions pertaining to socio-economic rights are very often located in general principles of states’ policy and are therefore not justiciable. This does not make socio-economic rights less human right. Consequently, the non justiciability of the RTD should not destroy its qualification as a human right.

Nonetheless, it is worth noting that if someone is deprived of his or her socio-economic rights or civil and political ones, he or she can petition the relevant body and not so for the RTD, though the natural character of the latter gives it a significant value.

On the second point of public interest litigation, this thesis argues that the RTD, though very often located in general Principles of State Policy⁴⁹⁹ may just be as justiciable as any right contained in a national bill of rights. This can be done through the public interest litigation mechanism which is a reading of the law by the judiciary which allows the judge to interpret

⁴⁹⁶ Baxi (1989) 187.

⁴⁹⁷ Sen (2006) 3.

⁴⁹⁸ Sen (2006) 3.

⁴⁹⁹ Principle of state policy are generally not justiciable.

the law in order to protect public interest in infusing into the constitutional provisions the spirit of social justice.⁵⁰⁰ This approach is well demonstrated by the Indian jurisprudence.⁵⁰¹

3.2.4 The right to self-determination: An important element of the RTD

The right to self-determination is another cornerstone of the RTD. It is underlined by article 1(2) of the UNDRTD. According to this provision, the RTD will never be a reality if there is no right to self-determination. In this regard, the second purpose in article 1 of the UN Charter is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace.’ Accordingly, relations amongst states should be based on the principle of equality between them. This equality implies their right to freedom to choose their political system, to administer their wealth and resources which can be understood as their right to self-determination. This is fundamental in realising universal peace as well as fighting poverty or providing ‘adequate standard of living’.

According to this provision, there is no doubt that the beneficiary of the right to self-determination is a sovereign state on the international plane. This interpretation of self-determination is substantiated by the provision of the ICESCR and the ICCPR in their common article 1(1) according to which ‘all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their

⁵⁰⁰ For more on PIL, see Circle of Rights – Economic, Social & Cultural Rights Activism: A Training Resource ‘Justiciability of ESC [Economic Social and Cultural] Rights-the Indian experience at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accessed on 1 January 2011).

⁵⁰¹ See for example *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225, para 1707; *Bandhua Mukti v Union of India* (1984) 3 SCC 161; *Shanti Star Builders v Narayan K. Totame* (1990) 1 SCC 520; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

economic, social and cultural development'. This provision is confirmed by the Vienna Declaration,⁵⁰² the Charter of Economic Rights and Duties of States (CERDS),⁵⁰³ the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁵⁰⁴ as well as the UN Declaration on the Rights of Indigenous Peoples.⁵⁰⁵

For most of these instruments, self-determination is a group right or 'people's right'. But it seems that in the international arena, self-determination refers to sovereign entities like states.⁵⁰⁶

However, keeping in mind that the concept will be thoroughly analysed in chapter 4 of the thesis, what is important here is to note that the right to self-determination is a composite element of the RTD.

In sum, the RTD is inalienable, connected or 'interlinked' with the right to self-determination and is a multifaceted human right which comprises civil and political rights as well as socio-economic and cultural rights. It emphasises the right to participation, the right to self-

⁵⁰² Vienna Declaration, part 1, para 2; also art 4 of the NIEO Declaration, 26 (k) and 14 (e) of Copenhagen Declaration.

⁵⁰³ Art 2 'Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities'.

⁵⁰⁴ Art 2 (2).

⁵⁰⁵ Art 3.

⁵⁰⁶ For more on the nature of the RTD see: Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8; Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999); Concluding Observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999); Concluding Observations on Australia, UN Doc. CCPR/CO/69/AUS (2000); M Scheinin 'Advocating the right to development through complaint procedures under human right treaties' in Andreassen & Marks (eds) *Development as a human right. Legal, political and economic dimensions* (2006) 276; Communication No 547/1993 *Makuika et al v New Zealand* (27 October 2000) where it is argued that the right to self-determination is an individual human right; See 2000 Report of the Human Rights Committee, Vol. II, UN Doc. A/56/40 (Vol. II), 11-29.

determination and the principle of universality, interdependency and indivisibility of human rights. As will be shown later, it is an individual as well as a collective right. However, this description of the RTD, though based on the first article of the UNDRTD, is very controversial.

3.3 The RTD: A controversial human right

This section argues that the RTD is a subject of disagreement in academic arenas as well as at the UN level.

3.3.1 The controversy in academic arenas

In academics circles, the debate on the nature of the right under study goes from the concept of development law to the RTD *per se*.

3.3.1.1 The skirmishes on development law

Under this subsection, it is important to understand the link between the law of development⁵⁰⁷ and the RTD. The theory advanced here is the positivist one claiming that law is the source of rights and that a right emanates from the law. From this standpoint, it could be said that the law of development sets out the legal or normative framework for pursuing development by the addressees in that law i.e. states both as individual or collectives. The law of development which may be in the form of customary international law, treaties, statutes, case law, charity law amongst others consists of principles, objectives and even steps to be taken towards attaining development or particular levels of development. The RTD is therefore secured in the law of development. The latter, also called international development law or international economic development law, was fashioned by a group of academic lawyers around *l'Annuaire Francais de Droit International* with prominent names such as Michel Virally and Maurice Flory in the driving seat.⁵⁰⁸

⁵⁰⁷ For more on this concept, see G Schwarzenberger 'Meanings and functions of international development law' in Snyder & Slinn (eds) *International law of development: Comparatives perspectives* (1987) 49.

⁵⁰⁸ Schwarzenberger (1987) 49.

The discussion about international law and development may be seen as a feature of the broader controversy about the nature and the identity of international law between those who view international law as a normative system and those who discard the notion of rules in favour of a process and a policy, goal-orientated approach.⁵⁰⁹ It is a question opposing supporters of the Fitzmaurice School of thought who believe in the classic sources of international law made of a set of neutral value-free rules, to be impartially and universally applied to the supporters of French School of the *Droit international du développement* (DID) who are of the view that international legal norms are shaped by social, economic and ideological factors.⁵¹⁰

According to the Fitzmaurice School of thought, the only sources of international law are the traditional ones listed in article 38 of the ICJ Statute established in 1922. The wording of article 38 of ICJ is as follows:

- 1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states
 - (b) International custom, as evidence of a general practice accepted as law
 - (c) The general principle of law recognized by civilized nations
 - (d) Subject to the provision of article 59,⁵¹¹ judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
- 2) This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*⁵¹² if the parties agree thereto.

⁵⁰⁹ P Slinn 'Differing approaches to the relationship between international law and development' in Snyder & Slinn (eds) *International law of development: Comparative perspectives* (1987) 28.

⁵¹⁰ Slinn (1987) 28.

⁵¹¹ Art 59 of the ICJ Statute reads: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

⁵¹² To decide a case *ex aequo et bono* means to decide otherwise than in accordance with the applicable law.

The ICJ Statute clearly identifies the sources of international law. According to the Fitzmaurice School, to be included in international law, development should find its sources in article 38 of the ICJ statutes. From this standpoint, there is no such thing as the RTD.

However, since 1922 when the ICJ was established, international law has evolved and unilateral acts, equity, resolutions of the UN General Assembly or Declarations and *Jus Cogens* were added to the traditional sources of international law.⁵¹³ This view is sustained by the French school of thought which believes that international law is not static, but develops in response to societal needs. In responding to societal needs, law can be used to eradicate poverty, address social inequities and encourage interdependence between nations. Opponents of this theory warn about confusion of law as it is (*lex lata*) with law as it should be (*lex feranda*). For instance, they argue that it is an illusion to believe that there is a system of international law underpinned by the principle of social interdependency of states and functioning in the interest of all.⁵¹⁴ In this respect, Slinn argues that confusing *lex lata* and *lex feranda* will lead to a vagueness which will affect the reliability of the international legal system and create confusion between law, morality and ideology.⁵¹⁵ In the same vein, Sir Robert Jennings offered a caution related to the concept of the NIEO in these terms:⁵¹⁶

Unless the formal test of what it is international law and what it is not can be tightened, clarified and disciplined, we shall find international law becoming more and more a series of expressions in juridical guise of the ambitions of different political and economic pressure groupings.

⁵¹³ H Thirlway 'The sources of international law' in Evans (ed) *International law* (2006) 135; for more on the *Jus Cogens* nature of the RTD, see F Murray-Bruce 'Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to Development' (2005) bpress legal series' working paper No 725.

⁵¹⁴ B Cheng *International law, teaching and practice* (1982) 514; also Slinn (1987) 30.

⁵¹⁵ Slinn (1987) 31.

⁵¹⁶ Slinn (1987) 31.

This view is shared by Alfredsson who believes that claiming the RTD on the ground of the NIEO and other resolutions is a ‘risky form of legal gymnastics’ and cautions about using political preferences as law.⁵¹⁷ From this standpoint, it is important to abandon the concept of development law because it is legally incompatible with other basic concepts of international law, it is not binding and it is therefore not part of classical international law. Consequently, it can be argued that the form of an instrument is the only criteria to evaluate the intent to be bound. If parties want to be bound by an agreement, the best way to show that they are serious about the agreement and accept its binding character is to put it in a treaty form and not wait for their intention to be guessed or subjected to speculation. Following this logic, Kratochwil argues that a non binding instrument or soft law is nothing, but ‘a weak institutionalization of the norm-creation process by prodding the parties to seek more specific law-solutions within the space laid out in the declaration of intent.’⁵¹⁸ In other words, an international agreement not concluded as a treaty (sources of classical international law) is everything, but not law. The logical conclusion would be that outside Africa, the law of development is not binding since it is grounded on declarations at a global level.

Nevertheless, general principles of law as recognised by civilised nations constitute international law. Therefore, aspects of the development law, though grounded in general principles, are a source of the RTD. However, this view remains the subject of controversy. In this regard, Alfredsson basing his argument on the hierarchy of sources of international law aptly argues that a general principle of law cannot overcome a vigorous states’ opposition to the development of the same principle to treaty and customary rank.⁵¹⁹ According to him, it would not happen because a general principle ‘fills gaps in existing laws and does not override the other two primary sources [International convention and international custom] or to preempt on ongoing legislative debate which is loaded with disagreement and opposition or significant reservations by major participants’.⁵²⁰

⁵¹⁷ G Alfredsson ‘The right to development: Perspective from human rights law’ in L A Rehof & C Gulmann (eds) *Human Rights in domestic law and development assistance policies of the Nordic countries* (1989) 84.

⁵¹⁸ Kratochwil quoted from G Maggio (1997).

⁵¹⁹ Alfredsson (1989) 84.

⁵²⁰ Alfredsson (1989) 84.

Though this view makes sense, it can be put aside on the ground that based on the sovereign equality of all states, international rules are equivalent, sources are equivalent, and procedures are equivalent⁵²¹ since all of them express the will of states.⁵²² More importantly, international law is evolutive and addresses problems of the international society as they arise. It should be responsive of society problems. Are poverty and underdevelopment international problems? If the answer is yes, then the international community shall take action through international law to address such issues. Stressing the importance of non binding instruments, Brownlie claims that when a resolution of the UN General Assembly (non binding) touches on subjects that deal with the UN Charter, it may be regarded as an ‘authoritative interpretation of the Charter’.⁵²³ It could therefore be argued that the RTD, though secured in a UN General Assembly Resolution, but dealing with ‘the better standard of living’ incorporated in the UN Charter, has a normative force.

Furthermore, international law is dynamic and is frequently adjusted to respond to international crises whether they are linked to genocide, terrorism or abject poverty. In this perspective, the binding force of an instrument is not always in its form or label. The core question lies in the substance of the text and the intent to be bound. In other words, what is the true intention of the parties while signing the agreement? What is the content of the agreement?

⁵²¹ P-M Dupuy *Droit International Public* (1995) 14 & 16; for more on the debate on the normative force of the sources of international law, see C M Chinkin ‘The Challenge of soft law: Development and change in international law’ (1989) 38 *International and Comparative Law Quarterly* 549; P M Dupuy ‘Soft law and the international law of environment’ (1991) 12 *Michigan Journal of International Law* 420.

⁵²² In this regard, see the ‘*Lotus judgment* (1927), PCIJ, Ser A, No10, 18.

⁵²³ I Brownlie *Principles of public international law* (2003) 715 - 663.

The *Qatar-Bahrain Maritime Delimitation* case⁵²⁴ demonstrates that the binding character of an agreement does not lie in its form, but in its content and in the intent of the parties. In a matter of Maritime delimitation and territorial dispute between Qatar and Bahrain, under the mediation of Saudi Arabia, the two countries agreed to transmit the dispute to the ICJ in case they did not reach a compromise. The agreement was made through an exchange of letters and a document called ‘Minute’ and signed by the parties as well as Saudi Arabia. However, when Qatar took the matter to the ICJ, Bahrain in its counter argument claimed that both parties had agreed to submit the dispute to the ICJ jointly and argued that the letters and ‘Minute’ giving jurisdiction to the ICJ were not legally binding instruments and were not treaties. The ICJ found that these instruments were ‘international agreements creating rights and obligations for the parties’. It cited the *Anglo-Iranian Oil Co case*⁵²⁵ to highlight that an agreement between a state and another entity may be binding even if it is not a treaty. Viewed from this angle, it could be argued that the law of development is law with a binding force at a global level. For those who believe that the law of development is nothing but a ‘nice aspiration’, Pellet replies that

[t]he law is not an ideal philosophy or a kind of mental game, but rather a guide for concrete social behaviour. International law does not appear in an abstract way, but in a social environment, in a given society.⁵²⁶

In the same perspective, the ICJ stated:⁵²⁷

⁵²⁴ *Maritime Delimitations and territorial questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, *Qatar v Bahrain* (1994) 1 July at <http://www.icj-ij.org/docket/index.php?sum=441&code=qb&p1=3&p2=3&case=87&k=61&p3=5> (accessed 23 May 2008).

