

**DRAFT LEGALLY BINDING INSTRUMENT**

**ON THE**

**RIGHT TO DEVELOPMENT**

**AS CALLED FOR BY**

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**A PAPER PRESENTED**

**BY**

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## **Preamble**

The right to development (RTD) is contested in international law, politics and practice. This remains the case, despite the over 30-years existence of the United Nations Declaration on the Right to Development (UNDRTD), the many substantive leads that current international law provides, and the renewed inspiration that can be drawn from Agenda 2030 and its sustainable development goals.

### **1. Framework Convention/Legally Binding Instrument on The Right To Development**

In December 2016, the United Nations Declaration on the Right to Development (UNDRTD) will have been in existence for thirty years. This Declaration is revered as the first international instrument to express the individual as well as the collective right to development at a global level. The importance of the Declaration also (currently still) lies in the fact that it provides one of the few structured approaches to addressing development issues in a rights-based manner. Thus, while being a soft law instrument (as will be addressed below), the UNDRTD takes State contributions to development policies and development work at large out of the realm of voluntariness and charity and into the sphere of rights and required international cooperation, or the duty to cooperate.

Furthermore, according to the Declaration, the Right to Development (RTD) focuses not only on equity and the indivisibility of human rights, but also on the importance of inclusive participation in development both as a means and as a goal. This is very much in line with what current conceptualizations of development, such as the 2015 sustainable development goals (SDGs), still emphasize today.

Despite the significance of its content and approach, in practice the UNDRTD has not managed to inspire a great deal of concrete implementation efforts. In fact, due to the great substantive and political divisions prevailing between—and within—the developed and the developing countries, about the exact substance and implications of the RTD, relatively little explicit follow-up has occurred. The 30th anniversary of the UNDRTD thus coincides with the continued acuteness of undertaking efforts to bring about, and further stimulate, development efforts, and with the substantive resonance between the UNDRTD and contemporary articulations of development concerns and agendas. This coincidence provides ample reasons for exploring whether there is cause and space to revitalize the RTD in international law and, if so, how this could take shape.

## **2. Substance and Implications as Conceived in the UN Declaration**

In 1986 the UNDRTD was adopted with 146 votes in favour, only one opposing vote and eight abstentions. As we have noted earlier in this paper, despite this relatively favourable voting record on the Declaration, the RTD always has been, and remains, controversial. In the words of Sakiko Fukuda-Parr, the UNDRTD:has been widely criticized as too poorly written, containing too much ambiguity over basic issues, such as whether this is a collective or an individual right, to provide a basis for defining a conceptually robust human right that would have significant meaning for improving human welfare.

In this light, it is now important to review the content of the UNDRTD, in particular as regards the nature and substance of the RTD and in terms of the implementation obligations specified. The next two subsections of this article present the findings of a close analysis of the full text of the UN Declaration. They broadly portray all the UNDRTD provisions that are relevant for understanding the nature, content and the implementation framework of the RTD, as originally envisaged. This amounts to an analysis of nearly all of the text of the Declaration.

### **2.1. The Nature and Content of the RTD according to the UN Declaration**

The Preamble to the UNDRTD clarifies right at the start that the document did not emerge out of the blue but that it already had a clear basis in existing provisions of international law at the time of its adoption. This was done through the inclusion of formal cross-references to the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and to:

the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter.

The Preamble to the UNDRTD defines the term 'development' fairly comprehensively, as follows:

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

Article 1 of the Declaration squarely qualifies the RTD as ‘an inalienable human right’ and formulates an entitlement for humans ‘to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights [...] can be fully realized’. Overall, the Declaration clearly has an anthropocentric outlook. This is expressed, *inter alia*, in that the Declaration recognizes respectively ‘the human person as the central subject of development’, the human being as ‘the main participant and beneficiary of development’ and ‘the active participant and beneficiary of the right to development’. This might explain why, despite the fact that the development of international environmental law was well on its way by 1986, the UNDRTD pays no attention to ecological or sustainability concerns at all. However, entirely in line with current international development priorities, the Declaration does explicitly pursue development as an inclusive notion, by emphasizing non-discrimination and equality of opportunity for all, which are to be enjoyed by ‘every human person and all peoples’.

