

# Reflections on the right to development: Challenges and prospects

Mesenbet Assefa Tadege\*

Lecturer of Law, College of Law and Governance, Department of Law;  
Director, Mekelle University Human Rights Center, Ethiopia

## Summary

*The right to development is one of the most contested rights, continuing to attract the attention of academics, international lawyers and scholars in the development discourse. Since the adoption of the United Nations Declaration on the Right to Development in 1986, the question whether a legal right to development exists, particularly in the context of states' rights, is unresolved. The article seeks to explore the challenges and prospects of recognising the right to development as a legal right. In making such an inquiry, the article discusses the legal framework governing the right to development, the theoretical controversies surrounding its articulation and the prospects of its implementation. Beyond reinvigorating the discussion on the right to development, the article aims to give the reader new insights on the subject.*

## 1 Introduction

Human rights are the product of the human struggle throughout history. The right to development in an international context is partly the result of the struggle of developing countries for a new international economic order.<sup>1</sup> The right to development belongs to third generation rights, which includes the right to a healthy environment and the

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\* LLB (Bahir Dar), LLM (Human Rights and Democratisation in Africa) (Pretoria); Tsehay2000@gmail.com. This article is based on the author's dissertation submitted in partial compliance with the requirements for the degree LLM (Human Rights and Democratisation in Africa), Centre for Human Rights, Faculty of Law, University of Pretoria, 2008.

<sup>1</sup> The collective struggle of developing countries for the establishment of an international order that favours their special needs culminated in the adoption of the UN Declaration on the Establishment of a New International Economic Order; GA Res 3201(S-VI) UN GAOR 6th special session Agenda Item 6, 2229th plen mgt at UN Doc A/RES/3201(S-VI) (1974).

right to peace.<sup>2</sup> According to the proponents of third generation rights all actors, including the state, the individual, public and private firms and the entire international community have to make an effort to realise these rights.<sup>3</sup> Supporters of third generation rights stress the danger posed by globalisation to existing human rights structures. This renders individual states, acting alone, unable to satisfy the obligations imposed by international human rights instruments.<sup>4</sup>

Since the idea of a right to development was born, the subject has been the focus of human rights and development literature. The idea was conceived in 1972 in an inaugural lecture at the International Institute of Human Rights in Strasbourg by Senegalese jurist and the then head of the United Nations High Commission on Human Rights, Keba M'Baye.<sup>5</sup> From the moment of its inception, developing countries advocated the inclusion of the right to development as a human right through the United Nations (UN). This advocacy culminated in 1986 in the adoption of the Declaration on the Right to Development, which recognised the right to development as a fundamental principle of human rights.<sup>6</sup> Subsequently, scholars from the south articulated the notion and enumerated the possible subjects and objects of the right, while jurists from the north questioned whether such a right existed at all.<sup>7</sup>

The right to development was reaffirmed by the Vienna Declaration and Programme of Action (Vienna Declaration) adopted by 171 countries participating in the World Conference on Human Rights in 1993, as a universal and inalienable right and an integral part of fundamental human rights.<sup>8</sup> The African Charter on Human and Peoples' Rights (African Charter), adopted in 1981, in article 22 expressly incorporates

<sup>2</sup> O Sheehy 'The right to development and the proliferation of rights in international law' (2002) 5 *Trinity Law Review* 253.

<sup>3</sup> Sheehy (n 2 above) 254.

<sup>4</sup> R Rich *The right to development: A right of peoples?* (1992) 312, cited by Sheehy (n 2 above) 254.

<sup>5</sup> K M'Baye 'Le droit au développement comme un droit de l'homme' in *Revue internationale des droits de l'homme* (1972), cited in RL Barsh 'The right to development as a human right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322.

<sup>6</sup> Declaration on the Right to Development adopted by General Assembly Resolution 41/128 (4 December 1986).

<sup>7</sup> Barsh (n 5 above) 322. With respect to scholars from the south, see also M'Baye (n 5 above); UN Independent Expert on the Right to Development; A Sengupta 'Implementing the right to development' in N Schrijver & F Weiss (eds) *International law and sustainable development: Principles and practices* (2004) 15; TA Aguda *Human rights and the right to development in Africa* (1989). For arguments forwarded by academics from the north, see J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 475.

<sup>8</sup> Vienna Declaration and Programme of Action A/CONF 157/23 (12 July 1993).

this right; in fact, it is the only legally-binding international document containing an express recognition of the right to development.<sup>9</sup>

Under the UN, initiatives to implement the right to development were incorporated through its Charter-based bodies such as the Economic and Social Council (ECOSOC) and resolution-based working groups. In 1989, the UN Commission on Human Rights established a Global Consultation on the Realisation of the Right to Development as a human right, involving experts with relevant experience, representatives of the UN system, including its specialised agencies, regional intergovernmental organisations and non-governmental organisations (NGOs).<sup>10</sup> Currently, the UN is making efforts to implement the principles of the right to development through the Working Group on the Right to Development and the Special Task Force on the Right to Development.<sup>11</sup> Although there are still legal and theoretical controversies surrounding the notion of the right to development, the emerging consensus on the subject and the initiative of the UN under the Working Group on the Right to Development reinvigorate the prospects of its implementation.