⁵²⁵ *Anglo-Iranian Oil Co. Preliminary Objections, United Kingdom v Iran*, Judgment (22 July 1952) ICJ Reports 93.

⁵²⁶ A Pellet ‘A new international legal order: what legal tools for what changes?’ in Snyder & Slinn (1987) 118.

⁵²⁷ I.C.J. Advisory Opinion of December 20, 1980, interpretation of the agreement of 25 March 1951 between the W.H.O and Egypt, No 10, Rep, 16.

A rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.

According to these two views, international law is more than just pure *lex lata*. It should respond to the needs of the international community at a given time. In fact, it could be argued that development law is a law which addresses development issues that were not on the table when the sources of international law as provided for by the ICJ Statutes were drafted. According to Flory, the DID is '*cette nouvelle réalité juridique qu'est l'inégalité économique des Etats*',⁵²⁸ in other words, the international development law is this new legal reality which addresses economic inequality between states. Again, the form of the instrument or its location in the traditional sources of international law is not the yardstick of its normative force. In fact, non binding instruments have many valuable attributes and may well be a substitute to law making treaty. In law-making through non binding instruments, states agree to more details because the consequences of non-compliance are limited, the mechanism avoids the slowness attached to treaty ratification and the resulting document is flexible and may be the evidence of international support and consensus on a given topic.

However, it is difficult to consider mere declarations, codes of conduct, guidelines and other promulgations from the UN as law. The same applies to operational directives of multilateral development institutions as well as resolutions and other statements by NGOs. All these instruments are mere objectives with no legal strength. By the same token, Dupuy refers to soft law as 'either not yet or not only law'.⁵²⁹ Accordingly, soft law is different from law as it is non binding and the use of treaties or conventions as law making process should be the rule. In this perspective, Alliot argues that, the law of development can develop successfully by 'the elaboration of individual initiatives between two or more states, rather than by attempting the creation and imposition of an elaborate structure from above'.⁵³⁰ In other words, Alliot is a

⁵²⁸ Slinn (1987) 31.

⁵²⁹ Dupuy quoted from G Maggio & O J. Lynch (1997).

⁵³⁰ A Alliot 'The law of development and the development of law' in Snyder & Slinn (eds) *International law of development: Comparative perspectives* (1987) 84.

proponent of treaty law for the development of development law. Nonetheless, he does not address how the shortcomings of treaty law such as slowness and wastage of time (for examples) attached to treaty ratification will be addressed in the process. Alliot condemns the use of legislation as tools of emphasising desirable future goals, without any real hope of their being implemented.⁵³¹ He further argues that this approach may weaken the authority of the law itself.⁵³² Sharing his view, Chamelier believes that development cannot be a legal objective and maintains that the international legal system is incapable of transformation towards the realisation of development goals.⁵³³ This view was sustained by Dupuy in the *Texaco v Libya* case⁵³⁴ when he said that article 2 of the 1974 CERDS⁵³⁵ ‘must be analysed as

⁵³¹ A Alliot ‘Towards the unification of laws in Africa’ (1965) 14 *International Comparative Law Quarterly*, 366.

⁵³² Alliot (1965) 366.

⁵³³ M Chemelier-Gendreau ‘Relationship between the ideology of development and development law’ in Snyder Slinn (eds) (1987) 57; also M Hansungule ‘The right to development’ 18, paper presented at the International Human Rights Academy jointly organised by University of Western Cape, Utrecht University, Ghent University, American University; October 2005, Sea Point, Cape Town, South Africa.

⁵³⁴ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1978) (1) *International Legal Material* 30.

⁵³⁵ A/RES/29/3281, CERDS, art 2 (1). Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

(2). Each State has the right:

- a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
- c. To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned

a political rather than as a legal declaration concerned with the ideal strategy of development and as such, supported only by non industrialised states'.⁵³⁶ In other words, article 2 of CERDS, was not law, but a political provision; it was not *lex lata*. This position clearly establishes that development law is an ideal morality lacking enforceable legal standards because of its location in non binding or soft instruments.⁵³⁷

Closer to the French school of thought, this thesis contends that international law is dynamic and changes according to contemporary problems. For instance, in the past climate change was not an issue of international law, but these days, it is.⁵³⁸ Similarly, today in the context of globalisation, international law should address poverty; in fact international law is so fluent that Virally concluded that 'today there is a lack of sources of international law'.⁵³⁹ As correctly argued by Flory, though international law is still concerned with peace and a sound relationship between states in the international community, the demands of this community are now broader than before and include economic and social matters⁵⁴⁰ in order to ensure human welfare.

3.3.1.2 The skirmishes on the RTD

that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

⁵³⁶ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1978) (1) *International Legal Material* 30.

⁵³⁷ P H Brietzke 'Development as a human rite' in *The International Third World Legal Studies Association* (1984) 25.

⁵³⁸ Climate change issues are addressed through the Kyoto Protocol which is an international agreement linked to the UN Framework Convention on Climate Change.

⁵³⁹ M Flory 'A North-South legal dialogue: The international law of development' in Snyder & Slinn (eds) *International law of development: Comparative perspectives* (1987) 21.

⁵⁴⁰ Flory (1987) 21.

The scholarly disagreements on the law of development demonstrate that the RTD itself is not universally accepted. Commenting on the book *Development as human right - Legal, political and economic dimensions*,⁵⁴¹ Whyte claims that the book is an intellectual disaster,⁵⁴² whereas Louise Arbour, former UN High Commissioner for Human Rights believes that it is an ‘excellent scholarly writing’.⁵⁴³ This testifies the controversy on the right in question. In the same vein, while the Algerian Bedjaoui and others see the RTD as the most important human right or ‘the necessary condition for the achievement of all other human rights’,⁵⁴⁴ or as a ‘right to rights’,⁵⁴⁵ as a ‘basic right’, as Henry Shue⁵⁴⁶ put it or ‘enabling right’⁵⁴⁷ to use Abi-Saab words, it is also claimed that

[t]he right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights [and that] it also permits the Third World to “distort” the issues of human rights by affirming the equal importance of economic, social and cultural rights and by linking

⁵⁴¹ Andreassen & Marks (2006).

⁵⁴² Whyte ‘Review of development as a human right’ *electronic journal of sustainable development* 1, issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed 10 December 2008).

⁵⁴³ Andreassen & Marks (2006) iii.

⁵⁴⁴ M Bedjaoui ‘The difficult advance of human rights towards universality in a pluralistic world’ proceedings at the colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights, Strasbourg 17-19 April 1989; 32-47.

⁵⁴⁵ V Dimitrievic ‘Is there a right to development?’ paper presented at the annual convention of the International Studies Association, Cincinnati, March 1982.

⁵⁴⁶ Shue (1980) 19-20.

⁵⁴⁷ M E Salomon ‘Legal cosmopolitanism and the normative contribution of the right to development’ in Marks (ed) (2008) 17.

human rights in general to its ‘‘utopian’’ aspiration for a new international economic order.⁵⁴⁸

This strong stand against the RTD is supported by Donnelly who sees no legal or even moral reason for a RTD.⁵⁴⁹ Even though he believes that it is correct to link human rights and development,⁵⁵⁰ he also believes that ‘the right to development is neither philosophically [nor] legally justified nor a productive means to forge such a linkage’,⁵⁵¹ and he proceeds to explain ‘how not to link human rights and development’⁵⁵² because such a right is a hindrance in the search for how to link human rights and development.⁵⁵³

Not far from Donnelly, Shivji, distancing himself from the cosmopolitanism understanding of the world, claims that the RTD is grounded ‘on an illusory model of co-operation and solidarity’,⁵⁵⁴

To Donnelly’s claim that the RTD has no philosophical foundation, M’baye responds that any development endeavour has a human dimension that can be ‘moral, spiritual and [even] material’,⁵⁵⁵ and to Shivji, he speaks as a cosmopolitan and locates the RTD in the realm of

⁵⁴⁸ P Alston ‘Making space for new human rights: The case of the right to development’ (1998) 3 (1) *Harvard Human Rights Journal* 20.

⁵⁴⁹ J Donnelly ‘In search of the unicon: The jurisprudence and politics of the right to development’ (1985) 15 *California Western International Law Journal* 473.

⁵⁵⁰ Donnelly (1985) 477.

⁵⁵¹ Donnelly (1985) 478.

⁵⁵² Donnelly (1984) 261.

⁵⁵³ Donnelly (1985) 478; also Donnelly (1984) 274.

⁵⁵⁴ I Shivji *The concept of human rights in Africa* (1989) 82.

⁵⁵⁵ M’baye ‘le droit au developpement comme un droit de l’homme’ (1972) 5 *Revue des droits de l’homme* 513.

international ‘solidarity which must be at the centre of all conducts, of all human politics, [of] man himself.’⁵⁵⁶

In total disagreement with Mbaye’s contention, Bello criticises the RTD on the ground that it is

[t]oo woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; ...The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and ‘directionless;’ it strikes a cord of the advent of the good Samaritan.⁵⁵⁷

Sharing this view, Rosas argues that ‘the precise meaning and status of the right is still in flux’.⁵⁵⁸ In other words, the significance of the RTD is unclear. In support of this opinion, Gudmundur observes that it may be just to sustain that the RTD at least as provided for by the UNDRTD is not yet binding on states.⁵⁵⁹ In this register, one of the most radical rejections of the RTD is from Ghai who argues that the right is dangerous for the human rights discourse as it

[W]ill divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights and provide increasing resource and support for state manipulation (not to say repression) of civil society and social groups and [lead] the international community for many years in senseless and feigned combat on the urgency and parameters of the right.⁵⁶⁰

⁵⁵⁶ M’baye ‘le droit au developpement comme un droit de l’homme’ (1972) 5 *Revue des droits de l’homme* 523.

⁵⁵⁷ E Bello (1992) 462.

⁵⁵⁸ A Rosas ‘The right to development’ in Eide, Krausus & Rosas (eds) *Economic social and cultural rights* (2001) 251.

⁵⁵⁹ Alfredsson (1989) 84.

⁵⁶⁰ Y Ghai ‘Whose human rights to development’ Human Rights Unit Occasional Paper (1989) as quoted by Baxi (2007) 124.

Ghai's position is too extreme and seems to be a threat to the concept of human dignity itself, hence the correctness of Baxi's view that qualifies Ghai's as 'cynical perspective'.⁵⁶¹ In fact, the law of development is 'not only a new discipline but also...a juridical technique for carrying on the struggle against underdevelopment',⁵⁶² and this is in line with Eleanor Roosevelt's view, which in the early days of the UDHR observed: 'We are writing a Bill of Rights for the world, and ...one of the most important rights is the opportunity for development'.⁵⁶³ In agreement with this view and basing their arguments on the UN Charter,⁵⁶⁴ on the Universal Declaration,⁵⁶⁵ and on the 1966 International Covenant on Economic, Social and Cultural Rights,⁵⁶⁶ Chowdury and De Waart claim that the RTD is a human right in international law.⁵⁶⁷

Before assessing the RTD at the UN level, it is important to note that the RTD remains very controversial amongst scholars and this controversy filters to the UN system.

3.3.2 Controversy at the UN

At the UN level, the disagreement on the RTD is characterised by the politicisation of the debate, the reflection of such politicisation in voting resolutions on the right and different approaches *vis a vis* the right by international organisations.

⁵⁶¹ Baxi (2007) 124.

⁵⁶² G Espiell 'The right to Development' *Revue des droits de l'homme* 5 (1972) 190.

⁵⁶³ M Glen Johnson, 'The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights' (1987) 9 *Human Rights Quarterly* 19 – 48.

⁵⁶⁴ Art 55 & 56.

⁵⁶⁵ Art 28.

⁵⁶⁶ Art 2.

⁵⁶⁷ S R Chowdhury & P J IM De Waart (1992)10.

3.3.2.1 The politicisation of the debate

The idea of the RTD was designed by developing countries in the 1970s when they came together to claim the establishment of the NIEO⁵⁶⁸ to eliminate world injustice and allow third world countries to enjoy their development. Right from the start, there were two opposing camps: One developed and the other developing. The latter made up of countries in the Non-Aligned Movement (NAM) complained about their poverty and underdevelopment which could not be resolved through years of decolonisation process as well as years of development co-operation⁵⁶⁹ in which ‘developing countries continue to face difficulties in participating in the globalisation process, and that many risk being marginalised and effectively excluded from its benefits’.⁵⁷⁰ This claim did not sit well with the developed countries with the USA in the driving seat. As a result, throughout the numerous Working Groups on the RTD and the Open Ended Working Group led by Sengupta the Independent Expert on the right,⁵⁷¹ the latter was the topic of ideological and political battles.