According to the latter, both every human person and all peoples are the holders of the RTD. The duty bearers are a diffuse set of actors. All human beings ‘have a responsibility for development’. States, however, clearly have ‘the primary responsibility for the creation of national and international conditions favourable’ to the RTD and are required ‘to take steps, individually and collectively’.

All in all, the substantive picture of the nature and content of the RTD that emerges from the UN Declaration is still rather abstract and does not necessarily translate easily into concrete implementation obligations. This is perhaps exacerbated by the penultimate provision of the Declaration which stipulates that ‘[a] the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole’. While not all details concerning the individual and collective dimensions of the RTD may be entirely clear, it is nevertheless a fact that the UNDRTD posits development unequivocally as a human right. This makes it pertinent to now explore the vision of the UNDRTD on the possible implications of this right in terms of concrete implementation obligations. According to the former Independent Expert on the Right to Development, ArjunSengupta, this requires a ‘[yet] more nuanced explanation’.

## **2.2. The Obligations to Implement Formulated in the UN Declaration**

The most general vision on the action perspective that emerges from the existence of the RTD is provided in the closing provision of the UNDRTD: ‘Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels’. This formulation reinforces the idea that States are the primary duty bearers in relation to the RTD as policy-making, law-making and the adoption of other measures are largely, if not exclusively, within the domain of the State. The only implementation obligation specified for individuals is that all human beings should ‘promote and protect an appropriate political, social and economic order for development’.

This is indeed no small task and it is even questionable whether this is doable at all. While the role of individual human beings as duty bearers is not developed further, the UN Declaration provides some more concrete leads as to the implementation obligations of States. Accordingly, States have the duty to:

- 'formulate appropriate national development policies';
- 'undertake, at the national level, all necessary measures for the realization of the right to development';
- 'take steps, individually and collectively, to formulate international development policies' that pursue the full realization of the RTD;
- encourage 'the observance and realization of human rights' and to cooperate for this purpose;
- 'take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights'; and
- 'encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights'.

This list embodies a combination of national and international implementation obligations. These were not made strongly dependent on one another, although Article 4(2) of the UNDRTD refers to effective international cooperation as a 'complement to the efforts of developing countries'. In addition—according to Article 9(1) of the UNDRTD mentioned earlier—national and international implementation obligations are to be seen as 'indivisible and interdependent' and to be considered 'in the context of the whole' Declaration. Obviously, the notion of solidarity, translating into a duty to cooperate and to actively engage in international cooperation and assistance for development, forms another core implementation obligation concerning the RTD. Article 3(1) of the UN Declaration proclaims that: 'States have the responsibility for the creation of national and international conditions favourable to the realization of the right to development'. This entails that they 'have the duty to cooperate with each other in ensuring development and eliminating obstacles to development'.

As briefly stated already in the introduction to this article, the duty to formulate appropriate international development policies and to provide effective international cooperation are among the most controversial elements of the UNDRTD. From one perspective the level of controversy is perhaps understandable, given the fact that 'developed' countries would need to invest significantly in order to reach the required level of effort. From other perspectives this is less the case. For example, for a long time the same 'developed' countries have controlled the terms of international trade resulting among other things in a World Trade Organization regime that does not fully look after the trade interests of developing States, to put it mildly. The Doha Round, a negotiation process that was launched in November 2001 and that is also referred to as the Doha Development Agenda, could possibly remedy this (if only to some extent) as its 'fundamental objective is to improve the trading prospects of developing countries'. The Round is still ongoing, however, if not in a deadlock.

In addition, the duty to cooperate in pursuit of the objectives of the RTD is nothing new at all. At the time of the adoption of the UNDRTD, the concept had already been expressed in several international instruments, most notably in the UN Charter. The latter lists achieving 'international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights' among the purposes of the UN. By UN Charter Articles 55 and 56 all UN Member States pledged 'to take joint and separate action' to achieve:(a) Higher standards of living, full employment, and conditions of economic and social progress and development;(b) Solutions of international economic, social, health and related problems (c) Universal respect for, and observance of, human rights [...]

