THE RIGHT TO DEVELOPMENT IN INTERNATIONAL HUMAN RIGHTS LAW: A CALL FOR ITS DISSOLUTION

Arne Vandenbogaerde*

Abstract

In light of its recent twenty-fifth anniversary and the determination of the core norm of the right to development, the article revisits the question concerning its added value. After having examined the current legal framework it finds that the right to development does not raise any new substantive obligations for States and non-State actors and thus appears dissolvable within the current framework. The article concludes by calling for a focus on extraterritorial and transnational human rights obligations in order to further advance towards an international enabling environment for the realisation of all human rights. At the moment, the right to development is doing a disservice to other human rights, especially economic, social and cultural (ESC) rights, as it considers those rights to be consolidated in their scope and content regarding international responsibilities.

Keywords: core norm of the right to development (*kern norm van het recht op ontwikkeling*); extraterritorial obligations (*extraterritoriale verplichtingen*); ICESCR (*Internationaal Verdrag inzake economische, sociale en culturele rechten*); right to development (*recht op ontwikkeling*); transnational obligations (*transnationale verplichtingen*)

1. INTRODUCTION

Since the 1970s, the question whether the international community bears the obligation for assisting resource poor States to ensure the human rights of its citizens has been to a great extent translated into the human rights framework through the right to

* PhD Researcher at the Law and Development Research Group, University of Antwerp Law Research School. The research for this publication has been supported by the European Science Foundation (ESF), in the framework of the GLOTHRO Research Networking Programme: Beyond Territoriality – Globalisation and Transnational Human Rights Obligations (GLOTHRO). The author would like to thank the members of the Law and Development Research Group for their valuable comments on an earlier draft of this paper.

Netherlands Quarterly of Human Rights, Vol. 31/2, 187–209, 2013.

development. The right to development is arguably a prime example of the constant or progressive evolution of human rights and forms part of the alleged third generation of human rights, or 'solidarity' rights which espouse a shared or collective responsibility for the realisation of human rights around the globe. However, since the proclamation of the existence of a right to development by the former UN Commission on Human Rights (the Commission), the right to development has been controversial amongst States and scholars due to its lack of conceptual clarity. The enduring failure of States to agree on a common conceptual framework to develop the right to development has greatly affected the normative validity of the right. Vandenhole indicated already in 2003 that 'as far as academic literature on the right to development is concerned, no clear consensus has been reached, not even on the basic issues'.[1] In 2012, the right to development is still in murky waters, not casted in an international legally binding document and consequently still not a justiciable right at the international level.[2]

In order to clarify its content and end its substantive indeterminacy, a High-Level Task Force on the Implementation of the Right to Development (HLTF) has developed a set of criteria and has specified the core norm of the right to development. In light of these recent developments, this paper wants to revisit the question of the added value of the right to development to the existing human rights framework. Now that the right to development has celebrated its twenty-fifth anniversary, it seems fitting to posit this question again.

The paper commences by discussing the background to these recent developments before turning to the analysis of the core norm of the right to development and its potential added value or novelty to the present human rights framework. It will then go on to make the case for the fact that the existing human rights framework, in particular the International Covenant on Economic, Social, and Cultural Rights (ICESCR) already includes the substantive demands of the core norm. The paper concludes by

1 Vandenhole, W., 'The Human Right to Development as a Paradox', *Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America),* Vol. 36, No. 3, 2003, pp. 377–405, at p. 378; for a further discussion about the normative validity of the right to development see for example: Donnelly, J. 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal*, Vol. 15, No. 3, 1985, pp. 473–509 (rejecting the existence of the right to development); for a response to Donnelly see: Alston, P. 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development', *California Western International Law Journal*, Vol. 15, No. 3, 1985, pp. 510–518; more recently see for example: Villaroman, N.G., 'Rescuing a Troubled Concept: An Alternative View to the Right to Development', *Netherlands Quarterly of Human Rights*, Vol. 29, No. 1, 2011, pp. 13–53.

2 For an argument in favour of the justiciability or legally binding nature of the right to development see: Villaroman, N.G., 'The Right to Development: Exploring the Legal Basis of a Supernorm', *Florida Journal of International Law*, Vol. 22, 2010, pp. 299–332; others found that instead of arguing for a legally binding right to development one should better focus on a human rights based approach towards development, see for example: Sheehy, O., 'The Right to Development and the Proliferation of Rights in International Law', *Trinity College Law Review*, Vol. 5, 2002, pp. 251–265; many scholars consider the right to development encompassing the human rights based approach to development, see: Marks, S. 'The Human Rights Framework for Development: Seven Approaches', François-Xavier Bagnoud Center for Health and Human Right Working Paper (2003).

calling for a focus on possibilities for the current framework to accommodate the concerns voiced by the right to development. Considerable work is undertaken on the clarification of extraterritorial obligations of States in the field of economic, social and cultural (ESC) rights and on the issue of transnational human rights obligations of non-State actors. Although these research issues are far from consolidated, they constitute a solid starting point for the realisation of an international environment conducive to the enjoyment of human rights and fundamental freedoms. The core norm of the right to development calls for the same international environment.

2. FROM THE DECLARATION ON THE RIGHT TO DEVELOPMENT TO THE CORE NORM

In 2011, the Declaration on the Right to Development (RTD Declaration) celebrated its twenty-fifth anniversary amidst reigning uncertainty over the content and scope of the right.[3] However, the right to development and its subsequent claims are actually much older and were born out of the era of decolonisation where they found a 're- articulation, in the language of rights, of long-standing claims which had been evident both throughout much of the period of colonialism and the years immediately following liberation'.[4] Considering its history, the implementation of the right to development is thus slow. Such little progress in the implementation and consolidation of the right to development in a legally binding document is of course due to its highly political nature.

From the onset, the Cold War slowed down the implementation of the right to development and the North-South tensions surrounding the right to development were overtaken by the East-West Cold War tensions. The polarisation between States who found ESC rights mere (non-binding) aspirational goals and those States who found ESC rights legally binding or justiciable caused an effective standstill in international relations and also made any meaningful deliberations on the right to development impossible.[5] While Western States were not keen on recognising the right

3 Donnelly thus seems to be correct when he asserted in 1985 that we need to admit that the discussion about the right to development is not going to advance, however the author disagrees with Donnelly that this is because the right to development is incapable of justification, see: Donnelly, J. 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal*, Vol. 15, No. 3, 1985, pp. 473–509, at p. 507.