The fighters were divided in four camps: The most dynamic members of the NAM in the Working Group on the RTD, known as the ‘Like-Minded Group’ made of Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam.⁵⁷² This group views the RTD as the roadmap to reduce global inequities and stand for the institution of fair trade rules, technology transfer from the North to the South and the abolition of developing countries debts amongst others.

⁵⁶⁸ NIEO, UN G.A Res 3201 (S-VI), 1 May 1974.

⁵⁶⁹ Marks (2004) 139.

⁵⁷⁰ G.A. Res. 56/150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/56/150 (2001).

⁵⁷¹ G.A. Res. 1998/72.

⁵⁷² G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/2890 (2001).

A second group is made of more cautious developing countries that want to use human rights based approach in their national development plans and intend to keep good relations with the donor community at large.⁵⁷³

A third group comprises countries in transition and some wealthy countries. This group views the RTD as a bridge to enhance the North-South dialogue and is inclined to support the implementation of the right. The position of this group, especially the European Union (EU), is not always predictable because as Marks correctly observes, ‘they will go along with a resolution if nothing particularly objectionable is inserted or will abstain’.⁵⁷⁴

The fourth group or the ‘outsiders’ is the one in which the USA always leads the votes against resolutions on the RTD. Japan, Denmark, Israel and Australia are the other members of this group. It is worth to note that the US rejection of the RTD is linked to its hegemonic ideologies implemented through the globalisation of capitalism.⁵⁷⁵

3.3.2.2 The reflection of the politicisation of the debate on the voting pattern of RTD resolutions

This division on the RTD characterises the proceedings at the international level. The disagreement was manifest during the vote of the General Assembly Resolution 41/128 of 1986 proclaiming development as a human right, where the USA cast the only negative vote and eight other countries abstained.⁵⁷⁶ Even after 1986, the debates remain polarised at the UN. From 1998 to 2008, several resolutions on the RTD were adopted (some without votes) at the Commission on Human Rights (CHR or the Commission), (from 2006 Human Rights Council), and at the General Assembly.

⁵⁷³ Marks (2004) 141.

⁵⁷⁴ Marks (2004) 141.

⁵⁷⁵ Baxi (2007) 128.

⁵⁷⁶ Denmark, Finland, Federal Germany, Iceland, Israel, Japan, Sweden and Great Britain.

An examination of the voting pattern on the resolutions on the RTD at the UN level shows the following lack of unanimity:

In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the CHR without a vote whereas at the General Assembly, 125 votes in favour, 1 vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at General Assembly. At the CHR in 2001 the EU (except the UK) was for the RTD, 3 abstentions (UK, Canada and the Republic of Korea) were recorded and Japan and the USA voted against.⁵⁷⁷ The same year (2001), at the 56th session of the General Assembly (September–December) 123 votes in favor and 4 against (Denmark, Israel, Japan, and the USA), with 44 abstentions were recorded.⁵⁷⁸ The abstaining countries included Australia, Austria, Belgium, France, Germany, Norway, Sweden, and the UK, who had voted for the resolution in the previous year.⁵⁷⁹

At its 57th session in December 2002, where the General Assembly adopted the conclusions of the Open-Ended Working Group on the RTD, it recorded 133 votes in favor, 4 votes against (United States, Australia, the Marshall Islands and Palau), and 47 abstentions.⁵⁸⁰

At the CHR in April 2002, when the Commission (in the absence of the USA) was preparing the endorsement of the conclusions adopted by consensus at the third session of the Open Ended-Working Group, 38 countries voted for the RTD, 15 countries including the EU

⁵⁷⁷ Commission on Human Rights Res. 9, U.N. ESCOR, 57th Sess., at 68, UN Doc. E/CN.4/2001/167 (2001) (adopted by a vote of 48 to 2, with 3 abstentions).

⁵⁷⁸ G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/2890 (2001) (adopted on Dec. 19, 2001).

⁵⁷⁹ GA Res. 55, U.N. GAOR, 55th Sess., Supp. No. 49, at 405, UN Doc. A/55/49, vol.1 (2000).

⁵⁸⁰ G.A. Res. 556, U.N. GAOR, 57th Sess., Supp. No. 49, UN Doc. A/57/49 (2002) (adopted on Dec. 18, 2002, by a vote of 133 to 4, with 47 abstentions).

(incorporating the UK), Canada, Japan, South Korea abstained and there was zero vote against, perhaps because the USA was not member of the CHR in 2002.⁵⁸¹

The disagreement between UN member states was also visible in 2003 when the Commission decided to call upon its Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document assessing the avenues for the implementation of the RTD, including the adoption of an international legally binding instrument on the right amongst others.⁵⁸² 47 countries voted for the resolution; the USA, Australia and Japan voted against and 3 abstentions were recorded. In this vote, the USA stood strongly against the paragraph of the resolution considering the option of an international legal standard of a binding nature and attracted the attention of the General Assembly on the recorded votes of Australia, Canada, Japan, and Sweden on the paragraph which were identical to its own.⁵⁸³ The USA stood against the paragraph because it was not discussed in the Working Group⁵⁸⁴ and on the ground that it was going to lead to wastage of resources. Danies, the USA Representative to the commission stated that:

[The USA's] delegation opposed the proposal that the Sub-Commission should prepare a concept document on a legally binding instrument on the right to development because it would devote scarce resources to a project that would be unlikely ever to garner significant support.⁵⁸⁵

⁵⁸¹ Commission on Human Rights Res. 69, U.N. ESCOR, Supp. No. 3, at 292, U.N. doc. E/CN.4/2002/200, Part I (2002); also *The right to development: a review of the current state of the debate. Report for the Department for International Development, April 2002* available at www.odi-org.uk/rights/Publications/rights_to_dev.pdf, 18 (accessed 23 August 2007).

⁵⁸² U.N. Human Rights Commission, Summary Record of the 63rd Meeting, 59th Sess.; U.N. Doc. E/CN.4/2003/SR.63 (2003).

⁵⁸³ *Economic and Social Council Official Records*, U.N. Commission on Human Rights, 59th Sess., Supp. No. 3, at UN Doc. E/2003/23/E/CN.4/2003/135 (2003), available at <http://www.unhchr.ch/html/menu2/2/59chr/voting25pm.htm> (accessed 23 February 2010).

⁵⁸⁴ U.N. Human Rights Commission, Summary Record of the 63^d Meeting, 59th Sess., at 3, 5. UN Doc. E/CN.4/2003/SR.63 (2003).

⁵⁸⁵ Statement by Joel Danies, U.S. Representative to the U.N. Human Rights Commission, Summary Record of the 63^d Meeting, 59th Sess., at 5, 15, UN Doc. E/CN.4/2003/SR.63 (2003).

A similar trend of divergence on the RTD was observed in the same year (2003) at the General Assembly when 173 votes in favor, 3 against and 5 abstentions were recorded for the resolution A/RES/58/172.

In the subsequent years the voting pattern on the RTD at the UN did not change, hence the following statistics:

In 2004 at the CHR, 49 votes in favour, 3 against and 0 vote were recorded for the resolution E/CN.4/RES/2004/7 whereas at the General Assembly 181 votes for, 2 against and 4 abstentions were recorded for the resolution A/RES/59/159. In 2005 at the CHR, 48 votes for, 2 against and 0 abstention were recorded for the resolution E/CN.4/RES/2005/4 and at the General Assembly 172 votes for, 2 against and 5 abstentions were recorded for the resolution A/RES/60/157. In 2006, the first resolution of the Human Rights Council on the RTD (resolution A/HRC/RES/1/4) was adopted without vote, whereas at the General Assembly, 134 votes in favour, 54 against and no abstention were recorded for the resolution A/RES/61/169. The 2007 Human Rights Council Resolution (A/HRC/RES/4/4) including issues related to the adoption of a legally binding instrument on the RTD was adopted without vote and the same concerns yielded 136 votes in favour, 53 against and 0 abstention for the resolution A/RES/62/161 at the General Assembly.

Again, the same pattern was followed in 2008 at the Human Rights Council when the resolution, A/HRC/RES/9/3 was adopted without vote; but interestingly, the General Assembly (including developed countries) voted overwhelmingly for the resolution A/RES/63/178 that not only endorsed the Working Group conclusions and the work plan of the High Level Task Force, it encompassed the language related to the ‘consideration of an international legal standard of a binding nature’⁵⁸⁶ which almost created chaos at the same forum in the previous year.⁵⁸⁷ The 2008 General Assembly resolution was adopted by 182

⁵⁸⁶ Resolution on the right to development, adopted by the GA on its 63rd session on 18 December 2008, U.N. Doc A/RES/63/178. Decide if you are going to use UN or U.N.

⁵⁸⁷ See General Assembly resolution on the right to development, adopted on its 62nd session, 13 March 2008 U.N. Doc. A/RES/62/161, para 10 (d).

votes in favour, 4 against (Marshall Islands, Palau, Ukraine and the United States), and 2 abstentions (Israel and Canada).

The shift in position by developed countries on the need to have a binding instrument on the right seems to suggest that a consensus on the right may not be far away. Nevertheless, it also seems that the unwillingness to have such a convention remains strong. In fact, by the look of things, the debate on the RTD at a global level has nothing to do with the concept of a human right to development *per se*, but is rather a political debate. Marks correctly observes that

[t]he political discourse of the various working groups on the RTD and the Commission on Human Rights is often characterised by predictable posturing of political positions rather than practical dialogue on the implementation of the right to development.⁵⁸⁸

After the examination of UN member states' attitudes *vis a vis* the RTD, the next subsection assesses the behavior of international organisations in respect of the right at the UN level.

3.3.2.3 Different international organisations and different approaches *vis a vis* the RTD

The lack of agreement on the RTD reaches international organisations at the UN level. These organisations have different approaches in taking part in debates on the RTD at the CHR. For instance, the EU participates very often through EU member states and common EU position.⁵⁸⁹ The International Monetary Fund (IMF) does not participate actively, but presents its views and updates on its programmes, while the World Bank participates fully through its

⁵⁸⁸ Marks (2004) 141.

⁵⁸⁹ L- H Piron 'The right to development – A Review of the Current State of the Debate for the Department for International Development' 20 available at www.odi.org.uk/rights/Publications/rights_to_dev.pdf, (accessed 28 December 2010).

Geneva representative and tries to better the RTD.⁵⁹⁰ Lastly, the UNDP contributes concrete ideas to the discussion.⁵⁹¹

In spite of these divergences on the RTD, the latter is now universally recognised and confirmed as shown at the 1993 World Conference on Human Rights in Vienna Declaration⁵⁹² where the juridical character of the RTD was reiterated without a single abstention or negative vote.

Notwithstanding the controversy on the right under study, this thesis shares Alston's view when he says:⁵⁹³

In terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.

As correctly argued by Okon, the RTD is now acknowledged by all⁵⁹⁴ and the main question should focus on its implementation.

3.4 The normative force of the RTD

The aim of this section is to underline that notwithstanding its soft character, the RTD has a normative force. Non-binding instruments (such as the UNDRTD) are fundamental in

⁵⁹⁰ Piron (2002) 20.

⁵⁹¹ Piron (2002) 20.

⁵⁹² Vienna Declaration and Programme of Action (Vienna Declaration) 14- 25 June 1993, UN General Assembly A/Conf.157/23 12 July 1993.

⁵⁹³ P Alston 'Development and the rule of law: Prevention versus cure as a human rights strategy', in International Commission of Jurists (ed) *Development, human rights and the rule of law* (1981) 31.

⁵⁹⁴ E Okon 'Poverty alleviation and the control of public revenue in Nigeria: Legal and equitable issues' (2007) 1 *Pretoria Student Law Review* 7.

testifying the state practice and proving the *opinio juris* or intention to be bound as a proof of customary law. Following this perspective, Kratochwil argues that ‘...by legitimizing conduct which might diverge from the existing practices, soft law provides an alternative which can become a legally relevant crystallization for newly emerging customs or more explicit norms.’⁵⁹⁵ From this standpoint, it can be argued that the RTD’s source is in customary law because 25 years have passed since the UN General Assembly officially recognized the right in a Declaration,⁵⁹⁶ 18 years since a consensus involving all governments was reached on it,⁵⁹⁷ and 13 years since the Open Ended Working Group was established and an Independent Expert on the right⁵⁹⁸ was appointed as mentioned earlier. In addition, the UN High-Level Task Force on the Implementation of the RTD was established⁵⁹⁹ and remains operational. This extended and intense activity on the RTD demonstrates that it enjoys international recognition.

To the argument that the RTD enjoys a general international recognition, but is still short of state practice to gain the status of customary law,⁶⁰⁰ it can be argued that for a practice to become customary law, the duration does not matter. What is needed is the consistency and

⁵⁹⁵ Kratochwil quoted G Maggio and O J Lynch ‘Human Rights, Environment, and Economic Development: Emerging Standards in International Law and Global Society’ Revised Draft, November 15, 1997 at <http://www.ciel.org/Publications/olpapers3.html> (accessed 2006/05/25).

⁵⁹⁶ The UNDRTD was adopted by the UN General Assembly in its Resolution 41/128 of 4 December 1986.

⁵⁹⁷ Vienna Declaration and Programme of Action 14- 25 June 1993, UN General Assembly A/Conf.157/23 12 July 1993.