## 2 The legal framework

Although the legal foundation of the right to development was laid in 1986, its genesis may be traced to the Universal Declaration of Human Rights (Universal Declaration) and the subsequent international covenants. The Universal Declaration, by proclaiming the right of individuals to be free from fear and want, aspires towards the creation of an international order where the human rights of individuals may be enjoyed to the fullest extent. These principles were later incorporated under binding international treaties that impose obligations on states to respect, protect and fulfil human rights. As a composite right that incorporates other rights, it may be said that the right to development was implicitly recognised in the international Bill of Rights.

It should be pointed out that the right to development has unique features that characterise it as a separate and independent right. Its emphasis on establishing a fair international economic order, the pivotal role that it plays in the development discourse, as well as its comprehensive nature are some of the elements that necessitate its characterisation as a separate right. This right encourages an interdisciplinary analysis of human rights and tries to fill in the inadequacies of the existing human rights system. It provides an opportunity to

<sup>9</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981.

<sup>10</sup> UN Commission on Human Rights Resolution 1989/45 (6 March 1989) 'The Realisation of the Right to Development' Global Consultation on the Right to Development as a Human Right HR/PUB/91/2 United Nations, New York (1991).

<sup>11</sup> Open-Ended Working Group on the Right to Development E/CN/4 RES/1998/72.

strengthen the efforts of the international community to examine and address international human rights challenges in a wide and comprehensive context. Currently, the UN, under the High-Level Task Force on the Right to Development, serves as an important forum where states, international financial institutions (IFIs), inter-governmental organisations and other development actors meet to solve the challenges of ensuring development, particularly in the developing world.

## 2.1 Universal Declaration of Human Rights – A precursor to the right to development

The Universal Declaration, by incorporating civil and political rights as well as social, economic and cultural rights, laid the foundation of the concept. In its Preamble, the Universal Declaration reiterates the obligation of member states under the UN Charter to promote universal respect for and observance of human rights and fundamental freedoms.<sup>12</sup> In its promise of ‘larger freedom’; it emphasises social progress and the achievement of a better standard of living. It aims at achieving a social and international order that ensures the realisation of all the rights enshrined in the Declaration.<sup>13</sup>

By incorporating all categories of rights, the indivisibility and universality of human rights are articulated. The greatest achievement of the Universal Declaration was, in fact, its inclusion of economic, social and cultural rights. According to the Universal Declaration economic, social and cultural rights are indispensable for a person’s dignity and the free development of a person’s personality.<sup>14</sup>

The issues outlined here have important elements related to the concept of the right to development. The incorporation of social, economic and cultural rights, in particular, serves a ‘dual function of freedom and equality’ which the right intends to achieve.<sup>15</sup> By emphasising the significance of creating an international order where all human rights may be enjoyed to the fullest extent, it laid the foundation for the content of the right to development. The two international Covenants of 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), transformed the contents of the Universal Declaration into legally-binding treaties, thereby strengthening the enforcement of these rights.

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<sup>12</sup> Universal Declaration of Human Rights, adopted 10 December 1948, Preamble para 6.

<sup>13</sup> Preamble, para 5 Universal Declaration.

<sup>14</sup> Arts 22 & 25 Universal Declaration.

<sup>15</sup> BA Andreassen & S Marks (eds) *Development as a human right: Legal, political and economic dimensions* (2006) 241.

## 2.2 Declaration on the Right to Development

In 1977, the UN Commission on Human Rights adopted a resolution which for the first time formally recognised the right to development as a human right. The resolution called on the Secretary-General to undertake a study on 'the international dimensions of the right to development as a human right in relation to other human rights based on international co-operation'.<sup>16</sup>

In 1979, the Secretary-General published a report which laid down the ethical and legal foundation for the right to development. The report states:<sup>17</sup>

There are a variety of ethical arguments which may be considered to support the existence in ethical terms of a right to development. These include the fact that development is the condition of all social life, the international duty of solidarity, the duty of reparation for colonial and neo-colonial exploitation, increasing moral interdependence, economic interdependence, and the cause of world peace, which is threatened by underemployment.

The report of the Secretary-General highlights the major reason behind the articulation of the notion of the right to development. It is a claim for global justice and equity. Developing countries felt that if human rights are to be realised for all, not only the nation state but also the international community at large should bear this responsibility. The increasing interdependence among nations as a result of globalisation makes unilateral development endeavours fruitless unless backed by international co-operation. Hence, a concerted effort is needed to solve primarily the problem of poverty in developing countries through international co-operation, not as a matter of charity but as a matter of responsibility.

In November 1979, the UN General Assembly passed a resolution recognising the right to development as a human right.<sup>18</sup> Subsequently, the General Assembly proclaimed and adopted the Declaration on the Right to Development (Declaration) by a vote of 146 to one, with eight abstentions.<sup>19</sup> The adoption of the Declaration showed an overwhelming support for the recognition of the right to development as a human right. The single dissenting vote from the United States and the eight abstentions came from developed countries, showing the negative attitude of these countries towards the idea of a right to development.

The Declaration includes 10 provisions which define the content of the right, the right holders and duty bearers. Development as defined

<sup>16</sup> UN Doc E/CN.4/SR1389, 1392-98 (1977), Resolution 5 (XXXIII) para 4.

