ANNEXURE - I
REPRINTS

THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

Arjun Sengupta*

1. Introduction

The Declaration on the Right to Development,[1] which stated unequivocally that the right to development is a human right, was adopted by the United Nations in 1986 by an overwhelming majority, with the United States casting the single dissenting vote. This Declaration came almost thirty-eight years after the adoption of the Universal Declaration of Human Rights, according to which human rights constituted both civil and political rights (Articles 1 to 21) and economic, social, and cultural rights (Articles 22 to 28). In fact, the Universal Declaration reflected the immediate post-war consensus about human rights based on what President Roosevelt described as four freedoms - including the freedom from want - which he wanted to be incorporated in an International Bill of Rights. There was no ambiguity at that time about political and economic rights being interrelated and interdependent components of human rights, and no disagreement that "true individual freedom cannot exist without economic security and independence."[2] And the credit should rightfully go to Mrs. Eleanor Roosevelt, who was the head of the U.S. delegation during the drafting of the Universal Declaration, for having first identified and advocated for the right to development when she stated, "[W]e are writing a bill of rights for the world, and. . . one of the most important rights is the opportunity for development." [3]

The consensus over the unity of civil and political rights and economic, social, and cultural rights was broken in the Fifties, with the spread of the Cold War. Two separate covenants, one covering civil and political rights and another covering economic, social, and cultural rights, were promulgated to give them the status of international treaties in the late Sixties, and both Came into force in the late Seventies. It took many years of international deliberations and negotiation for the world community to get back to the original conception of integrated and indivisible human rights. The Declaration on the Right to Development was the result. However, the single dissenting vote by the United States set back the process by several years, during which the international community could have tried to translate such a right to development into a reality. Issues were raised about the foundational basis of this right, its legitimacy, justiciability, and coherence. The world was still divided between those who denied that economic, social, and cultural rights could be regarded as human rights, and those who considered that economic, social, and cultural rights as not only fully justifiable human rights but as essential human rights. Claims and counterclaims continued to be made by both the groups in different forums.

Finally, a new consensus emerged in Vienna at the Second UN World Conference on Human Rights

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* Professor School of International Studies, Jawaharlal Nehru University, New Delhi and a research professor at the Centre for Policy Research, New Delhi. He is currently the Independent Expert on the Right to Development for the Human Rights Commission, Geneva.

in 1993. The Declaration adopted there reaffirmed "the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights." This Declaration, which was supported by the United States, went on to say, "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government." It also committed the international community to the obligation of cooperation in order to realize these rights.[4] In effect the right to development emerged as a human right which integrated economic, social, and cultural rights with civil and political rights in the manner that was envisaged at the beginning of the post - World War II human rights movement. The world got back, so to speak, to the mainstream of the human rights movement, from which it was deflected for several years by Cold War international politics.

In this paper, I would like to examine some of the questions relating to the right to development as a human right. The first question is about the nature of the right to development itself. Although the right to development is described in detail in the 1986 Declaration, like all constitutional documents it is open to interpretations which may sometimes be conflicting. However, if this Declaration is read together with other instruments that are now regarded as the International Bill of Rights, viz., the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social, and Cultural Rights, and if it is seen as a document on human rights evolving from the process of the human rights movement, it can be given an interpretation that can be most helpful for its realization.

The second question, related to the first, is: how does it help the process of development if it is identified as a human right? In other words, is there a value addition in looking at programs for development as a process of realization of human rights, as spelled out in the Declaration on the Right to Development? The third question that naturally comes up would be: why, then, has it been so hard to secure a consensus on this subject so far? Are the differences due to some misunderstandings in interpretations of these texts, or are they due to some deeper conflict between the political and economic groups affected by the process? I would like to show that both the cold war issues and the call for the New International Economic Order by the developing countries raised questions which were not very pertinent to the process of realization of the right to development. Instead, the right to development as a human right raises issues about which the world has been fundamentally divided - such as issues related to the ideas of justice, equity, and priorities of international policy. Finally, I shall try to point out that because of its association with these issues related to justice and equity, realizing the right to development is fundamentally different from conventional policies and programs for development, whether seen as increasing the growth of gross national product (GNP), supplying basic needs, or improving the index of human development.

2. The Nature of the Right to Development

A Textual Analysis

I have discussed this issue at great length in my first report as the Independent Expert on the Right to Development, submitted to the Commission on Human Rights, Geneva, pursuant to Commission resolution 1998/72, and General Assembly resolution 53/155.[5] It has been further elaborated in my article in the journal *Development and Change*.[6]

The fist article of the text of the Declaration on the Right to Development succinctly puts forward the concept of the right to development. It states:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized.

First, there is a human right that is called the right to development, and this right is "inalienable," meaning it cannot be bargained away. Then, there is a process of "economic, social, cultural, and political development," which is recognized as a process in which "all human rights and fundamental freedoms can be fully realized." The right to development is a human right, by virtue of which "every human person and all peoples are entitled to participate in, contribute to and enjoy" that processes of development.

Subsequent articles in the Declaration clarify the nature of this process of development further and elaborate on the principles of exercising the right to development. For example, Article 1 recognizes that not only "every human person"_ but "all peoples" are entitled to the right to development. Article 1, Clause 2 even explicitly refers to the right of peoples to self-determination. But that does not mean that "peoples' rights" can be seen as countering to or in contradistinction from an individual's or "every human person's" right. Article 2, Clause 1 categorically states that it is "the human person" who is the central subject of development, in the sense of the "active participant and beneficiary of the right to development." Even if "peoples" or collectives of "human persons" are entitled to some rights, such as full sovereignty over the natural wealth and resources in terms of territory, it is the individual human person who must be the active participant in and beneficiary of this right.

The process of development, "in which all human rights and fundamental freedoms can be fully realized," would lead to, according to Article 2, Clause 3, "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 [emphasis added]." Article 8 elaborates this point further by stating that the measures for realizing the right to development shall ensure "equality of opportunity for all" in their access to basic resources, education, health services, food, housing, employment and in the *fair distribution of income*. The realization of the right would also require that *women have an active role* in the development peruses, and that "appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."

To realize this process of development to which every human person is entitled by virtue of his right to development, there are responsibilities to be borne by all the concerned parties: "the human persons," "the states operating nationally," and "the states operating internationally." According to Article 2, Clause 2, "all human beings (persons) have a responsibility for development individually and collectively," and they must take appropriate action, maintaining "full respect for the human rights and fundamental freedoms as well as their duties to the community." Human persons thus are recognized to function both individually and as members of collectives or communities and to have duties to communities that are necessary to be carried out in promoting the process of development.

But "the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development" is of the states, as Article 3 categorically suggests. This responsibility is complementary to the individual's responsibility as mentioned above, and is only for the creation of conditions for realizing the right and not for actually realizing the right itself. Only the individuals themselves can realize the right. The actions of the states needed for creating such conditions are to be undertaken at both the national and the international levels. At the national level, Article 2, Clause 3 points out that "states have the right and the duty to formulate appropriate national development policies," and Article 8 says that states should undertake "all necessary measures for the realization of the right to development," and again, "should encourage popular participation in all spheres." In addition, the states are required by Article 6, Clause 3 to take steps "to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social, and cultural rights, "because the implementation, promotion and protection of these rights would be essential for realizing the right to development as "all human rights and fundamental freedoms are indivisible and interdependent" (Article 6, Clause 2). The states are also expected to take resolute steps to "eliminate the massive and flagrant violation of human rights" resulting from apartheid, racial discrimination, colonialism, foreign domination and occupation, etc. (Article 5).

In regards to the obligation of the states operating at the international level, the Declaration emphasizes the crucial importance of international cooperation. First, the states have a duty "to cooperate with each other in ensuring development and diminishing obstacles to development.... and fulfill these duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, [and] mutual interest. . ." (Article 3, Clause 3). This has been further reiterated in Article 6, which states that "all states should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms." Indeed Clauses 2 and 3 clarify conditions required to fulfill the realization of fundamental freedoms and human rights as mentioned in Article 1. "All human rights and fundamental freedoms are indivisible and interdependent" and the "implementation, promotion, and protection of civil, political, economic, social, and cultural rights" deserve equal attention (Article 6, Clause 2). And failure to observe civil and political rights as well as economic, social, and cultural rights may result in "obstacles to development" that the states are responsible to eliminate (Article 6, Clause 3).

Finally, according to Article 4, the states have the duty, individually and collectively, to formulate international development policies to facilitate the realization of the right to development. It recognizes that sustained action is required to promote rapid development of developing countries and then declares: "As a complement to the efforts of developing countries, effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development."

International Cooperation

To appreciate fully the emphasis that the Declaration puts on international cooperation, Article 4 should be read in conjunction with the opening sentences of the preamble of the Declaration itself that refers to "the purposes and principles of the charter of the United Nations to the achievement of

international cooperation in solving international problems of an economic, social, cultural and humanitarian nature and in promoting and encouraging respect for human rights and fundamental freedoms." That reference was to Article 1 of the Charter, and the case of international cooperation could be further strengthened by referring also to Article 55 and 56 of the Charter. According to those articles, member states pledge themselves to take joint and separate actions to promote (a) high standards of living, full employment and conditions of economic and social progress and development, (b) solutions of international economic, social, health and related problems and international cultural and education cooperation, and (c) universal respect for and observance of human rights and fundamental freedoms without distinction as to race, sex, language, or religion. Then the Charter declares that all members of the United Nations Organizations "pledge themselves to take joint and separate actions in cooperation with the organization for the achievement of these purposes." Because the Charter has a special status as the foundation of the present international system, this pledge is a commitment to international cooperation by all states within the United Nations.

The Vienna Declaration of 1993, to which we have referred to above and which established the consensus about the right to development as a human right, reaffirms the solemn commitment of all states to fulfill these obligations in accordance with the Charter of the United Nations (para. 1); that states should cooperate with each other in ensuring development and eliminating obstacles to development, and that the international community should promote effective international cooperation for the realization of the right to development (para. 10); that progress towards the implementation of the right to development requires effective development policies at the national level, and a favorable as well as equitable economic environment at the international level (para. 10), and that the international community should make all efforts to alleviate specific problems such as the external debt burden of developing countries to supplement the efforts of the governments of these countries.

The Main Propositions

The Declaration on the Right to Development is a consensus document. It is the result of a paragraph-by-paragraph negotiation to settle on an agreed text which is not always very neat, focused, or non-ambivalent. But a textual analysis of the document as we have done above supplemented by the discussions held at the different form at that time would clearly suggest the following four main propositions of the Declaration: (A) The right to development is a human right. (B) The human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realized - which means that it combines all the rights enshrined in both the covenants and each of the rights has to be exercised with freedom. (C) The meaning of exercising these rights consistently with freedom implies *free, effective, and full participation* of all the individuals concerned in the decision making and the implementation of the process. Therefore, the process must be transparent and accountable, individuals must have *equal opportunity* of access to the resources for development and receive *fair distribution* of the benefits of development (and income). (D) Finally, the right confers unequivocal obligation on duty-holders: individuals in the community, states at the national level, and states at the international level. National states have the responsibility to help realize the process of development through appropriate development policies.

Other states and international agencies have the obligation to cooperate with the national states to facilitate the realization of the process of development.

The covenants on civil and politics rights and on economic, social, and cultural rights both call for international cooperation. But the Declaration on the Right to Development talks about that cooperation in the most concrete terms and places squarely on the international community the obligation to cooperate to make a success of the process of development together with appropriate policies and measures adopted by the national players. Furthermore, combining the implementation of the right to development with the other rights and a manner of exercising it which is consistent with fundamental freedoms envisions an approach to development which elevates the process of its realization to the exercise of a human right.

The last point can be illustrated by referring to a specific right and the progress in its treatment in any program for the realization of the different rights. For example, the right to housing was recognized as an element in the right to an adequate standard of living in Article 25 of the Universal Declaration of 1948. It was incorporated in almost the same form as Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966. Since a covenant has the status of an international treaty, this was a clear step forward from the Universal Declaration. The Article 11 in the covenant states: "The States Parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."[7]

The Committee on Economic, Social and Cultural Rights, the Treaty Body established by the ECOSOC to monitor and interpret the implications of the different components of the covenant, has examined the right to (adequate) housing in its General Comments. It stated that the right "should be seen as a right to live somewhere in security, peace and dignity. . . which should be ensured to all persons irrespective of income or access to economic resources. . . . [Article 11.1] must be read as referring not just to housing but to adequate housing, [which means] adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost."[8]

This interpretation is no doubt a further advance from the formulation in the covenant about what is meant by adequate housing. But it falls short of the standard of the right to development. The second part of the General Comment lays down the characteristics of adequate housing, but even if the supply of such housing expanded substantially, it will not be fulfilling the right to development unless the individual persons have the freedom to choose what they want from among them. The first part of the comment sets forth that this right should be seen as a right to live somewhere in security, peace and dignity (even if it is granted that it could be practically ensured to all irrespective of income or access to economic resources). But who decides what that "somewhere" is where an individual can live in security, peace and dignity? For realizing the right to development, that freedom to choose, through participation in decision making, transparency and with accountability, with equality of access, and with a fair share in the benefits, would be just as important as the supply of the housing at reasonable

cost through an appropriate policy of development. In a real world situation, that freedom to choose may have to be exercised carefully, within the overall constraints of resources and appropriate, democratically arrived at procedures of maximizing the choice in the presence of the possibility of disagreement among the different potential claimants. But that freedom must be there in exercising the right to housing as a part of the right to development. The state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available.

The problem of realizing the right to development, viewed from this perspective, would not appear to be only in designing a set of national and international policies to implement the elements of economic, social and cultural rights, as enunciated in the covenants together with civil and political rights, but also in exercising the human rights approach of respecting the fundamental freedom of individuals to choose the lives they want to live, and exercising the rights they want to claim, transparency and accountably, through participation, with equal access, and with a fair share of the benefits. The process of free exercise of the right to development is as important as the increase in the supply of means or resources that facilitate the enjoyment of those rights.

3. The Value Addition in the Human Rights Approach to Development

If development depends upon policy and not just in the spontaneous play of market forces, then any approach that facilitates, if not ensures, more than another the formulation, adoption, and implementation of appropriate policies to realize the objectives of development would be regarded as superior. When development is seen as a human right, it obligates the authorities, both nationally and internationally, to fulfill their duties in delivering (or, in human rights language, promoting, securing, and protecting) that right in a country. The adoption of appropriate policies follows from that obligation. Nationally, the government must do everything, or must be seen as doing everything to fulfill the claims of a human right. If the rights to food, education, and health are regarded as components of a human right to development, the state has to accept the primary responsibility of delivering the right either on its own or in collaboration with others. It has to adopt the appropriate policies and provide for the required resources to facilitate such delivery because meeting the obligation of human rights would have a primary claim on all the resources - physical, financial, or institutional - that it can command.

Internationally, states other than where the rights-claimants reside, if they are party to the international agreement recognizing those rights, would also have the obligation to do everything possible to help in delivering those rights. The Declaration on the Right to Development and the Vienna Declaration have spelled out the international obligations to cooperate for realizing these human rights which belong to individuals as human beings irrespective of their residence, citizenship, nationality, or religion. But even without these relatively recent Declarations, the Charter of the United Nations enjoins upon them the duty to cooperate in fulfilling human rights. They are supposed to adopt international policies and set aside resources for the purpose of realizing these rights.

There is a long history behind the rise of human rights to such a predominant position of influence over government actions. The notion that every human being is enticed to some basic rights was the inspiration behind most of the revolutions in history, including the English, American, French,

Mexican, Russian, and Chinese. The last half of the 20th century, as noted in the *Encyclopedia Britannica,* may be fairly said to mark the birth of the international as well as universal recognition of human rights. In the treaty establishing the United Nations, all members obliged themselves to take joint and separate actions for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." In the Universal Declaration of Human Rights (1948), representatives from many diverse cultures endorsed the rights therein set forth "as a common standard of achievement for all peoples and all nations." And in 1976, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, each previously approved by the UN General Assembly in 1966, entered into force and effect. Indeed, the last half of the 20th century has seen, in the words of human rights scholar Louis Heineken, "essentially universal acceptance of Hunan rights in Principle," such that "no government dares to dissent from the ideology of human rights today".[9]

Indeed, it is this point that no government now dares to ignore human rights that gives the claims based on human rights such pre-eminence. There is still of course a lot of disagreement about the nature of these human rights, which rights or claims are to be regarded as human rights and which are not, and how such rights are to be realized or implemented.

But once there is a consensus, established through a due process about the nature and identity of the human rights, the governments are obliged to try to deliver them. Whether they succeed or not would depend upon the design of the programs of implementation, whether the governments command adequate physical, financial, and institutional resources required for this implementation, and whether the governments are able to reconcile or overcome the conflicts between different groups that may arise in the process of implementation. But the obligation to deliver this right becomes a major constraint, if not the binding constraint, on the behavior of the government.

This particular force in the notion of human rights, I submit, is derived from the origins of the human rights movement associated with the principles of social contract theory. This secular theory of social contract reversed the biblical concept of contract, such as the one between God and Abraham. Instead of God choosing his people and their governors, people chose their governors who acted according to promises. The natural rights theorists, Hobbes (1588-1679), Locke (1632-1704) and Rousseau (1712-1778), were the principle proponents of this secular theory, which was best exemplified by Locke's claim during the English Revolution of 1688 that certain rights like the right to life, liberty, and property belonged to individuals as human beings because they existed in the state of nature before human beings entered civil society. Upon entering a civil society, those human beings surrendered through a social contract to the state only the right to enforce the natural rights, not the rights themselves. If the state failed to secure these rights, it violated the terms of the social contract and would be liable to be overthrown by a social revolution. A century after the English Revolution, the French Revolution of 1789 was supported by the natural rights theorists again in terms of action against the sovereign breaking the terms of the social contract, and the French Declaration of the Rights of Man and Citizen asserted that the rights of liberty, property, security, and resistance to oppression are "natural, inalienable, and sacred." Among other revolutionaries of the Eighteenth Century, Thomas Jefferson claimed that it was not only permissible but morally required to overthrow

tyrannies that violate these principles of "natural equity and justice" that formed the basis of the legitimacy of the governments. The American Declaration of Independence openly proclaimed:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it. [10]

The eighteenth-century human rights movements thus established that there existed a set of human rights, which were derived from natural laws or any other generally accepted source of agreement, and that the government was the product of a social contract between the people, and the states were instituted to carry out the tasks of governance to fulfil these rights, in accordance with the social contract. There have been serious disagreements about the basis and the nature of human rights and there are very few proponents of the theory of natural rights now. But the basic principles of the notion of social contract are still widely accepted and almost universally accommodated within national constitutions, lending legitimacy to governments. The national constitutions codify the rules and procedures to protect, promote, and secure the rights of the individuals either, separately or as members of groups or collectives; and national governments are expected to protect and uphold those constitutions. They are liable to be corrected by the rule of law and when necessary overthrown or changed. Internationally, the governments accept contracts with other governments determining their mutual behavior or interactions through treaties, covenants, and declarations. In other words, the notion of social contracts has now become a universal principle, governing the behavior of states operating both at the national and at the international levels.

For such social contracts, what is important is the acceptance by all parties of a set of "human rights" which the state parties are obliged to fulfill. In the ultimate analysis, human rights are those rights which are given by people to themselves. They are not granted by any authority, nor are they derived from some overriding natural or divine principles. They are human rights because they are recognized as such by a community of peoples, flowing from their own conception of human dignity, in which these rights are supposed to be inherent. Once they are accepted through a process of consensus building, they become binding at least on those who are party to that process of acceptance.

The right to development when it is accepted as a human right through a legitimate process of consensus building, therefore, becomes a primary claim on resources of a country - when resources are taken in the broadest sense as being whatever instrument that is necessary to realize certain objectives - physical, financial, or institutional. It also entails a legitimate right of reprimanding the parties which have the obligation to deliver as the counterpart to the holders of rights. The exact process of reprimanding may vary according to circumstances. For a national government, this can be executed through a judicial process of compensation or reparation if these rights which are violated are justifiable. Otherwise, it may follow the route of legislative changes and parliamentary sanctions. It can even take the form of changing or overthrowing the government.

Internationally such reprimand has taken the form of sanctions or international pressures. But more

often than not, it has to be executed through public opinion or through the process of international law, compacts, or mutual agreements, especially when the obligation-holders are not just the national governments where the right-holders reside but all other governments who are party to the covenants establishing that right.

The importance of having a social contract around a set of human rights almost in the same form and spirit as in the eighteenth century was well recognized at the time of the formulation of the Universal Declaration of Human Rights. In the third preamble of the Declaration, it was stated, "it is essential if man is not to be compelled to have recourse as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[11] That is the signal to approaching the problem of realization of human rights through a legal process or a mutually enforced framework of positive action both at the national and at the international level. The right to development, once it is established as a human right, would be entitled to treatment similar to that meted out to any other universally accepted human right.

4. Controversies Regarding the Right to Development

Once the right to development is viewed in this manner - as a human right derived from an implicit social contract binding civil society that identifies duty-holders both nationally and internationally, (primarily the nation-states and the international community, individuals, and groups operating in civil society) with the obligation to deliver this right - it should be easy to appreciate the controversies surrounding this right. First, for many years and especially during the Cold War period, the Western democracies and the Second World socialist countries were not willing to treat civil and political rights and economic, social, and cultural rights at par, or on equal terms, not to speak of regarding them as components of an integrated whole of an international bill of rights. That is why we not only had two separate covenants on these two sets of rights, but also the Western block was upholding the civil and political rights and the Socialist countries pressured for the economic and social rights. On a formal plane the controversy was to have been resolved with the adoption of the right to development. But the reasons for taking these contrary positions kept lingering and was further complicated by the Third World countries putting forward the case of the right to development in the name of the collective rights of a group of countries to bring about a New International Economic Order. If some of the Industrialized countries would not support the economic and social rights, they would find it even more difficult to support the right to development.

Discounting the purely political and Cold War reasons for the countries taking their respective positions, the reasons for Western countries supporting civil and political rights but opposing economic and social rights as human rights can be summed up as follows: (a) human rights are individual rights, (b) they have to be coherent, in the sense that each right holder must have some corresponding duty-holder whose obligation would be to deliver the right, and (c) human rights must be justiciable. All these criticisms, if they are valid, would hold against the right to development.

The identification of human rights completely in terms of individual rights would imply total acceptance of the theory of natural rights. As Donnelly puts it, in the Universal Declaration of Human Rights, "human rights are clearly and unambiguously conceptualized as being inherent to humans and not as the product of social cooperation. These rights are conceptualized as being universal and hold

equally by all, that is as natural rights."[12] In that paradigm, human rights are only personal rights, based on negative freedom, such as the rights to life, liberty, and free speech, whereby the law prohibits others from killing, imprisoning, or silencing an individual who has a claim to such freedoms that the state is expected to protect. Economic and social rights are associated with positive freedoms which the state has to secure and protect through positive action. They are not natural rights, therefore, according to this view, not human rights. Collective rights are more than individual rights and to the extent the right to development is essentially linked to collective rights as well as positive economic rights, it would be disqualified from being regarded as a human right.