⁵⁹⁸ Commission on Human Rights, Resolution 1998/72 adopted without a vote on 22 April 1998 appointed Arjun Sengupta as the UN Independent Expert of the RTD.

⁵⁹⁹ The fifth session of the Working on the right to development recommended among other things the constitution of a High Level Task Force for the Implementation of the RTD within the framework of the working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights in its Resolution CHR 2004/7.

⁶⁰⁰ Sengupta ‘The human right to development’ in Andreassen & Marks (2006) 9 & 10.

generality of the practice.⁶⁰¹ It is instructive to note that even one practice is enough to create international customary law.⁶⁰² In this perspective, Professor Cheng sustained that a well worded General Assembly Resolution can create ‘instant’ customary law.⁶⁰³ In this regard, Salomon argues that a mandatory language indicates ‘the intent of parties to provide certain legal assurances’.⁶⁰⁴ The language used in the UNDRTD is a well crafted and mandatory language. For instance, the first article reads ‘the right to development is an inalienable human right’ and clearly highlights the individual and popular character of the right when it underlines that ‘every human and all people’ are entitled to. Salomon observes that the UNDRTD is ‘direct, unambiguous and leaves little scope for debate as whether the intention of the General Assembly was to declare the existence of a legally guaranteed right to development’.⁶⁰⁵

Nevertheless, General Assembly resolutions need a strong consensus because non binding undertakings may be entered into in order to demonstrate the will of the international community to solve an urgent global matter over the objections of few states. Agreeing with such a perspective, Shelton is of the view that a resolution can be a parade to gather a consensus on an international urgent matter.⁶⁰⁶ In such a case, the obligatory character or efficiency of the law remains questionable.

Nonetheless, in the case of the RTD, it can be argued that assessing *opinion juris* and defining the binding character of the law is less complicated. The 1986 UNDRTD was adopted by a

⁶⁰¹ I Brownlie *Principles of public international law* (2003) 7.

⁶⁰² B Cheng ‘United Nations Resolutions on outer space: ‘instant’ customary law?’ (1965) 5 *Indian Journal of International Law* 23-24.

⁶⁰³ Cheng (1965) 23-24.

⁶⁰⁴ Salomon (2007) 89.

⁶⁰⁵ Salomon (2007) 89.

⁶⁰⁶ D Shelton ‘International law and relative normativity’ in Evans M D Evans (ed) *International Law* (2006) 163.

very large majority with the only dissenting opinion coming from the USA. The 1993 Vienna Declaration produced a unanimous consensus, including that of the USA, that the RTD was a human right, hence the contention of this thesis that the recognition of the RTD as a human right (through the 1986 UNDRTD and 1993 Vienna Declaration) was the acknowledgement of its contribution to the norm creating process and should have been in that account recognised as a norm of customary law. The RTD should have been binding by now because in 1984, one of the main arguments against it was that though the Commission on Human Rights was working ‘on a Declaration on the topic’ there was no international instrument recognising it,⁶⁰⁷ but now there have been various instruments. So far, there are important developments as testified by the 1986 UNDRTD, 1993 Vienna Declaration, the appointment of a UN Independent Expert on the RTD and a UN Task Force on it as already mentioned.

In the same vein, Hansungule argues that though the UNDRTD, a product of a resolution of the UN General Assembly, is not legally binding, it ‘may nevertheless be construed to constitute law or at the very least would evolve into law all factors being equal’.⁶⁰⁸ In the same vein, Brownlie claims that when a resolution of the UN General Assembly touches on subjects that deal with the UN Charter, it may be regarded as an ‘authoritative interpretation of the Charter’.⁶⁰⁹ From this angle, it can be claimed that the UNDRTD is binding because it deals with human well-being which is fundamental in the UN Charter and the ICESCR.⁶¹⁰ To use Baxi’s words, ‘the jurispotency of the Declaration (UNDRTD) has survived, and will transcend the well-manicured scepticism’.⁶¹¹

⁶⁰⁷ Donnelly (1984) 267.

⁶⁰⁸ Also M Hansungule ‘The right to development’ 14, paper presented at the International Human Rights Academy jointly organised by University of Western Cape, Utrecht University, Ghent University, American University etc..., October 2005, Sea Point, Cape Town, South Africa (on file with author).

⁶⁰⁹ I Brownlie *Principles of public international law*, (2003) 15 & 663.

⁶¹⁰ ICESCR, art 11.

⁶¹¹ Baxi (2007) 126.

In spite of these strong views on the normative force of the UNDRTD, it is important to note that the latter remains in principle non binding in international law and as such, its lack of universal legal backing stands on its way of becoming a hard law instrument.⁶¹²

Nonetheless, the development of international law led the world to a point of recognising obligations that transcend states' concern; these obligations are *erga omnes*, engaging the legal interest of the world at large, and are known as *jus cogens*. To use Kamrul Hossain's words '*Jus cogens* is the technical term given to those norms of general international law, that are argued as hierarchically superior, the literal meaning of which is compelling'.⁶¹³ Article 53 of the 1969 Vienna Convention on the Law of Treaties,⁶¹⁴ repeated *verbatim* by article 53 of the 1986 Vienna Convention on the Law of treaties⁶¹⁵ states:

A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.

In other words, a norm of *jus cogens* should be recognised as a norm of general international law; it should be accepted by the international community of states as a whole, enjoy immunity from derogation and be amendable only by a norm of the same rank. In its judgment in the *Nicaragua* case,⁶¹⁶ the ICJ confirmed that the doctrine of *Jus cogens* was part

⁶¹² Gudmundur (1989) 84.

⁶¹³ K Hossain 'The concept of *jus cogens* in international law' *The Daily Star* No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶¹⁴ The Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

⁶¹⁵ The Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 1986, UN Doc. A/Conf.129/15 (1986).

⁶¹⁶ Military and paramilitary activity in and against Nicaragua (*Nicaragua v USA*) (27 June 1986) (1986) ICJ Reports (1986) 100.

and parcel of international law. It used the prohibition of the use of force to demonstrate ‘a conspicuous example of a rule of international law having the character of *jus cogens*.’⁶¹⁷

The RTD meets the criteria of *jus cogens*. Anchored in the promotion and protection of ‘higher standards of living’ for all, the RTD is recognised as a norm of general international law; the 1986 UNDRTD was passed with the blessing of 146 states, 8 abstentions and only one vote against.⁶¹⁸ The 1993 Vienna Declaration confirming the human rights nature of the RTD was unanimously applauded and so far has not been amended. In fact, the binding character of a *jus cogens* norm happens prior to the codification of the norms. This is clearly explained by Hossain who argues that codified norms such as ‘treaties can at best be contributing factor in the development of *jus cogens* rules’⁶¹⁹ because ‘a treaty cannot bind its parties not to modify its terms, nor to relieve themselves of their obligation under it, through a subsequent treaty to which all the parties to the first treaty have consented’.⁶²⁰ He further argues that ‘all existing, generally accepted *jus cogens* rules apply universally and none of the treaties which have codified these rules, have been universally ratified’.⁶²¹ It can therefore be argued that the RTD, anchored in the natural law theory had been a norm of *jus cogens* before its codification by the ACHPR, the UNDRTD and the Vienna Declaration.

Proponents of positivism are of the view that ‘there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*’.⁶²² Starting the

⁶¹⁷ *Nicaragua v USA* (27 June 1986) (1986) ICJ Reports (1986) 100.

⁶¹⁸ Only the USA voted against the 1986 UNDRTD.

⁶¹⁹ Hossain ‘The concept of *jus cogens* in international law’ (2005) *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²⁰ Hossain (2005) ‘The concept of *jus cogens* in international law’ *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²¹ Hossain (2005) ‘The concept of *jus cogens* in international law’ *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²² 2 *Yearbook of International Law Commission* (1966) 247-248, as quoted by G M Danilenko ‘International jus cogens: Issues of law-making’ (1991) 2 *European journal of international law* 45.

debate from the case between *France v Turkey*⁶²³ or the *Lotus* case in which the Permanent Court of International justice has stated that

[I]nternational law governs relations between independent states. The rule of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law,⁶²⁴

Consensualists can argue that though the *Nicaragua* case recognised *jus cogens*, the same case also acknowledged that ‘in international law there are no rules, other than such rules as may be accepted by the state concerned’.⁶²⁵ In other words, a rule of *jus cogens* is not binding on states which object it or which are persistent objectors. Nevertheless, to use the words of the International Law Commission, ‘it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the [International Law] Commission, give it the character of *jus cogens*’.⁶²⁶ Therefore, echoing Rozakis, Danilenko is correct in arguing that

[O]nce adopted, the peremptory norms bind the entire international community and in consequence a state can no longer be dissociated from the binding peremptory character of that rule even if it proves that no evidence exists of its acceptance and recognition of the specific function of that rule, or moreover, that it has expressly denied it.⁶²⁷

In the same line of thoughts, the chairman of the Drafting Committee during the Vienna Conference on the Law of Treaties, Yasseen explains that the sentence of article 53 of the Vienna Convention on the Law of Treaties ‘accepted and recognised by the international

⁶²³ *France v Turkey* PCIJ (7 September 1927), Series A, No. 10.

⁶²⁴ *France v Turkey* PCIJ (7 September 1927), Series A, No. 10, 19.

⁶²⁵ *Nicaragua* case, ICJ Reports (1986) 135.

⁶²⁶ 2 *Yearbook of International Law Commission* (1966) 247, as quoted by Danilenko (1991) 45.

⁶²⁷ Ch L Rozakis *The concept of Jus Cogens in the law of treaties* (1976) 78 as quoted by Danilenko (1991) 50.

community of states as a whole' did not mean that the universal acceptance and recognition of a rule of *jus cogens* was necessary.⁶²⁸ He said:

There was no question of requiring a rule to be accepted and recognised as peremptory by all states. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.⁶²⁹

In any case, the RTD passes the test; not only is it anchored in the natural law theory, but it also enjoys the support in modern legal theory. Apart from the adoption of the 1986 UNDRTD and Vienna Declaration, mentioned earlier, article 53 of the Vienna Convention on the Law of Treaties is declaratory of an already active international law with reference to *jus cogens*. As Murray-Bruce puts it

[W]ith the DRD's [Declaration on the right to development] purposes and objectives enshrined in the UN Charter – a peremptory norm of international law, a *jus cogens* from which there is no derogation – the Right to Development automatically espouses normative value and imposes legal and non derogable obligations on its duty holders.⁶³⁰

This view does not, however, meet universal acceptance and is very much contested. Laure H Piron argues that there is no legally binding item on the RTD, though she acknowledges its 'moral or political force'.⁶³¹ Even though she has a good point, perhaps she should reconsider her view because there are instances where the binding character of an 'ambiguous obligation' is linked to the obligation deriving from its rights which are already part of a clear and precise obligation. In this regard, the RTD which might be viewed as an 'ambiguous obligation' made

⁶²⁸ 2 *Yearbook of International Law Commission* (1976 II) 119, as quoted by Danilenko (1991) 54.

⁶²⁹ Danilenko (1991) 52.

⁶³⁰ F Murray-Bruce 'Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to development' (2005) bpress legal series' working paper No 725, 16.

⁶³¹ Piron (2002) 14.

of socio, economic, civil and political rights, might be binding because its constituent rights are attached to the two International Covenants that are not ambiguous.⁶³² Furthermore, some obligations can be unclear or loose, but still be indispensable. Calling them ‘imperfect obligations’ Kant argues that they are important duties which can be attached to better formulated obligations called ‘perfect obligations’.⁶³³ For instance, the RTD can co-exist with the civil and political as well as socio-economic and cultural rights which are perfect obligations with a binding force. From this perspective, it will be correct to argue that the right in question is grounded in the ICESCR and the ICCPR.

This thesis claims that there is more than just moral force to the RTD because it can be argued that the binding force of the RTD derives from the principles of the UN Charter: sovereign equality of states, non discrimination, and the principles of inter-dependence and international co-operation.⁶³⁴ Soft laws appear to be very instrumental to the creation of hard law. The path which led to the adoption of the two 1966 covenants seems to be followed by the RTD. This evolution clearly shows that a ‘soft’ instrument can produce hard ones and is therefore not a waste of time. A similar evolution seems to be happening on the RTD because 7 years after its declaration, a unanimous programme of action was undertaken by the international community. This evolution seems to indicate that a convention on the RTD is not far away. In fact, on behalf of the Non-Aligned Movement, Cuba recently called for the establishment of a convention on the RTD.⁶³⁵

However, perhaps the strengthening of development law does not depend on the adoption of a binding instrument, but rather on ‘interdependence–based reading and development informed reading of human right treaties [or instruments]’.⁶³⁶ As De Feyter correctly observes, this will

⁶³² Sengupta (2006) 10.

⁶³³ I Kant ‘Critique of practical reason, quoted from A Sen ‘Human Rights and Development’ in Andreassen & S Marks (2006) 7.

⁶³⁴ See UN Charter, chap1 art 1 & 2 addressing the purpose and principles of the UN.

⁶³⁵ Twelfth session Working Group on the Right to Development, High-level task force on the implementation of the right to development, Fifth session (Geneva, 1-9 April 2009), A/HRC/12/WG.2/TF/2,para 11.