<sup>17</sup> UN Doc E/CN.4/1334 (1979). For a further discussion on the ethical grounds of the RTD, see RY Rich 'The right to development as an emerging human right' (1983) 23 *Virginia Journal of International Law* 322.

<sup>18</sup> General Assembly Resolution 34/46 (1979).

<sup>19</sup> The United States of America was the only country that cast a vote against the Declaration, while Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom abstained.

in the Declaration is a comprehensive process that goes beyond economics and covers social, cultural and political fields to achieve the continuous improvement of the well-being of human beings.<sup>20</sup> This definition differs from the traditional definition which views development as a simple expansion of gross domestic product (GDP), industrialisation or capital inflows.<sup>21</sup> The traditional understanding that development is just an increase in GDP has thus been abandoned, thereby paving the way for this new conception.<sup>22</sup>

According to the Declaration, the right to development refers to a process of development that leads to the fulfilment of all human rights through a rights-based approach that takes account of international human rights standards,<sup>23</sup> participation,<sup>24</sup> non-discrimination,<sup>25</sup> accountability,<sup>26</sup> transparency and equity in decision making and sharing the benefits of the process.<sup>27</sup> Both the process of development and its objectives are, thus, important components of the right to development.

The emphasis given to the process of development as a basic component of the right to development is reflected in many of its provisions. For example, it states that the development process should be 'the constant improvement of the well-being of the entire population and of all individuals, on the basis of their free and meaningful *participation*'.<sup>28</sup> It further states that the purpose of development should be to ensure 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the *fair distribution of income*'.<sup>29</sup>

The purpose of a development process, according to the Declaration, is aimed at the full realisation of all human rights, that is, civil and political as well as social, economic and cultural rights.

### 2.3 Vienna Declaration and Programme of Action

The Vienna Declaration was a turning point for the general human rights discourse and the right to development in particular.<sup>30</sup> It laid down an important precedent by stating that all human rights, that is, civil and political rights as well as social, economic and cultural rights,

<sup>20</sup> Art 1 Declaration on the Right to Development.

<sup>21</sup> Andreassen & Marks (n 15 above) 11.

<sup>22</sup> A Eide 'Human rights requirement to social and economic development' (1996) 21 *Food Policy* 23.

<sup>23</sup> Art 6 Declaration on the Right to Development.

<sup>24</sup> Art 1(1) Declaration on the Right to Development.

<sup>25</sup> Art 5 D Declaration on the Right to Development.

<sup>26</sup> Arts 3, 4 & 10 Declaration on the Right to Development.

<sup>27</sup> Art 2(3) Declaration on the Right to Development.

<sup>28</sup> Art 2(3) Declaration on the Right to Development (my emphasis).

<sup>29</sup> Art 8(1) Declaration on the Right to Development (my emphasis).

<sup>30</sup> Vienna Declaration (n 8 above).

are universal, indivisible, interdependent and interrelated. Reiterating the significance of the right to development, the Declaration specifically states:<sup>31</sup>

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 right and an integral part of fundamental human rights.

The Declaration was significant in that it reflected a fundamental consensus on the inalienable, universal and interdependent nature of human rights in general. The consensus was also important as some countries that made reservations to the adoption of the Declaration, including the United States, which cast the only single objection against the adoption of the Declaration, accepted the right to development as a fundamental human right.

#### 2.4 African Charter on Human and Peoples' Rights

The African Charter is the only supra-national human rights instrument that recognises the right to development as a legally-binding and enforceable right. The African Charter included this right as a human right long before the adoption of the Declaration on the Right to Development by the General Assembly. As discussed above, it was also the product of an African intellectualism that gave rise to the notion of the right to development. Because of this, the right is considered as a uniquely African contribution to the international human rights discourse.<sup>32</sup>

The Preamble of the African Charter highlights the special emphasis given to the right to development by stating that it is 'essential to pay particular attention to the right to development' and civil and political rights and social, economic and cultural rights cannot be dissociated from each other.<sup>33</sup> Article 22, which spells out the normative basis of the right to development, states:

All peoples 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. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

The inclusion of this provision in the African Charter is significant to enriching the content of the right to development and its jurisprudence. The African Commission on Human and Peoples' Rights (African Commission), in its landmark decision of the *Ogoniland* case, stated that the

<sup>31</sup> Art 10 Vienna Declaration.

<sup>32</sup> BS Santos *Towards a new common sense: Law, science and politics in the paradigmatic transition* (1995) 357; see also M Bedjaoui *The right to development in international law: Achievements and prospects* (1991), cited in RW Perry 'Rethinking the right to development: After the critique of development, after the critique of rights' (1996) 18 *Law and Policy* 228.

<sup>33</sup> Preamble, para 9 African Charter.

state of Nigeria, by failing to protect the people of Ogoni, has violated their right to food implicitly incorporated in the right to development.<sup>34</sup>

More clear findings of a violation of article 22 of the African Charter are also found in the *DRC case*<sup>35</sup> and the *Endorois case*.<sup>36</sup> In the *Endorois case*, the applicant alleged that

the Endorois' right to development has been violated as a result of the respondent state's creation of a game reserve and the respondent state's failure to adequately involve the Endorois in the development process.