All these arguments have been substantially repudiated in the literature. The Universal Declaration has many elements going beyond the principles of natural rights. In fact, it is f1m1ly based on a pluralistic foundation of international law with many elements of economic and social rights, considering an individual's personality as essentially molded by the community.[13] Indeed, logically, there is no reason to take the rights of a group or a collective (people or nation, ethnic or linguistic groups) to be fundamentally different in nature from an individual's human rights so long as it is possible to define the obligation to fulfill them and duty-holders to secure them. Even personal rights can be taken as rights to be protected by individuals and groups.[14] Furthermore, it is well established that the identification of civil and political rights with negative rights and economic, social, and cultural rights with positive rights is too superficial because both would require negative (prevention) as well as positive (promotion or protective) actions. So logically, it is hard to regard only civil and political right as human rights and economic and social and collective rights as not human rights. As we have noted above, it is ultimately for the concerned people to decide what they would regard as human rights and which the states would have the obligation to deliver. [15]

The second criticism, which Sen has described as "the coherence critique" is spelled out as, "Rights are entitlements that require correlative duties. If person A has a right to some X, then there has to be some agency, say B, that has a duty to provide A with X. If no such duty is recognized, then the alleged right, in this view, cannot but be hollow." This would seem to make it very difficult for many of the positive rights to be treated as rights proper, without identifying "agency-specific duties," such as in the case of "every individual having a right to food, to medicine or to education."

Sen believes that it is possible to resist the claim that any use of rights except with co-linked perfect obligation lacks cogency. In many legal contexts the claim may indeed have some merit, but in normative discussions rights are often championed as entitlements or powers of immunities that would be good for people to have. Human rights are seen as rights shared by all - irrespective of citizenship - the benefits of which every person should have. Whie it is not the specific duty of any given individual to make sure that the person has his right fulfilled, the claim can be generally addressed to all those who are in a position to help."[16] Sen defines perfect obligation following Immanuel Kant as a specific duty of a particular agent for the realization of a right, and then describes what Kant himself had characterized as "imperfect obligation": "when the claims are addressed generally to anyone who can help, even though no particular person or agency maybe be charged to bring about the fulfillment of the rights involved." [17]

In terms of this approach, the assertion of a human right would require the identification of a set of

duty-holders who are in a position to help to deliver the rights and that demands are placed on them that they should try to help. If these claims can be made legal, with appropriate legislation, covenant, or treaty, then such obligation may become binding. Otherwise, they remain a moral standard which may not have a legal sanction, but which in many situations may be as forceful in persuading all the duty holders to deliver those rights.

In this perspective, any economic or social right for an individual or a collective can qualify as a human right, provided the moral standard or the ethical assertion of the right is accepted by all people in a particular civil society, and provided it is possible to identify at least a group of possible duty holders, if not one specific duty holder, who are in a position to deliver that right and who are willing to accept their obligations to help. From that point of view, the economic, social, and cultural rights according to the international covenant, and the right to development according to the Declaration of 1986 are all human rights. They have been adopted by the international community of states through a legitimate process of consensus building at the United Nations, and they have enumerated the rights and all the duty holders, primary among them being nation-states complemented by the international community of other states and multi-lateral agencies. What would be needed is an agreement about the procedures to be followed and the programs to be implemented by all the duty holders. In addition, what may be needed is to formulate a legislative basis for the obligations morally accepted to become legally obligatory.

It will be seen from these discussions that the third criticism that the human rights must be justiciable does not have a decisive force. The skeptics who doubt the appeal and effectiveness of ethical standards of rights-based arguments would not consider a right to be taken seriously unless the entitlements of those rights are sanctioned by a legal authority, such as the state, based on appropriate legislation. As Sen puts it, these skeptics would say, "Human beings in nature no more are born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring."[18]

This criticism confuses human rights with legal rights. Human rights are based on moral standards on a view of human dignity, and which have many different ways of fulfillment depending on the acceptability of the ethical base of the claims. This does not, of course, obfuscate the importance or usefulness of such human rights translated into legislated legal rights. In fact, every attempt should be made to formulate and adopt appropriate legislative instruments to ensure the realization of the claims of .a human right once it is accepted through consensus. These rights would then be backed by justiciable claims in courts and by authorities of enforcement. But to say that human rights cannot be invoked if they cannot be legally enforced would be most inappropriate. For many of the economic and social rights and the right to development, and even for some elements of civil and political rights, the positive actions that are necessary may often make it very difficult to identify precisely the obligations of particular duty-holders to make them legally liable to be prosecuted. Enacting appropriate legislative instruments for any of these rights would often be a stupendous task, and it would be often useful and necessary to find alternative methods of enforcement of the obligations rather than through the courts of law.

Monitoring of Implementation

In fact, for many of the positive rights, implementability is often more important than enforcement. Designing a program of action that would facilitate the realization of the right might be a better way of going about it than trying to legislate on those rights. In that case, what may be required is some monitoring authority or some dispute settlement agencies, than a court of law settling claims. Democratic institutions of local bodies, or non-governmental organizations, or public litigation agencies, may prove to be quite effective in dealing with the rights-based issues which are not amenable to exactly-formulated legislative principles.

Finding such monitoring agencies or consultative forums may often be the only way to enforce obligations of the international community, their agencies and governments, to cooperate in fulfilling the rights as envisaged in the right to development. Indeed, justiciability of international commitments must be dealt with differently from the enforcement of national obligations. The world has of course many different agencies of international arbitration of which the international court is only one. These .are established institutions and procedures for settling trade and financial disputes. For human rights, however, such agencies may not be useful unless the failure of the obligation can be put in a relevant form admissible to these institutions. The human rights treaty bodies, operating mostly on reporting methods, may be often quite inadequate, even when direct complaint procedures are available. What would be needed in most cases is a forum where international agencies and concerned governments could get together and talk to each other. A transparent consultation mechanism, subject to the democratic pressure of public opinion, may often play a much more significant role in enforcing institutional agreements, especially on human rights, than any outside judicial authority.

Collective Rights vs. Individual Rights

There is a different type of criticism which has been most persistently leveled against the right to development, in particular, in addition to the criticisms mentioned above that are application to all rights other than the civil and political rights. The right to development was promoted both by the Third World protagonists and First World critics as a collective right of states and of peoples for development. We have already dealt with the problem of the admissibility of collective rights as human rights, as against individual rights, and have argued that it is perfectly logical to press for collective rights to be recognized as human rights. But then care must be taken to defame the collective rights properly and not in opposition to individual rights per se. Indeed there are legal institutional agreements and covenants that have recognized and built upon collective rights, and the Declaration on the Right to Development itself has recognized the collective right of peoples in its Article 1 when it states that every human person and all peoples are entitled to the human right to development and also the right to self-determination, exercising "their inalienable right to full sovereignty over all their natural wealth and resources." But now these collective rights are seen as opposed to, or even superior to, the right of the individual. The Declaration on the Right to Development states categorically (Article 2) that "the human person is the central subject of development and should be the active participant and beneficiary of the right to development."

One of the most articulate defenders of the Third World position regarding collective rights, George's Abi-Saab, a Professor at the Graduate Institute of International Studies in Geneva, suggests two

possible definitions of collective rights, first as a sum-total of double aggregation of the rights and of the individuals. (If there are n different rights, r_j . $i = 1, \ldots\ldots n$, and if there are m different individuals $j = 1, \ldots m$, having these rights, the collective rights will be $R =$ *'Li'Lj rij)*. This, as Abi-Saab says, has the intent of highlighting the link between the rights of an individual and the right of the collectivity. The second definition of collective rights is seen as a right from the collective perspective, "without going through the process of aggregating individual human rights by considering it either in the economic dimensions of the right of self-determination, or alternatively as a parallel right to self-determination."[19]

Both these definitions build up on the rights of individuals. Indeed, the right to self-determination gives nations "the full sovereignty over all their natural wealth and resources," but that has to be exercised for the benefit of all individuals. In the case of an individual, the rights-holder is also the beneficiary of the exercise of the right. In the case of collective right, such as that to self-determination, the right-holder may be a collective such as a nation, but the beneficiary of the exercise of the right has to be the individual. There may of course be some occasion when the right of a particular individual may come into conflict with the right of a collective. An obvious example would be the closed-shop practices of a card union conflicting with the right to work of a particular unemployed person. But the beneficiaries of a trade union practice must be all individual workers, and not just the trade union, as an organization, its management and its treasury. It is also quite possible that different rights or different individuals enjoying a right may come into conflict in some specific situations. It would be necessary to institute some transparent procedures to resolve these conflicts. But such procedural restrictions in dealing with the exercise of a rights does not detract from the nature and importance of the collective right seen as built on individual rights.

It is important to note this point on the integral relationship between the collective and the individual in understanding the human rights approach to development. The Commission on Human Rights, in a resolution (No.5 XXXV) as early as in 1975 - well before the Declaration on the Right to Development was adopted - stated that "development is as much a prerogative of nations as of individuals within nations." Indeed, in many cases individual rights can be satisfied only in a collective context, and the right of a state or a nation to develop is a necessary condition of the fulfillment of the rights and the realization of the development of individuals.

Indeed, most of the demands of the developing countries during the 1970s, when the content of the right to development was negotiated, can be put forward in these terms. The integrated program of commodities, the generalized preference scheme, industrialization, and technology transfers and all the essential components of the New International Economic Orders were the claims made on behalf of the developing countries which were all meant to be preconditions for development of all peoples in those countries. Many of these proposals may not be relevant any more in the changed conditions of the world economy, and the developing countries themselves may not put them forward as parts of their development agenda. But during the Seventies and Eighties they were regarded as highly relevant, and this is reflected in the wording of the preamble of the Declaration of the Right to Development. However, they were never meant to disregard the primacy of individual rights which used the foundations of human rights theory and which developed over time with collective rights

complementing the individual rights. Those who detract from the significance of the right to development by arguing that it is a protection of a collective right of the state or the nation, in conflict with the individual rights foundations of the human rights tradition are more often than not politically motivated.

The Third World proponents of the right to development also must take a serious note of the implication of the human rights approach to development as collective rights of a nation or a state. The exercise of those rights must lead to the realization of the right of all individuals to development, which means a particular process of development where all human rights and fundamental freedoms can be fully realized. We have analyzed the text of the Declaration to establish that this would imply (a) effective participation of all individuals in the decision-making and the execution of the process of development, which would _necessarily require transparency and accountability of all activities, (b) equality of access to resources, and (c) equity in the sharing of benefits. These are essential elements of the process of development which make the right to that process a human right and which are the foundation of a right to development - development with equity and justice. Now it must be clear that economic growth and development of a state or a nation does not automatically lead to this process of development. In fact, if very specific policies are not taken to realize such development, the economic growth of a state increases often tends to the concentration of income and wealth, making the rich richer, even if not always the poor poorer.

The main motivation behind the developing countries' clamoring for the New International Economic Order was the demand for equity in dealing with the running of the international economic system, in all its trade, financial, and technological relationships. The specific methods of such running of the world economy may have changed over time, and the international economic order of today, defaming the relationship between the different economies and the rules and procedures of their interactions, is quite different from the international economic order of the Sixties and Seventies. But the basic requirements for equity and justice in the process of development fulfilling the human right to development have not changed. So if a country wants to develop along the path of the right to development, it must ensure the fulfillment of all the human rights consistent with equity and justice.

5. Characteristics of the Process of Development with Equity

It is important to appreciate the full significance of the point that the right to development associates development with equity and justice. Any human rights approach to economic and social policy may be constructed on the basis of justice because it follows from a notion of human dignity and of a social contract in the drawing of which all members of the civil society are supposed to have participated. But not all theories of justice are based on equity. The Universal Declaration of Human Rights contains elements to show that equity was one of its concerns. However, the Declaration on the Right to Development is, without question, founded on the notion that the right to development implies a claim for a social order based on equity. Not only do several of its articles clearly call for equality of opportunity, equality of access to resources, equality in the sharing of benefits and fairness of distribution, and equality in the rights to participation, its perambular paragraphs also call for the New International Economic Order. And the tenor of the debates that took place at the United Nations and other international form during the period of the negotiation and adoption of the draft left no one in

doubt that what the proponents of the right to development were asking for was an economic and social cider based on equity and justice. The have-nots of the international economy would have a right to share equally in the decision making privileges as well as in the distribution of the benefits just as the rich developed countries.

The significance of the North-South divide among the countries in the world economy may have become diluted in the contemporary interdependent world. But the essential spirit of the demand for equality would still remain in force in all forms of international cooperation envisaged in the realization of the right to development. Within a national economy, also, development as a human right, according to the Declaration on the Right to Development, has to be firmly rooted in equity. The claim that the right to development is a human right is a claim for a process of development with equity and justice. The states parties which have acceded to this demand have taken on the obligation to deliver such a process of development through programs of national policy and international cooperation. In other words, the policy programs that are designed nationally and internationally must take fully into account the concerns and the requirements of equity.

Article1 of the Declaration, as we have noted above, talks about the right to development as a right to the process where all fundamental freedoms are realized. At the time it was drafted, this way of defining development, which other General Assembly resolutions around that time described as expansion of well-being of all individual members of a community, purported to go beyond looking at development simply in terms of growth or income or opulence. Today, especially after the publication of Amartya Sen's book *Development as Freedom,* referred to above, the development process can be most aptly described as expansion of substantive freedom or "capabilities of persons to lead the kind of lives they value or have reasons to value." Indeed, it is possible also to identify the capabilities with human rights as propounded in the Universal Declaration of Human Rights.[20]

One advantage of that would be to situate such human rights firmly in a theory of justice that would bring out the logical implications of a concept of equity. That would hopefully improve our ability to operationalize the notion of equity and fairness embedded in the right to development.

The Universal Declaration of Human Rights recognizes a form of equity inherent in human dignity with equal and inalienable rights as the foundation of freedom and justice; that all men are born free and equal in dignity and rights; that all are equal before the law; and that all are enticed to equal protection against discrimination and that everyone has the right to freedom of thought, religion, expression and opinion. It is possible to build up a whole structure of relationships with equity on the basis of political and civil rights. But in the Universal Declaration everyone has a right to an adequate standard of living for health and well-being, including food, clothing, housing, medical care, and necessary social services, without mentioning that it should be equitable. The Declaration of the Right to Development, however, states (Article 8) that for the realization of the right to development, the states shall ensure "equality of opportunity for all in the access to basic resources, education, health services, food, housing, employment and the fair distribution of income." This together with its emphasis on every person being enticed to "participation in, contribute to and enjoy" the development process where "fundamental freedoms can be fully realized," should be seen against the perambular statements, viz., "equality of opportunity for development is a prerogative of nations and of

individuals who make up nations," to appreciate the central message of equity and justice in the right to development.

Quite clearly the right to development was elaborating on a concept of development that did not deny the importance of the growth of income and output which enhanced the expansion of basic resources and the opportunities for development. But it had to be realized in a manner that ensured a fair distribution and equality in access to the resources and expanded the fundamental freedoms of the individuals. These freedoms, as Sen points out today, should be seen as both "the primary end" and "the principal means" of development, both in a "constitutive role" and in the "instrumental role." [21] All individuals have the right to freely choose to participate in the development process and partake in the decision- making.

That development is not related only to the growth of GNP has been known to the economists from the very beginning, even from the times of Adam Smith. But most of them were persuaded to accept the principle of maximizing the per capita GNP as the basis of their strategies of development, because as W. A. Lewis, the Nobel laureate in development economics, wrote in ***The Theory of Economic Growth,*** the growth of output per head "gives man greater control over his environment, and thereby increases his freedom." The right to development does not deny this positive impact of the growth of GNP. But it calls for additional policy actions to accelerate the expansion of these freedoms together with equity and justice.

There were many economists and policy makers who were also influenced by the Kuznets' thesis that income growth and income equality are negatively related, which meant that policies to increase equality may actually lead to reduce growth. Empirical research has actually failed to substantiate that thesis on the basis of-experiences of developing countries. But even those who did not subscribe to this thesis did not always plead for adopting policies that would alter the structure of the development process based on consideration of equity. They would rather follow policies that maximized the growth of GNP and then adopt some redistribution measures to improve the lots of the poorest and the worst off. This was the case with the famous "minimum needs approach," according to which the international agencies such as the World Bank tried to help the developing countries to supply the poor with provisions that met these minimum needs.

The right to development is proposing a qualitatively different approach, in which considerations of equity and justice are primary determinants of development. Not only that, the whole structure of development is shaped by these determinants. For example, if poverty has to be reduced, the poor have to be empowered and the poorest regions have to be uplifted. The structure of production has to be adjusted to produce these outcomes through development policy. The aim of the policy should be to achieve this with the minimum impact on other objectives such as the overall growth of output. But if there is a trade-off such that growth will be less than the feasible maximum, that will have to be accepted in order to satisfy the concern for equity. This development process has to be participatory. The decisions will have to be taken with the full involvement of the beneficiaries, keeping in mind that if that involves a delay in the process, that delay should be minimized. If a group of destitute or deprived people have to have a minimum standard of well-being, a simple transfer of income through doles or subsidies may not be the right policy. They may actually have to be provided with the

opportunity to work, or to be self-employed, which may require generating activities that a simple reliance on the market forces may not be able to ensure.

The rights approach to development requires us to re-examine the ends and means of development. If improvement of well-being of the people based on the enjoyment of rights and freedoms is the object of development, economic growth consisting of the accumulation of wealth and gross national product would not be an end in itself. It can be one of the ends, and can also be a means to some other ends, when "well-being" is equivalent to the realization of human rights. As Sen would have put it, a prosperous community of slaves who do not have civil and political rights cannot be regarded as a community with well-being.

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1. The Declaration on the Right to Development was adopted by the United Nations General Assembly, resolution 4/128 on December 4,1986 (http://www.unhchr.ch/html/menu3/b/74.htm). The Universal Declaration of Human Rights was adopted by UN General Assembly Resolution 217 (A) II on December 10, 1948.
2. State of the Union Message to Congress by President Roosevelt, January 11, 1944.
3. M. Glen Johnson, "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights," *Human Rights Quarterly9.1* (1987): 19-48.
4. Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, June 25, 1993.
5. Economic and Social Council, United Nations E/CN.4/1999/WG.18/2, 27 July 1999.
6. Arjun Sengupta, "Towards Realizing the Right to Development," *Development and Change,* June 2000.
7. International Covenant on Economic, Social and Cultural Rights, adopted by United Nations General Assembly Resolution 2200 A (XXI) on 16 December 1966. (Entered into force on 3 January 1976.)
8. Committee on Economic and Social and Cultural Rights, General Comment 4: The Right to Adequate Housing (at. 11.1). On the completion of general comments and general recommendations adopted by the Human Rights Treaty Bodies. UN Doc. HRT/Gen/l/Rec 12, 1994.
9. Cited in Burns H. Weston, "Human Rights," *Encyclopedia Britanica,* online version, updated 1998.
10. For a discussion on the development of the doctrines of natural law and natural rights as well as constitutions and social contracts, besides the articles in the *Encyclopedia Britannica,* see Richard Tuck, *Natural Rights Theories Origins and Development* (Cambridge, 1979) and Richard McKeon, "Philosophy and History in the Development of Human Rights," in *Ethics and Social justice,* ed. H. E. Kiefer and M. Munitz (State University of New York Press, 1968).
11. Universal Declaration of Human Rights, 1948, Preamble.
12. See Jack Donnelly, *In Starch of the Unicorn: The jurisprudence and Policies of the Right to Development.* These issues have been debated extensively in the human rights literature. Most of the arguments are well summarized in two articles by Philip Alston: "The Right to Development at the International Level," in *Workshop of the Hague Academy of International Law,* October 1979, and "Making Space for New

Human Rights: The Case of the Right to Development," in *Human Rights Yearbook Vol.* 1, 1988. Also see Amartya Sen's latest book *Development as Freedom,* Chapter 12 (Alfred A. Knopf, 1999).

13. According to Philip Alston, "The Reagan Administration's outright refusal to accept the validity of the idea of collective human rights flows quite logically from its conception of human rights which is based not on the Universal Declaration of Human Rights but on the American Declaration of Independence" *(ibid Human Rights Yearbook* Vol. 1, 1988). Stephen Marks, in a well-reasoned paper, "From the 'Single Confused Page' to the Decalogue of Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution," shows that the form and the content of the Universal Declaration of Human Rights were very much influenced by the French Revolution.

14. See Charles Taylor, "Human Rights: The Legal Culture," in *Philosophical Foundation of Human Rights* (Paris: UNESCO, 1986), and Vienna Van Dyke, "Human Rights, Ethnicity and Discrimination," in *Contribution in Ethnic Studies,* 1985.

15. Philip Alston put it categorically: "It is a matter of human decision what kinds of units are accepted as right-and-duty bearing units and what kinds of rights they shall have." Alston, *op. cit.*. footnote 10.

16. Amartya Sen, *Development as Freedom,* p. 230.

17. Amartya Sen, *Ibid.*

18. Amartya *Sen, ibid,* p. 228.

19. Georges Ali-Saab (The Hague Academy of International Law), *Tht Right to Development at the International Level* (The Hague, 1975).

20. See Martha Nussbaum, "Capabilities, Human Rights and the Universal Declaration," in *The Future of Human Rights,* ed. Burns H. Weston and Stephen P. Marks (New York: Transnational Publishers, 1999).

21. Amartya Sen. *Development as Freedomom,* p. 16.

DEVELOPMENT AND HUMAN RIGHTS

Danilo Turk*

A. Introduction[1]

A substantial amount of complexity and uncertainty surrounds the topic of human rights and economic development. While it is generally accepted that a linkage exists between human rights and development, it is less clear whether the nature and the exact content of that linkage can actually be defined in terms of a discourse about human rights.

One way of dealing with this problem is expressed in the notion of the "right to development," which has been extensively discussed in the UN in 1980s and which was mentioned in resolutions adopted by various UN bodies in the context of preparation of the World Conference on Human Rights. It was made the subject of a UN General Assembly declaration - the "Declaration on the Right to Development" - on the implementation of which the UN Commission on Human Rights established a working group in March 1993. The essence of the idea of the right to development is in the attempt to link the major requirements of economic progress to the paradigm of human rights: development is defined in the terminology of rights – that is, as a process requiring respect for human rights and leading to *full enjoyment* (as opposed to mere recognition or respect) of all human rights. This approach raises a series of difficult conceptual and political issues that have occupied much of the time of the UN bodies that dealt with the "right to development."

The present chapter, however, does not deal with these issues but chooses a different approach. The idea here is to explore certain *selected* issues that are of obvious relevance to both human rights and economic development. We do not deal with a variety of conceptual issues that necessarily arise in the debates on the right to development.

First, however, a brief comment about the conceptual point of departure in this chapter is in order. It is the key notion of human dignity. Article 1 of the Universal Declaration of Human Rights starts with the words: " All human beings are born free and equal in dignity and rights". The concept of human dignity is invoked also in the preamble to both Covenants on Human Rights and in a number of their operative provisions.

This very abstract and general, but also very fundamental, concept has normative significance in the field of human rights, at least insofar as it suggests that all forms of deprivation of human dignity - either in the civil and political field or in the economic, social and cultural field - are unacceptable. Moreover, it suggests that human rights are not given by an authority and may therefore not be taken away by it.[2]

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* Ambassador, Permanent Representative of Slovenia in the UN

Protection of human dignity need not always require legal action and assertion of rights. But all human rights, including economic, social and cultural rights, can be traced back to this basic value, which should be seen as the common denominator in the interpretation and application of all human rights. Denial of human dignity may, and indeed does, take place through denial of both civil and political rights and economic, social and cultural rights in situations characterized by massive poverty and absence of development. Conversely, respect for all these rights and, where necessary, positive action for their realization, are the necessary elements for guaranteeing human dignity. Giving a general preference to this or that group of rights may become a way of departing from their very basis. Equal attention should therefore be paid to both groups of human rights. In the rest of this chapter we shall deal, as indicated above, with various development-related *policy questions,* that have a significant bearing upon the realization of human rights and hence, human dignity.