⁶³⁶ K De Feyter ‘Towards a multi-stakeholder Agreement on the right to development’ in Marks (2008) 98.

be in line with the Vienna Convention on the Law of treaties⁶³⁷ according to which ‘treaties [and other human rights instruments] are interpreted in the light of their context and their object and purpose’.⁶³⁸

In any event, the UNDRTD, though a soft instrument, has a normative value. In 1997 however, Nagendra Singh, President of the ICJ stated during a speech at the Vrije University (Free University, Amsterdam) affirmed that the RTD unquestionably exists, and that it is grounded on the essential principles of the UN Charter, especially those concerning the sovereign development of states, non discrimination, interdependence and international cooperation.⁶³⁹ In the same perspective, Professor Rais A Touzmohammadov argues that

[T]he normative aspect of the content of the RTD is of course connected to those aspects that make it legally binding. It would be wrong to categorically reject the normative character of the right just because there is no appropriate multilateral treaty. In addition to the source of the right to development, there are now a number of aspects of the right to development that comes under the category of customary law.⁶⁴⁰

In other words, the mere fact that the expression ‘right to development’ is not explicitly mentioned in documents comprising the bill of rights does not destroy the validity of the right.

⁶³⁷ 1969 Vienna Convention on the law of treaties, art 31, para 1.

⁶³⁸ K De Feyter ‘Towards a multi-stakeholder Agreement on the right to development’ in Marks (2008) 98.

⁶³⁹ ‘What does “defending the right to development” mean nowadays? Human Rights Commission 2002; Statement of the Working Group on the right to development. Joint written statement submitted by Centre Europe-Tiers Monde (CETIM) and AAJ. E/CN.4/2001/WG.18/CRP.15.

⁶⁴⁰ ‘What does “defending the right to development” mean nowadays? Human Rights Commission 2002; Statement of the Working Group on the right to development. Joint written statement submitted by Centre Europe-Tiers Monde (CETIM) and AAJ. E/CN.4/2001/WG.18/CRP.15.

Nevertheless, as correctly observed by Baxi, separating the UNDRTD from the initial texts on which it was based has weakened the document.⁶⁴¹ For instance, the UNDRD does not refer to the very empowering instruments such as the 1944 Declaration concerning the Aims and Purposes of International Labour Organisation (ILO) which amongst others condemn poverty, does not mention the Declaration on Social Progress and development,⁶⁴² the 1974 Declaration on the establishment of a NIEO and its Program of Action and the 1975 Charter on Economic Rights and duties of the States (CERDS). Referring to these documents would have added more clarity to the UNDRTD which, though well recognised, is quite vague.

However, despite its broad recognition which gives it a normative force, at the national level, unlike in the African human rights system (to be discussed in the next chapter) the right remains non binding as it is yet to be secured in a treaty or convention.

3.5 Implementation of the RTD

Implementing the right means achieving or realising the right. It entails applying Hohfeld theory that stipulates that ‘to every right, there is a correlative duty’.⁶⁴³ In other words, there is a positive duty (on the duty bearers) to deliver the RTD and a negative one not to hinder the realisation of the right.⁶⁴⁴ In fact, claiming that the RTD is a human right implies identifying who is the duty bearer and who is the beneficiary or the right holder. Answering these questions will be the main focus of this subsection.

3.5.1 The duty bearers of the RTD

⁶⁴¹ Baxi (2007) 134.

⁶⁴² G A Res 2542 (XXXI) 11 December 1969.

⁶⁴³ W N Hohfeld, *Fundamental legal concepts as applied in judicial reasoning* (1919). For a clear summary of his work, see J Waldron, *Theories of rights* (1984) 6-10; also A R White, *Rights* (1984) 115-132; also A Heard ‘Human rights: Chimeras in sheep’s clothing at <http://www.sfu.ca/~aheard/intro.html> (accessed 7 July 2009). R W M Dias *Jurisprudence* (1970) chap 8 & 9 and T Pogge (2007); L Henkin ‘International human rights as “rights”’ in Morton E (ed) *The philosophy of human rights* (1989).

⁶⁴⁴ See chap 2, section allocated to the rights based cosmopolitanism.

In terms of global responsibility for human rights, the duty bearers of the RTD include the state, the international community, multinational organisations like oil companies, individuals, individual legal persons and multilateral bodies like the WTO and the IMF. This prescription is located in the cosmopolitanism theory which perceives the world as a global family of human beings bound by their humanity. Accordingly, everyone, every state and every institution in position to help shall do so.

Article 3 of the UNDRTD underlines the duty bearers of the RTD. It reads:

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

In its first paragraph, the article clearly identifies states as main duty bearers having the ‘primary responsibility’ to ensure the realisation of the right. The second paragraph is equally clear in stressing the vital place of international co-operation among states in compliance with the UN Charter. In other words, states should come together as one in ensuring human welfare as provide for by articles 55 and 56 of the UN Charter. This is also the substance of paragraph 3 of the same article.

In short, the duty bearer of the RTD is the state at the national level and the international community at an international level. This is reiterated by the Vienna Declaration,⁶⁴⁵ the International Covenant on Civil and Political Rights⁶⁴⁶ (ICCPR) and the UNDRTD.⁶⁴⁷ The

⁶⁴⁵ Part 1, para 10 (5) which reads: ‘Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level’.

⁶⁴⁶ Art 2.

next subsections will unpack and examine the responsibilities of the state and the international community which are the duty bearers of the RTD.

3.5.1.1 The state

Traditionally, the nation-state has the primary responsibility for the realisation of human rights. According to the Preamble of the UNDRTD, ‘the creation of conditions favourable to the development of people and individuals is the primary responsibility of their states’.⁶⁴⁸ This responsibility is further stressed by the CERDS which clearly emphasises the key responsibility of the state to uphold the economic, social and cultural development of its people.⁶⁴⁹ In the same vein, in addition to article 3(3) above, article 8 of the UNDRTD provides:

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

This provision clarifies in details what is the state line of action in ensuring the RTD. This action should be broad enough and should encompass all human rights; civil and political and

⁶⁴⁷ Art 4 reads: ‘1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development’.

⁶⁴⁸ The Preamble of the 1986 UNDRTD.

⁶⁴⁹ CERDS, art 7.

economic as well as social rights. In the process, women should not be forgotten and the right to participation of all minorities should be ensured.⁶⁵⁰

Similarly, the UNDRTD⁶⁵¹ reiterates the duty of the state which has the primary mandate for the establishment of national and international environments necessary for the realisation of the RTD.

Put differently, the state must adopt development strategies, approaches and programmes informed by the interest and aspirations of the people and which integrate values and economic, social, cultural, political and environmental realities. In the same perspective, article 4(1) of the UNDRTD provides: ‘States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitate the full realisation of the right to development and article 2(3) of the same instrument also reads:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

The 1993 Vienna Declaration in its paragraph 1 reads: ‘Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion of human rights is the first responsibility of governments’ and paragraph 10 of the same instrument provides:

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

In the same vein, article 2 of the ICCPR reads:

Each State Party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

⁶⁵⁰ Art 21 UN Declaration on the Rights of Indigenous People.

⁶⁵¹ Art 3(1).

resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

All these provisions present national governments as the main provider of the RTD. The state is bound by the obligation to provide for its citizens. This obligation confirms the traditional approaches to human rights law whereby individuals are the beneficiaries of rights that should be fulfilled by the state which is the duty-holder. To fulfil human rights, the state is bound by four types of duties:⁶⁵²

- The duty to respect human rights calling on the state to avoid any action or measure which may encroach upon somebody's human rights.
- The duty to protect which calls upon the state to take action to ensure the enjoyment of human rights if the latter are threatened or are at risk.
- The duty to promote which calls upon the state to educate the right holders (the people) on their rights and how to claim them as well as prepare itself to carry out its obligations.
- The duty to provide which compels the state to supply goods and services to all without discrimination.

In fact, wherever there is a human rights crisis or poverty, the first question asked is on whether the state is a failed state. Ordinarily, the state has no way out, but to deliver, hence the argument that

[g]overnments should promote and protect all human rights and fundamental freedoms, including the right to development, bearing in mind the interdependency and mutually reinforcing relations between democracy, development and respect for human rights, and should make public institutions more responsive to people's needs...⁶⁵³

⁶⁵² See in general Asbjorn Eide, Catarina Krause and Alan Rosas (eds) (2001); also Marks 'The human rights approach to development: seven approaches' in Sengupta, Negi & M Basu (eds) (2005) 45- 46. In the human rights discourse, state obligations are known as 'the Maastricht principles'.

⁶⁵³ Report of the World Summit for Social Development, Copenhagen, para 71, 6-12 March 1995. UN Doc. (see earlier comment on UN or U.N.)A/CON.166/9, 19 April 1995.

However, it is not enough to have a myriad of instruments telling the state its obligations. How does it do it? What if a state is poor and has no resources? It can well be argued that the state has no resources or means to achieve its citizens' development. Such an argument does not hold and the state should take actions to institutionalise human rights and the RTD in particular. In practice, it should establish a constitution, with a strong separation of powers, a correct mechanism to provide remedies for victims of human rights violations and sanctions for violators. In fact, the mission of the state is to:

Provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.⁶⁵⁴

In other words, the state should be at the forefront for the realisation of the right. However, the state's action may not succeed if the formulation of national development policies suffers from external intrusion. In other words, the right to self-determination and peoples' right to freely dispose their wealth and natural resources should be a reality.⁶⁵⁵

Furthermore, at national level, the state success is also conditioned by a strong civil society which oversees its action. NGOs,⁶⁵⁶ churches, the media and others should come into play as helpers, observers or watchdogs of the state's actions towards the realisation of human rights

⁶⁵⁴ 1993 Vienna Declaration, part 1, para 27.

⁶⁵⁵ Art 2(1) of the 1986 UNDRTD reads: 'the human person is the central subject and should be the active participant and beneficiary of the right to development'.

⁶⁵⁶ On the role of NGOs in ensuring human rights, see Brett R 'Non-governmental actors in the field of human rights' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (2000).

including the RTD. In this regard, Sengupta argues that an NGO has the duty to apply the principle of participation, accountability and transparency in implementing the RTD,⁶⁵⁷ though some NGOs are not always able to perform their duties because of the lack of adequate funding and capacity.

In any event, the state responsibility in terms of realising the RTD at national level is perhaps the less controversial aspect of the RTD.

After an examination of the duty of the state's obligations in providing the RTD, the next subsection will focus on the international community's duties.

3.5.1.2 The international community

The international community is made of state members of the UN, international non states actors, international Non Governmental Organisations (INGOs) and the IFIs. Though in terms of global responsibility for human rights, each of these groups has the responsibility to protect human rights, the focus of this section will be to address the obligation of the UN member states (including the UN High Level Task Force's contribution to the achievement of the RTD) and the IFIs.

The UN member states

UN member states should cooperate in fighting poverty or realising the RTD. The UNDRTD in its article 4 reads:

- 1) States have the duty to take steps individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
- 2) Sustained action is required to promote more rapid development of developing countries. As complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

⁶⁵⁷A Sengupta 'Implementing the right to development' 17, available at <http://www.hsph.harvard.edu/fxbcenter/Implementing%20the%20RTD.pdf> (accessed 22 May 2008).

According to the first paragraph of this provision, the duty to formulate appropriate policies for the RTD is not limited within the states' boundaries. In fact, the state can act 'individually and collectively'. This statement clearly emphasises the collective role of UN member states in realising the RTD. The second paragraph of the provision is clearer. The call for an 'effective international co-operation' to ensure the RTD is well pronounced and obliges the community of states to take action. This is reinforced by article 6(1) of the 1986 UNDRTD⁶⁵⁸ and paragraph 4 of the Vienna Declaration.⁶⁵⁹ Accordingly, not only is global co-operation the appropriate path for the achievement of human rights, it should be done without any discrimination. The Vienna Declaration explains further:

In fact, after recognising the inalienable character of the RTD and its place in fundamental human rights,⁶⁶⁰ the Vienna Declaration stressed that 'democracy, development and human rights are interdependent and mutually reinforcing' and emphasised that 'the international community should support the strengthening and promoting of democracy, development and human rights and fundamental freedoms in the entire world'.⁶⁶¹ More interestingly, the same instrument provides that:

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international co-operation for the realisation of the right to development and the elimination of obstacles to development.⁶⁶²

⁶⁵⁸ Art 4 UNDRTD 'All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance for all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion'.

⁶⁵⁹ Vienna Declaration, para 4 'The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principle, in particular the purpose of international co-operation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community'.

⁶⁶⁰ The Vienna Declaration, part 1, para 10.

⁶⁶¹ The Vienna Declaration, part 1, para 8.

⁶⁶² The Vienna Declaration, part 1, para 10.

This call is also the substance of the UNDRTD in its article 3(3)⁶⁶³ and it is worth noting that the improvement of international co-operation on the field of human rights is fundamental in realising the purposes⁶⁶⁴ of the UN Charter⁶⁶⁵ which includes ending poverty.

The international community responsibility is grounded on international solidarity,⁶⁶⁶ and is also based on moral universalism which proposes that ‘individuals and political communities have moral obligation to [their fellow citizens, and to] other societies in the form of both the wider society of states and the universal community of mankind’.⁶⁶⁷ In this perspective, the affluent have the obligation not to harm the poor.⁶⁶⁸ In fact, from an utilitarian perspective, the affluent should be able to forgo their personal interests for the benefit of a greater objective, the good of all. In opposition to liberalism, this theory puts emphasis on the need to have an ‘equal access to the means of personal and collective advancement and fulfillment in a climate of respect for the civilisations and cultures, both national and worldwide’.⁶⁶⁹ In fact, modern cosmopolitanism expresses itself through the RTD ‘which establishes an emerging principle in international law that there is a collective international responsibility for the human condition’.⁶⁷⁰

⁶⁶³ UNDRTD, art 3(3) reads: ‘States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights’.