In response to this allegation, the African Commission stated that 'the Endorois community has suffered a violation of article 22 of the Charter'.<sup>37</sup> In coming to this finding, the African Commission reiterated the importance of the right to be consulted and the importance of participation in the development process as key components of the right to development which the respondent state failed to meet in accordance with the requirements of article 22.<sup>38</sup> The Commission also emphasised the *constitutive* and *instrumental* role of the right to development serving both as a means and an end.<sup>39</sup> Accordingly, a violation of either the procedural or substantive elements of the right to development will be a violation of article 22 of the African Charter. The Commission, noting the complainant's submissions, stated that the right to development requires five main elements:<sup>40</sup>

It must be equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important, overarching themes in the right to development.

Ruling on whether these conditions were met, the African Commission stated that the inadequacy of the consultation made by the respondent state with the Endorois community and the lack of choice of the Endorois community to remain in their land, leaving them with no choice but to leave their land, failed to meet the requirements of article 22 and was a violation of the right to development.<sup>41</sup>

State reports that are submitted periodically by state parties also provide another opportunity for the African Commission to monitor the compliance of member states to ensure the right to development. Each

<sup>34</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 64.

<sup>35</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) para 95.

<sup>36</sup> *Communication 276, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) 27th Activity Report of the African Commission, para 269.

<sup>37</sup> *Endorois case* (n 36 above) para 298.

<sup>38</sup> *Endorois case* (n 36 above) paras 297 & 298.

<sup>39</sup> *Endorois case* (n 36 above) para 277.

<sup>40</sup> As above.

<sup>41</sup> *Endorois case* (n 36 above) para 279.

state party has to show the efforts it has taken to ensure each of the rights incorporated under the Charter.<sup>42</sup> In some of the state reports that the author consulted, some important elements of the right to development were reflected.<sup>43</sup>

It is also interesting to see that the right to development is included in national constitutions of African countries, including Ethiopia. The Constitution of the Federal Democratic Republic of Ethiopia *inter alia* reiterates to ensure the rights of the people of Ethiopia as a whole and each nation, nationality or people to improved living standards and to sustainable development.<sup>44</sup> One of the most interesting aspects of this provision also makes direct reference to essential elements of the Declaration on the Right to Development. It states that 'nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community'.<sup>45</sup> Similarly, Uganda and Malawi incorporate the right to development in their national constitutions.<sup>46</sup> This shows that the right to development can, indeed, be included in binding human rights instruments both nationally and regionally as well as in an international context if there is a political commitment.

In general, the work of the African Commission as well as the African Court on Human and Peoples' Rights (African Court) will make an important contribution in the development of the jurisprudence of the right to development. It is important to note that the cross-pollination of international and regional human rights systems has made a significant contribution to the general human rights discourse. As the only regional human rights system that incorporates the right to development, other regional human rights systems and the international human rights system in general may benefit from this emerging jurisprudence.

## 2.5 Right to development as part of customary international law

Some scholars contend that the series of resolutions and declarations on the right to development have transformed it into a norm of *jus*

<sup>42</sup> Art 62 African Charter.

<sup>43</sup> See the 3rd and 4th Periodic Report of Algeria (2006). This report stated that the state was concerned with *equitable distribution of the benefits of development* and this was supported by statistical data on the measures taken to fulfil socio-economic rights. See also the 8th, 9th and 10th Periodic Reports of the Democratic Republic of Congo (2007) para 208.

<sup>44</sup> Art 43(1) Ethiopian Constitution.

<sup>45</sup> Art 43(2) Ethiopian Constitution.

<sup>46</sup> See the Constitution of the Republic of Uganda, National Objectives and Directive Principles of State Policy, Objective IX and the Constitution of the Republic of Malawi, art 31.

*cogens* that creates a legal obligation on states.<sup>47</sup> Dugard states that ‘an accumulation of declarations and resolutions on a particular subject may amount to evidence of collective practice on the part of states’ and hence may constitute a customary rule.<sup>48</sup>

Although contentious when the Declaration was adopted, the subsequent declarations, resolutions and decisions of UN human rights bodies and international conferences have shown that there is a major consensus emerging to respect the principles of the right to development. Bedjaoui contends that ‘the right to development is, by its nature, so incontrovertible that it should be regarded as belonging to a norm of *jus cogens*’.<sup>49</sup> A more elaborate discussion on this issue in the context of development assistance is presented in section 5 below.

### 3 Subjects and duty bearers

Developing countries were for many years in favour of the idea of a right to development in the context of state rights only.<sup>50</sup> The current general understanding is that, depending on the context, different categories of entities may be the subjects of the right to development. These include individuals, peoples and states. With respect to individuals, as much as they are the central subjects of the right to development, they also have a duty ‘to promote and protect an appropriate political, social and economic order for development’.<sup>51</sup> Every person has the duty to be able to develop his or her personality that would enable him or her to lead a worthy and dignified life. Individuals also have the duty to help their family and the larger community to ensure the right to development. Thus, they should be active participants in development planning as well as in all the processes of implementation.

Individual states are the traditional duty bearers in respect of human rights, including the right to development. This traditional notion is also emphasised by the Declaration in that it makes it clear that states, both individually and *collectively*, have the *primary responsibility* to create national and international conditions favourable to the realisation of the right to development.<sup>52</sup> In the first place, the fundamental obligation for ensuring development lies within each nation state. It has the obligation to undertake all measures necessary for the realisation

<sup>47</sup> M Bedjaoui *International law achievements and challenges* (1991), cited in H Steiner & P Alston (eds) *International human rights in context: Law, politics and morals* (2000) 1321.