B. Selected Policy Questions Related to Development and Human Rights

The fact that the major aspects of the processes of economic development have become internationalized can be accepted without much debate. This fact is particularly relevant to societies within economically weaker countries which depend on the international economic environment and, as a result of their weakness, on the decision making processes of the major international economic agents including the international financial agencies, notably the World Bank and the International Monetary Fund. In many cases, this dependence has considerably limited the sovereignty of the state and, thus, its ability to pursue the optimal policies in the field of human rights.

1. Economic Adjustment and Human Rights

In recent years, many of the policy questions that have a bearing on the realization of human rights have revolved around the economic structural adjustment policies pursued by the IMF and the World Bank. The relative decline of national sovereignty and domestic control over local economic processes and resources and the corresponding growth in the direct influence of the international financial agencies on domestic policy decisions are reflected in the adjustment process, which directly affects economic, social and cultural rights and indirectly, all other human rights. A range of authors have found problems with the use of the adjustment process as a means of externally directing the national economic development process. As author Graham Hancock argues,

adjustment loans represent the desire of the Bank not only to be an important source of finance, but also to play a central role in the decision-making processes in developing countries ... Governments which receive SALs [structural adjustment loans] are rewarded by being allowed to spend the money they receive on just about anything they like.[3]

This latter point also raises questions, for unlike project specific funding from donors and all that entails (design, participation, administration, follow-up, and analysis.), adjustment loans entail strong conditionalities but with only limited control exerted on decision makers as to how and where

they spend the funds. This has led some analysts to assert that adjustment is more about substantiating Bank and Fund dominance, and doing this by financially backing the *status quo,* than about promoting human development.[4]

Opening up a national economy may be seen as necessary for certain economic processes to flourish, and a certain degree of openness is unavoidable and indeed desirable. However, the liberalization process also tends to bring about a reduction of the regulatory capacity of states, a relative decline in national independence, and the subjection of certain national economic processes to the conditioning factors of the global marketplaces.[5] Each of these tendencies, of course, can reduce the capacity of national or local government to create the conditions necessary for the realization of economic, social and cultural rights, and the often drastic impact of adjustment, particularly on the lives of vulnerable groups, has led some countries to ponder whether the option of delinking from the international economy might be more advantageous an approach toward the fulfillment of human rights. Efforts at delinking, however, have usually proved fruitless and wrong.[6]

Perhaps in part because of their financial orientation, the appraisals of the Bank and Fund of the successes of these adjustment processes frequently differ markedly from the relative lack of achievement seen by a majority of other analysts. One author, for instance, encapsulating the sentiments of much of the literature, noted in 1991:

The economic benefits of adjustment in most African cases have been modest or lacking. Few reform programs have achieved the targeted growth rate or increase in per capita agricultural production, or improved current accounts balance and external debt position.[7]

Interestingly, examining the same region, the IMF offers a wholly different interpretation of the success of adjustment:

[F]or those countries that have experienced long-term low growth, with continuous deterioration of per capita income, such as in sub-Saharan Africa, a recent review by the IMF shows that where structural programs have been implemented unambiguously, growth performance has improved.[8]

These two examples illustrate a much wider tendency toward highly conflicting interpretation of the relative achievements of the adjustment process. This ongoing disparity of views could, however, decline as the policy reformulation taken by IMF and the World Bank vis-a-vis adjustment begin to take hold. While, rhetorically, the areas of complementarily between the approaches advocated by the Bank and the Fund and the manner in which the United Nations views economic, social and cultural rights are rapidly increasing, the practical realization of these rights is the major issue.

2. The Question of Income Distribution

Distribution of income is among the most difficult issues of any policy of development. While it is clear that generation of income represents the most important aspect of an effort to increase resources for satisfaction of human needs and for the realization of economic, social and cultural rights, it is equally true that inadequate distribution of income can make such an effort much less successful. The

international forums are generally cautious in approaching the question of income distribution and refrain from giving specific policy advice. The World Bank, for its part, cautions against income redistribution, arguing that it "can be damaging, and the benefits in any case often go to the less needy."[9] The IMF Executive Board has stated that" questions of income distribution should not be part of Fund conditionality."[10]

The important question remains whether there is - as authors claim - an empirical correlation between a worsening balance in the distribution of income and the undertaking of adjustment measures. Although statistics on income distribution are currently available only for slightly more than a quarter of all states, it is well established that income declined during the 1980s in Latin America and Sub-Saharan Africa. Furthermore, income distribution within states remains distressingly inequitable. Even in the industrialized countries where forms of comparatively progressive taxation and high levels of economic development and consumption are the norm, the wealthiest 20 percent of the population continues to receive nearly seven times as much income as the poorest 20 percent.[11] Conditions of income distribution in much of the developing world are substantially worse, such that countries as diverse as Botswana, Brazil, Colombia, Costa Rica, Cote d'Ivoire, Guatemala, Jamaica, Malaysia, Panama, Peru, Sri Lanka, Thailand, and Venezuela maintain economic systems where the richest 20 percent of the population possess more than a 50 percent share of total household income (and in some cases more than 60 percent), while the corresponding share of the poorest 20 percent of families hovers around 4 percent. These figures indicate that measures to rectify this income injustice are clearly required.[12] Adequately carrying out poverty-reduction programs and fulfilling economic, social and cultural rights throughout society would be very difficult without also redressing current income imbalances.

3. Growth Is Essential, but Is It a Panacea?

It is clear that questions of income distribution become easier in a situation of sustained economic growth. The current global embrace of the market and concomitant economic growth as a panacea for all of the world's economic dilemmas is manifested not only in measures of structural adjustment, but also in contemporary themes such as the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), the creation of expanded free trade zones, and a general open-armed approach toward opening up national economies to international interests. These new realities cannot be ignored in the context of human rights, for the increased reliance on economic growth in and of itself as a guarantor of economic, social and cultural rights is being ardently advocated by proponents of exclusively market-based approaches toward development. A "trickle down approach" that relies on growth as the satisfactory means for establishment of conditions for the realization of human rights would be to simplistic. Although it must be recognized that growth is necessary for the success of policies aimed at the realization of economic, social and cultural rights, and for realization of human rights in general, a growth-oriented policy in itself is not enough.

There appears to be no assurance whatsoever that economic growth, fuelled by an open market will

necessarily held to poverty alleviation or an improvement in the de facto fulfillment of socio-economic rights. For instance, despite record levels of economic growth in the Western world during the past fifteen years, more than one hundred million people in industrialized countries still live below the poverty line, a problem particularly acute for the young, single-parent families and ethnic minorities.[13] UNICEF has emphasized that the growing consensus concerning the importance of market economic policies should be accompanied by a corresponding consensus on the responsibility of governments to guarantee basic investments in people.[14] Policymakers should heed the statement of Amartya Sen, perhaps more pertinent now than ever:

> The limitations of the market mechanism in distributing health care and education have, in fact, been discussed in economic theory for a long time (e.g. Samuelson and Kenneth Arrow). But it is easy to lose sight of these problems in the current euphoria over the market mechanism. The market can indeed be a great ally of individual freedom in many fields, but the freedom to live long without succumbing to preventable morbidity and mortality calls for a broader class of social instruments.[15]

Recommendations

1. States

The effort to meet human needs through the development process should entail sustained action for the realization of economic, social and cultural rights as stated in the ICESCR as well as the ICCPR.

a. For a jurist, the most basic recommendation to states is that states that have not yet done so should ratify the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and other relevant, international instruments. States should adopt corresponding legislation, policies, and programs, and strengthen the process of implementation. In this connection, they should give special attention to the Limburger Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[16] and, more generally, to strengthening of these rights in the development process.

b. States parties to the ICESCR should attach particular importance to preparing their reports in accordance with articles, 16 and 17 of the Covenant, taking into account the revised general guidelines on reporting and the general comments prepared by the Committee on Economic, Social and Cultural Rights.

   The reporting obligation should be utilized as a process for assisting in the realization of economic, social and cultural rights. Its various functions and phases, such as initial review, monitoring, policy formulation, public scrutiny, evaluation, identification of problems and exchange of information, should be pursued in a systematic and coherent manner. Preparation of reports should be timely and used as a means for streamlining policies related to the realization of economic, social and cultural rights.

c. States should encourage the widest possible participation by citizens, community-based

organizations and non-governmental organizations in the process of preparing and discussing the reports. The reports should be widely publicized nationally, with a view both to promoting national dialogue and to allowing citizens to examine them. Excerpts from states' reports should be disseminated through the mass media to facilitate greater public involvement in the reporting process.

The reports should provide a coherent picture of the status of the realization of economic, social and cultural rights, in each reporting state. In this context, particular attention should be paid to the development and analysis of coherent sets of economic and social indicators, of the establishment of "benchmarks" of progress, and of appropriate methods of legislative and policy review.

The emerging principle that there are minimum core obligations concerning economic, social and cultural rights, and that these should be identified, should be promoted in the reporting process with the view to ensuring the satisfaction of basic levels of achievement of each of the rights found in ICESCR.

d. States should establish, whenever possible, mechanisms making possible judicial or administrative review of the state's fulfillment of its obligations concerning economic, social and cultural rights. The identification of core obligations of states regarding these rights should facilitate justifiability of those economic, social and cultural rights that cannot, as yet, be considered justifiable in all states.

e. Each state should adapt all relevant policies, legislation and programs, as appropriate, to reflect its international obligations concerning economic, social and cultural rights. Pertinent ministries should develop specific programs placing explicit emphasis upon strategies, methods and means for realizing these rights.

f. In accordance with the obligations arising from the Covenant and from other instruments in the field of economic, social and cultural rights, states should analyze patterns of public spending. This should include an in-depth consideration of the four relevant ratios suggested in the *Human Development Report* (1991)[17] the public expenditure ratio, the social allocation ratio, the social priority ratio and the human expenditure ratio. Efforts should be made by states to divert 5 percent of national income to human priory concerns, that is to say, to achieve a rate of 5 percent within the human expenditure ratio. Public spending must be consistent with the degree to which economic, social and cultural rights remain unrealized in a given country.

g. States should take practical measures aimed at reducing income disparity as a fundamental means for ensuring society-wide enjoyment of economic, social and cultural rights. Sustained and dedicated efforts are necessary to distribute more fairly both land and wealth within a designated society, in particular to benefit disadvantaged groups. States should note, in this connection, the clear correlation seen by some analysts between the enjoyment of economic, social arid cultural rights and systems that seek to ensure an equitable disruption of income.

States should try to increase the percentage of public revenues derived from measures of taxation (currently, some 10 percent in developing countries and more than 30 percent in industrialized countries) to the extent that this will promote the realization of economic, social and cultural rights.

In pursuit of the policy objectives mentioned in the preceding paragraphs, states should pay particular attention to the most disadvantaged groups and the extremely poor. They should bear in mind that extreme poverty leads to the exclusion of the affected persons and to their consequent inability fully to realize their human rights, including civil and political rights. States should develop strategies explicitly aimed at reducing and ultimately eradicating extreme poverty. Such strategies should be the subject of wide public debate and be implemented at all levels including, in particular, the local level.

h. In the context of economic adjustment or stabilization measures, whether carried out alone or in cooperation with the international financial institutions, states should ensure that socially disadvantaged groups do not suffer disproportionately from the measures employed. The human impact of adjustment should be subject to systematic review. Targeted subsidies, social safety nets, and other compensatory measures for poverty alleviation and eradication should be - applied.

i. International cooperation and assistance represent an important potential for strengthening the policies and programs of the developing countries aimed at fuller realization of economic, social and cultural rights. It is necessary to examine existing policies of development assistance continuously with a view to expanding the proportion of development assistance committed to human priority areas and social sectors. *The Human Development Report* (1990) offers particularly useful guidance in that regard. In the context of further evaluation of development assistance policies, consideration should be given to the need for debt relief, where necessary, and for debt reductions for developing countries based, inter alia, on the global commitment to the realization of human rights.

2. International Financial Institutions

a. World Bank

1. In general, the World Bank should strengthen and further develop its policies relating to poverty reduction and those intended to address the social aspects of adjustment. In this context, it should be sensitive to the pronouncements of the human rights bodies of the United Nations and should gradually incorporate human rights criteria in its work at all stages, including project and policy lending and preparation of policy guidelines, as well as in project and policy appraisal, monitoring and assessment.

2. A study concerning the possible methods of incorporating human rights criteria into the work of the World Bank should be undertaken, either by the Commission on Human Rights or by the Commission and the World Bank cooperatively.

3. The participation of persons and groups particularly - affected by the projects and policies supported by the World Bank is of particular importance, both for the success of those policies and projects and for the realization of human rights. Participation should be facilitated throughout all project cycles. In this context, the role of local and community based non-governmental organizations is of particular importance, as is the access of the people concerned to legal measures and to decision makers. Special research should be undertaken with a view to ascertaining the actual contribution of the various forms and methods of participation to the overall success of the project or policy concerned. Activities aiming at strengthened participation of NGOs in the framework of projects and policies supported by the World Bank should be developed in a manner that would provide for the necessary experimentation.
4. The World Bank and the borrowers should take the necessary measures to inform adequately the people to be affected by the Bank-supported projects and policies. The public must be given an appropriate opportunity to provide its own views before final decisions are made: modifications to plans should remain a possibility at any time. The World Bank should also develop various further methods of consultation with non-governmental organizations at the international level.
5. Independent persons and groups should undertake auditing and evaluation of the impact of programs and policies on economic, social and cultural rights and human rights in general.
6. Special measures should be taken to ensure that policies, programs, and projects supported by the Bank do not adversely affect these rights. To this end, the use of targeted subsidies and the development of carefully designed social safety nets should be given priority. Furthermore, policies concerning user charges to pay for public services should be reviewed. When user charges are employed or encouraged, caution should be exercised that they do not inhibit the enjoyment of economic, social and cultural rights. Policy measures should be selected and an appropriate policy mix should be developed so as to minimize the adverse effects on economic, social and cultural rights while retaining the economic viability of the policies, programs, and projects concerned.
7. Experience has shown that certain major projects often have a disproportionately high level of adverse effects on the environment, as well as social and human rights. In general, instead of certain large-scale prestige projects, the Bank should emphasize small-scale, environmentally and socially beneficial projects, with a view to encouraging long-term and sustainable economic growth. It should pay particular attention, in this connection, to ensuring the effective participation and the appropriate economic role of women in both the development and the execution of such projects.
8. Cooperation between the World Bank and the human rights organs of the United Nations should be strengthened and should include the participation of World Bank representatives at the meetings of the human rights organs concerned with the realization of economic, social and cultural rights and, as appropriate, human rights in general. The World Bank should consider, together with the IMF and the Commission on Human Rights, the possibility of organizing an

expert seminar on the role of the financial institutions in the realization of economic, social and cultural rights.

b. International Monetary Fund

1. The IMF should endeavor to assure that relevant social concerns are adequately addressed at the design and subsequent stages of the structural adjustment process. Consultations with the other United Nations agencies concerned with social matters, relevant national ministries and representatives of citizens should be carried out at the earliest possible stage of the adjustment process in order to mitigate any preventable negative social impact of adjustment.

   The Fund's "Policy Framework Papers" represent, in many case, the major policy documents of countries undergoing the process of adjustment. Therefore, concerns related to the realization of economic, social and cultural rights must be adequately dealt with in these Papers.

2. In the process of designing and putting into effect the IMF-supported policies of stabilization and adjustment, governments should pay particular attention to the issues of income distribution with a view to decreasing the growing disparities. Furthermore, the fiscal policies of states should evolve in a manner that would be beneficial to the realization of economic, social and cultural rights. The IMF should assist and stimulate talks aimed at developing their policies in that direction.

3. The existence of country-specific social safety nets and targeted subsidies within states should be viewed, inter alia, against their existing human rights obligations. Such safety nets and subsidies should be guaranteed at such a duration and level that the core minimum entitlements of all citizens in terms of economic, social and cultural rights are met. Subsidies will remain an important government tool for facilitating the realization of these rights.

4. Cooperation between the IMF and the human rights organs of the United Nations should be strengthened and should include the participation of IMF representatives at the meetings of the human rights organs concerned with economic, social and cultural rights. The IMF should consider, together with the World Bank and the Commission on Human Rights, the possibility of organizing an expert seminar on the role of the financial institutions in realizing these rights.

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1. This chapter was prepared on the basis of author's work as the Special Rapporteur (appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Realization of Economics, Social and Cultural Rights); the pertinent reports appear in UN documents E/CN.4 / Sub.2/ 1989/19; E/CN4 / Sub.2/1990/19; E/CN4 / Sub.2/1991/17 and E/CN4 / Sub.2 / 1992/16. This chapter summarizes some of the main proposals contained in those reports. Readers are advised to consult the mentioned reports for a more detailed analysis.

2. Oscar Schachter, "Human Dignity as a Normative Concept". 77 *AZIL*, 848 (editorial comment).

3. Graham Hancock, *Lords of Poverty*, (London, Mandarin, 1991) at 56.

4. James Hovard, *The World Bank vs the World's Poor*, Policy Analysis No. 92, Cato Institute, Washington, D.C., 1987. More recently a variation of such a critique was expressed by Jeffrey Sachs in his opinion about economic reforms in Russia where, according 'to Sachs, the World Bank "failed in its most important task to help finance badly needed social services." See Jeffrey Sachs, "The Reformer's Tragedy," *New York Times*, January 23,1994.

5. Jorge Schvarzer, "Opening Up the Economy, Debt and Crisis: the Inescapable Relationship," in *The IMF and the South*, (London, Zed Books, 1991) pp. 69-79.

6. Azzam Mahjoub, ed., *Adjustment or Delinking: The African Experience*, (London, Zed Books, 1990).

7. Richard Sandbrook, "Economic Crisis, Structural Adjustment and the State in Sub-Saharan Africa," in *The IMF and the South*, (London, Zed Press, 1991), p. 95.

8. Written statement submitted by the International Monetary Fund, September 9, 1991, (E/CN.4/Sub.2/1991/ 63).

9. World Bank, *World Development Report*, 1991, p. 10.

10. IMF, *Annual Report*, 1990, at 41.

11. UNDP, *Human Development Report*, 1991, pp. 24-25.

12. World Bank, *World Development Report*, 1991, Table 30: "Income Distribution and ICP Estimates of GDP," pp. 262-63.

13. UNDP, *Human Development Report*, 1991, p. 26.

14. UNICEF, *The State of the World's Children*, 1992, p. 24.

15. Amartya Sen, "Individual Freedom as a Social Commitment," *New York Review of Books*, June 14, 1990, at 53.

16. E/CN.4/Sub.2/1991/17.

17. UNDP, *Human Development Report*, 1991, Oxford University Press, New York, 1991, pp. 39-53.

THE DEVELOPMENT OF THE RIGHT TO DEVELOPMENT

Upendra Baxi*

The Adoption of the Declaration on the Right to Development

A landmark in the enunciation of new human rights occurred when, on 4 December 1986, the General Assembly adopted the Declaration on the Right to Development.[1] The right to development had been in gestation since at least 1981, when the Commission on Human Rights established a working group of 15 governmental experts which had also received very substantial inputs from non-governmental organizations.[2] As P. Alston[3] says, of all the various new rights which have been proposed, the right to development has attracted the greatest scholarly and diplomatic attention. However, the task was hardly finished with the adoption of the Declaration. On the agenda of the states and peoples of the world there still remains the major task of finding concrete ways and means to develop the right to development.

This task was only inaugurated by the Declaration because consensus among states on the nature and scope of the right to development is necessarily abstract. Consensus offers a rich variety of starting points, nationally, regionally and internationally for a new quest for human rights. Already the General Assembly has expressed the desire that governments, specialized agencies of the United Nations and non-governmental organizations comment on the text of the Declaration, including practical proposals and ideas which could contribute substantively to the further enhancement, and implementation of the Declaration.[4] All this suggests that the right to development is to be taken seriously and summons all of us to 'stand up and be counted'. For cynicism and indifference, always the well-cultivated enemies of human rights, certainly have a potential for converting this precious Declaration into a lifeless text.

The Core Conceptions

The Preamble to the Declaration indicates that it is a lineal descend ant of the Universal Declaration of Human Rights, the two International Covenants and all other subsequent enunciations of human rights, such as those on the prevention of racial discrimination, maintenance of peace or self determination. The conception of the right to development embraces the following crucial notions:

- the right of peoples to self-determination, meaning the right to' determine freely their political status and to pursue their economic, social and cultural development;
- their right to full and complete sovereignty over all their wealth and natural resources;
- elimination of massive and flagrant violations of the human rights of peoples and individuals;[5]
- all human rights and fundamental freedoms are indivisible and interdependent, and equal attention should be paid to the promotion and protection of all rights, civil political, economic, social and

* Vice-Chancellor, University of Delhi, India.

cultural. Promotion of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms;

- international peace and security are essential elements for the realization of the right to development;
- the human person is the central subject of the development process and development policy should therefore make the human being the main participant and beneficiary of development;
- equality of opportunity for development is a prerogative both " of nations and of individuals who make up nations and, hence, resources released through disarmament should be devoted to the economic and social development and well-being of all, peoples and, in particular, those of the developing countries;
- efforts at the international level to promote and protect human rights and fundamental freedoms should be accompanied by efforts to establish a new international economic order.

When the right to development is declared an inalienable human right, we must recall that it is so proclaimed in the light of the foregoing value premises. The right to development is, in effect, the right of all human persons everywhere, and of humanity as a whole, to realize their potential. For the first time in recent history, we move from conception of rights as resources for individuals against state power to the conception of human rights as species rights as well.[6] And therefore it is natural that rights should apply not just to states but to international organizations as well, whose major historical role is to enunciate the new future of humankind through the reconstruction of a human person whose loyalties are global or planetary. Transcendence from state sovereignty, which concerns mapping new trajectories for an alternative human future, can only be achieved by retooling the notions of human rights and fundamental freedoms. It is for this reason that the Preamble lays particular stress on the centrality of the human person.

Underlying the Declaration and animating all its formulations is a central duty of all human beings, the performance of which alone justifies their having the inalienable right to development. This cardinal duty is to work towards a world order which is free of massive and flagrant violations of human rights and fundamental freedoms and to contribute to human survival and peace. The Declaration on the Right to Development is, furthermore, an explicit charter of duties for human beings everywhere to struggle to create and maintain conditions where authentic human, social and civilization development is possible. Further concretization of this duty is an ineluctable aspect of the development of the right to development.

Towards Participation and Responsibility

The *leitmotiv* of the Declaration is that the human person is the central subject of development and therefore an active participant and beneficiary of the right to development: states have the right and duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals (Article 2/3), but the performance, of this duty requires solicitude regarding active, free and meaningful, participation of all individuals. In other words, appropriate development stands identified with participatory development. The kind of

development in which a few people take all developmental decisions, through the idiom of paternalism (whether of the old liberal variety or of its newer and sinister form reflected in scientific or technological paternalism), loses its legitimacy through the notions of appropriate development. Development policies which treat people as objects of development and not as subjects, are clearly not appropriate. Human rights as conceived by the Declaration are not merely liberties which individuals may exercise at their will. They now betoken a responsibility to participate in development decisions, at both the national and inter national levels.

This right is accompanied by a responsibility on all human beings for development. That responsibility requires respect for human rights and fundamental freedoms as well as duties to promote and protect an appropriate political, social and economic order for development. A whole new ethic is reinforced when Article 9(2) further declares :

Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

The parameters of participation are thus clearly indicated by Article 2. So is its immanent logic which consists, in the felicitous words of J.R. Lucas, in 'the abandonment of the [...] one-dimensional concept of the public interest of which the Government is the best judge'.[7] But this repudiation is not enough. If multidimensional processes of, determination concerning development are to be initiated and institutionalized, participation has to be conceptualized as the diffusion " of public power and authority. What is known as decentralization of power is usually inhibited by the notion that it entails decentring of power. This, of course, is not so. After all, some centres of power will finally and formally have to adopt, announce and administer public decisions.