⁶⁶⁴ Art 1 of the UN Charter.

⁶⁶⁵ Vienna Declaration, part 1, para 1.

⁶⁶⁶ R Malhotra ‘Right to development’ where are we today? in Negi, & Basu (2005) 130 &131.

⁶⁶⁷ P Hayden *Cosmopolitan global politics* (2005) 34.

⁶⁶⁸ Pogge (2005) 74.

⁶⁶⁹ Malhotra (2005) 131.

⁶⁷⁰ Woods (2003) 793.

In this vein, the 2000 Millennium Declaration⁶⁷¹ stresses the ‘collective responsibility of states to uphold the principles of human dignity, equality and equity at the global levels’.⁶⁷² The MDG number 8⁶⁷³ emphasises the vital place of the international partnership to eradicate world poverty and to ‘making the right to development a reality for everyone and to freeing the entire human race from want’⁶⁷⁴ amongst others. From this standpoint, the UN High Level Task Force on the Implementation of the Right to Development set up by the Commission on Human Rights in its resolution 2004/7 as endorsed by the Economic and Social Council in its decision 2004/249, within the structure of the intergovernmental open-ended Working Group on the Right to Development used the MDG number 8 as its vehicle towards the implementation of the right.⁶⁷⁵ In so doing, it has developed a set of criteria based on the targets of goal 8 which are:

- ‘Develop further an open, rule-based, predictable, non-discriminatory trading and financial system’;⁶⁷⁶
- Address the special needs of least developed countries,⁶⁷⁷ landlocked countries and small island developing states’.⁶⁷⁸

⁶⁷¹ Millennium Declaration, GA res A/55/2, 8 September 2000.

⁶⁷² Millennium Declaration, GA res A/55/2, 8 September 2000, Sec I.2.

⁶⁷³ The targets for goal 8 are aid, trade and debt relief.

⁶⁷⁴ Millennium Declaration, GA res A/55/2, 8 September 2000, Sec III.12.

⁶⁷⁵ In its resolution 2005/4, the Commission on Human Rights requested the task force to examine Millennium Development Goal 8 and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the RTD. The Human Rights Council, in its resolution 9/3, and the General Assembly, in its resolution 63/178, endorsed the workplan for the task force for the period 2008-2010, as recommended by the Working Group in its report on its ninth session (A/HRC/9/17, para. 43).

⁶⁷⁶ Target 8a.

⁶⁷⁷ Target 8b.

- Deal comprehensively with developing countries' debt through national and international measures in order to make debt sustainable in the long term.⁶⁷⁹

However, amongst others, this criteria was criticised for being based exclusively on Goal 8 whereas the RTD framework is much broader 'than a well conceived partnership for development or the MDG 8';⁶⁸⁰ for not covering thoroughly the human rights standards as related to the RTD,⁶⁸¹ and for the 'overlapping scope of many of the existing criteria' which could not facilitate the operationalisation of the criteria.⁶⁸²

In response to these criticisms, the Task Force went back to the drawing board and came out with another 'Right to Development Criteria' or 'interim draft version' to be improved and submitted in 2010 in compliance with the objectives set out in relevant provisions of the Human Rights Council resolution 9/3. The Interim Draft Version of the Right to Development Criteria as revised at the fifth session of the High Level Task Force from the first to nine April

⁶⁷⁸ Target 8c.

⁶⁷⁹ Target 8d.

⁶⁸⁰ R Malhotra 'Implementing the right to development- a review of the task force criteria and some options' A/HRC/12/WG.2/TF/CRP.6; para 26; 31 March 2009.

⁶⁸¹ Malhotra (2009) para 27.

⁶⁸² Malhotra (2009) para 30; also the UN document A/HRC/8/WG.2/TF/CRP.5 by Bronwen Manby where she highlights the need to revise the criteria with a view to make them more focused on the mission reports of the High Level Task Force.

2009 in Geneva,⁶⁸³ is human centered,⁶⁸⁴ addresses the appropriate or enabling environment⁶⁸⁵ as well as social justice and equity⁶⁸⁶ which are vital for the realisation of the RTD.

The ‘enabling environment’ deals with the role of the international community in implementing the RTD. It underlines the vital places of international co-operation and assistance, national policy space and autonomy to design such policy, rule of law and good governance and peace, security and disarmament.

This provision calls upon the international community to ensure technology transfer, fair trade rules for all and equality between states ‘subject to effective accountability mechanism ’ to realise the RTD. In addition, the national policy space and autonomy should be respected; in other words, there should not be external interferences with national development strategies and at the same time national as well as global good governance should be the rule of the partnership.

Though the Task force should be applauded for its work, one wonders how the international community at large will cooperate in realising the RTD without the adoption of a legally binding instrument on the RTD.

On a different note, how can the IFIs be effectively held accountable? They are not parties to international agreements between states and therefore, it becomes almost impossible to identify a binding obligation upon them in terms of achieving human rights.

As for the UN member states, they are are compelled by the UN Charter to work together to ensure universal better life.⁶⁸⁷

⁶⁸³ A/HRC/12/WG.2/TF/2.

⁶⁸⁴ A/HRC/12/WG.2/TF/2, Annex IV, para a, b, c, d & f.

⁶⁸⁵ A/HRC/12/WG.2/TF/2, Annex IV, para g, h, i, j, k, l, m, n, o & p.

⁶⁸⁶ A/HRC/12/WG.2/TF/2, Annex IV, para q, r, s, t, u.

⁶⁸⁷ Art 55 of the UN Charter reads:

From a utilitarian perspective, states have the obligation to realise the RTD. This perspective was summarised by Jeremy Bentham's 'fundamental axiom' according to which 'it is the greatest happiness of the greatest number that is the measure of right and wrong'.⁶⁸⁸ In fact, this theory is enshrined in the French legal system. Accordingly, it is a 'criminal liability of omissions' due to 'a failure to provide reasonable assistance which a person is expected (or required) to provide to another'.⁶⁸⁹ In the common law, the same theory applies under the law of tort. This theory stands for the transnational responsibility of states. Rejecting the libertarian philosophy and drawing from the utilitarianism one, Henry Shue argues that the international community has the duty to 'avoid depriving, to protect from deprivation [and] to aid the deprived'.⁶⁹⁰ In other words, just like a national government, the international

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

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

See also art 56 of the same instrument; art 1(3) of the UN Charter, art 22 UDHR, art 2(1) and 11 of the ICESCR, art 4, 23(4) and 24(4) of the CRC and art 32 of the Convention on Rights of People with Disabilities

⁶⁸⁸ Marks 'Obligation to implement the right to development: Philosophical, political and legal rationales' in Andreassen & Marks (2006) 64.

⁶⁸⁹ Sen 'Human rights and development' in Andreassen & Marks (2006) 7. On the theory of criminal liability of omission, see A Ashworth and E Steiner 'Criminal omission and public duties: The French experience' (1990) *Legal Studies* 10; G Williams, 'Criminal omission: The conventional view' (1991) *Law Quarterly Review* 107.

⁶⁹⁰ H Shue *Basic rights: Subsistence, affluence and the U.S foreign policy* (1996) as quoted by Marks 'Obligation to implement the right to development: Philosophical, political and legal rationales' in Andreassen & Marks (2006) 66.

community must respect, protect and provide a higher standard of living for those in need. In the same perspective, it is reported that

[T]he enormous and continuing increases in the capacity of richer states, and other actors in richer societies mean that very often they can provide assistance effectively...Their capacity also confers added responsibilities. This responsibility is set out in international human rights law, which state that richer societies have an obligation to assist poorer states through international co-operation, within their means to achieve protection of [human] rights.⁶⁹¹

‘Our common humanity’ and interdependency create a sense of collective responsibility for one another,⁶⁹² hence the Franciscan theory arguing for ‘the right of the poor to receive what is necessary for their life and dignity’.⁶⁹³ Nevertheless, individualists argue that the resources are scarce and therefore everyone shall take care of himself. This thesis disagrees and sustains Baxi in his claim that the problem lies in the ‘redistribution’⁶⁹⁴ of world resources. The problem should be addressed in terms of who owns what and why? who sets the rules of the redistribution ? as correctly argued by Woods ‘World poverty is a function not of scarcity, but of distribution’⁶⁹⁵ In agreement with Pogge on the responsibility of the affluent to assist the poor, Walzer argues that ‘Men and women who appropriate vast sums of money for themselves while needs are still unmet act like tyrants, dominating and distorting the distribution of security and welfare’,⁶⁹⁶ hence the need to hold them accountable. In this register, Baxi argues that the RTD will loose its significance

⁶⁹¹ International Council on Human Rights Policy (2003) *Duties sans frontiers: Human rights and Global social justice* 73 (Geneva) as quoted by Marks in Marks & Andreassen (2006) 73.

⁶⁹² C Fried *Right and wrong* (1978) 118 as quoted by Woods (2003) 775.

⁶⁹³ O F M Thaddee Matura ‘The Franciscan concept of poverty’ in *World Poverty – Franciscan reflections* (2007) 3.

⁶⁹⁴ Baxi (1984) 234.

⁶⁹⁵ Woods (2003) 792.

⁶⁹⁶ M Walzer *Spheres of justice: A Defense of Pluralism and Equality* (1983)75-76 as quoted by Woods (2003) 792.

[I]f it can be ethically said that the national of affluent societies owe no human rights obligations to non-nationals adversely and manifestly affected by economic and military policies of their governments.⁶⁹⁷

The theory of international responsibility for human rights was codified through the UN Charter which does not only list conditions to ensure development, but also urges member states to act for the achievement of these purposes. The betterment of human life should be in the interest of every human being. The fact that the community of nations agrees on such a principle and records it in a charter testifies to their willingness to go the extra mile for the sake of humanity. The pledge made by the international community to take action individually and collectively to ensure international societal well being implies taking action beyond state's borders or at least actions with effects beyond their borders. This can be interpreted as an agreement to give up some attribute of their sovereignty to promote and protect others from the worst form of human rights violations, which is poverty.⁶⁹⁸ Thus, if the community of states is ready to be held accountable for each other's well being, it is actually a compromise of their sovereignty. In this regard, M'baye convincingly argues that the mere fact that member states of the UN show concern for poverty and are willing to compromise their sovereignty in the name of human rights constitutes a legal basis for the RTD.⁶⁹⁹

Furthermore, M'baye, like Pogge, believes that wealthy countries are responsible for world poverty. They are international law and policy makers, hence they should be held responsible for those policies and their consequences.⁷⁰⁰ M'baye argues:

⁶⁹⁷ Baxi (2007) 149-150.

⁶⁹⁸ M'baye (1972) 505-534.

⁶⁹⁹ M'baye (1972) 505-534. See also M'baye 'Emergency of the right to development as a human right in the context of the new economic order', paper presented to the UNESCO Meeting of Experts on Human Needs and the Establishment of a New International Economic Order, Paris, 19-23 June 1978.

⁷⁰⁰ M'baye (1972) 522.

They [wealthy countries] decide about peace or war, the international monetary regime, the conditions of international relations, impose ideologies, etc. etc. They do and undo the knots of politics and the world economy. What would be more natural than that they should assume the responsibility for the events and the state of affairs of which they are the authors?⁷⁰¹

He maintains that ‘the harm that they cause should be the responsibility of those that provoked them; [and that] this is an elementary principle of justice’.⁷⁰²

However, it is difficult to hold one state accountable for another state’s RTD. In fact, the renunciation of sovereignty in articles 55 and 56 of the UN Charter seems to be very limited because as Donnelly puts it ‘States merely accept an obligation to take (unspecified) co-operative action to further (unspecified) human rights and they do not oblige themselves to undertake any particular course of action, let alone to protect or realise any particular human right’.⁷⁰³ In other words, the international community has no obligation to ensure the realisation of the RTD. Allan Rosa observes that claiming that the RTD is grounded on international law, is a mere affirmation without any clear and substantial argument.⁷⁰⁴

Nevertheless, from a different angle, the commitment of the international community to promote ‘higher standards of living, full employment, conditions of economic and social progress and development, universal respect for, and observance of human rights and fundamental freedoms for all without distinction of race, sex, language or religion’ (as provided by articles 55 and 56 of UN Charter) is a good attempt to better human conditions, ensure human dignity and the RTD. In fact, grounded in the UN Charter, the mandate of the

⁷⁰¹ Mbaye (1972) 522.

⁷⁰² Mbaye (1972) 522.

⁷⁰³ Donnelly (1984) 262.

⁷⁰⁴ A Rosas ‘The right to development’ in Asbjorn Eide, Catarina Krauses and Allan Rosas (2001) 251.