<sup>48</sup> J Dugard *International law: A South African perspective* (2005) 34.

<sup>49</sup> Bedjaoui (n 47 above) 1323.

<sup>50</sup> J Makarczyk *Principles of a new international economic order* (1988) 186, cited in SR Chowdhury *et al* (eds) *The right to development in international law* (1992) 11.

<sup>51</sup> Art 2(2) Declaration on the Right to Development.

<sup>52</sup> Art 3(1) Declaration on the Right to Development.

of the right to development and the progressive enhancement of the right.<sup>53</sup>

Much of the impetus for the adoption of the Declaration centred on the needs of developing countries.<sup>54</sup> The UN General Assembly also adopted the Charter of Economic Rights and Duties of States which reaffirmed the responsibility of every state to promote economic, social and cultural development of its own people and those of developing countries.<sup>55</sup> These may include financial and technical assistance, providing better terms of trade, and the transfer of technology to developing countries.<sup>56</sup>

The Declaration emphasises the crucial importance of international co-operation. It states that states have a duty 'to co-operate with each other in ensuring development and eliminating obstacles to development',<sup>57</sup> to promote universal respect for and observance of all human rights and fundamental freedoms.<sup>58</sup>

The duty to co-operate also exists in international human rights treaties. In respect of socio-economic rights, there is a collective duty for countries that have ratified ICESCR to promote the fulfilment of socio-economic rights.<sup>59</sup> In its General Comment on the Nature of States Parties' Obligations, the ESCR Committee stated that the phrase 'to the maximum of its available resources' was intended to include both resources existing within a state and those available from the international community, clearly indicating the obligations of the international community, in particular that of the developed countries, in that regard.<sup>60</sup>

#### 4 Concerns of justiciability and feasibility

There are two major concerns that are raised against the right to development as a human right, namely that of justiciability and feasibility. In the following section the article discusses these arguments.

<sup>53</sup> Arts 2, 3, 7 & 10 Declaration on the Right to Development.

<sup>54</sup> Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right UN ESCOR 35th session paras 152-159, UN Doc E/CN.4/1334 (1979). See also Report of the Open-Ended Working Group of Governmental Experts on the Right to Development UN ESCOR 45th session para 25 UN Doc E/CN.4/1989/10 (1989).

<sup>55</sup> GA Res 3281 (XXIX), UN GAOR, 2nd Comm, 29th session, Agenda Item 48 arts 7 & 9, UN Doc A/RES/3281 (XXIX) (1975).

<sup>56</sup> GS Vargas *The new international economic order legal debate* (1983) 39 42-43, cited in ID Bunn 'The right to development: Implications for international economic law' (1999-2000) 15 *American University International Law Review* 1431.

<sup>57</sup> Art 3(3) Declaration on the Right to Development; see also art 4(2).

<sup>58</sup> Art 5 Declaration on the Right to Development.

<sup>59</sup> Art 2 ICESCR.

<sup>60</sup> General Comment 3 para 13.

#### 4.1 Concerns of justiciability

From a theoretical perspective, positivists consider an element of formal validity a fundamental and essential attribute of a right.<sup>61</sup> Similar to the arguments that are usually raised against socio-economic rights, much of the opposition against the notion of the right to development emanates from the allegedly non-justiciable nature of the right. Criticism gains strength due to the comprehensive nature of the notion of the right to development itself and the declaratory nature of its normative content.

From a legalistic perspective, critics of the right to development argue that it was adopted only as a declaration of the General Assembly and does not have a binding nature as is the case with a multilateral treaty.<sup>62</sup> They point out that, in other international human rights instruments, state parties have obligations to protect, respect and fulfil different categories of rights. Donnelly, one of the prominent critics on the right to development, characterises the right as a ‘search for the unicorn’ and contends that it is pointless within the framework of international legal argument.<sup>63</sup> He notes that its language confuses rights with moral claims without indicating specific right holders and duty bearers.

The closest that the UN General Assembly has come to prescribe the requirements for a norm to be considered a human right is Resolution 41/120 of 1986.<sup>64</sup> The General Assembly noted that new human rights instruments should, among others, ‘be sufficiently precise [as] to give rise to identifiable and practicable rights and obligations [and] to provide, where appropriate, realistic and effective implementation machinery, including reporting systems’.<sup>65</sup> Two separate requirements are laid down under Resolution 41/120. The first requirement is that any right articulation needs to have normative precision.<sup>66</sup> It is said that the term ‘identifiable’ requires a degree of specificity as to the content of the right. In the case of the right to development, the Declaration on the Right to Development sets out the nature and content of the right as well as the right holders and duty bearers and hence meets the requirements of Resolution 41/120. This, however, does not mean that the content of a certain human right has to give a complete picture of its meaning and application. Initially all human rights, such as equal protection or due process, emerge as general and imprecise formulations.

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<sup>61</sup> S Marks ‘Making space for new human rights: The case of the right to development’ (1998) 1 *Harvard Human Rights Yearbook* 3, 33.