In a nutshell, this amounts to the core of the RTD as conceived in the UNDRTD as well. Nevertheless, among 'developed' States there has hardly been any formally acknowledged progress in the recognition and application of these aspects of the RTD. Instead, the ideological divide over the matter continues to cause tension between 'developing' and 'developed' countries. As a result of their belief in the core content of the RTD and/or frustration about the lack of progress in practice, many 'developing' countries advocate the adoption of a treaty that would codify the RTD in a global hard law instrument setting out both the substance and implementation requirements of this right. Many 'developed' countries maintain the position, however, that the RTD is 'just' a combination of other existing rights and does not incur new legally binding obligations, or that the RTD represents merely an aspiration and not a right at all.

A significant number of scholars have attempted to either justify or discount the legal basis for enforceable external obligations on the part of rich countries regarding international cooperation between such rich countries and poorer countries in the pursuit of the realization of the RTD. We have decided **to present more details of the substance of the duty to cooperate in the context of the RTD below.**

A last set of implementation obligations that emerges from the UNDRTD relates to the structural nature of the development agenda. It relates to the obstacles encountered in realizing this agenda and is expressed in various references to the need to establish 'a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States'. According to the UNDRTD's Article 4(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.

Article 5 refers to the need to eliminate human rights violations:

resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 7 of the UN Declaration adds another realm by raising the importance of action for international peace and security and for achieving disarmament. In the context of the national implementation measures to be taken, Article 8(1) of the UNDRTD prescribes that ‘appropriate economic and social reforms should be carried out with a view to eradicating all social injustices’. It is no surprise that on these structural elements of the UNDRTD, which so directly raise current economic structures and interests, progress is most difficult to find of all.

### **So what then is the overall significance of the UNDRTD?**

Elements of an answer to this question can be derived from the following statement by the former UN High Commissioner for Human Rights Navi Pillay—who has been a great advocate of the RTD—in her foreword to a book published on the occasion of the 25th anniversary of the UNDRTD, addressing the course of affairs since the adoption of the Declaration:

We live in challenging times. Across the globe, millions are suffering the merciless, often devastating, effects of the many global crises of our age. The global financial and economic crisis, the food crisis, the energy crisis and the climate crisis have converged in a multi-front assault on human dignity. And our institutions of governance, at both the global and national levels, have been at best negligent, and at times complicit, in this onslaught... This was not the vision of ... the Declaration on the Right to Development ... . A debate has been raging in the halls of the United Nations and beyond. On one side, proponents of the right to development assert its relevance (or even primacy) and, on the other, sceptics (and rejectionists) relegate this right to secondary importance, or even deny its very existence. Unfortunately, while generating plenty of academic interest and stimulating political theatre, that debate has done little to free the right to development from the conceptual mud and political quicksand in which it has been mired all these years.

In other words, an important substantive vision has been developed in the form of the RTD, but concrete follow-up action is still wanting. In this context, we also agree with a slightly adjusted version of Fukuda-Parr’s follow-up remark to her above assessment of the UN Declaration: ‘its instrumental value lies in introducing human rights norms and standards into global governance, and in calling for effecting reforms in national and international policies’.

### **AsabeYar’ Adua’s Foundation suggestion on RTD**

In light of the fierce political controversy over certain key aspects of the RTD, and the urgent need to make headway, we advocate a pragmatic approach for revitalizing its implementation. Rather than seeking recourse to the creation of new legal instruments, such as a treaty or framework convention on the RTD, in our view the most promising—though difficult—way forward is through mobilizing existing provisions of international law. This entails drawing firmer attention to relevant provisions in already existing instruments, reinterpreting such instruments where appropriate and feasible, finding new momentum for example in the SDGs, and creating at least rudimentary accountability through conducting international monitoring processes or using regional and inter-regional mechanisms where available. Some aspects of these suggestions will be examined below.

### **3. Revitalizing the Implementation of the Right to Development by Mobilizing Existing Provisions of International Law and Building on the Momentum of the SDGs**

We have so far indicated in this article that there is quite a bit of ground to build on in international law relevant to the RTD, contested as it is. Nevertheless, 70 years after the adoption of the UN Charter and 30 years after the adoption of the UNDRTD, still very little real RTD implementation practice has been achieved. This does not mean, however, that no progress at all has been made on tackling development issues. On the contrary, in relation to certain persistent problems such as for example under-five child mortality—which has halved in the last decades—and child poverty, tremendous achievements can be noted. According to UNICEF's report *The State of the World's Children 2016: A Fair Chance for Every Child*, children born today 'are over 40 per cent more likely to survive to their fifth birthday and more likely to be in school' than was the case in the year 2000. Even on child poverty and child mortality, however, according to UNICEF much more action is still badly needed, if only because:

... in the midst of progress, millions of children continue to live—and die—in unconscionable conditions. In 2015, an estimated 5.9 million children died before reaching age 5, mostly as a result of diseases that can be readily and affordably prevented and treated. Millions more children are still denied access to education simply because their parents are poor or from a stigmatized group, because they were born female, or because they are growing up in countries affected by conflict or chronic crises. And even though poverty is falling globally, nearly half of the world's extreme poor are children, and many more experience multiple dimensions of poverty in their lives.