4 Mansell, W., Scott, J. 'Why Bother About a Right to Development', *Journal of Law and Society,* Vol. 21, No. 2, 1994, pp. 171–192, at p. 173.

5 Alston, P. 'Revitalising United Nations Work on Human Rights and Development', *Melbourne University Law Review*, Vol. 81, 1991, pp. 216–257, at p. 219–220; for a general discussion on the justiciability of economic, social and cultural rights see inter alia: Scheinin, M., *Economic and Social Rights as Human Rights*, Martinus Nijhoff, Dordrecht, 2001; Langford, M., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, New York, 2008; for a critique see: Dennis, M.J. and Stewart, D.P, 'Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate

to development, Eastern European countries provided political support to developing States in their struggle for the recognition of the right to development. Such support was founded on the idea that centrally planned socialism was the only way to secure the enjoyment of ESC rights, but more importantly on the fact that they never had been involved in colonialism. Therefore, they argued that large scale aid transfers were owed only by the former colonisers and not by the industrialised States in general. With the end of the Cold War came a restored confidence in multilateralism, free from East-West ideologies, and again an openness for a more sophisticated debate surrounding ESC rights. Such 'breathing space' for ESC rights resulted, for example, in the formal end of the justiciability debate with the adopted Optional Protocol to the ICESCR in 2008.[6]

Similarly, the de-icing of the Cold War resulted in the adoption of the Vienna Declaration in which States consolidated the international consensus about the existence and importance of implementing a human right to development.[7] The right to development thus came again to the forefront, and at that time Philip Alston noted that 'the real challenge for the remainder of the 1990s is going to be to deepen the understanding and appreciation of the changes in policy and practice which will be required to give effect to the principles reflected in the right to development'.[8] While the right to development was officially proclaimed in the 1986 RTD Declaration,[9] it took the former Commission more than 11 years to establish the first of several Working Groups on the Right to Development (Working Group) in order to start meeting that challenge.

Initial developments were slow and measured until the process was reinvigorated in 2004 by the establishment of the HLTF within the framework of the current Working Group.[10] The HLTF's objective was 'to examine Millennium Development

---

the Rights to Food, Water, Housing, and Health?', *American Journal of International Law,* Vol. 98, 2004, pp. 462–520.

6 On the Optional Protocol to the ICESCR see inter alia: Vandenhole, W., 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step: Towards a Complaints Procedure to the International Covenant on Economic, Social and Cultural Rights', *Netherlands Quarterly of Human Rights,* Vol. 21, No. 3, 2003, pp. 423–465; Scheinin, M., 'The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for a UN Human Rights Treaty Body Reform – Without Amending the Existing Treaties', *Human Rights Law Review,* Vol. 6, No. 1, 2006, pp. 131–142; Vandenbogaerde, A. and Vandenhole, W., 'The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights: An Ex-Ante Assessment of its Effectiveness in Light of the Drafting Process', *Human Rights Law Review,* Vol. 10. No. 2, 2010, pp. 207–237.

7 United Nations, Vienna Declaration and Programme of Action, Vienna, UN Doc. A/CONF.157/24 (Part I), 14–25 June 1993.

8 Alston, *loc.cit*. note 5, at p. 249.

9 United Nations, Declaration on the Right to Development, General Assembly Resolution 41/128, annex, 41 UN GAOR Supp. (No. 53), UN Doc. A/41/53 (1986), at p. 186.

10 Salomon has indicated that the HLTF was an innovative construct as it brought human rights experts and representatives of the international development, finance and trade institutions together with the subtext of creating an environment for discussion on the role of human rights in

Goal 8, on a global partnership for development, and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the right to development'.[11] In other words, the HLTF's task consisted of operationalising the right to development. In order to do this, the HLTF worked on developing a set of criteria to allow relevant stakeholders to assess the implementation of the right to development. Ultimately, in 2010, after seven years, and numerous consultations and comments of all the interested States and relevant stakeholders, the HLTF was able to present a set of criteria and sub-criteria to the Working Group.[12] The HLTF also fleshed out the so-called 'core norm' of the right to development (see *infra*) and outlined three levels or attributes of this core norm: comprehensive and human centred development policy; participatory human rights processes; and social justice in development. The core norm and its attributes provide the foundation for the above mentioned criteria and sub-criteria (or indicators).

According to the HLTF, these criteria 'should be relatively long-lasting and suitable for inclusion in a set of guidelines or a legally-binding instrument that development actors may use over the long term when assessing whether their own responsibilities or those of others are being met'.[13] Yet, the long-lasting nature of the criteria already seems problematic, as the comments from States on the criteria reveal that there is still no consensus on the substance of the right to development.

Although the former Chair of the HLTF has warned against an oversimplification of the political environment surrounding the right to development along the North/South or developed/developing States dichotomy, it seems resistance is running along those lines, in particular stronger resistance is met from developing States instead of developed States.[14] Remarkably, a reversal of the traditional political support for the right to development has emerged from the discussion of the criteria.

While the HLTF seeks consensus on the content of the right to development, developing countries – which placed the right to development on the agenda 25 years ago – sense the right to development slipping away from them as it does not anymore address their original claim of a global or shared responsibility for the establishment of an international enabling environment. Earlier, Aguirre has reminded us that

---

global governance and collective action in order to come to common approaches and terminology, see: Salomon, M.E., 'Towards a Just International Order: A Commentary on the First Session of the UN Task Force on the Right to Development', *Netherlands Quarterly of Human Rights*, Vol. 23, No. 3, 2005, pp. 409–438, at pp. 410–411.

11 High-level Task Force on the Implementation of the Right to Development The Right to Development and Practical Strategies for the Implementation of the Millenium Development Goals particularly goal 8, UN Doc. E/CN.4/2005/WG.18/TF/2 (20 September 2005).

12 For an overview of the history of the task force see: High-level Task Force on the Implementation of the Right to Development, Right to development Criteria and Operational Sub-Criteria, UN Doc.A/HRC/15/WG.2/TF/2/Add.2. (8 March 2010).

13 *Ibidem*, at para. 13.

14 Marks, S.P., '25 Years of the Right to Development: Achievements and Challenges of International Agreement on the Right to Development', Friedrich Ebert Stiftung (25 February 2011), available at: www.fes.de/gpol/en/RTD_conference.htm.

the danger of the working groups approach is that 'the international responsibility component of the right to development will be reduced in order to generate broader consensus'.[15] It should be no surprise that political and ideological considerations always play a role in shaping the negotiating of human rights instruments. The problem here appears that the consensus or balance sought by the HLTF does away with the fundamental characteristics of the right to development. Yet, this article posits hereunder that this is an actual non-discussion as the present human rights legal framework already demands to a great extent such an international outlook. States can no longer deny they have international (extraterritorial) obligations (see *infra* 5).