The right to participation may take both reactive and proactive forms. In its reactive form, participation consists in the collective articulation of the response to development policies. In its proactive form, participation invokes the responsibility of the people in the initiation of the articulation of development policies. In the first form, governments propose and citizens respond; in the second, citizens propose and governments respond. In the forms, participatory rights assume a logic of collaboration for development. The final aim of participatory endeavors is to identify and strive towards the goals of appropriate development, and this requires the creation and maintenance of spaces for dialogue in civil society and state structures. This, in turn, entails a vigorous tolerance of dissent on the part of individuals, groups and states.

The rights to freedom of speech and expression, and of the mass media, have therefore to be recognized as prerequisites of the right to participation. Repression of these rights negates participatory rights: at their very source. At the same time, the underlying ethic of participation forbids the crime of silence in the face of massive and flagrant violations of human rights, at home and abroad, on the part of individuals and groups. Strange though it may seem to some, at a purely analytical level, freedom of speech and expression entails a human rights responsibility for the articulation of issues of public policy. The notion that the right to speak also includes the right not to speak is fatal to the

logic of participatory rights, except in circumstances where the right to silence is an aspect of human rights, as in the case of the right not to incriminate oneself.

Similarly, the right to participation imposes duties going beyond the traditional duties of forbearance or non-interference with the rights to freedom of the press, expression and speech. The duties are now expanded. First, the right to participation entails a duty not to criminalize speech; except in the rarest of rare situations, speaking, writing and other forms of communication should not be offences punishable by criminal law. Second, the right to free speech must entail a duty to hear, listen and respond. Neither reactive nor proactive forms of the right to participation hold any prospect of impact with out the postulation of such a duty. Third, the right to freedom of speech and expression, as a participatory right, must extend effectively not just to individuals but to collectivities. Freedom of speech and expression should also extend to the right of association and activities congenial to associations, provided they respect the parameters of Article 2 of the Declaration. Fourth, the rights to speech must entail fair access to the institutionalized media of expression (whether state-owned or corporate), especially the mass media which alone can make participation in developmental decisions and policies meaningful. Fifth, participatory rights require access to relevant information in languages (both 'natural' and 'artificial', that is the specialized languages of sciences, including social sciences, and technologies). Privatization of information and secrecy defeat, at the very outset, the purposes of participatory rights. Sixth, participatory rights entail costs to governments, groups and individuals. The costs are those of time, money, effort and related resources. National-level planning must conceptualize this problem of costs of participation and provide for their just distribution.

Participation, above all, is participation in decision making. All these, and many more, aspects of participation as a human right need further thought and action if we are at all to develop the right to development.[8]

Popular Participation

The Declaration refers to the duties of states, in Article 8(2), ' to encourage... popular participation in all spheres as an important factor in development and in the full realization of all human rights'.

In a sense, popular participation is an aspect of the right to participation assured by the Declaration as a whole. As Article 9(1) declares, all aspects of the right to development are indivisible and interdependent. At the same time, there is merit in addressing the right to popular participation as a discrete, though related, aspect of the right to development. If we attend closely to the formulation in Article 8(2), we find that popular participation applies to all spheres and not just to developmental decisions. It would not be too far wrong to assume that what is intended by this provision is a reference to popular participation in governance. The article declares, in effect, that governance must be, based on the consent of the governed. The means and modes of articulation of the consent of the governed have varied in human history but, as we read the Declaration as a whole, it is clear that its conception of appropriate development is impossible and even inconceivable to attain without the security of the, principle of the consent of the governed.

Whatever its specific structuring may be, popular participation in governance entails some recourse to elective processes for public offices. These may also entail the rights of referendum and recall.

Integrity of elective processes also forms a vital aspect of the right to popular participation, as does the idea that constitutions may be adopted and amended through the processes of popular participation because constitutions provide the very title to legitimate governance.

The right to popular participation, of course, extends further to suggest that legal and extralegal repression of acts of participation in all spheres of life is suspect at the bar of the right to development. Justification of such repression is, indeed, problematic, especially when it is urged in furtherance of participation and development rights. Criminal and penal policies must respect rights to popular participation.

The agenda of the development of the right to development thus extends to a close scrutiny of national legal systems in their structuring of electoral processes and of criminal and preventive legislation, including law enforcement policies and personnel which, in turn, structure legal and extralegal repression. A critical review of the theory and practice of legislation is thus urgently called for. Fortunately, as regards the former, a number of international guidelines exist, especially following the valuable work of the UN Committee, on Prevention of Crime and Treatment of Offenders.

SLAPPS: Corporate Governance and Public/Popular Participation'

A yet more pressing issue on the agenda of development of the right to development, in this era of headlong and heedless globalization, relates to ways devised by national and transnational corporate capital to impose regimes of silence on activists seeking to implement the values enshrined in the Declaration.

A crucial question, of course, is whether the Declaration extends to non-state actors. There is ample scope for its being read as so extending. The dominant ideology of globalization, expressed through structural adjustment programmes, ordains that markets or the economy are a better vehicle of development than the polity or the state. Assuming this to be the case, there is no reason why the right of peoples regarded as subjects and not objects cannot be extended to non-state entities, directing development under the auspices of globalization processes. At a more technical level of analysis concerning the issue whether non-state entities are subjects of international law, one might at least be able to say that they can be construed as objects of international law, without necessarily exposing the endangered species of positivistic international lawyers or publicists to any furthere risk!

Even if this latter aspect may still be said to be problematical, it needs some re-examination in the light of existing international human rights law and jurisprudence. A brief excursus on SLAPPS will, perhaps, show why. SLAPPS stands for 'Strategic Lawsuits Against Public Participation'. The term, invented by G. Pring and P. Cannan,[9] represents use of national law to 'sue' activists or people into silence. The strategy involves the use of existing legal structures and processes, especially by multinational / transnational corporations, to instigate very heavy libel suits against active citizens' groups, regardless of whether they violate the First Amendment type of human rights.[10] The processes of SLAPPS tend to impose onerous costs on relatively resourceless activist groups in the South: resourceless in the market sense of staying power to face the might or the wrath of legal processes and structures. Although there have been instances of, 'reverse' SLAPPing by some activist groups, present studies show that SLAPPS indicates the tendency of global capital to thwart the nascent right

of peoples to regard themselves as subjects of development.

The Declaration orients state legal systems towards a programme of law reform which would prevent unconscious excesses of corporate rights militating. If they do (and I believe this to be the case) under positive international law, there will, of course, be scope for, enforcing the responsibility necessarily associated with rights of popular/ public participation. However, these responsibilities of social activists have only to be identified as demonstrably reckless and malicious to be deprived of all sense of serving the logic of participatory rights enunciated in the Declaration.

In other words, the development of the right to development ought not to burden social activists disproportionately, except in situations (in common law terms) where malice *de jure* and *de facto* is demon "strably proved. The taming of SLAPPS is thus justified, given the incomparable levels of resources commanded by global capital which until now make it 'convenient' for Ken Saro Wiwa to be executed. Any activist, worthy of the name knows the power of global capital, to organize even judicial murders, when extrajudicial ones tend to be relatively inefficient in terms of market rationality. That the latter remain the more favoured strategies of global capital does not detract from the organized prowess of the former.

If participatory rights are to prefigure a new human future; or even a new human rights future, the emergent phenomenon of . SLAPPS (a close cousin of SAPS: Structural Adjustment Programmes) invites a thoroughgoing regime of discipline and punishment. The Declaration must be so read, if it is not to be regarded as nothing more than a scrap of paper.

Removal of Obstacles to Development

Article 6(3) calls on states to take steps to eliminate obstacles to development resulting from the failure to observe civil and political rights, as well as economic, social and cultural rights. The nature and the context of these rights are crystallized in the International Covenants and the various related human rights instruments adopted under the auspices of the United Nations.

The notion of obstacles to human rights and fundamental freedoms is a momentous innovation. States are charged with a duty to remove these obstacles. Clearly, this assumes that the state itself will observe, rights and freedoms, as otherwise it would itself constitute an obstacle to be removed by the people. When a particular state structure or operation becomes an obstacle arising from a violation of human rights and fundamental freedoms, the right to development must indicate, if we read the Declaration as a whole, two component rights: the human right to reform state structures and processes and the human right to transform them where necessary. It would be too much to read the right to rebellion or revolution into any human rights codification. The foregoing two component rights fall far short of the right to revolution and it is this feature which seems to have commended itself to the community of states when it adopted the Declaration with such an overwhelming majority at the General Assembly.

But obstacles to development also arise within civil society. It is here that much work awaits us, particularly in the developing societies, though by no means only there. Some deep-seated tendencies towards violation of the rights of indigenous ethnic groups, other traditionally disadvantaged social groups and women operate in civil society. When the state and the law assume a relatively just profile,

the requisite militancy in action against these forms of violation is difficult to achieve. In this area, the violators of rights are not so much agents of state power as holders of social status and economic power. The idea of obstacles to rights and the call for their removal is fascinating in that it draws our attention to the hydra headed monster of human rights violation which resides not just in states but in human collectivities inscribed in the very order which constitutes society.

What strategies should be adopted to empower the disadvantaged in any endeavour to end violation of their rights and freedoms by social collectivities is an exceedingly important question, the answer to which is sometimes a danger to the wider struggle for the achievement of human rights. Certainly, empowerment strategies must not be such as to deprive the adversary social groups of their rights; this is clearly prohibited by the Declaration as a whole. Nor could they be such, either for the depressed groups or the hegemonic ones which deny them the structure of opportunities provided by the participatory rights, even when the latter tend to overprotect the numerical and vocal majorities against minorities. If the historically disadvantaged groups have to be empowered to fight unconscionable domination, repression and exploitation within the framework of the Declaration, considerable innovative thought and action are required, especially in terms of avoiding what Professor C. Ake has recently termed, though in an altogether different context, the democratization of disempowerment.[11]

This is linked with the problem of revisiting the idea that progress in the achievement of human rights is marked by incremental disempowerment of the state in relation to individuals and groups, Reduction and elimination of socially and culturally secure despotic domination by certain groups over others, however, require suitable strategies of empowering the state) without at the same time creating a new Leviathan. This remains the most formidable challenge to human rights thought and theory, where a large number of cognitive and epistemic obstacles also need to be overcome!

Article 8(1) of the Declaration does refer to carrying out, obviously in a participative manner, economic and social reforms, with a view to eradicating all social injustices. This formulation, read with Article .6(3), now at least helps us to identify obstacles to human rights as a form of social injustice. But removal of injustices has to be itself a just process. And herein lies the new problematic of the development of the right to development.

Women and the Right to Development

From a feminist point of view, the Declaration may seem somewhat unsatisfactory. Only Article 6(1) and Article 8(1) specifically refer to women. The former reinforces the well-accepted prohibition of discrimination based on sex, and the latter, importantly, prescribes that effective measures should be undertaken to ensure that women have an active role in the development process. It must be conceded that these formulations, put together, do not fully respond to the emerging feminist critiques of rights, state and society. The Declaration does not embody many of the implications of the feminist maxim: the personal is political. There is growing feminist consensus over the value of women's autonomy of the self, the right over their own bodies and reproductive rights. The Declaration, at most, addresses the issues of non-discrimination; in this it does not move beyond women's rights (in a man's world) to the rights of women (in a human world).

Perhaps the phrase 'active role' to be ensured for women in development may be made into a verbal vessel into which thes feminist mood, method and message may be poured. But the feminist task here is difficult, since formulations of human rights still continue to occur within the hegemonic patriarchal tradition, as the regressive text of the draft Platform for Action for the Fourth World Conference on Women (Beijing, 1995) so poignantly demonstrates, perhaps redeemed in the final text by concerted NGO efforts. The task of the feminist contribution to the development of the right to development is, on the one hand, to enrich the consensus already codified in the Declaration and, on the other, to transform to a feminist mould against all odds, the enunciation of the component rights of the right to development.

Juridical Critique

In a curious reversal of roles, while states have subscribed without many qualms to the Declaration, publicists and jurists have raised a plethora of difficulties and interrogations. Some critiques are basically 'Declaration-friendly'. Others question, and even deny, at both the legal and the ethical levels, the coherence and justification of the Declaration. Put together, juridical critiques raise the following issues.

- What ought to be a legitimate mode of production of new human rights in the United Nations system?
- Can we speak at all of collective [illegible] of states or peoples as human rights?
- Given the distinction between 'rights' and 'righteousness', the so-called 'right to development' cannot be a legal right, even of individuals; nor can it be a moral right.

The right to development is an accomplished juridical fact of human rights law and jurisprudence. In order to ensure that its legitimacy is not jeopardized, or its further development thwarted by critiques, primarily emanating from North America, it is necessary to examine the salient issues.

Mode of Creation of New Human Rights

How new rights should be created is undoubtedly an important question related to but going beyond the context of the Declaration on the Right to Development. O. Schachter[12] has already suggested that conformity with minimum procedural standards is an essential requirement for legitimating international decisions. Pursuing this theme, P. Alston has powerfully argued against the magical mode of production of new human rights, and suggested a model of procedural and substantive steps. Necromancy occurs

when bodies at lower level in the international hierarchy than the General Assembly have tended to proclaim new rights without adequate consideration of basis, let alone advisability or implications, for such action and without leaving the [General] Assembly with an adequate opportunity to determine whether or not the giving of the imprimatur is warranted.[13]

The elaborate procedure Alston proposes is designed to reinforce the declaratory authority of the General Assembly which depends on the maintenance of its: 'credibility as a responsible and discerning arbiter and as a weather vane of the state of world public and governmental opinion'.[14] These are, undoubtedly, important considerations, especially at the present juncture of free-market

structuring processes of 'globalization'. The production of new human rights, indeed, may further the paradigm (of what we have called) trade-related human rights. The oft-mentioned example of this trend is the proposal of the World Tourism Organization to recognize tourism as a basic individual and collective human need and therefore as the right!

At the same time, the realization of latent or unrecognized human rights and the normativeness of strict criteria and procedures may impede their progress towards explicit enunciation and universal recognition. The list of such latent human rights may be small, but its significance may well be of global importance.

Additionally, any overrationalized perspective of the production of rights seems to be based on notions of rationality and legitimacy which are themselves questionable. For one thing, the emphasis on reason over emotion reincarnates patriarchy. As A. Baier has reminded us, in so many respects Hume is a better guru than Kant. Baier stressed not merely frivolous factors such as historical chance and human fancy and what they select as salient, but also our capacity for sympathy, that is 'our ability to recognise and share sympathetically the reaction of others to ... [the] system of. rights, to communicate feelings and understand what our fellows are feeling and so to realize what resentment and satisfaction the present social scheme generates.[15] On this view, human rights signify progress in moral sentiments. The perils and promise of human rights production ought to be grasped through a creative mix of reason and emotion, and even political passion, especially in the content of the unfolding of latent human rights. Any serious ethical understanding of human rights as signifiers of progress in moral sentiments ought also to facilitate the struggle against the globalization-induced promotion of trade-related human rights at the expense of basic human rights. And, by definition, such a concept would also enhance struggles to preserve people's security, peace, productivity and denuclearization- the congeries of human-rights-in-the-making. Male visions of rationality and legitimacy ought surely to be informed by an alternative, and not merely supplemental, model of human rights creation.

Are People's Rights Human Rights?

It has recently been vociferously argued that not only does the Declaration mix up individual human rights and collective (people's) rights which are different and should be kept distinct but, since people as collective rights holders are not physical persons, they require an institutional person to exercise their rights. The most plausible 'person' to exercise such people's rights is, unfortunately, the state. This represents a radical reconceptualization of human rights - and an especially dangerous one.[16] It is dangerous, because all human rights are held primarily against the state and the

danger here is that the State is [...] placed in a position to use its human rights to deny the individual human rights while still plausibly claiming to be pursuing human rights. 'Human rights' are thus transformed into but another mechanism of political tyranny and oppression.[17]

Moreover, the very idea of a human right held by the state is incoherent and the very term 'human rights' of states involves a logical contradiction.[18]

The Declaration, carefully read, does not provide any notion ofhuman rights of states; rather, it forcefully articulates human rights responsibilities of states, acting within their jurisdiction as well

as in the international arena.[19] The fact that a handful of publicists derive from the Declaration a notion of the human rights of states is in itself too insignificant a factor to constitute criticism of the right to development. Nor does the fact that some states (notably Colombia, Togo and the Federal Republic of Yugoslavia) referred to the human rights k of states in the discussions leading to the Declaration now militate against its final text. Thus this line of attack is, essentially, an exercise in the slaying of straw men!

What is dangerous is not the existence or enunciation of the peoples' right to development (or the declaration-in-the-making of the human rights of indigenous peoples) but the obtuseness of moral philosophers. It is indeed perverse to say that the Declaration on the Right to Development may facilitate political tyranny or social oppression, neither of which needs to don the mask of the right to development. And it can be safely said that the modern development, of human rights law and jurisprudence does not acknowledge sovereignty (or domestic jurisdiction) as a shield for flagrant violations of human rights. Nor, furthermore, is it possible to read into the Declaration a whole configuration of elements legitimating violations of rights.

The notion that peoples are not entities in international law adheres to a classical premise which constructs only states as primary, or pre-eminent, subjects. But the increasing participation of non-governmental organizations (now termed 'international civil society') in the making of international law at the Rio, Vienna, Copenhagen, Cairo, Beijing and Istanbul Summit Conferences simply cannot be denied. Nor may the impact of women's movements throughout the world, which have sculpted the obligations of states in ways which radically reconfigure the very notion of human rights through the Convention on Elimination of Discrimination Against Women. The Declaration in many ways consummates this tendency and it is in deed logically possible only because nation-states, as well as the society of states as a whole, stand designated as bearers of obligations.

The point that state formations have their own distinctive ends, and that they may seek to pursue these in ways which frustrate rather than fulfil the Declaration's assurances of rights, makes historically valid sense. But to say that a state may not ever personify people's rights, even when in contradiction to its own distinctive interests or ends, is far from being grounded in reality.[20] For example (and these are, very complex illustrations), the struggle by many states of the South against the legitimacy and legality of the conditionalities to developmental assistance by the international financial institutions or the struggle against certain aspects of General Agreement on Tariffs and Trade /World Tourism Organization (GATT /WTO) reformulations do, indeed, present states as potentially examples of personified peoples. States may be seen to personify other people's human rights, as an aspect of the internationalization of a human rights culture, as in the case of India's assistance to the people's liberation struggle in former East Pakistan, or Vietnamese leadership in finally overthrowing the Khmer Rouge regimes in Cambodia. Of course, such personifications remain contentious, especially when undertaken by Third World states.

Modern history shows that the superpower humanitarian interventions reek of barely disguised national interest and hegemonic, considerations. The basic point, however, is this: conceding that sovereign states are never enterprising in the redressing of human rights abroad (and more often than not are bystanders or accomplices in perversions of power elsewhere), there exist examples of

'altruistic' state behaviour where it makes overall, non-hegemonic sense to speak of states as, even if momentarily, authentically personifying the people's right to development.

This leaves us with a rather familiar problem, overall, in the field of the creation of human rights; that is, if people have collective human rights, how do they enforce these outside the juridical personification of people by the state entity to which they owe allegiance? In a sense, this is a problem with all sorts of collective rights (whether, of indigenous peoples, migrant workers or diasporic minority groups). But the sphere of acknowledgment or enunciation of human rights is distinct from, though related to, the sphere of the realization and fulfilment of rights. It is only when rights are brought into existence that the issue of effective implementation comes into being. Undoubtedly, there exist substantial problems in the realization of the right to development, but that constitutes no justifiable reason to denounce the acts of enunciation.

Neither a Legal nor a Moral Right Thou *shalt be!*

It has been maintained that, in the absence of a broad, almost universal consensus concerning a derived right to development, it cannot be accepted as a part of customary international law and that such a consensus does not exist. Even when one might legitimately speak of an international legal regime of development, one may not derive from it any right to development.[21]

This kind of nihilism, of course, does not deny the variety of sources or lineages constituting a substantial body of principles from which the right to development maybe said to have been derived, but it contests the logic of such a derivation..[22] A detailed rebuttal must remain the task of another study, but one or two instances of such nihilism must be emphasized here.

For example, it has been strenuously argued that a substantially broader right to development cannot be derived from the right to self-determination, recognized by the two International Covenants. Neither, it is said, implies a right to live in a developing society or a right to be developed; both imply simply a right to pursue development.[23] Such bizarre readings of the two Covenants are as rare as they are outrageous. The Covenants certainly create individual and group rights, and an integrated approach to both the Covenants enables a reading consistent with derivation of the right to development from those texts;[24] and, indeed, Article 6(3) of the Declaration summoning all states to eliminate obstacles to development due to a failure to observe the obligations of the two International Covenants reinforces this reasoning.

Another example of this type of nihilism is furnished by the way Article 28 of the Universal Declaration of Human Rights is construed. That Article assures everyone's right 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. It is argued that the right to development cannot be derived from this provision because development suggests process or result, while' order' refers to ' structure'. Article 28 is

most plausibly interpreted as prohibiting structures that deny the opportunities or resources for the realization of civil, political, economic or cultural human rights. To get a right to development out of this would require showing that development is impossible or positively denied by current national or international structures. Clearly such an argument is [...] most contentious.[25]

Contentious or not, the massive attempt at standard setting in terms of human rights is sufficient to show that the structures of power, nationally and globally, are not simply and conducive to development. Even a momentary and rudimentary glance at the evolution of women's rights or the right to environment, for example, would lead to this inevitable conclusion. It is not necessary here to go further into the problematic stipulative definitions offered to elucidate notions of 'processes' and 'structures'.

Is the moral case for right to development largely baseless, as the nihilists would have us believe? Surely, it is trite to say that not all moral 'oughts' are grounded in or give rise to rights, and that one does not have a right to everything that is or would be right for one to possess.[26] But does this imply or entail any widespread confusion in the enunciation of the right to development? Why righteousness does not at times give rise to moral rights is a question which nihilists neither pose nor answer. For them, the distinction between righteousness and moral rights constitutes a kind of species-barrier. If there is a case for cogent argumentation for this position, a moral right to development can never be brought to existence, as this would create distinct moral obligations on states individually and collectively. This case is clearly not made by nihilists.

Conclusion: Avoidance of Non-proliferation

What holds good for nuclear weapons is bad for human rights. Non-proliferation should be the operative norm for nuclear weapons; proliferation should be the *grundnorm* for the right to development. The next step in the struggle for the development of the right to development is the proliferation of whole constellations of component rights. On the notions and nature of these component rights, we may not arrive at global consensus without a prolonged struggle. And one aspect of the struggle must be waged everywhere at the national level the discourse on the right to development has to be initiated at all levels of policy making and activism.[27] The easy minded cynicism towards the right to development has to be displaced, its practical uses demonstrated, its scope concretized through praxis.

More than any other authoritative enunciation of a vision of human rights, the Declaration on the Right to Development seeks to move beyond the traditional approaches to human rights and to structure respect for every person's right to be human amidst growing concerns about the next millennium and the future(s) it may hold for human rights. Above all, this aspect should continually engage our imagination and action.

NOTES :

1. Resolution 41/128 of 4 December 1986.
2. NGO Document (1981).
3. Philip Alston, 'Making space for human rights: the case of the right to development', *Harvard Human Rights Yearbook*, 1, (1), 1998.
4. See United Nations General Assembly resolution 43/160.