Clearly, the MDGs have played a positive role in the realization of the above-mentioned successes in combating poverty and under-five child mortality. They certainly have managed to bring about renewed momentum for development goals and targets, even though they grossly restricted the agenda to eight crucial, but not all-encompassing Goals. In addition to the existing hard law provisions in the UN Convention on the Rights of the Child, no less than four out of the eight soft law MDGs specifically addressed issues concerning poverty or child mortality. This may be a basis for explaining the relatively positive changes for children since the year 2000. In other words, the MDG example suggests that old/existing law can obtain impetus from new political mobilization and momentum. This sparks hope in terms of the to be expected impact of the—more comprehensive, and more rights-oriented—SDGs.

If one analyses the existing legal provisions which are relevant to the RTD, including the hard and soft law that were already reviewed in this article, then three common substantive orientations emerge that are crucial for improving the implementation record.



Firstly, across older and newer instruments, including the SDGs, a strong call for inclusive development appears. This element has evolved most strongly out of the three orientations presented here. It entails, *inter alia*, that development objectives, targets and interventions should be non-discriminatory. The non-discrimination principle has a strong status both in international and national law. It has found its place in international human rights law but also in international trade law. Pursuing inclusive, non-discriminatory development and/or equal development opportunities implies special attention for the position, needs and rights of vulnerable, marginalized and/or discriminated people. These will often include women, children, persons with disabilities, indigenous people(s) and rural populations. The non-discrimination principle is a core element of human rights-based approaches to development and, as such, has gained more prominence in development practice than in the past. It is a crucial key to bringing home development for all.

Secondly, there is a strong need for comprehensive and coherent approaches that seek to integrate, and possibly balance, the various interests, needs and rights that come together in the concept of sustainable development and the associated implementation agenda. This entails adequately looking after economic, social, cultural, political and other relevant dimensions and manifestations of development. This also involves considering both human and ecological needs, and looking for normative and policy coherence. As observed before, the UNDRTD does not contain any environmental provisions. Consequently, in that respect it is incomplete and/or out of date. The SDGs are more progressive as far as this is concerned and explicitly seek to integrate and balance the economic, social and environmental dimensions of sustainable development. This SDG consensus should be built upon in the future.

Thirdly, to advance the RTD structurally, a new international order has to be pursued which would redress the current injustices in international economic and trade law, and allow for more forceful action on global challenges such as climate change and concerning financing development. This has been the elephant in too many relevant rooms for too long, though, both at international and national levels. As described in Sect. 3.2, this element of the RTD has received little follow-up. Hence is it no surprise that MDG 8, on the Global Partnership for Development, also has been labelled “the most neglected of all MDGs”. Progress in this area has been very difficult and slow and there is not much reason to believe that this picture will change drastically in the near future.

In the next section we will nevertheless review the scope for revitalizing the implementation of the RTD. In doing so we will focus on three concrete means of implementation for which we believe there to be sufficient leads for seeing at least some prospect for positive change. These means are: international cooperation, accountability mechanisms and regional and inter-regional instruments and procedures.

### 3.1. **Advancing International Cooperation**

As explained in Sect. 3.2, the duty to cooperate for international development is a long-standing element of international law. More in particular, it is a standing feature of various global and widely ratified UN human rights treaties. For example, the general implementation article of the 1966 International Covenant on Economic, Social and Cultural Rights already specified that States Parties to that Covenant shall ‘take steps, individually and through international assistance and cooperation, especially economic and technical’ to realize the Covenant. While the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention Against Torture and the Migrant Workers Convention all lack such an international cooperation provision, some other global UN human rights treaties have ever more elaborate stipulations on this aspect.