3. THE CORE NORM OF THE RIGHT TO DEVELOPMENT

3.1. THE RIGHT TO A NATIONAL AND INTERNATIONAL ENABLING ENVIRONMENT

Initially, the HLTF proposed three components – rather than a core norm – of the right to development. These components of the right to development were: enabling environment; social justice and equity; and comprehensive human-centred development. The 'enabling environment' component, however, was ultimately upgraded by the HLTF to make it 'definitional of the right'.[16] The core norm was developed by the HLTF exactly to put an end to – as the former Chair of the HLTF has termed it – this 'normative indeterminacy' of the right to development.[17] Considering scholars still do not agree on a definition of the right to development, the paper therefore opted to use the analytical framework set out by the HLTF's core norm in its analysis. The core norm of the right to development was articulated after several years and numerous consultations with all relevant stakeholders and thus presents an authoritative statement on the definition of the right to development. The adoption of this analytical framework is further justified considering the fact that although the right to development criteria will almost certainly undergo changes, the core norm has not received any substantial criticism from States. The core norm is thus most probably to be consolidated also because it is well entrenched in current international

15 Aguire, D., *The Human Right to Development in a Globalized Context,* Ashgate Publishing, Aldershot, 2008, at p. 87.

16 Marks, *loc.cit.* note 14, at p. 16.

17 Observe that the core norm as stipulated by the task force is not to be confused with the minimum core obligations developed and recognised by the Committee on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights has stipulated in its General Comment No. 3 (and subsequent General Comments) that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party': Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23 (1990), at para. 10.

human rights law (see *infra*). This focus on the core norm as a point of departure is also warranted in view of the fact that the core norm as specified by the HLTF has a very wide scope and hence is able to encompass earlier developed definitions of the right to development (see *infra*). According to the HLTF, the core norm of the right to development constitutes:

> 'The right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights'.[18]

Accordingly, the essence of the right to development is the right of people to a national and global enabling environment conducive to the enjoyment of their human rights. This core norm is derived from the RTD Declaration in which States have stipulated that 'under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized'.[19] The RTD Declaration further considers the creation of such an environment to be an obligation of all States.[20]

Yet, this assertion is neither novel nor exclusive to the right to development. In the next section, this article posits that the obligation to create favourable international conditions conducive to the enjoyment of human rights does not emanate out of the right to development, but has its legal and normative basis or roots in the existing legal human rights framework.

3.2. THE RIGHT TO AN ENABLING ENVIRONMENT IN INTERNATIONAL HUMAN RIGHTS LAW

The UN Charter calls for an enabling environment in its preamble by affirming 'that conditions need to be established under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'.[21] Similarly, Article 28 of the Universal Declaration of Human Rights stipulates that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.[22] The ICESCR as well as the International Covenant on Civil and Political Rights (ICCPR) in their preambles declare identically 'that in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only

18 High-level Task Force on the Implementation of the Right to Development, *loc.cit.* note 12, Annex.

19 Declaration on the Right to Development, *loc. cit.* note 9, at p. 186.

20 *Ibidem,* at Art. 3(1).

21 Charter of the United Nations, adopted 26 June 1945, 1031 UNTS 993.

22 Universal Declaration of Human Rights, General Assembly Resolution 217A (III), UN Doc A/810, 10 December 1948, at p. 71.

be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.[23] Subsequent international human rights treaties have also recognised this need for an enabling environment. The Convention on the Elimination of all Discrimination against Women (CEDAW), for example, states in its preamble that 'the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women'.[24]

If we turn to the regional human rights treaties we encounter similar language. The American Convention on Human Rights reiterates that: 'in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights'.[25] The African Charter on Human and Peoples' Rights has not only consolidated the right to development in Article 22, but has also explicitly stipulated further in Article 24 that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.[26]

Various important soft-law documents also recognise the need for an enabling environment. States have asserted in the Millennium Declaration that in order to realise the right to development it is necessary to 'create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty'.[27] The Vienna Declaration declares that: 'there is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights'.[28] In addition, the Vienna Declaration states that 'increased efforts should be made to assist countries which so

---

23 International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171.

24 International Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, 1249 UNTS 13; Further in the preamble more detail is given on how such an international order should look in order to achieve the rights set forth in CEDAW: the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women'.

25 Preamble, American Convention on Human Rights, 22 November 1969, 1144 UNTS 123.

26 African [Banjul] Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

27 United Nations Millennium Declaration, General Assembly Resolution 55/2, UN GAOR, 55th Session, Supp. No. 49, at p. 4,UN Doc. A/55/49 (2000), at para. 12.

28 Vienna Declaration and Programme of Action, *loc. cit.* note 7, at para. 13.

request to create the conditions whereby each individual can enjoy universal human rights and fundamental freedoms'.[29]

From the above examination of the current legal human rights framework, we can conclude that the right to an enabling environment is strongly rooted in international and regional human rights law. But what does it exactly entail?

3.3. THE CONTENT OF THE RIGHT TO AN ENABLING ENVIRONMENT

The right to an enabling environment can be read in conjunction with the definition of the right to development as forwarded by the late Independent Expert on the Right to Development, Arjun Sengupta, as 'the right to a process that expands the capabilities or freedom of individuals to improve their well being and to realize what they value'.[30] This clearly reflects Amartya Sen's work which describes development as a process which facilitates 'the expansion of capabilities of persons to lead the kind of lives they value or have reasons to value'.[31] As such, this right to an enabling environment asserts the capacity of people to realise and enjoy their human rights in dignity. Therefore the creation of an enabling environment equals the construction of an economic, political, cultural and social environment where people themselves can realise their rights.

From this point of view, human rights only present minimal standards and reaffirm the fact that people carry the primary responsibility for the realisation of their rights. This is what Sen has coined the 'agency aspect' of the individual, which stresses the capacity of people to help themselves.[32] Indeed, the RTD Declaration in Article 2(2) clearly states that 'all human beings have a responsibility for development, individually and collectively'.[33] According to Sen, 'development requires the removal of major sources of unfreedom such as poverty'[34] since 'freedom is not only the primary end of development but also the means of development'.[35] The State thus has the obligation *to enable* people to exercise their rights and realise their right to development. Sengupta has noted 'this responsibility [of the State] is complementary to the individual's responsibility […] and is only for the creation of conditions for realising the right and not for actually realising the right itself […] only the individuals themselves can realise the right [to development]'.[36] This is only logical as 'it is the

29 *Ibidem,* at para. 34.