UNDP is to ensure human well-being or the RTD, even if it cannot force donors to provide development assistance, but obtain it through multilateral or bilateral negotiations.⁷⁰⁵

Furthermore, the purposes of the UN Charter are also enshrined in the 1948 Universal Declaration⁷⁰⁶ as well as the ICESCR⁷⁰⁷ and are therefore specified human rights with legal sources. In fact, the UN Charter represents an international consensus on the fight against poverty to ensure the RTD. In this regard, Aaronson and Zimmerman correctly argue that

[t]he signing of the UN Declaration by the community of States was a commitment through multilateral mechanisms to further the enjoyment by all States...of access, on equal terms, to the trade and the raw materials of the world which are needed for their economic prosperity; to bring about the fullest collaboration between all nations in the economic field with the object of securing for all, improved labour standards, economic advancement and social security;...and they hope to see established a peace ... which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.⁷⁰⁸

In the same vein, Salomon argues that under the

[UN] Charter, UN member states relinquish a degree of their sovereignty and instead accept international co-operation in the respect for, and observance of, human rights as a common purpose of their contemporary collective activities.⁷⁰⁹

This is cosmopolitanism at its best. However, in practice, contemporary international law is informed by liberalism ideologies which do not consider human dignity. Hence, it is difficult

⁷⁰⁵ Discussion with Lopa Banerjee who is the Advocacy and Policy Advisor at the UNDP, Pretoria, South Africa, 20 April 2009.

⁷⁰⁶ The Universal Declaration, art 28 for example.

⁷⁰⁷ Art 11.

⁷⁰⁸ S A Aaronson and J M Zimmerman *Trade imbalance: The struggle to weigh human rights concerns in trade policymaking* (2008) 12.

⁷⁰⁹ Salomon (2007) 21.

to obtain compliance with international instruments including the UN Charter. More importantly, it is even more difficult to hold members of the international communities accountable on the ground of non binding instruments such as the UNDRTD for example.

Nevertheless, it is believed that the RTD could be claimed on the ground of international solidarity. This view was sustained at the Conference on Development and Human Rights held in Dakar in September 1978 which concluded that

[t]here exists a right to development. The essential content of this right is derived from the need for justice, both at the national and international levels. The right to development draws its strength from the duty of solidarity, which is reflected in international co-operation. It is both collective and individual. It is clearly established by the various instruments of the United Nations and its specialized agencies.⁷¹⁰

Accordingly, amongst others, international solidarity was the source of the RTD. In this perspective, developed countries had made a commitment since 1970 through Resolution 26/26 of 24 October 1970 at the International Conference on Financing Development, reaffirmed in 2002 in Monterrey, Mexico. They committed themselves to allocate 0.7% of their Gross National Product (GNP) to development assistance. However, only Sweden, Norway, Denmark, Holland and Luxemburg are meeting this target.⁷¹¹

Nonetheless, in the context of their foreign policy (not in a RTD context), the US established the Millennium Challenge Account and made it public at the 2002 Monterrey Conference on Financing Development. It was the opportunity for former President Bush to take a position on co-operation. He said:⁷¹²

Developed nations have the duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.

⁷¹⁰ The 1978 Dakar conference quoted from Malhotra (2005)130 &131.

⁷¹¹ OECD, *Development co-operation: efforts and policies of the Members of the Development Assistance Committee 1998 Report*; also OECD, *development co-operation Annual Report 2000*.

⁷¹² Statement by the US President George W Bush, Monterrey, Mexico, March 22, 2002.

The consensus document adopted at the Conference viewed ‘respect for human rights including the right to development, and the rule of law, gender equality, market orientated policies, and overall commitment to just and democratic societies’ as elements of sustainable development.⁷¹³

However, this seems to be mere words because there is no international treaty on the RTD obliging developed countries to assist developing ones. In fact, the RTD ‘refers to the responsibility of nations *ad intra*’⁷¹⁴ or within the confine of the state. Guevara stresses that wealthy countries’ obligation to help poor ones can be based on the past relation between them, particularly after the end of colonialism.⁷¹⁵ In this vein, international assistance can be given on humanitarian grounds or to ensure collective self-interest. There is no obligation based on a RTD. The example in mind is from Tanzania. In fact, during his visit to Tanzania, former President Bush claimed his happiness to have signed the ‘largest Millennium Challenge Account (\$700 million) in the history of the US’.⁷¹⁶ He also mentioned that it is the ‘way we have conducted our foreign policy with Africa. We come to the continent not out of guilt, but out of compassion’.⁷¹⁷ Most importantly, he said ‘absolutely, it is in our national interest that America helps deal with hopelessness; and it’s in our moral interests that we help brothers and sisters who hurt’.⁷¹⁸ In other words, nothing was done for Tanzania because of

⁷¹³ Monterrey Consensus of the International Conference on Financing for Development, Annex, para 11.

⁷¹⁴ J Guevara ‘Poverty and the right to development: An international human right approach’ 2, SELA 2005, Panel 5: “Poverty and the International Order”, 6 available at [http://islandia.law.yale.edu/sela/SELA%202005/Jose%20Guevara%20\(Final%20English%20Version\)%20v%201.0.pdf](http://islandia.law.yale.edu/sela/SELA%202005/Jose%20Guevara%20(Final%20English%20Version)%20v%201.0.pdf) (accessed 25 December 2009).

⁷¹⁵ Guevara (2005) 6.

⁷¹⁶ The White House’ President Bush participates in joint press availability with President Kikwete of Tanzania’ 8 February 2008 at <http://www.whitehouse.gov/news/releases/2008/02/20080217.html> (accessed 26 February 2008).

⁷¹⁷ The White House (2008).

⁷¹⁸ The White House (2008) 7.

their entitlement to the RTD and even the 0.7% commitment mentioned above was not referred to. Indeed, President Bush's words were unambiguous on the issue.

This is the implementation of the Truman text discussed earlier. In this context, development is a way to project American power and seek domination, hence it has nothing to do with 'fairness', 'rights'⁷¹⁹ or justice.

In fact, this is an attempt to change human rights standards as established in the UDHR and the UN Charter which recognised the right to everyone for a better life. The USA is a major player in shaping international policies which influence people life in Tanzania. For instance the US is the main sponsor of the IFIs whose SAPs destroyed people's life in Tanzania; it is the main player in the WTO which regulations hinder Tanzania's ability to have access to medicine; through globalization, the US shapes the world with its neoliberal policies 'to which the right to development talk presents an irritating moral nuisance'.⁷²⁰ In fact, if it was not for the US imposed (through globalisation) 'new idea' about political economy',⁷²¹ Tanzania could have developed. Hence, from Pogge perspective the US's and its citizens who are beneficiaries of the international order have the obligation to make sure that all Tanzanians are well off.

Human well-being should not be informed by foreign policies; it should not be 'an affair of North largesse',⁷²² but should be informed by international human rights standards with the aim to achieve global justice.

Though this remains a challenging task, the human family as a whole should strive to find a way to ensure that the international community respects human rights everywhere because as correctly observed by Eide and Rosas 'fundamental needs should not be at the mercy of

⁷¹⁹ M D Adler and C W Sannchirico 'Inequality and uncertainty: Theory and legal application' University of Pennsylvania, Politics, law and legal theory working paper (2006) 8 at <http://www/.srn.com> as quoted by Baxi (2007) 116.

⁷²⁰ Baxi (2007) 129.

⁷²¹ Baxi (2007) 129.

⁷²² Baxi (2007) 141.

changing governmental policies and programmes, but should be defined as entitlements.⁷²³ Defined as entitlements, all state members of the international communities will be duty bearers of human rights which should be realised through various means with international co-operation as the defining factor.

In sum, holding the international community of states accountable for human rights and the RTD beyond their jurisdictions seems very complicated. Nonetheless, the human family as a whole should strive to find a way to ensure that the international community respects human rights everywhere.

Global institutions' obligations

According to the UDHR, not only is everyone entitled to an 'adequate standard of living for himself and his family',⁷²⁴ he or she is also 'entitled to an international order in which [his] rights and freedom can be fully realized.'⁷²⁵ In other words, these provisions compel 'international order makers' to ensure their actions are conducive to the realisation of human rights; given their vital role in 'the determination of the development policies and the creation of development condition for states',⁷²⁶ the IFIs, the WTO/the G7 and even the transnational companies have the responsibility in terms of human rights. In fact, their pre-eminence in these times of globalisation reduces sovereignty of states in terms of domestic policies.⁷²⁷ Pogge through a cosmopolitan justice theory establishes that IFIs have a moral obligation to respect human rights; they have a 'negative duty' not to harm the poor;⁷²⁸ in other words,

⁷²³ A Eide & A Rosas 'Economic, social and cultural rights: a universal challenge' in A Eide *et al* (1995) 18.

⁷²⁴ Art 25

⁷²⁵ Art 28.

⁷²⁶ S I Skogly 'The role of the international financial institutions in a rights-based approach to the process of development' in Andreassen and Marks (eds) (2006) 288; also I Skogly *The human rights obligations of the World Bank and the International Monetary Fund* (2001).

⁷²⁷ S Kogly (2006) 297.

⁷²⁸ Pogge (2007) 20.

international institutions shall ‘refrain from (actively) causing other’s human rights not to be fulfilled’.⁷²⁹

This section will briefly focus on IFIs and the WTO’s obligations.⁷³⁰ In their early days, the main objectives of the IFIs were to cater for economic growth, thus they play a fundamental role in the development arena. In this register, as mentioned earlier, they designed the SAPs for the developing world, and their effects on human rights will not be repeated here. In fact, these institutions failed to protect the poor through their policies, they did not respect their negative duty not to harm the poor. Pogge extends this responsibility to the affluent who shall refrain from taking part in IFIs activities which hinder the eradication of poverty.⁷³¹

In fact, the negative obligation of the IFIs was emphasised by the UN Committee on Economic, Social and Cultural Rights who called upon them to ‘pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programme’.⁷³² Furthermore, a similar call was made in relation to the right to food.⁷³³ More importantly, the fiasco of the SAPs led an Intergovernmental Group of Experts to call the IFIs to order in these words:

The Bretton Woods institutions (World Bank and IMF) should take account of the right to development in their guiding principles, decision-making criteria and programmes. The same is true of NGO’s work at the international and national levels and whose activities relate to human rights, development and democracy. From this point of view, the ties between the World Bank and the IMF on the one hand, and the United Nations General Assembly and the Economic Social Council, on the other, should be strengthened. The IMF and the World Bank should be required to submit regular reports to the General

⁷²⁹ Pogge (2007) 20.

⁷³⁰ Chapter 7 will further assess the WTO and the G8.

⁷³¹ Pogge (2007) 20.

⁷³² UN Committee on Economic, Social and Cultural Rights, General Comments No 14 on the right to health, para 66.

⁷³³ UN Committee on Economic, Social and Cultural Rights, General Comments No 12 on the right to Adequate Food, para 41.

Assembly and the Economic and Social Council to keep them informed of the extent to which these institutions are taking account of the right to development in their programmes and activities.⁷³⁴

As a result of this call, when the IFIs shifted their policies to the PRSPs (discussed in the chapter 2 of this work), in an attempt to underline the IFIs obligations in terms of human rights, the UN High Commissioner for Human Rights drafted the 2002 Guidelines which reads as follows:

... global actors must be subject to accessible, transparent and effective monitoring and accountability procedures. If global actors fail to establish appropriate monitoring and accountability mechanisms in relation to their poverty reduction and human rights responsibilities, others should take steps do so.⁷³⁵

Unfortunately, the Guidelines do not call for celebration as there were addressed to states and not the IFIs who are in charge of PRSPs. Consequently, it could be argued that the IFIs do not accept human rights responsibility. This does not however stop Skogly from arguing that in addition to negative duty, IFIs also have positive duties which compel them 'to take positive steps to achieve a certain result'.⁷³⁶ In this respect, she emphasises the responsibility of the IFIs to take action to ensure that their sub-contractors respect human rights while implementing their projects.⁷³⁷

Unfortunately, the IFIs do not respect such positive obligations. For example, in June 2000, it was reported that the World Bank approved the Chad-Cameroon oil pipeline project without looking at its impact on the *Bagyeli* people's rights.⁷³⁸ These indigenous people were not

⁷³⁴ UN Doc, E/CN.4/1997/22,21 January 1997, para 5.

⁷³⁵ The UN High Commissioner for Human Rights *Human rights in development: Draft Guidelines: A human rights approach to Poverty Reduction Strategies* (2002) as quoted by Skogly (2006) 296-297.

⁷³⁶ Skogly (2006) 289.

⁷³⁷ Skogly (2006) 289.

⁷³⁸ See Forest Peoples Project: Annual Report 2001, 6 -7 available at http://www.forestpeoples.org/documents/ann_rep/fpproj_ar_01.pdf (accessed 28 December, 2010).

informed on the likely consequences of the project in their community and were not compensated for the effects of the pipelines crossing their lands. They did not participate in decision making process and an Indigenous Peoples Plan aiming to alleviate the effects of the pipeline on the indigenous group failed to comply with the World Bank's policy to protect individuals from harm caused by operations of the Bank.⁷³⁹

In any event, IFIs are not exempted from human rights obligations. They have legal personalities and can be brought to court for human rights violations.⁷⁴⁰ This is elaborated by the ICJ in its argument that international organisations are subjects of international law and are bound by any obligations incumbent upon them under general rule of international law, under their constitutions or under international agreements to which they are parties.⁷⁴¹

Furthermore, IFIs has been taken to court to comply with their human rights obligations. In the *Chixoy Dam case*⁷⁴² submitted by the Centre for Housing Rights and Evictions to the Inter American Court of Human Rights against the government of Guatemala, the World Bank and the Inter-American Development Bank (IBD) were taken to court to compensate for the violation of human rights of indigenous Rio Negro people in Guatemala. As indicated on the website of the Centre for Political Ecology,⁷⁴³ these people were violently displaced to make room for the construction of the Bank and IBD sponsored Pueblo Viejo-Quixal Hydroelectric Project. While the decision of the Court is still awaited, it is important to note that the IFIs have human rights responsibilities.