Accordingly, the general implementation article of the 1989 UN Convention on the Rights of the Child (Article 4) provides that ‘with regard to economic, social and cultural rights, States Parties shall undertake such implementation measures ... where needed, within the framework of international co-operation’. More specific aspects are highlighted in references to undertakings to cooperate internationally on: the production, exchange and dissemination of information and material of social and cultural benefit to the child; protecting and assisting refugee children; preventive health care and treatment of children with disabilities; health; and education. Article 45 explains the mandate of the UN Committee on the Rights of the Child to encourage international cooperation by liaising between various relevant actors.

The Convention on the Rights of Persons with Disabilities has a similar general implementation provision as the Convention on the Rights of the Child, and brings the matter even to a higher level by featuring a lengthy separate article on international cooperation in general terms. This article precedes the one on national implementation and monitoring. Likewise, the mandate of the Committee on the Rights of Persons with Disabilities also explicitly extends to encouraging international cooperation.

Due to the nature of the topic covered, it is not unexpected that the International Convention for the Protection of All Persons Against Enforced Disappearance, in its Article 15, contains ‘only’ a rather specific and modest international cooperation obligation:

States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

All in all, the various UN human rights treaties presented above—covering a wide range of important issues relating to economic, social and cultural rights, children’s rights, persons with disabilities and the phenomenon of enforced disappearance—provide a solid and concrete legal basis and a reason for further operationalizing international cooperation for development. The UN treaty bodies involved have already acted upon this to some extent by referring to international cooperation and/or assistance in quite a few of their General Comments. In doing so, the Committee on Economic, Social and Cultural Rights has not only referred several times to the obligations of States to contribute to international cooperation, but also indicated that States Parties which lack national resources for achieving the progressive realization of economic, social and cultural rights ‘have an obligation to seek international cooperation and assistance’. In this way, at least in legal terms, the circle of the duty to cooperate has been closed.

A feasible way forward in terms of RTD implementation action would be for the treaty bodies involved to pay more attention to relevant aspects of the duty to cooperate for human rights and development in the State reporting procedures that they conduct. This would entail that they enquire more frequently and more explicitly than is currently the case whether governments sufficiently provide or request international cooperation and assistance, according to what applies in the particular case.

A further impetus could be found in the SDGs. After all, when endorsing the SDGs, the UN Member States referred to the goal of achieving the SDGs as a ‘collective journey’. They also expressed their determination ‘to mobilize the means required to implement this Agenda through a revitalized Global Partnership for Sustainable Development, based on a spirit of strengthened global solidarity’. Another interesting dimension could be that of stepping up South-South international cooperation, although for the time being this could only complement—and not replace—North–South cooperation. A current example is that of the India Brazil South Africa (IBSA) Dialogue Forum. This Forum was established in June 2003 because of ‘the necessity of a process of dialogue among developing nations and countries of the South to counter their marginalisation’. The three States involved collaborate in IBSA because they are determined to: contribute to the construction of a new international architecture; bring their voices together on global issues; and deepen their ties in various areas. They also conduct ‘concrete projects of cooperation and partnership with less developed countries’. While thus this has made a potentially promising start, this seems not yet to have generated an all-encompassing policy practice. For example, there are reports that the foreign economic policies of IBSA States ‘deliberately but also unintentionally create sub-optimal conditions for the development of some of their Southern neighbours’.

### **3.2. Strengthening Accountability**

Another vital element in pushing for more implementation action concerning the RTD is that of assigning more concrete responsibilities to both rights holders and duty bearers. The more vigilant role for the UN human rights treaty bodies that we proposed in the previous section could also contribute to processes of assigning such specific responsibilities. Obviously, monitoring the extent to which States actually perform their RTD obligations—for example in relation to making available or demanding international assistance—would then become more useful and so perhaps more achievable. In this way the State reporting procedures concerning the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on Persons With Disabilities, and to a lesser extent the International Convention on the Protection of All Persons from Enforced Disappearance, could turn into monitoring possibilities for the specific RTD elements that are relevant to the human rights treaty involved. Once such practice has taken off, over time this could perhaps even inspire greater attention for RTD issues in the work of the Human Rights Council, more in particular in the Universal Periodic Review process by which the Council reviews the overall human rights records of all UN Member States.