30 Sengupta, S. 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly,* Vol. 24, No. 4, 2002, pp. 837–889, at p. 868.

31 Sen, A., *Development as Freedom,* Oxford University Press, Oxford, 1999, at p. 24.

32 *Ibidem*, at p. 19.

33 Declaration on the Right to Development, *loc. cit.* note 9.

34 Sen, *op. cit*, note 31, at p. 3.

35 *Ibidem*, note 31, at pp. 10–11.

36 Sengupta, A., 'Right to Development as a Human Right', *Economic and Political Weekly*, Vol. 36, No. 27, 2001, pp. 2527–2536, at p. 2528.

individual person who must be the active participant and beneficiary of the right to development'.[37]

However, the active or 'agency' role of the individual in the right to development is not a unique characteristic of the right to development, but is again entrenched firmly in the existing human rights framework. The concept of human dignity affirms that each individual is an active participant and beneficiary of its human rights. Accordingly, the individual as the rights-holder needs to have an enabling environment constructed by the State in order to be able to live in dignity. In this respect, Jack Donnelly has indicated that 'all human rights aim to prevent particular denials of human dignity'.[38] The right to food (and most other human rights)[39] also depart from the capacity or dignity of individuals to realise the right themselves. The right to adequate food is considered the right to feed *oneself*, not the right to be fed.[40] The individual as the rights-holder thus has the responsibility to feed him- or herself adequately (unless one is unable to do this for reasons beyond its control). Although the State has the obligation to ensure that people have physical and economic access to adequate food, it cannot force them to eat it and to live a healthy lifestyle. Other examples are the right to free speech, to adequate health and so on. The realisation of such rights is their own responsibility or moral obligation. People need to realise or exercise their own human rights. This is why 'empowerment' is such an elementary human rights principle.

Now that we have demonstrated that the present human rights framework already requires the creation of an enabling environment and that it also asserts the individual as a participant and beneficiary, the question becomes if there is a need for including the right to development in this current framework. Put differently, can we not realise this core norm of the right to development through the existing human rights framework? Or does the right to development require a new legally binding framework? In order to answer this, we will analyse more closely the diverse dimensions of the right to development.

4. THE ADDED VALUE OF THE RIGHT TO DEVELOPMENT

The broader discussion of the emergence of new human rights and their validity in international law is not a recent question, but still a valid one today as new rights are constantly emerging, most recently the right to international

37 Declaration on the Right to Development, *loc. cit.* note 9, Preamble.

38 Donnelly, *loc. cit.* note 3, at p. 485.

39 Naturally some rights, such as the right not to be tortured or the prohibition of slavery, are not expected to be realised by the individual.

40 Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5 (1999).

solidarity.[41] The question of the added value of the right to development is thus not a recent one. When we strive to answer the issue of the added value, we should be inquiring if the right in question can or cannot be accommodated or dissolved into the current framework of established rights. If this is the case for the right to development, then this does not mean claims concerning the right to development are not valid. It would rather denote a realistic need to dissolve the right to development in the existing human rights framework in order for these claims to become justiciable. We will illustrate that a common mistake made by scholars and experts when studying the added value – and therefore the current human rights framework – is that they only centre on how the framework currently *is* constituted, not on how it *should* be constituted.

Two main qualities or characteristics emerge from the more than 25 years of scholarly work and debate on the right to development: the right to development as a process, and the external or international dimension of the right. We will evaluate both of them in light of the current legal framework.

4.1. THE RIGHT TO DEVELOPMENT AS A PROCESS

The former independent expert on the right to development held that the question about the added value would only be valid when the right to development was defined as the mere sum total of the already recognised rights.[42] He found that the added value of the right to development is that it describes a process that demands the realisation of all rights, not merely the realisation of human rights individually. This has also been described as the right to development as a vector of all the different rights, just as the vector itself is a human right.[43] In this way, an improvement in the right to development equals an improvement in all the other human rights (or elements of the vector).

The added value of this acknowledgement, however, is questionable since all human rights can be considered vectors. Human rights are interdependent, indivisible and thus mutually reinforcing. For example, the improvement in an individual's right to water will potentially also result in an improvement of an individual's other human rights, such as his or her right to health. Likewise, the realisation of the right to freedom of speech complements and reinforces the right to freedom of the press and is meaningless without the realisation of the latter.

41 For a general discussion on the emergence of new rights see for example: Alston, P. 'Conjuring Up New Rights: A Proposal for Quality Control', *The American Journal of International Law*, Vol. 78, No. 3, pp. 607–621.

42 Sengupta, *loc. cit.* note 30, at p. 873; for a view on the right to development as the aggregate of existing human rights see inter alia: Abi-Saab, G. 'The Legal Formulation of a Right to Development' in: Dupuy, R.J., (ed.) *The Right to Development at the International Level*, Hague Academy of International Law, The Hague, 1980, pp. 159–175.

43 Sengupta, *loc. cit.* note 30, at p. 868.

If we turn to the core norm, we find it stipulates that the right to development entails the right of peoples to 'a constant improvement of their well-being'.[44] Here, the right to development as a process is described as a constant and gradual progression of individuals towards a greater well-being. Yet, the right to a process that empowers people to realise their human rights is also clearly found in the ICESCR. Article 2(1) of the ICESCR holds that:

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.[45]

The right to an enabling process is reflected by the obligations of States to progressively undertake steps to realise the rights found in the ICESCR. The right to the highest attainable standard of health, for example, describes perfectly this element of constant progress. If human rights, especially ESC rights, would not be considered as a process, then their scope and content would be deficient. Although in reality this often might be the case, in theory this is untenable.

4.2. THE EXTERNAL DIMENSION OF THE RIGHT TO DEVELOPMENT

The right to development arguably has an internal and an external dimension. The internal dimensions (re)affirms the obligation of the domestic State to ensure the realisation of the right to development while the external dimension entails the obligation of *all* States to cooperate in ensuring the right to development around the globe. Koen De Feyter has indicated that 'from a normative point of view, the internal dimension of the RTD is already part of existing international human rights law […] No new norms are needed to establish that a state should abide by its human rights obligations in the context of the domestic development process'.[46] This acknowledgement can actually be illustrated by looking at the *Endorois* case.