5. Described as violations arising from: 'colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression [...] and threats of war' (see the Preamble to the Declaration). Widening of this category in ways which describe violations of human rights practice at non-state or societal levels would be an important task for the future. This also appears in Article 5 of the Declaration.
6. K. Marx, *Collected Works of Marx and Engels,* 1, Progress Publishers, Moscow, 1975, 164. .
7. J.R. Lucas, *Democracy and Participation,* London, Pelican Books, 1976, 243.
8. 8 Perhaps the most sustained articulation of 'participation' has occurred, unsurprisingly, in the context of environment protection: see para 23.2, Agenda 21; Principle 10, the Rio Declaration; Article 4.1, the Climate Change Convention; Article 16, OECD Council Recommendation Concerning ... Accidents, Involving Hazardous Substances; ILO Convention 141 (the Rural Workers). The listing here is not exhaustive; see paragraphs 123-39, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* Geneva, September 1995.
9. George W. Pring and Penelope Cannan, 'Strategic lawsuits against public participation', *Bridgeport Law Review,* 12, 1992, 931-62.
10. For a detailed narrative, see Andrew Rowell, *Green Backlash: Global Subversion of the Environmental Movement,* London, Routledge, 1996,179--81,247-9,279--81, 336-8.
11. Claude Ake, 'The democratization of disempowerment in Africa', in J. Hippler (ed.), *The Democratization of Disempowerment: The Problem of Democracy in the Third World,* London, Pluto Press, 1995, 70.
12. Oscar Schachter, 'The crisis of legitimation in the United Nations', *Nordic Journal of International Law:.Acta Scandarn;via Juris Gentium,* 50, 1981, 3-4.
13. Philip Alston, 'Conjuring up new human rights', *American Journal of International Law,* 78, 1984, 608.
14. Ibid., 609.
15. Annette C. Baier, *A Progress of Sentiments: Reflection on Hume's Treatise,* Cam'bridge, MA, Harvard University Press, 1991, 55-6.
16. Jack Donnelly, 'In search of the unicorn: the jurisprudence and politics of the right to development', *California Western International Law Journal,* 15, 1985,499.
17. 17 Ibid., 499-500.
18. Ibid., 499.
19. See especially Article 4(2) of the Declaration stating the duty of all states, individually and collectively to 'formulate international development policies with a view to facilitating the full realization of the right to development'. Also see Article 7 casting similar obligations on states to 'promote the establishment, maintenance and strengthening of international peace and security'.
20. It is noteworthy that in federal state formations the discourse on states' rights is not devoid of human rights coherence.
21. See Donnelly (1985, 487 and 489).
22. For a comprehensive listing of sources acknowledging the right to development, see the United Nations Secretary- General's Report, UN Doc. E/CN.6/1336 (1979).
23. See Donnelly (1985, 484).
24. Rolf Kunnemann, ,' A coherent approach to human rights', *Human Rights Quarterly,* 17, 1995, 332-42.

25. See Donnelly (1985, 487--8).
26. Ibid., 490.
27. In New Zealand, the Report of the Waitangi Tribunal on the Muriwheuna Fishing Claim (June 1988) has taken full account of the right to development in interpreting the treaty with the Maoris (see, for example, p.234); see also the judicial recognition accorded to the right to development in *Simon* v. *The Queen* (1985) 24 *DLR* (4th), pp.390 and 402. Parallel developments have been reported from Pakistan. And the Interim Draft Constitution of the Republic of South Africa, now finally certified by the Constitutional Court of South Africa, seems suffused with the values explicated in the Declaration.

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THE RIGHT TO DEVELOPMENT : A RIGHT OF PEOPLES?

Roland Rich*

I. Introduction

In 1982 I set out some of the arguments for recognition of the right to development as a human right.[1] That paper stopped short of the claim that the right to development was a part of positive international law. That being the case I did not believe I needed to make explicit what seemed implicit-that major international law texts do not list the right to development as an existing human right. My aim was to cite authorities who had recognized the right to development as a means of gauging the level of acceptance it had achieved.

The right to development remains a putative right not fully accepted into the body of generally accepted international law. I t is part of the body of *lex ferenda* and not *lex lata*. .Its claim for inclusion in the latter was strengthened, but not finally confirmed, by the passage, on -1- December J 986, of General Assembly Resolution *41/128* adopting the Declaration on the Right to Development. However, there are commentators who hold a different view. Professor Brownlie quotes with approval Alston's plea for a system of quality control in the proclamation of new human rights.[2] One would expect Alston to exercise care in giving .his own 'appellation control' or seal of approval to a new human right. While acknowledging a number of difficulties, Alston has this to say about the right to development.[3]

It is appropriate to acknowledge that, as a general proposition in terms of international human rights law, the existence of the right to development is a *fait accompli.* Whatever reservations different groups may have as to its legitimacy, Roland Rich 1988 viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.

I propose to be guided by Alston's injunction. I do not believe it is possible to discuss the rights of peoples solely in terms of existing internationally. Questions of law and policy can be divorced, but only at the cost of creating a degree of artificiality in discussion of the subject. The right to development is a political issue. To Third World countries it may be the most pressing political issue they face. That is why I was surprised at Professor Brownlie's advice to the practitioner not to stray from the confines of positive international law. My experience as a practitioner is that this advice will only lead to a dialogue of the deaf, a dialogue which will not achieve my purpose. In this context the human rights I am concerned about are the rights of the peoples of the Third World. It is these rights which require promotion and which add an element of urgency to any discussion of the right to development.

In this chapter I raise four subjects for discussion :

1. The framework in which the right to development has been elaborated;

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* Department of Foreign Affairs, Canberra, Australia.

2. A brief overview of relevant State practice, including the question of the linkage between development assistance and human rights.
3. The articulation of the right to development, especially in the United Nations General Assembly;
4. Finally, the question whether this putative right has a useful role to play in international law.

2. The Conceptual Framework

In a sense we are at a disadvantage in that discussion of these issues is not taking place in French. Most of the thoughts on this subject have been thought in French. Much of the literature is in French. The method of approaching the subject differs from the method which a lawyer schooled in the Anglo-Saxon tradition would adopt. Questions of practical application, workable definitions and the examination of State practice are often considered by the French as secondary considerations best left for others. True nobility of purpose is to be found in the development of the concept, and in fixing its place in history.

(I) Generations, Phases and Colours: Some Attempts at Conceptualization

In this context a conceptualization that has become popular is that of a 'third generation of human rights'. The Senegalese jurist Keba M'Baye was the first commentator to refer to a right to development,[4] but it was Karel Vasak, formerly UNESCO'S Legal Adviser, who popularized the concept of the third generation of human rights, which is said to include the right to development.[5] It is within this framework that many people, especially from developing countries, tend to view the right to development. Vasak called the third generation rights the solidarity rights, a term which loses something when translated from the French. His thesis is as follows :

- The first generation rights were those rights which emerged from the American and French revolutions. They were aimed at securing the citizen's liberty from arbitrary action by the State. They correspond by and large to the Civil and Political Rights in the International Bill of Rights. They are said to be negative rights in that they call for restraint from the State.
- The second generation rights emerged with the Russian revolution and were echoed in the welfare state concepts which developed in the West. They correspond largely to the Economic, Social and Cultural rights and they require positive action by the State.
- The third generation rights, as Vassal sees them, are a response to the phenomenon of global interdependence. Individual States acting alone can no longer satisfy their human rights obligations. The problems that are now being faced require international cooperation for their resolution. These problems include the maintenance of peace, the protection of the environment and the encouragement of development. The third generation rights necessarily benefit individuals and peoples.

Vasak's thesis is open to criticism especially in the positive/negative dichotomy he postulates in respect of the first two 'generations' of rights. It could be argued that civil and political rights require considerable activity on the part of the State for their full enjoyment, and that economic rights may often be enhanced through the absence of government in development. None the less this classification of the 'generations' of human rights is attractive, and has considerable persuasive power.[6]

Combined with this idea is a growing acceptance of a 'structural approach' to human rights. Alston has argued that since 1977 there has been a new trend in human rights activity.[7] Led by the Commission on Human Rights, the trend has been to identify and attempt to remove structural obstacles to the enjoyment of human rights. Thus writers have identified four phases of the activities of the Commission on Human Rights. Writing in 1975 Jean-Bernard Marie categorized the first three phases.[8]

- 1945-55 was the standard setting or normative phase. The Universal Declaration on Human Rights was drafted, the bulk of the work on drafting the two Covenants was completed. Other Conventions including those on Genocide and Refugees were drafted. This lofty work however stood in stark contrast to the UN's inability to react to specific human rights violations.
- The 1955-65 phase was an attempt to correct this by the promotion of human rights. It was a period of attempting to influence the situation by working with governments through the procedure of periodic governmental reports and the provision of advisory services. The achievements in this phase were modest.
- Within the next decade, 1965-75, came the phase of protection of human rights' and an attempt to do something more directly about violations of human rights. New techniques were developed for appointing special rapporteurs to investigate situations. The problem of what to do with the thousands of communications received by the UN on human rights issues was tackled, and in 1970 ECOSOC adopted the procedures under resolution 1503. The idea of a High Commissioner for Human Rights was launched.

Clearly these distinctions are not watertight, but the trends appear to be clearly enough identified. They provide a backdrop to developments in human rights in the mid-1970s when the concepts behind the New International Economic Order took hold of the imagination of the Third World. Previous methods of looking at human rights, which concentrated essentially on the civil and political rights, began to lose relevance. In 1977 the Commission on Human Rights began considering the right to development and the General Assembly adopted Resolution 32/130. What can be described as the structural phase of human rights work had begun. Indeed, the right to development has been described by Alston as 'the single most important element in the launching of a structural approach to human rights at the international level'.[9]

Historical classifications aside, it is important also to consider how perceptions of the process of development changed. In addition to three generations and four phases, one might mention Johan Galtung's description of the three colours of development:[10]

- Galtung describes 'blue' development as the method of achieving economic growth by fostering the activities of an entrepreneurial class. The nation is seen as a market-place, the role of the government is seen as essentially negative, i.e. to take as few economic initiatives as possible and not to fetter the activities of the entrepreneurial class.
- 'Red' development, as one can guess, is economic growth controlled and initiated by a governmental bureaucracy. The ultimate determinant of economic direction is not the market but the plan.

- Thirdly, perhaps as a synthesis, comes 'green' development. It is development based on concepts such as those elaborated by Schumacher.[11] It calls for more autonomy at the local level, for smaller economic cycles, for concentration on village economies and for agriculture based on more traditional models.

There may well be a place for all three types of development, even in the one country. The right to development would require that the choice, of development policies not be based solely on macro-economic models, but that it should take fully into account the needs of the primary subject of human rights law, the individual.

(2) Persons and Peoples

The dichotomy between persons and peoples as subjects of international human rights law lies at the heart of the problem of the 'third generation' of rights. I wish to propose three premises which any conclusions on this question should take into account:

(1) The individual necessarily remains the primary subject of international human rights law.

(2) International human rights law recognizes the existence of groups.

(3) The full enjoyment of individual human rights requires certain human rights to devolve, wholly or in part, upon groups.

Something should be said about each of these propositions in turn.

The first proposition would require no elaboration if it avoided the assertion that there is a hierarchy among the subjects of human rights law. I believe it is important to make that assertion, to insist that the individual, as the ultimate beneficiary of all human rights, has primacy. An important corollary is that there can be no human rights which detract from the individual's human rights. I must concede that this assertion sits uncomfortably with one aspect of UNGA Res. 32/130, which tends to speak in the same breath about the rights of the human person and of peoples. However I would not accept another possible criticism, which is that the primacy of the individual gives priority to civil and political rights over economic, social, and cultural rights. Both Covenants place primary emphasis on the individual, and both use the same formulations in describing the beneficiary of the rights; 'all persons' or 'everyone'. (The one exception, the right of self-determination, I discuss below.) When human rights law recognizes groups, the individual is nevertheless usually singled out as the primary beneficiary.

The second proposition asserts that human rights law does recognize certain rights of groups. Human rights law has recognized groups as a matter of necessity, because groups have so often been the victims of abuses of human rights. The subject deserves study in depth but I simply list a few examples.

- *Protection of minorities.* An extensive system of provisions protecting minorities was built into the network of treaties concluded at the end of World War I. For many newly created States of Europe, a price for nationhood had to be paid in the form of a guarantee to respect the cultural, religious, and even linguistic freedom of minorities within their borders, and a promise that there would be no institutionalized discrimination.[12]

- *Proscribing racial and other forms of discrimination.* Various conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination, the ILO's Discrimination Convention (No III) and UNESCO's Convention against Discrimination in Education, extend their protection to members of groups defined by reference to race, colour, descent, sex, national or ethnic origin, political or other opinion, economic conditions, or birth.
- *Protection of indigenous populations.* ILO Convention No 107 concerning indigenous and tribal populations sanctions affirmative action in favour of the populations concerned. ECOSOC in its Decision 1982/34 established a Working Group to review developments relating to the promotion and protection of the human rights and fundamental freedoms of indigenous populations, with special attention to the evolution of standards concerning the rights of indigenous populations.

In each of these areas the recognition of groups is essential for the effective protection of the rights of the individual members. The recognition of the group is necessary to allow human rights law to define the individual requiring special protection. The instruments cited are for the most part careful not to grant rights directly to peoples, as distinct from persons belonging to the groups. But there are at least two instances where, in support of my third premiss, it is the group itself which is the direct beneficiary of human rights. The Convention on the Prevention and Punishment of the Crime of Genocide is intended for the protection of groups defined by national, ethnic, racial, or religious criteria. The Convention implies an acceptance that the group is qualitatively different from the sum of its parts. The International Convention on the Suppression and Punishment of the Crime of Apartheid has similar provisions. While extending rights to members of the group, other provisions, like Article II (b), refer to the crime of 'deliberate imposition on a racial group. . . of living conditions calculated to cause its.... physical destruction. . .'. These two cases appear to be instances where rights devolve directly upon groups.

The two best-known examples of peoples' rights are of course the right of self-determination and 'the rights of peoples and nations to permanent sovereignty over their natural resources' as stated in Art. I of UNGA Res. 1803 (1962). Two conclusions from the existence of these rights may be relevant to an examination of the right to development. First, the proposition that the right to development may be a right of peoples in human rights law does not break new ground in principle. The precedent was set decades ago. If there is a third generation of human rights then the first-born of that generation is the right of self-determination. Second, the possibility that a State could itself be one of the beneficiaries of human rights law is foreshadowed in the principle stated in UNGA Res. 1803, which recognizes the right of peoples and nations to permanent sovereignty. If peoples are capable of being subjects of human rights law, then why should these same peoples, organized as nations, lose this capacity?

There are however two important distinctions to be drawn between the right of self-determination and the right to development. Many commentators refer to the former as a precondition for the enjoyment of individual human rights. Given the subjugated condition of colonized peoples, this may be valid. But the same description should not be attached to the right to development, lest this right be used as a justification for violating or delaying the implementation of civil and political rights.

The other distinction is that the right to development is widely said to be a right of peoples and, simultaneously, of individuals. In this way the traditional individual human rights are considered to be the necessary base on which to erect the broader structure. There is no derogation from existing individual human rights. Rather they are reinforced.

(3) The Universal Declaration of the Rights of Peoples (1976)

To complete this comment on the theoretical framework, I wish to refer briefly to the Universal Declaration of the Rights of Peoples adopted in Algiers on 4 July 1976.[13] The Universal Declaration was drafted not by States but by individuals. It was drafted in French and it shows the Gallic tendency to devise abstract principles before full consideration of the substance of a matter is undertaken. I raise this document not as evidence of positive international law but as an example of the importance with which the rights of peoples are held by some commentators.[14]

The Declaration is in seven parts. Section I deals with the right of peoples to exist and to maintain their national and cultural identity. Section II concerns the right of political self-determination, including the right to be represented democratically. Section I II on economic rights refers to permanent sovereignty, the common heritage of mankind, equity in international trade and the right of peoples freely to choose their own path to development. Section IV on cultural rights includes, a suggestion that peoples have a right to their artistic treasures and an implication that they have a right to have these treasures returned to them. Section V deals with the right to protect the environment and enjoy the common heritage of mankind. It also contains a rather cryptic reference to the need of peoples 'to coordinate the demands of economic development with those of solidarity between all the peoples of the world'. Section VI concerns minority rights, which do not include any right of secession. The final Section on guarantees and sanctions contains some interesting ideas on enforcement of international law. The Declaration makes no attempt to define the term 'peoples'. However it tends to equate peoples with nations.

2. State Practice

We must now confront the difficult issue of what constitutes State practice in the present case. Professor Brownlie has taken me to task for adopting what he considers to be an unacceptable view of State practice. He appears to require a fairly strict positivist interpretation. But the positivist method requires a State to concede that its actions flow from obligations. I do not believe that this test can be the sole qualification for an act to constitute State practice. States often consider themselves obliged to undertake certain actions but nevertheless prefer to couch these actions in the language of discretion. Those working in government will be familiar with this need to portray all official actions as based on decisions freely selected from various options. International law must lift this veil of claimed discretion and examine the actions themselves to determine if they are sufficiently widespread and consistent to constitute State practice. Articulation of a particular practice by governments is an important piece of evidence, but its absence should not automatically be a disqualifying factor.

In contrast to the French approach, the common law tradition tends to put more emphasis on assessing relevant State actions. I intend briefly to state four conclusions which may be derived from State

practice and also to examine the emerging links between human rights and development. I do not consider these four conclusions constitute proof of the existence of the right to development, but they are evidence of a distinct trend in that direction, and are thus foundation stones in the construction of the right to development. I propose to state the four conclusions without elaboration but with some illustration.

(I) States behave as if they were under an obligation to provide development assistance. The Brandt Commission[15] and the Development Assistance Committee of the OECD[16] have provided ample documentation of the development assistance phenomenon. In absolute terms, it has totaled well over $US30 billion a year in each of the first years of this decade.[17] It may not have reached the targets set, but it is a substantial and consistent flow.

The develop assistance phenomenon provides an interesting test case of what may constitute Sate practice. Donor countries has stopped short of admitting that aid is an obligation owed to developed countries. Yet the practice of giving such aid is such consistent as to require closer examination. All Western donors belonging to the Development Assistance Committee of the OECD where they compare notes on each other's performance and experiences. Many have established government agéncies dedicated to this function (for example USAID(United State), CIDA(Canada), ADAB (Australia)). Some have made the provision of development assistance part of their domestic law.[18] Others collect domestic taxes earmarked for development assistance purposes.[19]

There is also a considerable level of articulation of governmental positions concerning development assistance. The OECD's annual publication, *Development Cooperation,* spells out donor motives. The 1981 issue summarized these as 'global solidarity'.[20] The General Assembly has passed numerous resolutions urging donors to undertake to achieve certain aid targets.[21] Among academics, Oscar Schachter argues that the international law of development incorporates 'a new conception of international entitlement to aid and preferences based on need'.[22] Maurice Flory argues that 'the international community is moving towards the recognition of the developing countries' right to aid'.[23]

Donor countries through their consistent actions and their statements and votes in international institutions have represented themselves as intending to provide development assistance. Recipient countries, who are usually required by donors to match foreign exchange contributions with local support for development assistance projects, have, in accepting to co-operate with donor countries, moved from their original positions. An analogy may be made with national law. Though there may be no consideration flowing directly to donor countries, the common law doctrine of equitable estoppel would arguably preclude them from reneging on their original offers and representations. It is difficult to escape the conclusion that the relationship between donor and recipient is one of obligation.

In 1971, the United Nations Secretary- General said of the view that development assistance was a right of developing countries, that 'no such obligation has been accepted in positive law'.[24] In 1979, a study commissioned by the Secretary- General argued that the 1971 conclusion required reconsideration.[25] If the obligation to provide aid is a part of international law, then it would be a cornerstone of the right to development.

(2) International organizations have adopted as one of their major goals the advancement of developing countries. Though international organizations emerged late last century, their number, influence and fields of activity have grown significantly since 1945. Their constitutions recognize the need to assist developing countries, and their programmes are to an increasing extent geared to helping meet that need. The Constitution of UNIDO is particularly significant as .the most recent expression of community goals. It describes international development co-operation as the 'shared goal and common obligation of all countries'.[26]

(3) Developing countries appear to have become distinct subjects of international law (that is, they are beneficiaries as such of special rights in international law). The evidence for this proposition is weighty, particularly when one takes into account the numerous references to the term 'developing countries' in a wide range of international instruments adopted over many years. These instruments range from the International Bill of Rights (developing countries are set a slightly less onerous duty than other parties in Art. 2(3) of the International Covenant on Economic, Social and Cultural Rights) to the Law of the Sea Convention (where the concept of the benefit of mankind is qualified by reference to the special interests and needs of developing countries).[27]

(4) There has been a recognition of the substantive inequality of developing as against industrialized States, entitling the former to affirmative action. The conclusion that affirmative action is an applicable principle in the relations between the developed and developing world is of considerable significance. It would form a key element of the right to development. Three of the starkest examples are :

- the granting of trade concessions to developing countries, accompanied by a renunciation on the part of the grantor to reciprocity.[28]
- the practice of international financial institutions to grant the most confessional terms to the poorest countries. Thus the worst risk borrowers attract the most favorable rates.[29]
- the provisions of the Law of the Sea Convention granting developing countries preference in such areas as access to foreign fishing zones (Art. 62), access to seabed mining technology (Annex III, Art. 5(3)(e)) and compensation for adversely affected land-based mining industries (Art. 151).

These four propositions are not presented to show that the problems of the developing countries have been resolved. But they do show that practices have evolved which address these problems, These practices contribute to the emergence of the right to development and would form an important part of that right.

An important factor in the establishment of the right to development would be the adoption by States of links between human rights and development assistance. State practice in forging this link however can be said to be tentative.

Some years ago consideration was given to creating these links in a negative way. The Development Assistance Committee of the OECD spoke of 'a disposition on the part of donors to turn down or even off the aid flow to developing countries guilty of persistent human rights violations' [30] Two countries, Holland[31] and the United States,[32] the latter through domestic legislation, made this link one element

of their aid policies in the late 1970s. But this method of linking the two issues does not appear to have taken hold. The then Government of Holland and the Carter Administration which instituted these links have both lost office, Their successors have adopted a more cautious approach, Among European countries there appears to be a general disinclination to adopt the 'negative link' as a matter of policy.[33]

The increasing unpopularity of the negative link complicates the question of justiciability posed in Professor Crawford's paper. Justiciability is not inappropriate on legal grounds but rather on the basis of aid policy. As the Australian Minister for Foreign Affairs recently put it, linking development assistance to human rights protection 'would probably lead to a repudiation of the aid proposals-and therein rests a moral dilemma... namely that aid denied where it is desperately needed means punitive experiences for the most exposed and dependent groups in a particular community'.[34]

Attempts have also been made to bind the two concepts in a positive way rather than in the form of a sanction. A move in this direction was the development in the late 1970s of the Basic Human Needs approach to development planning. This was an attempt to make the individual and his basic needs the centre of the development process. It seemed that it could provide the bridge between human rights and development. But the approach was soon discredited. The developing countries argued that it distracted attention from issues of the New International Economic Order, played down the importance of economic growth and encouraged foreign interference in their domestic affairs.[35] In short, it smacked of paternalism.

The structural approach to human rights, mentioned above as a possible new phase in human rights activity, by requiring the removal of structural obstacles to the enjoyment of human rights, would certainly create the link in a positive fashion. And the Commission on Human Rights also adopted a positive and constructive approach in the cases of Equatorial Guinea,[36] the Central African Republic[37] and Uganda.[38] The Commission's resolutions, rather than simply condemning human rights violations, required advisory services, action plans and other concrete forms of assistance to be provided to help those countries to establish a system which would safe-guard respect for human rights and fundamental freedoms.