On the one hand, the suggestions above might seem idealistic and/or naïve. After all, most of the global efforts to further specify the implications of the RTD have stranded. One of the more recent examples is the work of the High Level Task Force on the Right to Development. The set of operational criteria and the list of indicators for the implementation of the RTD that the Task Force developed reportedly appear ‘to have brought the political divisions to a head’. On the other hand, there might be a new straw to seize, in that the process around the formulation of the SDGs has clearly generated a renewed emphasis on concrete targets, on data as a basis for evidence-based monitoring and on the development of concrete sustainable development indicators. It remains to be seen, however, how strong or weak this straw will turn out to be. While the ‘Follow-Up and Review’ section of Agenda 2030 as such is relatively elaborate and comprehensive, it is utterly disappointing that the review process is stated to be an entirely ‘voluntary and country-led’ process and that ‘the global review will be based primarily on national official data sources’. According to ShahraRazavi, Chief of Research and Data of UN Women since mid-2013, ‘there was complete consensus’ among the UN Member States about keeping the review process voluntary, ‘regardless of their regional, political, or ideological differences on other issues’. We fully agree with her that, ‘given the explicit human rights anchoring of the new Agenda, it is doubly disappointing that Member States did not break any new ground in subjecting themselves’ to more robust monitoring systems.

### **3.3. Using Regional and Inter-Regional Understandings of the RTD**

As outlined in Sect. 2 above, some binding regional and inter-regional instruments have also incorporated RTD content or inspired RTD implementation efforts. These might provide leads for revitalizing the RTD as well. The most direct and prominent example of such an instrument is Article 22 of the African Charter on Human and Peoples' Rights. The former Prince Claus Chair Holder in Development and Equity OlajumokeOduwole, who during her tenure of this Chair focused her work on the RTD, has noted that this Article is understudied. She also observed that:

the relevance of this regional right to analysis of the universal RTD lies in its contextual guidance regarding the original intent of the African developing country players who initiated this right at the regional level, as well as the continent's contribution in the area of jurisprudence on the RTD so far.

It is in this regard indeed that the African perspective on the RTD could be an inspiration for the revitalization or operationalization of the RTD at the global level.

Important developments have been recorded at the African regional human rights system regarding both the conceptual and operational understanding of the RTD. The African Charter on Human and Peoples' Rights, referred to in short as the Banjul Charter, remains the only tested international instrument on the RTD with an emerging quasi-jurisprudence on the subject. At least seven of the over 229 decisions that had been rendered by the African Commission up until June 2016 have relevance for the RTD. These cases either explicitly involved the RTD, or are strongly relevant to it, for example because they address pertinent economic, social and cultural aspects of development. As already stated in Sect. 2 above, Article 22 of the African Charter stipulates that 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' and that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'. Although ObioraOkafor has noted that the content of Article 22 'remains obscure as to the nature of the concept of development especially as]no detailed developmental programme can be deciphered from its reading', implementation practice under this clause could provide a useful perspective on potential options for revitalizing the RTD in international law. Okafor thought so too and in a 2013 publication already advocated that a 'globally contextualized analysis of article 22' of the African Charter might even hold important lessons for 'any anticipated global treaty on the right to development'. According to Okafor, the developments in the African regional human rights system have established that:

any conception of development under article 22 must, at a minimum: (a) frame the process and goals of development as constituted in part by the enjoyment of peace; (b) envision the process and ends of development in part through a human rights optic; (c) view the gender, ethnic and other such inequities that exist in the distribution of developmental benefits as a lack of development; (d) imagine the people's participation in their own development as an irreducible minimum; and (e) imagine the right to development as inclusive of the rights to the means, processes and outcomes of development.

For our purposes, it is indeed most important to consider how the African Commission has interpreted and given meaning to Article 22. So far, the African Commission's most well-known decision regarding a violation of Article 22 of the African Charter is that in the *Endorois* case. This case involved the forced removal in the 1970s of the Endorois (a pastoralist group) from their ancestral land on which they had lived for centuries, to set up a national game reserve and tourist facilities. The complainants in this case raised several violations of their rights under the African Charter, including their RTD under Article 22. In the 2009 decision in this case, the African Commission found that the Kenyan government had indeed violated Article 22. It clarified the content of the RTD by noting:

that the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognizing the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, overarching themes in the right to development.