The case concerned the eviction in the 1970s of the indigenous Endorois families from their land for tourism purposes by the Kenyan government. Subsequently, the

---

44 High-level Task Force on the Implementation of the Right to Development, *loc.cit.* note 12, Annex.

45 International Covenant on Economic, Social and Cultural Rights, *loc.cit.* note 23, (emphasis added).

46 De Feyter, K. 'Towards A Multi-Stakeholder Agreement on the Right to Development' in Marks, S.P. (ed.), *Implementing the Right to Development: The Role of International Law*, Friedrich Ebert Stiftung, Berlin, 2008, pp. 97–104, at p. 98; the internal dimension or collective dimension of the right to development is also arguably covered by such instruments as the UN Declaration on the Rights of Indigenous People (General Assembly Resolution 61/295, UN Doc. A/RES/61/295 (2 October 2007).

Endorois' access to the land was restricted, which prevented the community from practising their pastoralist way of life. In the *Endorois* case, the African Commission on Human and People's Rights (African Commission) found violations of the Endorois' rights to religious practice, to property, to culture, to the free disposition of natural resources and to development (respectively Articles 8, 14, 17, 21 and 22 of the African Charter).[47] The case is viewed as a landmark decision since it was the first time a violation of the right to development was found in a human rights case.

The complainants argued that the Kenyan government had violated their right to development since it had 'failed to adequately involve the Endorois in the development process […] to ensure the continued improvement of the Endorois community's well-being'.[48] The African Commission concurred and found that the Kenyan government 'bears the burden for creating conditions favourable to a people's development'[49] and consequently considered that 'the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process'.[50] The African Commission thus recognised the principle of participation and the right of the Endorois to an enabling environment, but, as pointed out earlier, this cannot be claimed to be a distinctive feature of the right to development.

Through the sole recognition of violations of the right to property, food or cultural life, the Endorois could have claimed adequate participation rights and remedies for the loss of their land. From the reading of the African Commission's ruling, there appears no readily available reading of the added practical or legal value of including the right to development as one of the rights violated. The African Commission's ruling does not clarify the content of the right to development, but rather appears to strengthen the view that its internal or domestic dimension can be realised through the existing framework and its substantive rights and obligations. Consequently, the decision seems more important for its first time recognition of indigenous rights to land in Africa than it is for the clarification of the right to development.[51]

Considering the above, one thus might conclude that the factual value of the right to development lies in its external dimension, namely the fact that it stresses States' international or collective responsibilities. Indeed, as early as 1985, Dinah Shelton indicated that 'one valuable aspect of the right to development is that it encompasses a more broadly based legal obligation of States: the duties corresponding to the right to development are not exclusively domestic in nature but have an international

47 African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 4 February 2010 (Appl.no. 276/2003).

48 *Ibidem*, at para. 125.

49 *Ibidem*, at para. 298.

50 *Ibidem*, at para. 298.

51 For a critical evaluation of the case (in light of its recognition on indigenous rights) see: Lynch, G., 'Become Indigenous in the Pursuit of Justice: The African Commission on Human and Peoples' Rights and the Endorois', *African Affairs*, Vol. 110, No. 442, 2012, pp. 24–45.

component'.[52] Similarly, Margot Salomon finds that the most vital component of the right to development is that it is preoccupied 'not with a State's duties to its own nationals, but with its duties to people in far off places'.[53]

According to the HLTF, there exist three levels of States' responsibility in relation to the right to development: (i) States acting collectively in global and regional partnerships; (ii) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and (iii) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction.[54] The former two levels appear to apply to the responsibilities States have outside their territory. However, the HLTF has not clarified these obligations. Uncertainty remains on the important issue of jurisdiction (what does 'not strictly within their jurisdiction' imply?) or on the attribution and distribution of responsibility for the fulfilment of the right to development.[55] This is unfortunate; however, one would assume that from a reading of the devised criteria these obligations would be somewhat clarified.

Yet, the developed responsibilities and criteria are disappointing since they are not only vague, but many of its indicators still seem underdeveloped.[56] Guidance on attribution and distribution of international responsibilities is sought in vain in the formulated criteria. Not surprisingly, every country or group of countries, such as the EU or the Non-Aligned Movement (NAM) have stated in their comments on the criteria that more work needs to be done on these criteria in order to clarify the content and scope of the right to development. However, although most of the countries expressed the need to further refine the criteria, the reason for the need for this refinement differs when asking a developed or a developing country.

---

52 Shelton, D., 'A Response to Donnelly and Alston', *California Western International Law Journal*, Vol. 15, No. 3, 1985, pp. 524–527, at p. 527.

53 Salomon, M.E., 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development', LSE Law, Society, and Economy Working Papers 16/2008, pp. 1–14, at p. 11.

54 High-level Task Force on the Implementation of the Right to Development, *loc.cit*. note 12, Annex.

55 Note that the scope of jurisdiction in the field of ESC rights has recently been clarified in the 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights'. Principle 9 (scope of jurisdiction) indicates that: 'A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law', De Schutter et al., 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights', *Human Rights Quarterly*, Vol. 34, No. 4, 2012, pp. 1084–1169, at p. 1104.

56 For example the only indicator for food security and nutrition (sub-criteria 1(a)(v)) are child-stunting rates. It should be clear that food security should not be measured by child-stunting rates alone.

The NAM started off by stating that the HLTF went beyond its mandate in devising indicators and 'deems it unfeasible to consider the list of indicators presented by the taskforce'.[57] However, the major problem for the NAM group and developing States is that the criteria neglect the international dimension of the right to development. These States depart from the fact that in order to change the current international order and its global economy it should be possible to hold all relevant international organisations accountable. In other words, organisations such as the World Bank or the World Trade Organisation should be made legally responsible for implementing the right to development.[58] Since the HLTF only finds States under the obligation to implement the right to development, many countries remain discontented. The NAM expressed similar concerns at the eleventh session of the Working Group and stated that the criteria should 'reflect the dimensions of international cooperation and solidarity, as well as the international responsibility for creating an enabling environment for the realization of the right to development'.[59] The government of India added that 'the right [to development] was framed to ensure global solidarity, while the report of the task force shifted the balance towards national responsibility'.[60] Several delegations thus felt that the balance was shifting from an international perspective, where there is place for shared responsibility and genuine participation in global decision-making, towards a national or domestic perspective.[61]

The former Chair of the HLTF, however, found that they had been particularly attentive to the international enabling environment and that it was a mistake to downplay the importance of national policies in international cooperation and assistance.[62] He added that the criteria all involved the obligations of States acting collectively and internationally.[63]

The EU similarly expressed a very different view from the NAM and African Group, while commenting on the three levels of obligations. It held that 'International Human Rights law only recognises clearly that States have legally binding obligations with regard to persons falling under their national jurisdiction, the European Union

57 Submission of Egypt on Behalf of the Non-Aligned Movement (NAM) "The Right to Development" in Follow-up to Human Rights Council Resolution 25/15, UN Doc. A/HRC/RES/15/25 (2010), at para. 6(a).