<sup>62</sup> L Irish ‘The right to development versus a human rights-based approach to development’ (2005) 3 *International Law Journal of Civil Society* 6.

<sup>63</sup> Donnelly (n 7 above) 475.

<sup>64</sup> GA Res 41/120, para 4 (d), 41 UN GAOR Suppl (No 53), UN Doc A/41/53 (1986).

<sup>65</sup> As above.

<sup>66</sup> As above.

The second requirement of Resolution 41/120 is that new instruments should 'provide, where appropriate, realistic and effective implementation machinery, including reporting systems'.<sup>67</sup> This requirement raises two fundamental questions. The first is whether implementation mechanisms are always required and, secondly, whether a reporting system *per se* is sufficient.

With respect to the first, the inclusion of the phrase 'where appropriate' may be intended to imply that new rights could be proclaimed without a simultaneous implementation provision. It may also be that supervision mechanisms in existing instruments are adequate. In relation to the second possibility, it has for long been accepted by most prominent international lawyers that an international system for the 'supervision' of states' compliance with international human rights obligations is sufficient to satisfy the requirements of 'enforceability'.<sup>68</sup>

The right to development is 'a [composite] of rights' encompassing civil and political as well as socio-economic rights'.<sup>69</sup> Thus, from a traditional conception of justiciability, it would be difficult to enforce this whole set of rights in a formalised and rigid judicial or quasi-judicial body. Nevertheless, the right to development is a legally-enforceable human right reaffirmed in the Declaration on the Right to Development and numerous other declarations and resolutions of the General Assembly and its subsidiary bodies. The manner in which this right may be implemented is something that is evolving under its Working Group on the Right to Development; yet it suffices to say that it is a legal right with identifiable duty bearers. One has to recognise that much of the international human rights mechanism is based on supervision and implementation rather than adjudication, and hence the right to development can well fit under such a system. Thus, depending on the nature of the right, the nature of the obligations involved and the factual circumstances, judicial remedies are not the only ways of implementing a right.

Although no concrete enforcement mechanism has yet been established for the right to development under a treaty-based system, there is no reason why it cannot be done in the future. Whenever there is political will, a binding international human rights treaty may be devised within the framework of the right to development. Moreover, the Working Group, through the Special Task Force, serves as a supervising organ for different development actors, including developed countries, international financial institutions and other inter-governmental organisations complying with the principles of the right to development. The experience of the Working Group and the Special

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<sup>67</sup> As above.

<sup>68</sup> H Lauterpacht *An international bill of the rights of man* (1945), cited in Marks (n 61 above) 38.

<sup>69</sup> Andreassen & Marks (n 15 above) 5.

Task Force on the Right to Development demonstrates that a supervisory mechanism may be devised in the framework of the right.

The experience of the African Charter clearly demonstrates that the right to development could be justiciable under a supra-national human rights system if there is the political commitment of states in that regard. The landmark decisions of the African Commission in the *Endorois*<sup>70</sup> and *DRC* cases<sup>71</sup> show that the judicial application of the right to development is feasible in the current legal discourse. Thus, one can say that serious concerns about justifiability cannot be raised in the case of a failure to implement the right to development.

#### 4.2 Concerns of feasibility

The second major objection to the idea of a right to development stems from the fact that development is not likely to be fulfilled for all.<sup>72</sup> Much of the argument for the realisation of socio-economic rights arises from this as detractors argue that the full enjoyment of these rights is impossible and hence one should abandon attempts to realise such rights. This conception puts the right to development and most socio-economic rights which are central to it outside the scope of human rights. They argue that it would not be feasible to fulfil and guarantee these rights for all, especially in developing countries where there is a formidable resource barrier.

This argument has been attacked by prominent scholars, including Sen. Sen contends that feasibility should not be a standard by which the cogency of human rights is measured when the objective itself is to work towards expanding their feasibility and full realisation.<sup>73</sup> The fact that certain rights cannot be realised under current circumstances does not rule out the fact that they are rights.

Efforts are being made under the UN not only to articulate and elaborate the notion of the right to development, but also regarding its implementation. First, under the Global Consultation on the Right to Development and later on under the Working Group on the Right to Development, the UN has been working towards a meaningful realisation of the right to development through consultations with IFIs, intergovernmental organisations and other development actors.<sup>74</sup>

In general, the series of international agreements, custom and practices have created legal obligations on states and other non-state actors for which they will be accountable. Because of this, it may be said that the right to development satisfies the characteristics of a human right by identifying specific duty bearers and specifying their obligations

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<sup>70</sup> *Endorois case* (n 36 above).

<sup>71</sup> *DRC case* (n 35 above).

<sup>72</sup> Andreassen & Marks (n 15 above) 6.

<sup>73</sup> As above.

<sup>74</sup> Open-Ended Working Group (n 11 above).

and the corresponding national,<sup>75</sup> regional<sup>76</sup> and international monitoring and enforcement mechanisms. It is also important to note that the discourse of international human rights law adopts notions of implementation and supervision rather than those of justiciability and enforceability.<sup>77</sup> This fits with the current trend on implementing the right to development through the Working Group on the Right to Development.