⁷³⁹ See Forest Peoples Project: Annual Report 2001, 6 -7 available at http://www.forestpeoples.org/documents/ann_rep/fpproj_ar_01.pdf (accessed 28 December, 2010).

⁷⁴⁰ For more on the IFIs legal personality, see Skogly (2001) 64-70.

⁷⁴¹ See *WHO v Egypt*, ICJ (25 March 1951) (1951) ICJ Reports 89-90.

⁷⁴² For more on this case see <http://www.cohre.org/store/attachments/chixoy-petition-CIDH.pdf> & <http://www.centerforpolitical ecology.org/chixoy.html> (accessed 10 September 2009).

⁷⁴³ Chixoy Dam Legacy Issues Study <http://www.centerforpolitical ecology.org/chixoy.html> (accessed 28 December 2010).

Opponents of this view such as Cohen⁷⁴⁴ and Rawls are of the view that global institutions are not the causes of poverty. For Rawls, the culture, religion and corruption are the real causes of poverty in the developing world.⁷⁴⁵ The counter argument to this view is that corruption in the developing world is very often sponsored by Northern countries that benefit from it.⁷⁴⁶

As far as the WTO is concerned, severe poverty is created and sustained by its arrangements. It uses several aspects of its TRIPs agreement to keep the poor unhealthy, and uses its agreements on agriculture (AoA) to keep them hungry.⁷⁴⁷ Pogge claims that developing countries are poor as a result of protectionist policies imposed on them by developed countries, which are actually responsible for their suffering.⁷⁴⁸ By so doing, developed countries violate their obligation not to harm the poor. As will be shown in chapter 7 of this research, the WTO is like a big enterprise where only wealthy countries can make profit; to use Pogge's words, it is tailored 'toward a better accommodation of the interests of the governments, corporations and citizens of the affluent countries'.⁷⁴⁹ *The Economist* magazine summarises the situation in these terms:

Rich countries cut their tariffs by less in the Uruguay round than poor ones did. Since then, they have found new ways to close their markets, notably by imposing-antidumping duties on imports they deem 'unfairly cheap'. Rich countries are particularly protectionist in many of the sectors where developing countries are best able to compete, such as agriculture, textile and clothing. As a result, rich countries' average tariffs on manufacturing imports from poor countries are four times higher than those on imports from other rich countries. This imposes a big burden on poor countries... that could export

⁷⁴⁴ Cohen (2010) 19

⁷⁴⁵ Pogge (2007) 31.

⁷⁴⁶ Pogge (2007) 46.

⁷⁴⁷ Pogge (2008) 21.

⁷⁴⁸ Pogge (2004) 278.

⁷⁴⁹ Pogge (2007) 34.

\$700 billion a year by 2005 if rich countries did more to open their markets. Poor countries are also hobbled by lack of know-how [in terms of WTO processes].⁷⁵⁰

Furthermore, severe poverty is the result of the TRIPs agreement which offers twenty years of ownership to the inventor of a new medicine. As a result, the global poor and most needy are kept away from the drugs because of high pricing, and researchers focus on diseases from the Western world, hence ‘of the 1393 new drug approved between 1995 and 1999, only 13 were tropical diseases – of which five by products of veterinary research on the health and two commissioned the military’.⁷⁵¹

Indeed the current world order does nothing to eradicate poverty; on the contrary, there is a global policy to ensure the longevity of poverty. This is justified by the fact the most rich countries do not comply with their commitment to give 0,7% of their gross national income to official development assistance (ODA).⁷⁵² In the contrary as correctly observed by Pogge, there was a reduction of ODA from 0,33% in 1990 to 0,22% in 2000.⁷⁵³ The resurgence of ODA which reached 0,33% in 2005 was linked to financing the so-called ‘war on terror’ and did not make a difference on ‘basic social services [such as] basic education, primary health care, nutrition programs’ and others.⁷⁵⁴

All beneficiaries of this neoliberal approach to globalisation are harming the poor. For those who blame poor countries for accepting such deals, it could be argued that these countries have no choice; in fact they find themselves between a rock and a hard place because the ‘one who failed to sign up [to the WTO regime] would find its trading opportunity even more severely curtailed’.⁷⁵⁵

⁷⁵⁰ *The Economist*, 25 September 1989, 89 as quoted by Pogge (2007) 34.

⁷⁵¹ Pogge (2007) 37.

⁷⁵² This commitment was made for the first time in 1970 and was reiterated at the International Conference on Financing for Development held in Monterrey, Mexico in 2002, A/CONF.198/11.

⁷⁵³ Pogge (2007) 27.

⁷⁵⁴ Pogge (2007) 27.

⁷⁵⁵ Pogge (2007) 37.

Overall, international institutions have human rights obligations and should comply with them. These obligations are negative, which entails ‘obligation of conduct’ and positive which entails ‘obligation of results’.⁷⁵⁶ Not only should international institutions’ conduct not harm the poor, their actions should also enhance the realisation of human rights. Furthermore, beneficiaries of an unjust world order are all accomplices in harming the poor and should therefore be held responsible, hence the need to criminalise the RTD.⁷⁵⁷

After an examination of the duty bearers of the RTD, the next subsection will focus on the right-holders of the RTD.

3.5.2 The right-holders of the RTD

Traditionally, individuals are rights-holders or beneficiaries of human rights. However, from an RTD standpoint, individuals, peoples and even the state (the latter is usually the duty bearer) are all beneficiaries of the right.

3.5.2.1 Individuals

The UNDRTD states: ‘the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in...’⁷⁵⁸ In this sentence, the beneficiary is an individual right when the provision refers to the entitlement of ‘every human person’. Similarly, in defining development as a process aiming at the constant development of the ‘well-being of the entire population and all individuals’,⁷⁵⁹ the individual

⁷⁵⁶ Skogly (2006) 299.

⁷⁵⁷ Baxi (2007) 153.

⁷⁵⁸ Art 1.

⁷⁵⁹ UNDRTD, Preamble, para 2.

character of the beneficiary of the right is highlighted under the concept of ‘all individuals’.⁷⁶⁰ Furthermore, the individual character of the right is also exposed by article 2 (1) of the UNDRTD which provides that ‘The human person is the central subject of development and should be the active participant and beneficiary of the right to development’.

Even the USA, a main opponent of the RTD would give it a chance if it is understood to mean an individual and not a collective right. At the 61st Commission on Human rights, Danies, the US representative claimed that for his country

[t]he RTD implies that each individual should enjoy the right to develop his or her intellectual capabilities to the maximum extent possible through the exercise of the full range of civil and political rights.⁷⁶¹

This is consistent with the liberalism theory which believes exclusively in negative rights, hence the reference to civil and political rights by the US representative whose claim views the RTD as a burden on individuals without involvement of the state and a positive obligation on international community. It fails to understand that human potential or capabilities cannot be developed in a context of dictatorship, hunger or poverty which should be avoided by the state and the international community. More importantly, the USA links the RTD to civil and political rights only, and refutes its composite aspect discussed earlier.

3.5.2.2 Peoples⁷⁶²

The sentences that the RTD is a right in which ‘all peoples are entitled to participate in...’⁷⁶³ and that the RTD is a process aiming at the constant development of the ‘well-being of the

⁷⁶⁰ The collective aspect of the rights included in these provision will be discussed in the subsection dealing with people as rights holders of the RTD; sec 3.4.2.2.

⁷⁶¹ Explanation of the vote on right to development, 61st Commission on Human Rights’ Statement delivered by Joel Danies US Delegation to the 61st Commission on Human Rights, April 12, 2005.

⁷⁶² The concept of ‘peoples’ will be covered extensively while looking at the RTD in the African human rights system in the next chapter of this work.

⁷⁶³ Art 1 of the UNDRTD.

entire population...⁷⁶⁴ show the collective feature of the RTD; here, peoples are right-holders of the RTD. In other words, communities or collectivities and groups are beneficiaries of the RTD.

Questions related to the beneficiary of the RTD are always on the table. Responding to Donnelly's query on the individual or collective character of the right, Bedjaoui argues that it is not a problem whether the RTD is a collective or individual right; he states, 'the right to development is the right of human race in general'.⁷⁶⁵ Similarly, at the twelfth session of the Working Group and the fifth session of the High Level Task Force on the implementation of the RTD,⁷⁶⁶ China argued that whether the RTD was a collective or individual right, it was urgent to implement the right in question and not waste time examining whether the RTD necessitates national or international obligations, whether it was an individual or collective right.⁷⁶⁷

Apart from Donnelly's assertion, these arguments are inclined towards catering for human well being in general and this thesis is of the view that the RTD is an individual as well as a collective right and indeed human welfare should be paramount in any circumstances. Nevertheless, the state is also perceived as a beneficiary of the RTD.

3.5.2.3 The state

The usual duty bearer of rights, the state is also identified as the beneficiary of the RTD. Article 2(3) of the UNDRTD is clear:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of

⁷⁶⁴ UNDRTD, Preamble, para 2.

⁷⁶⁵ Bedjaoui (1989); also Hansungule (2005) 12.

⁷⁶⁶ Twelfth session Working Group on the Right to Development, High-level task force on the implementation of the right to development, Fifth session (Geneva, 1-9 April 2009), A/HRC/12/WG.2/TF/2.

⁷⁶⁷ Twelfth session Working Group on the Right to Development (2009) para 12.

their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Even though the provision refers to the duty of the state, the interesting part here is ‘States have the right...’ In this instance, the state is the beneficiary in the sense that it has the right to formulate its development policies without any interference; it should exercise its sovereignty in defining national development policies. This principle is further stressed by the Declaration on the Establishment of a New International Economic Order.⁷⁶⁸ In this vein, Swanson argues that the RTD is the collective right of a developing country to the establishment of a new international order and underscores the role of international co-operation for its realisation.⁷⁶⁹

Nevertheless, the provision could also mean that the state has human rights and can claim them against the international community at large. However, since a state is not human, it can only claim such a right on behalf of its people. In this case, it is the representative of its people; Crawford stresses that the involvement of the state as the main negotiator of the right does not make it the beneficiary, but the tool used for the interest of individuals;⁷⁷⁰ the ‘state plays the role of the equivalent legal trustee’ to use the words of Keba M’baye.⁷⁷¹ The Working Group on the Right to Development sheds more light on the issue in these words:⁷⁷²

States and organizations had rights and obligations as far as the realisation of human rights was concerned and in relation to the right to development as a human right, although that did not mean that they possessed human rights as such.

⁷⁶⁸ Art 4(d) which reads: The new international economic order should be founded on full respect for the following principles: The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result’.

⁷⁶⁹ J Swanson, ‘The emergency of a new right in the African Charter’ (1991) 12 *New York Law School Journal of International & Comparative Law* 318.

⁷⁷⁰ J Crawford *The rights of peoples* (1988) 159 - 167.

⁷⁷¹ K M’baye ‘Introduction’ (part four) ‘Human rights and the rights of peoples’ in M Bedjaoui (ed), *International law: Achievements and prospects* (1991) 1041 - 1049; see also Salomon (2007) 119.

⁷⁷² Report of the Working Group of Governmental Experts on the Right to Development (8th session, 24 January 1985) UN Doc E/CN4/1985/11, para 20.

In sum, the state is the beneficiary of the right if it acts on behalf of its citizens.

3.6 Concluding remarks

The aim of this chapter was to examine the nature of the RTD. In so doing, it focuses on the content of the right, studies the controversies on the right, before looking at its implementation where duty-bearers and right-holders are identified.

From the discussion, it could be affirmed that the right is inalienable, is a multifaceted one made of civil and political rights, economic, social and cultural rights, right to participation and right to self-determination with a special emphasis on the interdependence, indivisibility and universality of all its elements. Apart from its composite feature, the right is also a claim for global justice, for fairness in sharing the world resources.

The right is very contentious in academic arenas where scholars battle on the concept of development law as well as the nature of the RTD *per se*. At the UN level, the debate has been turned into a political battlefield which is reflected in the voting patterns on UN resolutions on the RTD. The disagreement on the RTD is also illustrated through different attitudes adopted by international organisations in addressing the right. However, in spite of this disagreement, the right has been a subject of various undertakings at the national level and has a normative force, but remains non binding at international level where it is yet to be secured in a treaty or convention.

On the implementation of the RTD, the chapter shows that at the national level, the state is the duty bearer of the right whereas at international level, based on the cosmopolitanism philosophy, the international community is the duty bearer, even though this last aspect creates more controversy on the right as it is clear that right is not yet binding at a global level.

Lastly, based on the analysis of the UNDRTD, the chapter argues that the beneficiaries of the right are individuals as well as peoples. Nevertheless, the state is also perceived as a beneficiary of the right when it acts on behalf of its people.

After an analysis of the RTD at global level, the next chapter will focus on the right in the African human rights system.