More attention needs to be given to this question of reinforcing respect for human rights through a constructive application of aid and affirmative action programmes. Organizations like ADAB and CIDA should in my view consider general human rights questions in their aid project planning. It must be concluded however that this link, so important in founding the right to development, is only in its infancy.

3. The Articulation of the Right to Development

For some, the repetition of the assertion that there is a right to development by such bodies as the General Assembly,[39] the Commission on Human Rights,[40] the Conference of Heads of State of Non-Aligned Countries,[41] and the Assembly of Heads of State and Government of the Organization of African Unity,[42] is sufficient proof of its existence. But such assertions cannot be conclusive. They need to be backed by State practice and by the detailed articulation of the content of the right in an instrument enjoying widespread support.

In 1981 the Commission on Human Rights established a Working Group to draft a Declaration on the Right to Development.[43] The fifteen-member Working Group (including France, the Netherlands, and the United States) was unable to conclude a text and the Commission decided to refer the issue to the General Assembly. Yugoslavia accepted responsibility for securing progress on the issue and at the 40th Session of the General Assembly in 1985 circulated a draft declaration drawn from the drafts prepared by the Working Group. The draft attracted a surprising level of acceptance but consensus proved elusive and the Yugoslav delegation decided not to press the issue at that session.[44]

In 1986 Yugoslavia circulated the draft declaration at the 41st Session of the General Assembly but this time made clear its willingness to press the matter to a vote. On 4 December 1986 the General Assembly, by a vote of 146 in favor to I against with 8 abstentions, adopted Resolution 41/I28, the 'Declaration on the Right to Development'. The Chairman of the Third Committee of the General Assembly at the 41st Session described the adoption of the Declaration as 'perhaps the Committee's most significant achievement'.[45]

In the course of the negotiations Yugoslavia accepted one amendment and deflected another. An amendment submitted by France and the Netherlands to make clear that references in the Declaration to the right of peoples to full sovereignty over all their natural wealth and resources is governed by Article I, paragraph 2 of the International Covenant on Civil and Political Rights, was incorporated in the Declaration.[46] With this amendment the support of 15 OECD countries was secured.[47] A Pakistani amendment incorporating references to specific aspects of 'new international economic order' was deflected so as not to risk losing the support of those industrialized countries prepared to vote in favour. It was subsequently adopted as a separate resolution with a significantly reduced majority.[48]

The absence of consensus raises questions about the authority in which the Declaration should be held. The largest international donor in monetary terms, the United States, voted against Res. 41 I 128. In its explanation of vote,[49] the United States delegation described the Declaration as 'imprecise and confusing', took exception to the connections drawn between disarmament and development, and disagreed with the view that development was to be principally achieved by transfers of resources from the developed to the developing world (a view not elaborated in the Declaration). The eight countries abstaining included four Nordic countries, Japan, the United Kingdom, and the Federal Republic of Germany, all significant aid donors and all countries which have promoted the observance of human rights in recent times. From their explanations of vote,[50] two major preoccupations emerged: first, that priority should be given to individual human rights rather than the concept of a human right of peoples and, secondly, that the provision of development assistance could not be seen as an obligation under international law.

It is interesting that these aspects of the Declaration should be singled out for criticism. The duties imposed on States in the Declaration are not specific, let alone quantified; rather they are couched in quite general language. The claim in Article 3 that 'states have the duty to cooperate with each other in ensuring development and eliminating obstacles to development' sounds more like a description of existing development assistance objectives than an onerous new obligation. Where the Declaration calls for 'more rapid development of developing countries' (Article 4) it does so in the passive voice

and juxtaposes this as 'a complement to the efforts of developing countries'.

The Declaration is more strident in its insistence that 'the right to development is an inalienable human right' devolving on both persons and peoples (Article 1) and that all aspects of the right to development are indivisible and interdependent (Article 9). It seems that some countries are still not prepared to accept this arresting new notion.

The reluctance of a few countries should not obscure the force of the innovative concepts elaborated in the Declaration. It contains the unequivocal statements that 'the human person is the central subject of development' (Article 2), that in formulating national development policies States must 'aim at the constant improvement of the well-being of the entire population and of all individuals' on the basis of 'the fair distribution of the benefits' of development (Article 2), that 'failure to observe civil and political rights' can be 'an obstacle to development' (Article 6), that States shall ensure 'equal opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income' and shall encourage 'popular participation in all spheres' (Article 8).

The objections expressed to the Declaration, some of which were also shared by countries voting in favour of Resolution 41/ 128, must be given due weight when assessing the degree of acceptance of the Declaration in the international community. The adoption of the Declaration by such a broad majority should be seen as an important and perhaps decisive step in the progress of the right to development to the status of international law. While the dissenting opinions are significant, there is a likelihood that dissent will wane as the years pass and as the Declaration is given practical application.

4. The Necessity for a Right to Development

The final section of this paper is devoted to a presentation of arguments on the usefulness of the concept of a right to development. I noted above the precedent for 'nations' to be beneficiaries of human rights. As a right of peoples, I see no effective means of implementing the right to development other than through States and their governments. There is no other acceptable method of representing peoples in the pasted colonization era than through their national governments which are recipients of development assistance.

Many would consider this aspect an unacceptable concession to Socialist bloc doctrine. In practice however, the principle of at affirmative action in favour of developing countries is already largely established. The right to development would place this practice in the framework of international human rights law. Affirmative action would no longer be considered as a discretionary practice, nor as amends for past guilt, nor as a political concession, but as a human rights obligation. The acceptance of aid and affirmative action programmes by recipient countries would also be seen in a human rights context. As things stand, and bilateral agreements aside, the acceptance of such assistance creates no corresponding obligation. The right to development would link the acceptance of the benefit with a corresponding obligation on developing countries to respect and advance the human rights of their people. It would be a further avenue through which individuals could base claims on their own governments.

The right to development would thus disallow any suggestion that economic rights have priority over civil and political right. It would give substance to the claim that such rights are 'indivisible and interdependent'.

It would reject the notion that civil and political rights are luxuries beyond the means of developing countries.

The right to development would provide a rationale for development beyond the impersonal calculations of economic growth targets. It would insist that the development of the individual is the ultimate objective of all development projects. It would therefore work as a corrective to mal-development. Development projects requiring coercive pressures on individuals, forced removal of indigenous or agrarian populations, or even unacceptable environmental damage, could no longer be supported by foreign aid or confessional loans or assistance from international organizations. Indeed there are now indications that countries are beginning. to take these factors into account when assessing aid requests.

The issue of the quality of aid would be squarely faced. Donors would not be entitled to dump unwanted produce that did not meet the needs of foreign recipients. The trend to tie aid grants to trade concessions would be reversed. Project planning would be required to go beyond macroeconomics. E. F. Schemata once described official development assistance as 'a process where you collect money from the poor people in the rich countries, to give it to the rich people in the poor countries'.[51] The right to development would make unfounded at least the second half of that statement.

We are all aware of the criticism of international law from Third World countries.[52] To these countries, international law is tainted. It was developed without their participation and, initially at least, worked against the interests of their peoples. Human rights law is often tarred with the same brush. It also suffers from another criticism. It is believed that the Western emphasis on civil and political rights is a reflection of the Western conception of the individual's role in society. Asian and African societies tend to place more emphasis on the welfare of the group, whether family, clan or tribe, than on the rights of the individual.

The right of self-determination played a role in rehabilitating human rights law in the Third World. However, that right is now less a war-cry than a ceremonial chant of remembrance. The right to development would be a positive force in involving Third World countries in human rights, including the less fashionable civil and political rights. The right to development acknowledges the importance of both the individual and the group. It would associate traditional human rights with the issue of greatest concern to developing countries-development.

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SOME UNORTHODOX REFLECTIONS ON THE "RIGHT TO DEVELOPMENT"

Mohammed Bedjaoui

Against the troubling backdrop of a polluted planet whose limited resources are also unequally shared, and where the spendthrift society contrasts sharply with lives of hunger and absolute poverty, the question is continually being asked whether there is a "right to development" of the world's peoples. It is clear that if this right existed and was actually respected, there would be no explanation for the prevalence in many parts of the world of sheer poverty and malnutrition, which are the most obvious and tragic negation of any such right. Conversely, however, if it is true that man is both the first and the last protagonist of universal civilization, the first and ultimate "common heritage of mankind", then his "right to development" emerges as a right of the most fundamental and absolute kind. This contradiction becomes apparent if we compare "natural law", which acknowledges the right of each individual to life and wellbeing, with positive law, which as yet can offer no definite peremptory norms to protect this right to development and translate it into practice. Yet it is becoming ever clearer that this situation cannot endure. International law cannot be, nor can it remain, indifferent to the dignity of man; it can no longer be reduced to a collection of dry techniques when the question of development is putting at risk the basic moral values of the human race.

The Moslem philosopher El-Halladj was burnt alive for having dared to claim that he possessed the truth. Nowadays, our personal conviction may be less ambitious and more vulnerable, yet they cannot guarantee that we will escape a similar fate. Indeed, it may appear heretical to believe in the existence of a right to development. It would be even more inculpatory, and would invite an even worse fate, to claim not only that this right to development has now attained the status of a legal norm, but that it is further protected by the loftiest of the rules subsumed in the hierarchy of these norms. In that light it would be a paradox, and even an act of provocation, to attempt to reconcile the concept of the right to development with the *jus cogens*. The right to development cannot claim the distinction of first place in this hierarchy of norms, and in the view of some it has not even acquired the status of an ordinary rule of law.

Such an enterprise may be deficient on some counts, but at least it will serve to illustrate the formidable gulf between things as they are and as they could or should be. And this exercise may even bring out the unconscious tendency we sometimes show, towards an important right which has not yet received legal blessing, of putting it on such a high pedestal for our conscience' sake that it becomes inaccessible. It is only too convenient to undermine this right by placing it out of reach. . . If we feel uneasy at withholding legal status from a right which we feel to be indispensable for ourselves yet dangerous if granted to others, since it is liable to have a revolutionary impact on the pattern of international relations; if this right, in short, is both uncomfortable to ignore and disturbing to concede, surely the easiest solution is to raise it to a pinnacle and surround it with facile, reassuring incantations.

The right to development can readily be treated to this premature retirement to a horizon far readily

the *jus cogens*, in the pale effulgence cast by the prophets of natural law, because both its exercise and its infringement do not normally appear in any striking or obvious form. For example, aggression, genocide and *apartheid* are international crimes according to modern legal theory; they are all too palpable violations of the *jus cogens*. But violations of the "right to development" are the stock-in-trade, no less, of international relations. . . These violations of the "right to development" appear under the anaesthetic label of ordinary "straight" commercial practice, protected since time immemorial by Mercury who, as we know, is the special deity of both merchants and thieves, since the two invariably go together. Violations of the "right to development" also appear in the highly seductive guise of "aid" and "assistance"; and yet, to borrow the phrase of Tibor Mende, it is a short step "from aid to recolonization". In short, violations of the "right to development" are particularly hard to define, because State sovereignty is still framed in traditional terms, by virtue of its *political* aspects alone, with the result that transgressions of the "right to development", *viz.*, of the *economic* aspects of that sovereignty, fail to appear as obvious breaches of State sovereignty. . .

At first sight, there are convincing reasons for believing that there is a right to development. For twenty years positivists have attempted to fashion a right of development, and it is hard to believe that the network of legal norms which they have established is operating in a vacuum. Since the right of development is the collection of rules which enables the right to development to be put into effect, there is a logical sequence which compels us to recognize the existence of a right to development which must precede any analysis of the right of development. If this were not the case, the right of development would be a mere speculation, quite unconnected with the socio-economic facts of the world. Indeed, Professor Monique Chemillier-Gendreau goes further, maintaining that "the right of development governs an illusion", and is "a deliberate deception, postulating a reality which is steadfastly ignored".[1]

But perhaps we should define what we mean by the "right to development" .

THE RIGHT TO DEVELOPMENT AS A RIGHT OF PEOPLES AND STATES

If it is to have an effective meaning and content, the right to development must have a State as its subject and beneficiary. To avoid any misunderstanding, we will call this "the right to development *at the international level*", to borrow the title of the Hague workshop.[2] This does not mean that we deny the existence of this right at the individual level. But, as we wrote in 1969:

> Individual welfare is achieved more surely and quickly if we begin with the welfare of the group to which the individual belongs. However we describe States, they are only subjects of international law in order to guarantee the exercise of rights which ultimately appertain to the individual. [3]

In fact, unless we are cherishing a doomed illusion, the right to development cannot be an individual human right unless it is first a right of the people or the State. It is not an individual interpretation, but a collective and community approach to the right to development, which enables us to identify the real problems involved and the solutions available.

Evidently, the right to development is a human right, since the individual is the ultimate beneficiary of international legal norms; it is nonetheless true that this right is proclaimed within the defined

framework of a system which operates among States.

> One can hardly speak of international law in the sense of a law of the universal human community of which individuals are *direct* beneficiaries, and one must therefore refer to inter-State law. There is an apparent contradiction between a system established on the level of international relations, but which tends to resolve problems which relate primarily to the domestic affairs of States. But it is the fact of this reciprocal interpenetration of two completely different spheres which marks an important development in contemporary internationallaw.[4]

This is not all. For even if international law is showing promising signs of a progressive transformation into a law of the universal human community, above and beyond its evident inter-State origins, the inherent logic of a right to development claimed by the individual against the international community falls short, at the very least, this right cannot be effective in practice for the time being, owing to the lack of practical machinery for its implementation. Between the formal designation of the holder or beneficiary of the right, and the attribution of liability on this account to the international community, emerges the obstacle of the irremediably inter-State practice which is typical of the international system and its structures.

Thus our argument runs into the sand, unless we are content to make of the right to development a mere pious aspiration which pacifies our conscience by creating a compulsory link between the individual and the international community. What redress, therefore, is open to the individual who aspires to development? To appeal against the State or the group to which he belongs, in other words, to reduce the right to development, as a human right, to an individual claim against the State at the national level? This is a trap which bedevils any attempt to locate the right to development in human rights; especially when there is already a tendency to restrict the enjoyment of these to the individual level alone. This trap should be avoided, for two reasons. First, as we have already said, contemporary international law may not be destined, and it is certainly not equipped, to intervene legitimately and effectively in domestic dealings between States and their nationals. And secondly, its prospects of successfully doing so are far from rosy. However willing a State may be to guarantee its citizens their right to development, it encounters a tragic *non possumus,* a complete *impasse,* where the international environment impedes that State's search for development by the interplay of a variety of factors, including the current international division of labour. In such a situation, for which the State as defendant is not responsible, international law can only act unjustly and ineffectively, by making that State into a scapegoat. Thus to approach the right to development from the angle of individual rights based on human rights, is to risk obscuring, the fundamental international problem.

The best means of securing the citizen's right to development is quite different; it is to set the State free from certain international operations which drain its wealth abroad. Thus, an interpretation of the right to development in the context of human rights which, unwittingly or not, take on a largely individual connotation, merely diverts attention from the real problems. At best, it leads to an impasse, and at worst, it is mere hypocrisy or pretence.

Legally speaking, the problem of development is a challenge to the international community, since the Charter of the United Nations has turned development into a supremely *international* phenomenon. Underdevelopment is not a sign of backwardness which can be ascribed to purely national factors such

as internal constraints of various kinds, poor leadership, or corruption and prevarication on the part of local officials. These factors certainly play a part, alas often a substantial part, in national underdevelopment. But we must be careful not to use them as alibis to obscure another more decisive fact: *underdevelopment is a structural phenomenon linked to a given model of international economic relations, and to a certain international division of labour.* Indeed, underdevelopment is the *direct result* of this international division. Even under the best conceivable government, in a country of outstanding potential wealth and resources, this international division of labour will indubitably, through the machinery of the international order, act like a leech, draining the country of its lifeblood.

As long ago as 1969, we said that :

> the gulf which divides rich and poor nations is continually growing, threatening disastrous effects for the whole of mankind. The problems of the *"proletariat within nations"* in their individual dimension must not make us forget the problems of the *"proletarian nations"* of the international community. What we need is an international social law on a scale befitting nations. The developing countries have frequently spoken of this problem, appealing to international solidarity, as they did recently at Algiers, at the Conference of the 77. . . International cooperation should be the expression of a new international law which, for the wealthiest States, imposes *a duty to contribute to the development* of the least advantaged States, in a spirit of human solidarity which must henceforward outlaw any idea of exploitation.

Individual appeals to the State to obtain satisfaction of the right to development, in a context where the real facts of international life are obscured, appear still more unjust and ineffectual if we turn to the lessons of history. In Europe, for example, the practice of paying heed to human rights has been the outcome of a struggle, not the result of legal codes being handed down by some enlightened or benevolent State authority. Generally speaking, throughout the world individual rights and freedoms have been wrested from the powers of the State at the price of prolonged battle. There is nothing to suggest that a different route is to be followed in the Third World, especially in Africa. And the precarious condition of emergent African States warrants the choice of a primordial objective, the consolidation of institutions of State for the very purpose of combatting underdevelopment. Thus the individual's pursuit of the right to development *vis-a-vis* his State can only weaken the State, and would occur at the very time when the State needs to be strengthened if it is to neutralize the negative effects of the international factors which counteract its collective development. In laying claim to development, the individual would undermine the State at a time when the latter is engaged in the attempt to secure him that same development. We must now turn to be question of the actual basis and content of the right to development.

BASIS OF THE RIGHT TO DEVELOPMENT

The right to development as a corollary of the right to life

In this field, the simplest ideas are probably the best. No jurist, whether a positivist or not, would think of arguing that international law contains principles which contradict the elementary right to life. If that is so, there is overwhelming evidence in favor of the existence of the right to development, and

its basis is logically perceived as a corollary to the right to life. If the right to development does not, by the same logic, derive from the *jus cogens,* it could be argued that genocide, which is the denial of the right of nations to life, is permissible under international law. "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime", according to Article 19 of the draft Articles on State responsibility prepared by the International Law Commission, based on the report of Professor Robert Ago.

Meanwhile, the human multitude is plagued by hunger, which every year supplies the epitaph to 50 million anonymous tombs throughout the world. This is a veritable holocaust on a world scale. National penal codes recognize and punish the offence of failing to render assistance to persons in distress. Evidently there is nothing of the kind in international law, which could be said to prove that the right to development still lacks a firm legal foundation.

The right to development and its derivation from the Charter

Article 55 of the Charter: an uncertain forerunner

It has become an automatic reaction among internationalists to turn to the Charter of the United Nations. However, this return to source is not always successful, even if the Charter itself, richly endowed both in its original text and in its supposed accretions, lends itself to fruitful exegesis. Some jurists claim that the right to development is a legal concept and principle enshrined in the Charter, the basis of which is to be found both in the Preamble, in Article 1, paragraph 3, and in Article 55. These are praiseworthy efforts of exegesis, for which there is ample scope in the remarkable flexibility of this incomparable document. But the end result of these efforts is unavoidably limited by the fact that in the circumstances of 1945, the ideology of "development for all" was still vague, and its legal expression in the Charter inevitably timid.

The self-determination of peoples, a certain forerunner of the right to development

The modern international community is universal and "open", the opposite of what it used to be when it was restricted to the European club of States. The "open" community of today, which has replaced the "closed" community of yesterday, owes this distinguishing feature to the self-determination of peoples. The right of peoples to self-determination has become the instrument, the key and the tool of an open society. Thus self-determination is in some degree a *prior condition* of the very *existence* of this type of international community. In other words, the principle is the primordial condition which has enabled international society to become what it is. Thus it conditions both the *being* and the *essence* of contemporary international society. It is an essential and primary principle from which derives the essence of the existing international community. Without self-determination, there is no contemporary international community. Consequently, in the hierarchy of international legal norms, self-determination is an essential, initial and primary principle, from which are derived the other principles which govern the international community. Thus self-determination belongs to the *jus cogens.*

The "right to development" flows from this right to self determination and is of *the same kind.* For it is pointless to acknowledge self-determination as an overriding and peremptory principle, if we do

not *simultaneously* acknowledge a "right to development" for the people which has determined own future. This right to development cannot be other than an absolute inherent, "built-in" rig inextricably enshrined in the right to self-determination.

Here we see the possibility of a more fertile and more self explanatory basis for the right development of every nation and every State. We also note that the direct descent which we trace the right to development from its source in the right to self determination makes the former a rig of the State, or of the people, taking precedence over the right of the individual, which seems a bett explanation.

International solidarity, as a basis of the right to development

One preliminary comment is in order. We cannot hold the *jus cogens* to be an established part international law without deducing from it the existence of an "international community". Article 5 of the Vienna Convention on the Law of Treaties defines the *jus cogens* by reference to "th international community of States as it whole". Similarly, the International Court of Justice, in 197 in the *Barcelona Traction* case, referred to the "obligations of a State towards the internationa community as a whole". Thus the existence of a *jus cogens* presupposes that of an internationa community. This was also the approach of the International Law Commission when it define "internationally wrongful acts" in its draft codification of State responsibility under Professo Roberto Ago.

Having said this, we can identify an *initial foundation* for the right to development in the *jus cogen* thus protecting this right by a norm adopted barring any exemption by an international communit which simultaneously exists, puts forward demands and is inspired by solidarity. But the momer "international solidarity" is argued as a basis for the right to development, it falls foul of the scepticisr of some writers who deny that its existence can be discerned from any perusal of past or presen sources. For a start, they say, does the international community itself exist? Not so, according t Claude Nigoul and Maurice Torrelli in their recent work, in which one chapter has the deliberatel controversial title "An international community without faith", followed by "An internationa community without law". [5] And what about international solidarity? At the most, they say, this is " vague fancy. . . an ambiguous blend combining ingredients of a moral description (equity), a lega description (sovereign equality), and a material description (interdependence and the commo interest) . . . In this indigestible cocktail, the idealistic note is soured by misunderstanding an illusion".[6] Even the perceptions which prevail of "international solidarity" differ, according to thes authors; they are as heterogeneous and as contradictory as their spokesmen on the international stage

We take, a different view. The contradictions and conflicts visible within the international communit are a tangible proof of its existence.[7] As for international solidarity, this is not some nebulous ideal but the realization of the interdependence of nations. Three stages can be identified in this attempt t locate the basis of the right to development from the starting-point of the concept of international solidarity:

1. interdependence as a result of the global nature of the inter national economy;
2. the universal obligation incumbent upon every State to develop the world economy, an obligation which makes development an international problem of the first order; and

3. international solidarity as a basis of the right to development.

Let us take these three points in order.

Interdependence, a result of the global nature of the international economy,

It is clearly impossible to split up or to break down development problems, whether occurring within a single country or on a worldwide scale. They have to be considered from an overall standpoint both within the confines of a State (planned integration of all sectors) and at the global level (international division of labour). This universal approach is inevitable and is the only one that can be adopted, given the causes and consequences of the present world economic crisis and the nature of the means suited to dealing with it.

The factors underlying the crisis are global ones, like the crisis itself. Solutions must be envisaged on the same scale, as national economies have never been economically self-sufficient or, at least, have never lived in enduring economic isolation. The fabric of world history, with its varied texture of happy and unhappy events, has been woven on the underlying basis of the search for raw materials, and shows that there has always been *an international division of labour between nations*. Throughout the ages and the different periods of human history, this international division of labour may at different times have appeared just or unjust, powerful or unstable. Without describing it, we can assert that it has always existed. Accordingly, there has always been a *single* world economy, based upon a certain international division of labour appropriate to each period of history. The universality of the world economy is an ever-present phenomenon. This international division of labour has served to justify the economic and legal doctrines by which the world has been governed: the feudal system and serfdom, the building of empires from the 16th century, along with slavery; the theories of the acquisition of territory by occupation, the doctrine of *terra nullius*, the right of trade, the open door policy, the allocation of spheres of influence etc. . .