## 5 Does the right to development include a right to development assistance?

One of the most controversial aspects of the concept of the right to development is whether it can be claimed as a right to development assistance by developing countries from developed countries. Official development assistance or foreign aid has been one of the major ways of ensuring international economic co-operation.<sup>78</sup> Other ways of bilateral and multilateral economic co-operation include market access through preferential trade liberalisation, incentives to increase investment flows and technology transfer and debt relief. The concessional nature of official development assistance, the failure of developing countries to successfully attract private investors and generate sufficient market returns to provide incentives, makes it indispensable in the context developing countries. Official development assistance makes a significant contribution in financing activities which have important social returns such as education, nutrition, health, housing and other items of social development; all crucial to realize the right to development.<sup>79</sup> Because of this, the discussion would focus on official development assistance in the context of the right to development.

On the one hand, developed countries have argued that the right to development does not create any legal obligation on their part to economically or technically assist developing countries. They contend that if there is any obligation to that effect, it is merely moral. From the perspective of developed countries, international assistance is given for three major reasons. The first reason is purely based on moral grounds and sees it as a compassionate response to extreme poverty in developing countries. The second is based on the enlightened self-interest of developed countries to ensure political stability, social cohesion, human security and economic prosperity in developing countries. Lastly, development assistance is also motivated by international

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<sup>75</sup> See art 43 of the Ethiopian Constitution which expressly guarantees the right of the people of Ethiopia to development.

<sup>76</sup> Art 22 African Charter.

<sup>77</sup> Marks (n 61 above) 35.

<sup>78</sup> A Sengputa *et al* (eds) *Reflections on the right to development* (2005) 93.

<sup>79</sup> As above.

solidarity, that is, a common desire of all nations to address common problems and deal with issues that reach across borders, such as environmental protection.<sup>80</sup>

On the other hand, developing countries have argued that the right to development includes the right to seek development assistance from developed countries. Slavery, colonialism and the neo-colonial socio-economic hegemony of the North are raised as justifications for the legal right of states to seek development assistance from developed countries. A broader obligation of states to co-operate has its foundation in article 56 of the UN Charter and article 28 of the Universal Declaration. These two provisions impose a broader international duty to co-operate.<sup>81</sup>

In trying to analyse whether official development assistance forms part of the legal obligations of developed countries, it is important to consider state practice in this regard. Official development assistance is commonplace and the existence of this widespread practice raises the question whether official development assistance has become a legal obligation of developed countries. The United States unilaterally began development aid programmes in 1949. Subsequently, other Western countries followed and, by the 1950s, they were providing aid that counts for one per cent of their GDP. Currently, all members of the Organisation for Economic Co-operation and Development (OECD) and members of the Organisation of Petroleum Exporting Countries (OPEC) are continuously providing development assistance to developing countries and they consider this as one of their serious and demonstrated national objectives. In the Millennium Declaration, developed countries pledged to provide 0,7 per cent of their GDP to development assistance.

Many scholars, including Schachter, argue that international law relating to development includes a 'new conception of entitlement to aid and preferences based on need'.<sup>82</sup> The widespread practice and the long history of providing aid and preferences made to developing countries demonstrate evidence of the acceptance by developed countries of this new responsibility and hence the fulfilment of the necessary *opinio juris*. Moreover, many countries consider the obligation to provide official development assistance as part of their domestic law. The fact that official development assistance has been continuing for decades, even in the presence of domestic criticism, further strengthens the fact that developed countries consider themselves legally obliged to do so. In general, on the basis of state practice, one can conclude that official development assistance and the general obligation to provide aid are part of international law and forms an integral part of the right to development.

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<sup>80</sup> OECD *Shaping the 21st century: The contribution of development co-operation* (1996).

<sup>81</sup> Steiner & Alston (n 47 above) 1319.

<sup>82</sup> Sengputa *et al* (n 78 above) 10.

## 6 Way forward

### 6.1 Necessity of a binding international treaty

Although I maintain that the right to development is a legal right, I have to concede the fact that one of the major problems in its implementation, from a global perspective, is the nature of the Declaration on the Right to Development. The normative basis of the right to development still remains in the 1986 Declaration. Unlike a treaty that has the effect of imposing a legally-binding obligation on ratifying states, a declaration merely shows a willingness and the statement of intent by a state to give effect to the principles embodied in the declaration. Moreover, the 10-provision Declaration is written less specifically and most of its provisions are framed in a general manner. An international treaty on the right to development would be indispensable, not only in terms of having a legally-binding international obligation, but also in terms of coming up with more specific and elaborate legal obligations that have greater normative precision.

One would think that, given the negative attitude of developed countries towards the notion of a right to development, there would be no chance that a binding international treaty will be adopted. Nevertheless, the recent attitude of developed countries shows that they are accepting the right, at least on theoretical grounds. In the Vienna Declaration, which was important for the universality, interdependence and indivisibility of human rights, many developed countries that were against the idea of the right to development adopted and endorsed the inherent nature of the right to development as a fundamental human right.

This changed attitude of developed countries towards a notion of a right to development and the general emerging consensus call for efforts to come up with a binding international human rights instrument. The UN, through the Human Rights Council, should take the initiative in drafting the treaty and taking the whole process of adopting a treaty on the right to development. This in many ways strengthens implementation mechanisms already initiated under the UN through the Working Group on the Right to Development.