58 Marks, *loc.cit.* note 14, at p. 15.

59 Working Group on the Right to Development, Report of the Working Group on the Right to Development on its 11th Session, UN Doc. A/HRC/15/23 (2010), at para. 7.

60 *Ibidem*, at para. 8.

61 *Ibidem*, at para. 21.

62 The Chairperson-Rapporteur claimed that 'the taskforce had covered virtually all of the aspects of international economic relations of concern to developing countries, including debt sustainability; national ownership of development policies; the mitigating effects of international financial and economic crises; protection against volatility of international commodity prices; bilateral, regional and multilateral trade rules; ODA flows; […] Since these issues of concern to developing counties arose from national policies that have a global impact, including through multilateral institutions, it would be misleading to find that the references to national policies reflected a neglect of the international enabling environment.' *Ibidem*, at para. 17.

63 *Ibidem*, at para. 28.

would [therefore] like further clarification on the three levels of responsibility identified by the HLTF'.[64] The EU members, and thus a large part of the developed States, do not recognise they have obligations to people outside of their borders. Canada correspondingly stated that 'the primary responsibility of States to ensure the fulfilment of the right to development is within their jurisdictions […] and in the context of creating enabling environments for the realization of this right, we believe that the focus on the national dimension must remain central'.[65] When commenting on criterion 2(b) (relevant international human rights instruments in elaborating development strategies) and on its indicators (responsibility for extraterritorial infringement of human rights including by business enterprises),[66] Canada stated clearly that 'the criteria should not hold business enterprises directly responsible for human rights infringements under international law, nor exercise extraterritorial jurisdiction on the activities of business enterprises doing business abroad'.[67] The Netherlands and the UK expressed similar concerns about the legal basis for the three levels of obligations.[68]

The above assertions of Canada and other developed States thus appear to question the vital 'international' component of the right to development. The perceived added value or novelty of the right to development for the human rights framework is its focus on collective responsibility and corresponding duties and obligations for States and non-State actors.

It is clear there is no consensus on the content and scope of this external component of the right to development. We actually find that today this 'traditional' added value of the right to development is being hijacked by developed countries which have reset the focus on the domestic obligations of each State for the realisation of the right to development. What is also important is that the current debate demonstrates that the developing States do not like to discuss their domestic obligations in the context of the right to development. In this respect, Donnelly has argued that this international component of the right to development is outright dangerous as it is 'likely to be used to divert attention from systematic national violations of human rights, and even to absolve Third World governments of their responsibility for human rights violations'.[69]

---

64 Submission of the European Union in Follow-up to Human Rights Council Resolution 25/15 "The Right to Development", at para. 16, *available at*: www.ohchr.org/EN/Issues/Development/Pages/12thSession.aspx.

65 Submission of Canada in Follow-up to Human Rights Council Resolution 25/15 "The Right to Development", *available at:* www.ohchr.org/EN/Issues/Development/Pages/12thSession.aspx.

66 This is basically the only indicator which mentions States' extraterritorial or international obligations.

67 Canada, *loc.cit*. note 65.

68 See: Submission of the Netherlands in Follow-up to Human Rights Council Resolution 25/15 "The Right to Development"; Submission of the UK in Follow-up to Human Rights Council Resolution 25/15 "The Right to Development", *available at*: www.ohchr.org/EN/Issues/Development/Pages/12thSession.aspx.

69 Donnelly, *loc.cit*. note 3, at p. 502.

In any case, even when consensus would arise and the right to development criteria would reflect more adequately the international component, the question of the added value remains valid. After all, do ESC rights not also contain such an international component? This brings us to our final argument of dissolving the right to development into the existing human rights framework.

5. DISSOLVING THE RIGHT TO DEVELOPMENT INTO THE EXISTING FRAMEWORK

One of the issues on the Working Group's agenda today is whether or not to proceed in the direction of a legally binding instrument.[70] The Human Rights Council has openly considered the possibility of a legally binding document once standards are distilled out of the criteria.[71] The HLTF itself has been careful not to take any position on the adoption of a legally binding document and has limited itself to suggesting that further work on standards 'could be an opportunity to explore whether and to what extent existing treaty regimes could accommodate right to development issues within their legal and institutional settings'.[72] Portugal and the NAM countries have agreed with this. The latter group of countries even suggested that human rights bodies already start including the right to development into their work.[73]

As a matter of fact, the Committee on Economic, Social and Cultural Rights (CESCR) has noted 'that nearly all of the substantive articles 1–15 of the [ICESCR] touch upon the substance of the right to development, most notably Article 11 on the right to an adequate living standard'.[74] Of course the CESCR and other UN bodies cannot explicitly state it, but according to the above statement, the right to development

70 Note that already in 2003 the Commission on Human Rights requested the preparation of a concept document on options for the implementation of the right to development, including an international binding legal standard: Commission on Human Rights, The Right to Development, UN Doc. E/CN.4/RES/2003/83 (2003). The concept document (presented in 2006), however, argued *against* the adoption of a legally binding standard, finding it premature.

71 'The Working Group on the Right to Development shall take appropriate steps to ensure respect for and practical application of the above-mentioned standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature through a collaborative process of engagement.' Human Rights Council, The Right to Development, UN Doc. A/HRC/18/L.15 (2011), at para. 6(c); note that the United States of America abstained.

72 High-Level Task Force on the Implementation of the Right to Development, Report of the High-Level Task Force on the Implementation of the Right to Development on its Sixth Session, UN Doc. A/HRC/15/WG.2/TF/2 (2010), at para.77.

73 However, according to the NAM 'this does not entail supporting the inclusion of the suggested reporting template and a specific reference to the right to development and the criteria developed by the taskforce in their own reporting guidelines.' See: Egypt on behalf of the Non-Aligned Movement (NAM), *loc.cit.* note 57.