The universality of development problems is also a specific implication of the Charter of the United Nations. The Charter has placed the problem of development on an essentially international footing, and has made it the responsibility of the whole international community (Preamble, Art. 1, para. 3, and Art. 55). It is not possible to envisage anything other than a universal approach to the problem of development, since any solutions presuppose universal participation, equality between partners, and the ability to envisage the interrelations and reciprocal interactions involved in such problems as may arise. The United Nations General Assembly has, in its resolutions, frequently recalled the *responsibilities;* and *obligations incumbent* upon it under Articles 55 and 56, which *compel* it to promote development.

The nature of the world crisis, which is structural and not specific, also implies a need for a comprehensive approach to solutions. The crisis is so profound that it is not to be remedied by stabilizing the world economy, but rather by restructuring it to 'take account of changes as between nations in the influence of the various factors, i.e. politics, demography, energy, mineral resources etc. This is also clearly apparent when care is taken to observe the distinction between the *concept of development* and that of *growth,* which are completely different.

It has been said that, given the "exhaustion" of the world economy, the industrialized countries must first be "helped" to relaunch their economies and recover their rate of growth - and it is said that this

will have beneficial repercussions upon the developing countries. The revival of growth in the industrialized countries would have a stimulating effect and would spread to the developing countries. **Such an argument is completely misleading.**

Word-wide action *to promote development* can neither be reduced nor subordinated to the revival of *growth* in industrialized countries. For under-development is not, and has never been, the result of an absence of growth in the developed countries, and there is absolutely no correlation between under development in the Third World and the lack of growth in industrialized countries. Growth in the latter does not necessarily promote the development of countries which lag behind. Development, in fact, implies a specific action quite unrelated to the renewal of growth.

This misleading argument as it has been advanced *presupposes that under-development is linked to the current world crisis, even that it results from the crisis.*

This is untrue. Under-development existed before the crisis, it continues to exist alongside it, and there is every probability that it will survive it in future, unless it is combated by appropriate means. There is no logical relationship between the under-development of the developing countries and the fact that the growth if the industrialized countries has currently come to a halt.

In short, the revival of growth in the industrialized countries and the promotion of development in under-developed countries are not mutually exclusive - but neither are they conditional upon each other. They can be dealt with jointly and in a comprehensive manner by reforging the structures of the world economy on the basis of equity and mutual advantage. International co-operation for development implies a *global approach to all sectors* of the world economy, since they are inter-related and interact upon one another. Comprehensive solutions must be found for a global crisis. This was the intention framed in Resolution 34/138 of the United Nations General Assembly which launched the "Global Negotiations", and emphasized the need for these to proceed "in a simultaneous manner in order to ensure a coherent and integrated approach" to all the world's economic problems.

Finally, industrialized countries can be sorely tempted to leave the developing countries to their fate, and to refuse to assume what they tend to see as a burden. This temptation is all the greater in that the industrialized countries are being asked to give development aid at a time when they themselves are in crisis. But the industrialized countries should resist this temptation in their own interests. This is an absolute requirement for their future well-being. On the one hand, the revival of their growth must inevitably be linked to economic take-off in the developing countries, whose overall demand - especially for capital goods - will give a new impetus to manufacturing and trade in the industrialized countries. On the other hand, the predictable collapse of the economies of developing countries would have disastrous repercussions on the industrialized countries, which would have no way of protecting themselves. The bankruptcy of developing countries, their inability to pay their debts, outbreaks of violence, uncertainty in the supply of raw materials, energy and commodities, trade protectionism, etc. . . , would combine to ruin the advanced countries.

This is the age-old reality of an international division of labour which has subordinated the economy of the Third World to that of the West, making the latter powerful but also highly vulnerable.

The universal obligation incumbent upon every State to develop the world economy, which makes development an international problem of the first order

The foregoing analysis of the interdependence of nations results in every State and nation acting as joint guarantors of the prosperity of the world economy towards both present and future generations. This joint responsibility in the management of the world's economy is due precisely to the global nature of that economy and of interdependence.

However, we must avoid hastening to the conclusion that this interdependence must persist unchanged in its present structure, heavily imprinted as it is by the contemporary international division of labour. The interdependence and solidarity of nations must not forever take the shape of the horseman and his mount. It is to prevent this that we invoke the right to development.

Subject to this obvious reservation, the duty to develop the world economy is incumbent on all of us. Here we recognize the concept of *"collective economic security"*, which is far from new, but highly revealing in view of what has been said. The Charter of Economic Rights and Duties of States refers to this collective economic security.

Article 31 of this Charter is remarkably dogmatic on this point, and we cannot but agree with it. It runs:

All States have the duty to contribute to the *balanced* expansion of the world economy, taking *duly* into account the *close interrelationship* between the *wellbeing of the developed countries* and the *growth* and *development* of the developing countries, and the fact that the *prosperity of the international community as a whole depends upon the prosperity of its constitutent parts.* (My italics.)

International solidarity as a basis of the right to development

From the foregoing analysis several important consequences arise.

- The joint duty and responsibility of States to guarantee the development of the world economy are radically incompatible with the risk of that economy being destroyed. One of the advantages of this approach is to supply a legal foundation and framework for the question which is often posed, but never subjected to thorough legal analysis, of redirecting world arms spending to development tasks.
- This line of argument is related to another: the duty which is incumbent upon all to safeguard the human race from nuclear extinction, a duty which seems indisputably to derive from the *jus cogens,* if international law has any purpose whatever. Those alive today are only one link in a chain which they have an absolute duty neither to break nor to permit to be broken. The right to development, founded on international solidarity, is a concept which transcends the boundaries of both space and time, to the advantage of all nations of the world and all the generations in history.
- As we have said above, it is not an individual interpretation, but a collective and community approach to the right to development which enables us to identify the true nature of the problem and the solutions which must be applied.
- Some received ideas which bedevil the right *of* development, such as the *principle of the duality of norms,* must now be superseded. The principle of the duality of norms was, in fact, grafted upon the *existing* international division of labour. The specific norm governing development, which makes the developing country a beneficiary either through non-reciprocity or the grant of trading preferences, is perceived as a mere exception to an arrangement which remains

completely unchanged in other respects, and which retains unaltered the existing international division of labour. Under that system, a developing country benefits from a particular norm, but the fundamental structure of international economic relations, especially relating to international trade, and the liberal principles which underlie that structure, remain untouched. The economic order established by the world's industrial giants, to meet the needs of their respective societies, still cannot be touched. This reveals both the global nature of the world economy, and the existence of a pre-established international division of labour.

CONTENT OF THE RIGHT TO DEVELOPMENT

In the right to development we discern two aspects:

1. the right *erga omnes* to develop, a right claimed by a State which is "master in its own house" and which is *opposable* by it towards all others;
2. the right to develop claimed by a State which is an active protagonist in international relations, and which represents *a right over others,* namely a right which may be *exacted* by that State from other States and from the entire international community.

Let us look at each of these two aspects, bearing in mind the concept of *jus cogens.*

The right to develop *erga omnes,* claimed by a State "master in its own house"

This right of the State "master in its own house" includes a number of others, the most important and complete being the right of each nation freely to adopt its own economic and social system, without outside interference or compulsion of any kind, and to choose its own development model with the same degree of freedom. This is a right inherent in the right to self-determination and the right to development. This seems to be an established point, and official views appear to concur. But the consensus is a mere facade, as we can see from the way the right to development is impugned when in is expressed through the right of free choice of an economic system and a development model.

The right to development and permanent sovereignty over natural resources

State sovereignty, as enshrined in the Charter of the United Nations, is traditionally defined through its political rather than its economic aspects. The inadequacy of this definition is plain. The Charter was only able to condemn breaches of the political sovereignty of States, and the sanctions it prescribes are linked only to the transgression of political obligations, not of economic duties.

Arising from this we have the extraordinary situation of "banana republics", dominated by foreign economic entities or subjected by foreign States to economic pressures of all kinds, where it is impossible to invoke any breach of sovereignty. The political sovereignty of the State is thus abrogated by the wholesale violation of its economic sovereignty; yet no redress is available under international law, since on the face of things political sovereignty is not directly affected, at least in the formal and political sense which is ultimately a mere *fiction* for developing States. This formal expression is put on show through a flag, a national anthem or a seat at the United Nations, whereas the real seat of power is located elsewhere than within the State; the latter is subjugated by foreign economic forces, whether private or public, which are in virtual command of the country's economy as a result of their direct or hidden pressures. Behind the para-legal institutional structures which are

erected to create a semblance of political sovereignty, there is a manifest state of actual dependency in various forms, relying on a deliberate economic subjugation which is totally incompatible with the concept of genuine sovereignty. As a result of this faked version of sovereignty, independence is nothing but a veneer to disguise the continuance of earlier forms of dependency, and the consequent accrual of wealth to foreign economic empires.

This, and none other, is the underlying reason why the States which have to suffer this situation have forged the principle of "the permanent sovereignty of every State and every people over natural wealth and resources". The objection has been made that to claim sovereignty in these terms is superfluous, and smacks of unbridled for a distinctly earthbound species of sovereignty. This is inaccurate; superfluity would imply that sovereignty already exists, In fact, there was a pressing need to redefine sovereignty by a re-appraisal of its constituent parts. Formal sovereignty in its fictitious shape, as achieved on independence, remained an international pretence which obstructed development until a modern conception of sovereignty had been formulated to include the dimension of economic independence.

Where the elementary foundations of national independence on the economic level are absent, having been appropriated by foreign influences which are largely concealed, it is impossible to refer to the sovereign equality of States or to State sovereignty without succumbing to fantasy. Thus it has become blindingly clear that States cannot be equally sovereign unless they are equally developed. And it can be seen with equal clarity that the right to development is a *sine qua non* of sovereignty. Here we have a *necessary correlation* between authentic sovereignty and the right to development; between genuine sovereignty over a country's wealth and the right to that country's development. For every inequality in development carries implications of domination and dependency which place sovereignty at risk.

We come to the following conclusion: a State cannot renounce its own jurisdiction over its natural resources without seriously undermining its own sovereignty and independence, and threatening *their very existence*. Here lies the novelty. Resolution 1803 of 14 December 1962 had already declared that "Permanent sovereignty over natural wealth and resources [is] a basic constituent of the right to self-determination". To renounce it is to renounce self-determination, and to deny one's independence, This new principle was gradually fleshed out by the General Assembly of the United Nations, and can now be reduced to two propositions. The first is that the *intrinsic condition of the existence* of a State's sovereignty is its permanent sovereignty over the natural resources of its territory; in other words, there is neither State sovereignty nor State independence without sovereignty over these resources. The second proposition is that any persistent breach of permanent sovereignty over natural resources is a threat " to international peace and security.

Thus the economic dimension of sovereignty becomes not merely a prior condition of its existence, but also a guarantee of peace and security. This is a new and resonant affirmation of sovereignty. What is new here is that international peace and security may be threatened not merely, as is supposed, by situations of political or military conflict, but also by situations of economic conflict arising from exploitation. This is a more *concrete* and more *accurate* perception of the world's security problems in the light of economic issues, which have always played a major role in relations among States and in international conflicts.

This approach consequently poses economic problems in terms of the maintenance of peace; and conversely, the maintenance of peace is posed in economic terms. If we read Declaration 3201 (S-V1) of 1 May 1974 on the new international economic order without, of course, referring to questions of institutional or juridical status - we find that the Declaration is reminiscent even in its style, especially in its preamble, of the San Francisco Declaration which established the United Nations. In other words, Declaration 3201 has a meaning for the economic sovereignty of States identical to that of the San Francisco Declaration, thirty years before, for their political sovereignty. From this viewpoint, 1974 and the years which followed witnessed a major legal upheaval.

Here we find the commanding organic link between sovereignty and the right to development opposable *erga omnes*. It is clear that from this analysis, this aspect of the right to development must derive from the *jus cogens*. State sovereignty, permanent sovereignty over natural resources and the right to development are all links in the same chain, which is only as solid as each of its individual links. If the "right to development" link is especially frail, the same will be true of sovereignty itself.

This, then, is the argument, the new *Weltanschauung*. And what is the attitude of State practice, jurisprudence and legal theory? This is another matter altogether, which illustrates the gulf between theory and fact.

The legal force of the principle of permanent sovereignty over natural resources has divided jurists into a number of camps: those who deny the existence of such a principle in international law; those who hold it to be *in statu nascendi*, in the making or in course of taking shape; and those who hold it to be a cardinal, binding and peremptory principle which derives from the *jus cogens*.

It must be pointed out that this principle is endorsed not merely by the declaratory law of the United Nations, where resolutions, declarations and other recommendations on the matter have recurred with impressive frequency. The same principle is already embodied in treaty law.[8]

Nationalization is the supreme manifestation of sovereignty and of the right to development. It is a supreme act of development, since it enables foreign enterprises to be released and integrated into the national economy under a management which conforms to the national interest. Now that the right to nationalize is admitted and acknowledged as a manifestation of the right to development, it is the style of nationalization which excites controversy. The methods involved may undermine the right of nationalization itself as a commanding principle. Heated dispute continues to surround the question of whether "the duty of compensation" exists or not. The heart of the argument is that developing countries are afraid of the *power* to nationalize being limited in practice by the *ability* to pay, and thus being rendered ineffectual.

Indeed, it may be asked whether there is any legal justification for speaking of an actual sovereign authority to nationalize, if it is limited in advance by a potential inability to pay. It might even be argued that it is *because* the State is poor that it nationalizes, *viz.*, that nationalization presupposes a certain inability to pay. It would, seem that to link the right of nationalization to a duty to compensate ends by rendering illusory the authority to nationalize itself, which amounts to limiting the sovereignty of the State. To do so recasts sovereignty in its traditional, formal and ineffectual mould, in other words, in a format which does not operate equally for all States. And so the problem starts anew.

During the discussions which took place in Geneva, Mexico and New York during the preparation of the Charter of Economic Rights and Duties of States, Westerners proposed that the right to nationalize should be exercised *"in conformity with international law"*, which was seen by the Third World as a vicious circle, reminiscent of the snake biting its tail.

At the end of the day, doubts abound, and not only because some scholars still dispute the legal force of Declaration 3201 (S-VI) on the new international economic order, and of the Charter of Economic Rights and Duties of States; but also because the two texts, adopted six months apart, contradict each other on the fundamental issue of compensation. Admittedly, the right to nationalize is plainly acknowledged in both texts; nationalization does not derive from international law, but from municipal law. However, Declaration 3201 refers to compensation as a mere possibility, whereas in the Charter of Rights and Duties it is a certainty.

International jurisprudence suffers from the same lack of harmony and consistency. Here I shall briefly mention certain cases which followed upon the Libyan nationalization laws of 1971 and 1974. Three arbitration awards (Lagergren, Dupuy, Mahmassani), which are mutually contradictory, all distorted to some degree the scope of the principles of sovereignty over natural resources and of the right to development; this is a long way from the *jus cogens.* Yet these arbitration awards related to the same country, the same act of nationalization, the same product - oil and concessions of the same kind, granted by the same government under the same Libyan law of 1955. To this series of cases one might add the Reuter (Aminoil) award of 1982.

In at least two of the four awards (Reuter and Dupuy), it was a question of appraising the legal nature of the principle of sovereignty over resources, and deciding where it should be fitted into the hierarchy of legal norms.

> It has been claimed [says the Reuters award] that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting States from affording. . . guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation . . .. [There is no] rule of international law prohibiting a State from undertaking not to proceed to nationalization during a limited period of time.

In the Reuter award, a State which makes a clear and explicit undertaking to refrain from nationalization altogether is not transgressing any binding rule of international law.

But the Dupuy award goes so far as to assume such an undertaking by the State on the basis of a mere *stabilization clause.* Admittedly the Dupuy arbitrator does not deny the right to nationalization; no one has yet gone as far as that. However, he considers this right to be limited by *international commitments* which are freely assumed and which are themselves a demonstration of such sovereignty. He implicitly affirms the binding character, deriving from the *jus cogens,* of the principle of permanent sovereignty over natural resources. But he draws a distinction between the *enjoyment* and the *exercise* of a right. In his view, it is only the exercise of the right which has been affected, and only for a limited length of time and in a limited area.

However, in actual fact, the oil sector is not a limited area in Libya, since it dominates the country's entire economy; moreover, the period of the concession (50 years) is neither as negligible nor as

limited as the terms of the award imply.

The right to development and reparation of past injustices

The problem of damage to economic structures, the distortion of the economy and the excessive exploitation, indeed the theft, of resources has been raised by the States of the Third World against the former powers which administered their territories. In the context of the right to development, and thus the preservation of resources for future generations, is the State which is the beneficiary of this right entitled to sue the State which was responsible for administering the colonial territory? This is a thorny problem which is liable to engender unceasing and bitter legal dispute. But the claim exists, and the texts are clear. Their legal significance is another matter. [9]

The former administering State occasionally responds to this concern within certain limits, albeit modest ones, and on quite a different basis, presenting a specific aspect of the satisfaction of the "right to development" which cannot be ignored. What the former administering State does is to offer *"aid"* or *"assistance"*, through special bilateral arrangements. It justifies the practice by recourse to the concept of *"mutually beneficial co-operation"*. Ideas of "solidarity" are also invoked. The former administering State itself observes that it has no motive for permitting economic collapse in its former possession, if only for the sake of maintaining or establishing markets there for its products.

The command of the "means" necessary for "normal" development

This is a third aspect of the right to development opposable *erga omnes* by the State towards others. The right to development, as we know,

> implies the full realization of the right of peoples to self determination, by virtue of which all peoples freely determine their political status and freely pursue their economic, cultural and social development.[10]

It follows from this that a people may never, in any circumstances, be deprived of its own means of subsistence. In particular, it would be a breach of the *jus cogens* if unjust practices forced upon a nation were to deprive it of "its natural resources necessary to its normal development", in the language employed by the Charter of Economic Rights and Duties of States (9th principle). Thus, an economic blockade of the coasts of a State, or the deviation of a watercourse which results in totally or partially depriving a State of natural water resources, are measures involving a breach of that State's right to development.

The right to development as a right which can be exacted from others and from the international community

The other dimension of the right to development is fundamental, but much more complex than the first. It is no longer a question of "the State master in its own house", but of the State as an active protagonist on the international scene. This second dimension shows that the State cannot be the one without the other. If it is a hapless victim of the current international division of labour, if it is denied participation, it cannot develop. This fundamental aspect of the right to development can be reduced to the sensitive question of whether it can be *exacted* by a State from all others, on behalf of the international community. Its purpose is to ensure equal development opportunities, as the prerogative of all nations. This implies, on the one hand, that the current international division of labour must be

radically altered, and, on the other hand, that another more equitable system must replace it.

This right over others, which one nation may exact from other nations, from the entire international community, multinational companies and all international economic agents, is hotly challenged. The debtor's obligation in respect of the right to development is thought of as no more than a moral obligation. The dues which the *State* possessing the right to development claims from the international community or from other States are said to lack any firm legal foundation, and to be at all events far removed from the compulsion to pay which is authorized by a superior legal norm.

In this sense, this right which can be exacted from all by the beneficiary State has a twofold significance which can be summarized as follows:

- to every man his due,
- to each according to his needs.

To every man his due

This first point implies that the State which is trying to develop has the right to ask all other States, the international community and all international economic agents *to refrain from taking that which rightly belongs to it, or which is its rightful due,* or which "must" be its entitlement under international terms of exchange. In the name of this right to development, the State in question can lay claim to a *"fair price"* for its raw materials and for all that it has to offer in its exchanges with more developed countries.

Its argument is more or less as follows:

> Before you start giving me alms or making me gifts, give me my rightful due. Perhaps once you've done that, I won't need your charity. Your charity could will be no more than a stratagem to hide the fact that you are taking what is rightfully mine. Your "charity" is not worthy of the name, as you are merely giving me what you owe me, and not all of it at that.

To each according to his needs

The second implication of this right to development which can be exacted from the international community would seem to be rather more complex. The State *is entitled, if not to the satisfaction of all its requirements, at least to its fair share of what belongs to everybody and which, then, belongs to it by right.*

This leads on to two questions:

- what is it that belongs to the international community and which can be claimed by any State in the context of its right to development?
- what is the "fair" share due to that State in application of the dictum "to each according to his needs"?

With regard to the first question, the satisfaction of people's basic requirements is seen as a right, not as an act of charity. It is a right which should be put into effect through appropriate *norms and institutions.* The relationship between the giving State and the receiving State appears to be a matter of responsibility and of mutual entitlement to property considered to belong to all. This analysis leaves no more room for charity or for "acts of grace", which are seen as factors of inequality in that the State

giving aid expects to see signs of submission or political flexibility manifested by the State which receives it. If *need* is taken as the criterion of equity, this helps to clarify the concept of *"fair shares"*, which would otherwise have been distinctly vague.

To each according to his needs, means that the "fair price" cannot be equated with the *market price*. The desired objective of an equitable relationship between producer and consumer can only be reached by modifying the price to benefit the less developed country, through the medium of other compensatory provisions. This implies a transfer of resources towards the poorer countries. The fair price is calculated according to the general principle of responsibility towards the neediest countries. The fair price will take account of the need to recover production costs, including the social costs relating to the minimal well-being and development of developing countries. [11]

What belongs to the international community and forms part of the "common heritage of mankind", must be shared among all States according to the maxim *"to each according to his needs"*. What we have here is an element of the *jus cogens*.

This innovatory approach to the common heritage of mankind is capable of giving real substance to the notion of universal solidarity. It is especially promising for the future prospects of international relations; it can be applied not merely to the resources of the sea bed and of outer space (the resources of the moon and celestial bodies), as is already the case, but also to the earth, the atmosphere, the climate, the environment, inert matter such as plant life and the genetic heritage of animal and vegetable species, whose wealth and variety must be preserved for future generations. It can also open up prospects, and offer promising solutions, for such issues as the cultural and artistic wealth of the planet. Likewise, it could and should be applied first to man, who is the foremost common heritage of mankind, and to humanity itself, the new province of international law and the first inheritance which unquestionably merits preservation from the wholesale destruction which threatens it.

ESSENTIAL WORLD FOOD RESOURCES AS THE COMMON HERITAGE OF MANKIND

"To each according to his needs" refers, as we have said, to each State's entitlement to a fair share of the property of the international community. But the international community can further extend and enrich its heritage. And from this viewpoint, if the "right to development" is to be given its full meaning, it is vital to save Leo Tolstoy's barefooted man from the prospect of having to choose a pair of boots rather than the works of Shakespeare! No doubt my proposal that all the "essential world food resources" required by the nations should be considered as belonging to the whole human race, will be judged Utopian. These resources must be declared the "common heritage of mankind"; and in these barren days, this will no doubt sound Utopian. But it is risky to scorn human aspirations. It is risky to confine 4 billion human beings to the bounds of what some may choose to call panegyric nonsense.

If I advocate that the "world's food resources" should be declared "the common heritage of mankind", so that each people can be given what it needs, this is not out of moral idealism, but from a concern to avoid the dangerous seizing-up of international relations today. My proposition would completely transform international society, and could short-circuit the major crises and contradictions of our time, also enabling the common responsibility for global needs to be clearly perceived.

Why should the end of the twentieth century, with its prodigious progress in the fields of technology and science and its heightened awareness of the interdependence of all peoples, not be equal to the

ideas of the sixteenth century, during which jurists like the Spaniard Vitoria maintained that the Christian Scriptures had designated the "fruits of the earth" as intended for *the whole human race,* to be *utilized by everybody* and *made available to all?* And I am sure that in the powerful spirituality of other creeds, religions and philosophies, there are texts along the same lines.