One may wonder how a new treaty on the right to development will take shape, given its comprehensive nature and issues of justiciability and feasibility. In this regard, the lessons to be drawn from the recently-adopted Convention on the Rights of Persons with Disabilities are significant. Some commentators state that the recent Convention expresses new developments in human rights thinking which are important in the context of the right to development.<sup>83</sup> The inclusion in the new treaty of the possibility of ratification by intergovernmental

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<sup>83</sup> AE Gouwenberg 'The legal implementation of the right to development' unpublished LLM thesis, Leiden University (2009).

organisations and the provision of a monitoring body which would receive collective complaints are significant developments in this regard.

Gouwenberg also states that another option could be to adopt a framework convention on the right to development similar to the UN Framework Convention on Climate Change (UNFCCC).<sup>84</sup> Framework conventions are treaties which show the commitment of states on principles that will be developed in order to bring action-oriented rules into international politics. In brief, the legal status of these conventions is similar to that of a declaration. This is because framework conventions provide generally-phrased obligations which are open-ended and seek further elaboration.<sup>85</sup>

With respect to the right to development, a framework convention may stipulate a commitment to ensure the right, the basic principles underlying the right, right holders and duty bearers, and the general mechanisms of implementation and review of state obligations. The UNFCCC can provide important guidance on the structure of the framework convention on the right to development and the above procedural issues. After laying down such a framework convention, different protocols may then provide specific obligations and detailed matters in relation to different aspects of the right to development. This flexible legal framework would elevate the legal recognition of the right to development, while still giving states time to agree on the specifics of the right and states' obligations. This whole range of possibilities demonstrates that the right to development can indeed be brought under the framework of international human rights conventions if the political will exists.

## 6.2 Strengthening the Working Group on the Right to Development

The UN Charter-based system, such as the General Assembly and ECOSOC, as well as its resolution-based organs that are created by the different organs of the UN, such as working groups, are important mechanisms of ensuring human rights accountability mechanisms.

The Working Group on the Right to Development is among the first international monitoring bodies that made clear and direct attempts to make formal consultation and institutionalised ties with intergovernmental organisations, IFIs and the wider donor community.

Through the Working Group, supported by the High-Level Task Force on the Right to Development, a series of discussions are being conducted between IFIs in order to ensure the right to development in their institutional framework. The emphasis in recognising the role of these institutions in ensuring the right to development and human

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<sup>84</sup> As above.

<sup>85</sup> As above.

rights in general shows their crucial roles and elaborates some of their legal positions in this regard.

The High-Level Task Force on the Right to Development, under the Working Group on the Right to Development, has now become an important body that applies human rights standards to international organisations. It evaluates the human rights impact of IFIs and other important development actors from the perspective of the right to development. Recently, reflecting on the possibility of evaluating a World Bank plan for Africa, the Task Force stated:<sup>86</sup>

Given the preponderant role of the World Bank in the development of Africa and the influence of its thinking and operations on the donor community at large, its partnership should be critically scrutinised. Accordingly, the Bank should therefore be invited by the Working Group to allow the African Action Plan and its partnerships with governments of sub-Saharan Africa to be evaluated against the criteria of the right to development.

In brief, the Working Group on the Right to Development provides a tremendous opportunity to integrate the notion of the right to development in a comprehensive and multi-disciplinary manner. It serves as a forum whereby states, IFIs, donor communities, NGOs, intergovernmental organisations and other stakeholders can deliberate on mechanisms of implementing the right to development in a wider context.

## 7 Conclusion

The right to development prompts an examination of human rights issues in a comprehensive and much wider context than has traditionally been the case; encouraging an interdisciplinary analysis of human rights problems and showing the inadequacy of the existing human rights framework to address structural problems.<sup>87</sup> The right to development provides a unique opportunity to promote an international economic order that is based on equity, social justice, and one that integrates human rights in different dimensions. It has been argued in this article that the right to development, though conceived under a declaration, has evolved into a legal right through a series of declarations and resolutions. The fact that it is a composite right that incorporates all other rights also makes its normative foundation implicit in the different international human rights instruments.

By emphasising the indivisibility and interdependence of human rights, the right to development shows that any development process must acknowledge that the promotion and protection of human rights

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<sup>86</sup> Report of the High-Level Task Force on the Implementation of the Right to Development, 3rd session (2007) UN Doc A/HRC/4/WG.2/TF/2, para 87.

<sup>87</sup> Marks (n 61 above) 7.

are part of that process. Importantly, development is defined as a human right that has the objective of fulfilling the continuing improvement of the well-being of individuals by expanding their capabilities and their freedom.

The article highlights the challenges and prospects of implementing the right to development from various perspectives. The adoption of a legally-binding treaty on the right to development with more normative precision of its contents and clear obligations on duty bearers is indispensable for a meaningful realisation of the right. Thus, a binding treaty with a competent supervisory body that is able to monitor the implementation of the right to development is crucial for its effective realisation. In this regard, if there is a political commitment, the experience of the African Charter has shown that the right to development can be a legally-enforceable right through a treaty body. The adoption of framework conventions and the advent of new types of international human rights conventions, such as that of the Convention on the Rights of Persons with Disabilities that brought new developments in human rights thinking and implementation mechanisms, are important lessons relevant for the right to development.