74 Committee on Economic, Social, and Cultural Rights, Submission in Follow-up to Human Rights Council Resolution 25/15 'The Right to Development', available at: www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForceWrittenContributions.aspx.

is dissolvable within the existing framework. Scholars have also indicated that 'all of the obligations [that] the two International Covenants on Human Rights impose on states and the international community apply to *all* measures associated with implementing the right to development'.[75] Yet, is the international component of the right to development adequately present in the existing human rights framework?

The answer is no. In fact, international human rights law is found increasingly ineffective when confronted with the effects of globalisation and the subsequent rise of powerful new non-State actors, such as international organisations and transnational corporations. States are ever more finding difficulties in ensuring the human rights of their population due to the decision-making power and influence of other powerful States, intergovernmental organisations and transnational corporations on the enjoyment of ESC rights. Holding these actors responsible is not possible under the current legal framework, although these organisations are often responsible for violations of ESC rights. International human rights law has become therefore out of synch with the realities of our globalised world and is currently incapable of providing the much-needed guidance regarding the obligations and responsibilities of States and non-State actors.[76] However, this is not because 'new' rights such as the right to development need to be made justiciable, but because the traditional focus on the (domestic) State as the sole duty-bearer still prevails in international (human rights) law.

In order to meet the challenges set by globalisation and the rise of powerful non-State actors, human rights scholars have begun to focus on States' extraterritorial obligations and the potential (transnational) obligations of non-State actors. Exactly the same starting point, namely the negative impact of States as well as non-State actors abroad and the often consequent inability of developing States to ensure the human rights of their population, gave rise to a growing academic debate and recognition of such obligations.[77]

The last decades' various guidelines and norms were elaborated in an attempt to deal with the obligations of non-State actors. Such norms and guidelines include the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, the UN Guiding Principles on Business and Human Rights (the Ruggie Principles) and the Tilburg Principles on the World

---

75 Sengupta, *loc.cit.* note 30, at p. 853 (emphasis added).

76 The European Science Foundation Research Networking Programme 'GLOTHRO: Beyond Territoriality: Globalisation and Transnational Human Rights Obligations' starts exactly from this assumption and aims to bring together separate fields of study on non-State actors such as international organisations and transnational corporations. See: www.glothro.org.

77 See inter alia: Coomans, F., Kamminga, M.T., (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004; Skogly, S., *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, Intersentia, Antwerp, 2006; Salomon, M.E., Tostensen, A., Vandenhole, W. (eds.), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, Intersentia, Antwerp, 2007; Gibney, M. and Skogly, S., *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, Philadelphia, 2010; Langford et al., *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, Cambridge, 2012 (forthcoming).

Bank, IMF and Human Rights.[78] In addition, the International Law Association as well as the International Law Commission have attempted to devise primary and secondary norms for international organisations in international law.[79]

The area where most progress has been made, however, is in the field of States' extraterritorial obligations. The recently adopted Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (ETO Principles) are especially illustrative and important of this increasing advancement made in clarifying and understanding the obligations of States beyond their territory.[80]

Noel Villaroman has argued 'that on the basis of the right to development, the international community has an obligation to create international conditions that allow developing countries to achieve their national goals, including the realisation of ESC rights'.[81] The ETO Principles overlap completely with such assertion of obligations by stipulating that extraterritorial obligations of States include *inter alia*: 'Obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally'.[82] The ETO Principles, however, do not draw on the right to development to establish such obligations. The ETO Principles are rather drawn from the existing legal framework protecting ESC rights, and established along the obligations of States to respect, protect and fulfil those rights.

There exists total overlap between the discussions on extraterritorial obligations of States in the field of human rights and the discussions on obligations of States surrounding the right to development. It has been argued, however, that there is no

78 Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (2011); Tilburg Guiding Principles on World Bank, IMF and Human Rights, in: Van Genugten W., Hunt, P., Mathews, S. (eds.), *World Bank, IMF, and Human Rights*, Wolf Legal Publishers, Nijmegen, 2003, pp. 247–255; For a recent discussion of these principles see: Vandenhole, W. 'Emerging Normative Frameworks on Transnational Human Rights Obligations', EUI Working Paper RSCAS 2012/17 (2012).

79 See: International Law Association, Final Report: Accountability of International Organisations, Berlin Conference, 2004; International Law Commission, Draft Articles on the Responsibility of International Organisations Adopted by the International Law Commission at its 63rd Session, UN Doc. A/66/10 (2011).

80 The recently adopted ETO Principles build on the earlier adopted Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (UN Commission on Human Rights, Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles"), UN Doc., E/CN.4/1987/17 (8 January 1987) and on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).

81 Villaroman, N.G., 'Rescuing a Troubled Concept: An Alternative View to the Right to Development', *Netherlands Quarterly of Human Rights*, Vol. 29, No. 1, pp.13–53, at p. 39.

82 De Schutter, *loc.cit.* note 55, Principle 8(b).

such overlap because extraterritorial human rights obligations are narrowly framed, while the structural approach proposed by the right to development calls for proactive steps to ensure human rights globally.[83]

However, ETO Principle 29 considers that: 'States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation'.[84] The ETO Principles find that the core norm of the right to development is grounded in the obligation of States to fulfil human rights territorially and extraterritorially, and not on the right to development. Like the core norm, the principle has a very broad scope and is focused on the structural issues which impede the enjoyment of human rights around the world.

The scholarly work, the ETO Principles, and the subsequent growing evidence of such obligations demonstrate we do not require the right to development to remind us of the fact that the rights in the ICESCR cannot be realised if the structural challenges of today's political and financial order are not met, and if States and other non-State actors do not hold (positive) obligations as well. If one finds that ESC rights do not demand such a just international order, then one finds these rights structurally flawed or inadequate to ensure the enjoyment of ESC rights for all.

Perhaps a cause of confusion amongst proponents of the right to development is the fact they have viewed the ICESCR as consolidated in scope and content and therefore ill-suited to accommodate the claims of the right to development. Yet, Martin Scheinin has argued it is possible 'to strive for the realization of the RTD also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question'.[85] This article has argued that such a reading must be given. The right to development as 'the *alpha* and *omega*' of human rights seems thus simplistic, and is actually condescending to the potential of existing human rights. It is not because extraterritorial obligations of States and potential obligations of non-State actors are still contested, underdeveloped and subsequently not fully recognised that this automatically calls for a (binding) right to development.