In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states '... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available'. Freedom of choice must be present as a part of the right to development.

In the earlier case of *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda* the African Commission had already shed light on the meaning of the RTD as well as the entitlements and duties that follow. In adjudicating this case, that concerned regional military interference in the Democratic Republic of the Congo, the African Commission noted that:

the deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation—their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under article 22 of the African Charter.

This specific interpretation of the RTD in a growing body of quasi-jurisprudence by the African Commission contrasts with, and could usefully complement, the more abstract current debates at the global level.

Article 22 of the Banjul Charter as interpreted by the African Commission is instrumental in at least two ways. Firstly, at the conceptual level, it offers a more detailed understanding of the RTD. Secondly, at the enforcement level, the African system might hold clues for those who advocate similar accountability or enforcement structures at the global level. The African model, its achievements, effectiveness and challenges could provide some critical thoughts, for example for those supporting a global treaty on the RTD, and thereby it would be useful to analyse and publicise these more than has been the case so far.

The other example of a treaty operating at the inter-regional level and relevant for RTD debates that was presented in Sect. 2 above is the ACP-EU Cotonou Agreement. The current version of this treaty, that provides the framework for international development cooperation between in total 107 States in Europe, Africa, the Caribbean and the Pacific, will expire in 2020. While this treaty does not refer to the RTD as such, its implementation practice shows several highly relevant features. In the run-up to the start of the renegotiations on terms of collaboration between the ACP and the EU, there are signs that several of the achievements established in the past may be at risk. This extends, for example, to the principle of joint management of the cooperation activities and the relationship as such. Some EU Member States as well as some forces in the European Commission would not mind doing away with this aspect and returning to a more unilaterally directed basis for ACP-EU relations. This would seriously affect the participation of the ACP States in the process and so cut back on an important aspect of the RTD. There might be space, however, for curbing such tendencies, should they materialize as official positions later on in the formal negotiation process. This space might be found in the EU Action Plan on Human Rights and Democracy 2015–2019, in which the Union has committed itself 'to move towards a rights based approach to development cooperation, encompassing all human rights by pursuing its full concrete integration into all EU development instruments and activities' and 'to contribute to discussions on the right to development'. Renegotiating the terms of ACP-EU collaboration will become an important litmus test for the EU's commitment to its self-imposed policy priorities.

#### **4. Conclusion**

This article has explored the scope for revitalizing the RTD through existing international law instruments, rather than by creating additional normative frameworks. In analysing the state of the RTD over 30 years after the adoption of the UNDRTD, we found a mixed picture. On the one hand, the protracted debate and controversy over the RTD have more or less ended up in a stalemate at the global level, with the exception of selected UN human rights instruments and the SDGs process that we have discussed. While Agenda 2030 is directly inspired by rights-based approaches to development and the RTD, the possible hope that this may generate for revitalizing the RTD is tempered by the fact that the SDGs themselves and the attached Targets do not represent a firm rights orientation. Accordingly, we have pointed out modest potential (and partly alternative) spaces for revitalizing the RTD and its implementation efforts on the basis of, respectively:

- a better understanding of the law on international cooperation and related obligations, especially as taken up by UN human rights treaty bodies;
- Creating accountability processes, which include monitoring the extent to which States actually perform their RTD obligations; and learning from regional experiences on concretizing the RTD such as the ones thus far gained most notably in the African regional system.

Though not exclusive of other elements, in our view these three aspects certainly are germane to future understandings of the RTD and to the potential realization of this right in the coming period. In particular, they reinforce the argument that, notwithstanding current contestations, the core elements of the RTD already exist firmly in international law. 'The UN Charter and the accompanying two human rights covenants establish the foundations for an ethical system of global governance'.

While we acknowledge that RTD practice is scattered at best, and insufficient overall—and that this is due to the differences in persistent economic, political and ideological interests of 'developed' and 'developing' States—we also note that at the regional level the African human rights system is in the process heart of producing a fuller understanding of the RTD that supports its further definition (both in terms of substance and implementation obligations) and its enforceability. States across the globe would do well to take up the challenges of operationalizing and practising the RTD now, through both national and international means and measures. Besides serving to fulfil the RTD, this would also be a tremendous step forward in tackling current global problems relating to structural poverty and inequalities, contagious diseases, climate change and mass migration.

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