With respect to the current criteria, Stephen Marks has noted that these 'touch on the main obligations that any useful treaty on the subject would necessarily include'.[86]

---

83 Salomon, *loc.cit.* note 53, at p. 8.

84 De Schutter, *loc.cit.* note 55, Principle 29.

85 Scheinin, M., 'Advocating the Right to Development Through Complaint Procedures Under Human Rights Treaties' in Andreassen, B.A. and Marks, S.P. (eds.), *Development as a Human Right,* Harvard University Press, Cambridge, 2006, at p. 274.

86 Marks, S.P., 'A Legal Perspective on the Evolving Criteria of the HLTF on the Right to Development' in: Marks, S.P. (ed.), *Implementing the Right to Development: The Role of International Law*, Friedrich Ebert Stiftung, 2008, at p. 79.

There is no sign that the current legal framework would not be able to incorporate such criteria, not even in the rare instances where the criteria are more progressive and try to go beyond the already established benchmarks by the human rights bodies. Criteria such as 'to promote good governance at the international level and effective participation of all countries in international decision-making (criteria 2(d))' or 'to provide for fair sharing of the burdens of development (3(g))' are all criteria or measures which the CESCR could and should promote through the assertion of States' extraterritorial obligations. Further criteria, such as the maintenance of a national and global stable economic and financial system; the establishment of an oversight system; or the creation of an equitable trading system, are structural issues which are equally recognised in the above mentioned ETO Principle 29 on the extraterritorial obligation of States to fulfil ESC rights.

The CESCR is increasingly recognising the existence of these structural issues. In its statement on the 2008 World Food Crisis, the CESCR, for example, urged States to address the structural causes at the national and international level by *inter alia* revising the global trade regime or implementing the strategies to combat climate change.[87] Additionally, UN specialised agencies, such as the Food and Agricultural Organisation (FAO), recognise the importance of addressing structural issues. The 'Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security' (the RTF guidelines) are developed by the FAO to help States implement the right to food and reflect numerous (international) criteria.[88] These RTF Guidelines, for example, assert the need for an international enabling environment and call for attention to cooperation on matters such as external debt, ODA, international trade and technical cooperation. Sengupta's (and others') reasoning appears thus erroneous when he finds that the right to food 'does not go to the extent of noting that it implies looking at the provision of food as a part of a country's overall development program, bringing in fiscal, trade and monetary policies and the issues of macroeconomic balance which the right to development approach must take into account'.[89]

In sum, the current framework addresses the same concerns that the right to development does with respect to the creation of an international enabling environment. One could definitely make the case that the international or external dimension of ESC rights has not been sufficiently asserted, clarified and implemented. The international component of ESC rights – the recognition of extraterritorial

87 Committee on Economic, Social, and Cultural Rights, Statement of the Committee on the World Food Crisis, UN Doc. E/C.12/2008/1 (2008), at para.13.

88 The RTF Guidelines presented a first attempt to interpret an economic, social and cultural right so significantly in order to assist States with their national strategy towards realising the right to food. These Guidelines have become the central tool for the implementation of the right to food, see: FAO, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted by the 127th session of the FAO Council, November 2004.

89 Sengupta, *loc.cit.* note 30, at p. 874.

and transnational obligations – is indeed still largely *de lege ferenda* in the current framework. However, this should not lead us to the conclusion that we need a right to development.

The immense challenge now before us is how to make ESC rights truly justiciable in the sense that they defend individuals against *all* violations of ESC rights, including those of a structural (international) order. The various scholars, UN experts and developed principles in essence argue that if ESC rights would not entail such external or international obligations, then these rights would be structurally flawed and doomed to be largely ineffective in today's globalised landscape.

6. CONCLUSION

In light of the twenty-fifth anniversary and the development of the core norm of the right to development, it seemed opportune to raise again the important question of the added value of the right to development. This paper revealed that, from its inception, the current international human rights framework has acknowledged the importance of a national and international enabling environment conducive to the enjoyment of human rights. The article has illustrated that the concerns of the right to development as indicated by the core norm and its criteria can be – and to a certain extent already are being – accommodated by the current framework and human rights bodies.

As illustrated briefly in this paper above, today an increasingly large body of academic work has demonstrated the existence of international obligations in the field of ESC rights. The right to development therefore actually duplicates work done in the field of extraterritorial and transnational human rights obligations, as these already respectively focus on obligations of foreign States and non-State actors. Both the right to development and the concepts of extraterritorial and transnational human rights obligations indicate that there is a fissure between today's human rights violations of a structural nature and the existing legal framework. Both share the idea that States and other powerful non-State actors have consequent obligations in filling this fissure, and both have to fight the reluctance or outright refusal of (mostly developed) States to acknowledge those obligations.[90]

Naturally, the right to development can exist parallel to the other human rights. In fact, it almost certainly will, as it seems very implausible that the UN will stop promoting the right to development given its entrenchment in the various Declarations and its own work. However, it is as unlikely that States will agree on a legally binding

[90] The lack of any acknowledgement of extraterritorial obligations in the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights provides a recent illustration of this reluctance (for a discussion see: Vandenbogaerde, A. and Vandenhole, W. 'The Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights: An Ex-Ante Assessment of its Effectiveness in Light of the Drafting Process', *Human Rights Law Review*, Vol. 10, No. 2, 2010, pp. 207–237.

document on the right to development. This article has argued from a theoretical point of view that this is not problematic and that we can use the present framework to further advance the international dimension of the right to development.

One must conclude that, in order to create favourable international conditions, it would be strategically wiser for States to steer their efforts towards recognition and clarification of extraterritorial and transnational human rights obligations in the field of ESC rights. The potential dissolving of the right to development in the current framework has the advantage of already having a legal, although imperfect, framework in place with monitoring bodies and accountability mechanisms. In addition, one might argue that the advantage of discussing extraterritorial obligations of States and obligations of non-State actors in the context of the ICESCR and other established treaties is that it allows us to escape more easily from the highly politicised environment of the right to development and its dominating 'developed-developing States' dichotomy.

Alston has noted that the essential dynamism of human rights inevitably causes tension and that the 'challenge is to achieve an appropriate balance between, one the one hand, the need to maintain integrity and credibility of the human rights tradition, and one the other hand, the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being'.[91] Given the persistent lack of consensus amongst States about the future of the right to development and the difficult years ahead for the recognition and clarification of extraterritorial and transnational human rights obligations, it is advisable that we try to find this balance in the current established human rights framework. At the moment, the right to development is doing a disservice to other human rights, especially ESC rights, as it considers those rights to be consolidated in their scope and content with regards to international responsibilities.

91 Alston, *loc.cit.* note 41, at p. 609.