Why should not the twentieth century, for example, be equal to the spirituality of the seventh century, when the Koran proclaimed to all men that all riches, all goods belonged to God, and hence to all the members of the community, and that in consequence the "zakat" or giving of alms took on the character of an institutionalized compulsory act, a manifestation of solidarity among men, obliging each one of them to give away one-tenth of his property every year?

Cannot this same twentieth century raise itself to the level of the principles of solidarity set forth in 1758 by the jurist Emeric de Vattel, who said that every nation should contribute to the happiness and the perfection of others, by every means in its power?

In his *"Essai sur le don, forme archaique de l'echange"*, the sociologist Mauss explained the theory of *"potlatch"*[12], a feature of some so-called "primitive" societies, such as the "consumer" society of the Aztecs, whose members at regular intervals surrendered surplus goods which they had amassed through their work.

The French novelist, Georges Bataille, took up this theme in his book *La part maudite*, in which some passages are filled with an imprecatory violence against modern societies which do not know how to give away their surplus or excess resources by organizing their economy on the basis of gifts.

Today, mankind should harness its energy in the search for an institutional system based on a *global, reciprocal and permanent "Marshall Plan"*, so as to make use at least of surplus food resources which would otherwise be wasted, if not of all its wealth.

Distinguished economists of world standing, such as Francois Perroux, have lent their names to this transfer or "gift" economy.

They have acquired a considerable hearing, and the so-called theory of *"generalized reciprocity"* as a means of restructuring and relaunching the whole of the modern world economy is winning many supporters, even among the most skeptical. At least as far as food resources are concerned, action like this is essential if we are to escape blame for the intolerable catastrophe of mass starvation while food surpluses are being destroyed elsewhere.

How can the world's food resources be made the common heritage of mankind? How can this "new international food order" be achieved? Politicians, economists, jurists and financial experts should reflect upon these tasks. An early temporary measure could be the establishment of a *universal institution* with an operational management, perhaps under the name of an "International Fund 'for Food Resources" (IFFR). It would be financed by a tax levied in each State on a few manufactured products of high added value, made from raw materials originating in Third World countries, and/or by a 1 per cent tax on military appropriations.

This Fund at the disposal of the Organization would operate as an *equalization fund.* It would subsidize the purchase of food resources, or, more accurately, would buy the exportable portion of food products from food-producing countries and place it at the disposal of other countries, according

to their deficit on foodstuffs and at a token price - which might be replaced later by a generalized system of free distribution of the world's food.

This universal organization would continually review changes in the pattern of food production and consumption, and would have available to it a range of incentives enabling it to integrate national production and consumption policies into a coherent global police for the world's food resources.

Like all generous principles, the "common heritage of mankind", especially if it is to follow this precept and embrace world food resources, has a visionary character; yet it would be a mistake to dismiss it as Utopian. In fact, this concept presents the opportunity for man to achieve an impressive breakthrough in his quest for the "right to development". Far from being an illusion, it marks a crucial breaking point with various age-old sources of confrontation, domination and appropriation of the wealth of others.

This principle is a return to basics, to the satisfaction of the aspirations and needs of all, aspirations and needs which cannot be in competition or mutually exclusive, since the thinking behind this concept makes the human race its first priority, surpassing States and individuals. Developed and advanced States should be powerfully motivated in this direction by their awareness of the global character of the world economy, the interaction of which compels them to promote the welfare of others in order to achieve their own.

In this era of painful transition, it is imperative that men should turn for a guiding light to their better selves, where they will find a full interpretation of the Universe, and a perfect model of civilization. In the "long day's journey into night" on which they are embarking, they have for their guidance the torch of Antigone, whose tremulous free spirit shines down the ages with her echo in every heart: "I was born for love, not for hatred". Then the world can experience at last the boundless majesty of mankind at peace. And then the saying of Sophocles will come true - that the universe has many miracles, but the finest of all is Man.

FOOTNOTES

1. "Relations between the Ideology of Development and Development Law", p. 57 above.
2. "The Right to Development at the International Level", symposium organised by the Academy of International Law in conjunction with the United Nations University, *Recueil des Cours,* 1979, Nijthoff, 1980.
3. Mohammed Bedjaoui: "Pour un nouveau droit social international", *Yearbook of the A.A.A.*, The Hague, 1969, Vol. 39, p. 17 (Congress of the A.A.A. at Algiers).
4. Giovanni Kojanec: "Principes d'un systeme international du droit social", *Yearbook of the A.A.A.*, 1969, Algiers Congress, *op. dt.*, p. 29.
5. This refers to the establishment at Algiers, in 1%7, of the famous group of 77, the multilateral North-South negotiating body created to implement the right to development and, more broadly, the new international economic order.
6. Mohammed Bedjaoui: "Pour un nouveau droit social international", *op. dt."* p. 27.

7. Claude Nigoul and Maurice Torrelli: "Les Mystifications du nouvel ordre economique international", Paris, P. U .F., in the series *Perspectives, internationales,* 1984, p. 153.

8. *Ibid,* p. 57-58.

9. See Rene-Jean Dupuy: "Communaute internationale et disparites de developpement", Cours general de droit international public, *Recueil des cours de l'Academie de droit international,* 1979, IV, Vol. 165, pp. 21-231.

10. Among the relevant multilateral treaties and international conventions (some of which, admittedly, are not in force), reference may be made to:

    * the 1958 *Geneva Convention on the Continental Shelf;*

    * the 1978 *Vienna Convention on the Succession of States in Respect of Treaties* (Article 13):

    Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources.

    * the 1983 *Vienna Convention on Succession of States in respect of State Property, Archives and Debts* (Art. 15, para. 4):

    Agreements concluded between the predecessor State and the newly independent State. . . shall not infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.

    The question is whether such agreements, which infringe the principle of sovereignty, are open to denunciation by one of the parties, or whether they are void *de piano* and *ab initio.* An examination of this problem in the light of the *jus cogens* prompts the reply that nullity is intrinsic and *ab initio.*"

11. See Mohammed Bedjaoui: "Problemes nouveaux de succession d'Etats", *Recueil des Cours de l'Academie de droit international,* 1970, II, Vol. 130, pp. 550-551 ("Reappreciation de I'ethique de l'indemnisation"; and the theory of the obligation to compensate the colonial territory as explained by Professor Rudolf Bistricky in 1966); and Mohammed Bedjaoui: "Non alignement et droit international", *Recueil des Cours, ibid,* 1976, 111, *passim* and especially pp. 430-444.

    The problem was raised by the first conference of the Non-aligned Countries in September 1961 in Belgrade. This conference, at the level of Heads of State, devised a formula for a *right to reparation* and a *right to compensation,* (to counter-balance the right to compensation in the event of nationalization).

    * The sixth of the 20 principles contained in *Declaration 3201 (S- VI) on the new international economic order affirms* the right to all States, territories and peoples under foreign occupation, alien "and colonial domination or *apartheid,* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples" (para. *4(f))*

    * The ninth of the 15 principles set out in the *Charter of Economic Rights and Duties of States (Resolution 3281 (XXIX)* places emphasis on "Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development".

12. Art. 1, para. 3, of the draft *Declaration of the Right to Development,* E/CN 4/1984/13, Annex II, 14 November 1983.

ANNEXURE - II
EXTRACTS

DEBATE : GROUP FREEDOM

Anthony D'Amato*

1. The Primacy of Individual Freedom

I am not here concerned with external self-determination. The colonial phase of world history is nearly over. Rule from abroad - the "logic" of capitalism's quest for markets and cheap labor, as Lenin argued-seems to have faded out in recent years just as Lenin has faded out. Rather, I am concerned with claims of "internal" self-determination- "new" claims that are showing up in many countries as ethnic, religious, or cultural groups claim self-determination and autonomy.

For all the reasons expressed above by Professor Pomerance, these "new" claims of self-determination can not be solved by an international rule or norm. The international community might proclaim that "self-determination" is a right of peoples everywhere, yet it is impossible to come up with a general-purpose definition of "peoples."

International law (viewed as a set of rules), therefore, "runs out" at this point. The autonomy claims of groups cannot in principle be solved by rules of law. Many such claims are destined to be resolved through bloodshed, destruction, civil war and genocide. But that does not mean that international law is irrelevant to the assessment of autonomy claims. All that is irrelevant is the misguided notion that "law" is a collection of determinative prescriptive rules. A more sophisticated view of law- law as an institutionalized decisional procedure designed to safeguard the conditions of human flourishing- suggests that the relevance of law to the topic of group autonomy claims lies in the underlying values that a legal system promotes.

The relation of law to freedom is not superficially obvious. Jeremy Bentham rightly observed that "Every law is an infraction of liberty." Yet well-chosen laws surely have the power to enhance liberty. The law that requires me to drive my car on the right-hand side of the road (in the United States, not in Great Britain) curtails my liberty of driving on the other side. Yet in the absence of that traffic law, the resulting vehicular confusion and congestion would inhibit my liberty to drive anywhere. The traffic laws are not an infraction of my over-all liberty; when well-designed, they enhance my liberty. To be sure, some laws seem to be out-and-out infractions of liberty. The laws that criminalize certain nonviolent sexual practices between consenting adults do not appear to enhance liberty but simply to restrain it.

When groups seek autonomy and self-determination, they invoke not only rules of law but also the concept of freedom. Thus, individuals seek freedom, and groups seek freedom. There is agreement on goals. The problem is that groups may have a quite different view of human freedom than individuals have.

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* Leighton Professor of Law, Northwestern University School of Law, U.S.A.

Thus we should analyze the central concept of human freedom. Much has been written in the abstract about freedom; let me begin with a concrete example from my experience in advising and representing a group of American women who were married or had been married to Arabian husbands. Jenny (not her real name) said that she met Ahmed (not his real name) when they were students at a technical college in Missouri. He treated her as an equal partner in choosing places to go on a date and other aspects of their relationship. They became engaged, and she agreed to convert to the Muslim religion. They were married in the United States and they both graduated. Then, as agreed, they moved to Saudi Arabia (or Iran, Algeria, or Kuwait). She was welcomed warmly by his parents and relatives. But after a few weeks, he began telling her what to do instead of asking her. Soon he issued orders to her, and raised his voice when she protested. Shortly thereafter, he began hitting her when she did not comply with his wishes. The level of violence gradually escalated; he bruised her and battered her, and locked her up in their apartment whose windows he barricaded with tinfoil so that no light from the outside could come in. Jenny tried to run away but was immediately picked up by the police and brought back home, where her husband beat her severely. (In Saudi Arabia, a wife cannot leave the home without her husband's permission; she cannot travel within or outside the country without his permission; and she is totally forbidden to drive a car or ride a bicycle. When she goes out shopping, she must be completely veiled.) Jenny sought the advice of her women friends, including her husband's mother and an American woman who had, married an Arab fifteen years previously. Fariva, her mother in-law, summed up the opinion of all of them when she said: "He's just disciplining you. It's easy to stop him from hitting you. Just obey him and please him."

My other clients told me similar stories. I learned from them, and from my own research, that in Islamic countries a husband may legally divorce his wife simply by saying three times "I divorce thee," but the only way she can divorce him is by petitioning a court. The court, whose judges are exclusively male, in every case count a man's testimony as equivalent to that of two women. If a man divorces his wife, she is not entitled to alimony; indeed, she will be rendered destitute. A man is also entitled to have up to four wives, but a woman may only have one husband.

From Jenny's point of view, her freedom was greatly curtailed when she moved to Saudi Arabia. A good starting position for analyzing freedom is Isaiah Berlin's concepts of negative freedom and positive freedom. "Negative freedom" consists of the uncoerced opportunity for action. Clearly, if Jenny wants to travel away from her home in Saudi Arabia or drive a car or ride a bicycle, or wear the clothes of her choice, she is inviting punishment. "Negative freedom" does not require that Jenny actually drive the car or ride the bicycle, it only states that if she wants to do so she can without fear of coercion or punishment. Thus, objectively speaking, Jenny's situation is one that is lacking in negative freedom. "Positive freedom" consists of the ability to make one's own choices. Jenny lacks positive freedom because most of her life's choices are made by Ahmed. If Ahmed tells Jenny that she must put on a certain kind of nail polish, presumably Jenny retains the freedom to decide the order in which she will apply the nail polish to her fingers and thumb. In this latter respect she is free to make her own choice. But Jenny certainly would not regard this ambit of choice as being significant. For most of the choices of life that matter to her, she is controlled by her husband.

Westerners can readily empathize with Jenny. It's harder to see the situation from Fariva's point of

view. Yet Fariva's viewpoint is also entitled to fair consideration.

In the first place, with respect to "negative freedom," Fariva would probably say that she has no desire to travel to other cities or countries, or to wear revealing clothes in public, or to have a job and career. She is perfectly content to stay at home and enjoy the home freedoms, including choosing the sequence in which she dresses herself and applies make-up. Instead of resenting the fact that she is cooped up at home, Fariva rises above and becomes unconscious of the impediments to her freedom of movement. It is akin to the claim Epictetus made that he, a slave, is freer than his master. The ancient Stoics accepted their fate in life, "internalized" it, and gloried in it. Moreover, Fariva could give a rational defense of her position. By not caring about going outside the home or getting a job, she attains security and sustenance. American women, in her view, may wish to work in the marketplace, but when they get married their husbands may not have the same degree of commitment that Arab husbands have to support their wives. Moreover, a business career is a risky enterprise and is hard and demanding. To be chained to an office desk is hardly a desirable alternative to staying at home, from Fariva's viewpoint.

Secondly, with respect to "positive freedom," Fariva would probably say that her husband respects her and has her best interests at heart. She willingly leaves the decision-making to him; it relieves her mind and frees her from risk and uncertainty. She would not wish to trade her subservient marital status to the subservient status of a career woman. For a career woman is also subject to the will of her employer, and her employer is much less likely to know what is best for her than her husband. At the outset of their marriage her husband beat and disciplined her; she now says that the discipline made her a better person and a better wife. He has not beaten her in twenty years and she is happy and content with her position in life. Women were not born the equal of men; as a woman, Fariva has done quite well for herself, as well as could be expected.

How can we decide whether Jenny or Fariva is right? The decision is impossible if we make it on the subjective level: Fariva's viewpoint is as logical as Jenny's. In order to proceed, we must reject the viewpoints, feelings, and beliefs of the persons whose freedom we are considering. Epictetus may sincerely believe that he has more freedom than his master; but when we observe his situation, we would be violating semantics and common sense if we agreed with him or concluded that a slave is a free person. Nor must we confuse Fariva's sense of what makes her happy with whether she is a free person. All her wants and desires may be fulfilled by her marital situation, yet the question of freedom is not decided definitively by the degree of her satisfaction. As Isaiah Berlin pointedly argued:

> If degrees of freedom were a function of the satisfaction of desires, I could increase freedom as effectively by eliminating desires as by satisfying them; I could render men (including myself) free by conditioning them into losing the original desires which I have decided not to satisfy.

We must instead adopt an objective stance. "Negative freedom" consists in the ability to choose; the degree of freedom consists in the number of choices available. One does not have to travel to attain the freedom of travel. Jenny and Fariva are not free if it is not open to them to travel to other cities or countries. If they are coerced into staying at home, or beaten if they venture away from the home, the result is the same: they have been deprived of an objective measure of freedom. Suppose Jenny

is a "homebody" type; living in the United States, she never leaves her small town. Nevertheless, we can say objectively that she is "free" to travel in the United States. Now suppose she is in Riyadh, and also never leaves her immediate home area. The difference is that she has been deprived of the choice to leave, and hence in Riyadh she is not free.

This objective look at freedom results in our drawing the same conclusion for Jenny and Fariva. Both of them are equally unfree in Saudi Arabia. There is of course the subjective difference: Jenny feels constrained but Fariva does not.

The lasting lesson taught by John Stuart Mill is that human freedom is fostered by variety and tolerance. Although freedom of speech is the central focus of his essay On *Liberty*, he has a lot to say about human freedom in general. He was an enemy of enforced social conformity the conformity that stifles our growth as persons because we are cast into a mold ordained by society. The greatest advances in human civilization are achieved by people who are not constrained, who are free to invent and create. Not only mush society *tolerate* the differences among people, but society must also be pluralistic- in the sense of increasing the diversity and variety of choices available to everyone. Communication is the most important way that the diversity and variety of free choice can be made known; hence the importance Mill attaches to freedom of speech. Education is also important; a person who is ignorant of various choices is less free than a person who knows about them.

Fariva of course knew about traveling to other cities or countries, or driving a car or riding a bicycle; she simply accepted the fact that women are not allowed to do those things. But suppose she makes the following argument about "positive freedom":

> An insane person who has no control over her body is certainly not "free"; she is slave to her bodily functions and physical needs. Freedom consists in the ability of our minds to control our bodies. Suppose a person decides to become a monk, takes a vow of poverty, and enters a monastery. We say that he has freely made the choice to become a monk, even though he has become in a sense a slave to the dictates of his religion. If God tells his body what to do, he is just as "free" as if his own mind tells his body what to do. In my case, when I got married I gave up the mental decision-making to my husband. Instead of my mind telling me what to do, now it is my husband's mind that tells me what to do. If he wants me to drive a car or travel to another country, then I will do so. You see, I am actually free to travel or drive a car or whatever; like anyone else, I follow the commands of the mind. Now that I am married, the mental command comes from my husband's mind and not my own. It's like the monk following the commands of God.

This argument represents the duelist position, the most articulate expression of which was contained in Plato's *Republic*. Plato and the writers who follow him move easily from the Mind controlling the Body, to Reason controlling the Body, to Social Reason controlling the bodies of every member of society. As Isaiah Berlin so well recounts:

> Have not men had the experience of liberating themselves from spiritual slavery, or slavery to nature, and do they not in the course of it become aware, on the one hand, of a self which dominates, and, on the other, of something in them which is brought to heel? This dominant self is then variously identified with reason, with my 'higher nature,' with the self which calculates and aims at what will satisfy it in the long run, with my 'real,' or 'ideal,' or

> 'autonomous' self, or with my self 'at its best'; which is then contrasted with irrational impulse, uncontrolled desires, my 'lower' nature, the pursuit of immediate pleasures, my 'empirical' or 'heteronomous' self, swept by every gust of desire and passion, needing to be rigidly disciplined if it is ever to rise to the full height of its 'real' nature. Presently the two selves may be represented as divided by an even larger gap: the real self may be conceived as something wider than the individual (as the term is normally understood), as a social 'whole' of which the individual is an element or aspect: a tribe, a race, a church, a state, the great society of the living and the dead and the yet unborn. This entity is then identified as being the 'true' self which, by imposing its collective, or 'organic,' single will upon its recalcitrant 'members,' achieves its own, and therefore their, 'higher' freedom.

This is the passage that bridges the gap between "group freedom" and "individual freedom" that I discussed earlier. If the collective will of the group becomes the "mind" that controls the individual actions of the members of the group, then the group's claim to autonomy resonates with at least the conception of "positive freedom" discussed by Plato and his followers. The members of the group are "free" to the extent that they are controlled by the collective mind of the group. This is said to be a higher freedom than any freedom achievable by the individuals themselves. In this sense, Fariva may truly believe that she has achieved a higher freedom by conforming her behavior to her husband's wishes. His mind is the "collective" mind controlling the two of them. Thus her nature, and destiny, as a woman is realized and achieved by doing what is in the collective interest of her husband and herself-as determined by him.

1. The Problem of Dissenters. Although Jenny adopted the Muslim faith when she got married, she is obviously a dissenter within the Muslim community. She rejects the community's basic values, especially the value of subordinating women to men. Is Jenny a "member" of the group or a "nonmember"? It's hard to say; the Shari' a courts would treat her as a member, and indeed rejecting the Muslim religion once one has embraced it is a capital crime. But member or nonmember, Jenny dissents from the group's values.

It is often difficult to discover what percentage of a group's membership is comprised of dissidents or potential dissidents. Consider the problem of determining such a statistic even in a case that is fairly open and documented: that of the Arab minority in Israel. The Shari' a courts were given broad authority in matters of personal status and religion over all Muslims in Israel, but the Muslim law allowing men to wed immature girls was specifically prohibited by the Knesset. How can we tell whether a nine or ten-year-old girl is being forced against her will into a marriage arranged by her parents? Some indication of nonvoluntariness might be whether there is a substantial cash payment to the girl's parents. But even then, the child might say that she wishes that her hitherto worthless self be the occasion of a bountiful reward to her mother and father. Yet on the general question I would have no difficulty in agreeing with the Israeli solution. Surely the minority rights of Muslims in Israel deserve to be trumped by the human rights of immature girls whether or not they themselves are actual or potential dissenters from the Islamic group practice in which they were raised.

The position of dissenters within minority groups is part of the larger issue that I am raising in this essay- whether the unseen price we pay for supporting many group claims for autonomy or special

international-law protection is a costly erosion of individual human liberties. My position is like saying that when we look at the pyramids of Egypt we should envision not a brilliant achievement of ancient civilization and culture but rather the work product of slaves under whip and lash dragging blocks of stone across hot desert sands.

The characteristics that define a minority group ethnicity, race, religion, gender, language, culture, or traditions generally- are also the characteristics that need to be reinforced among the membership if the group wishes to preserve its identity. Because the group is politically non-dominant, there is a shared concern that its identifying characteristics may be eroded through assimilation of its members into the general society or simply the opting-out of individual members. Within the group, its leadership has a vested interest in preventing the loss of members. Group leaders enjoy personal power solely because there is a group and they are its leaders; if the group erodes, their personal power base will erode as well. Their much-acclaimed "charisma" may merely be a function of the fact that they lead a well-defined group. Such leaders may be expected to promote conformity to group characteristics. Much of their efforts along these lines consist of education and propaganda. Young persons are taught to treasure the particular group characteristics that make them at least "different" from other people and may be "better." The "difference" is often a suggestion that outsiders "can never know what it is like" to be a group member, or can never experience the "same" feelings or emotions in the same depth. Only the members of the group can be "true believers."

Even if a group does not claim that it is "better" than outsiders, the outsiders will tend to interpret the group's claim as one of superiority. The natural result is a growing resentment between the minority group and the rest of society. The minority group's leaders will of course strive for political dominance within the society, so as to ensure the group's survival, but in most cases the desire for power falls considerably short of securing it. Thus the group leaders will tend to look beyond the state- to the international community- for support and protection. Their claim for international-law assistance is typically couched in terms of the fear of loss, via assimilation of their membership into the majority culture, of their identifying characteristics.

However, the fear of assimilation can arise even if there is no resentment of the minority group by the politically dominant society. Sometimes a government simply must make a policy choice. For example, a government must make some choice of the language to be used in elementary school instruction. Most governments, in order to promote national unity, tend to choose a standard national language throughout the school system. Yet some minority groups may feel that their own ultra and linguistic heritage could be eroded unless their own minority language is used as the primary language of instruction in the public school system. Belgium in 1968 is an example of a country which had a remarkably tolerant approach to languages in elementary schools: children would be instructed in whatever language was predominant in the locality. However, a group of French-speaking parents situated in a Dutch speaking community petitioned the European Court of Human Rights to require Belgium to provide or approve local French-language schools for their children. The Court denied the petition, holding that states are not obliged under the European Convention for the Protection of Human Rights and Fundamental Freedoms to respect purely linguistic preferences of minorities in the sphere of education.

If we regard the French-speaking parents in the Belgian Linguistic case as a minority group within a minority group, it is clear that they resorted to international law specifically, to the European Court of Human Rights because they lacked the political power within the state of Belgium to achieve their objective. The numerous "minorities treaties" following World War I had given more protection to minorities than the European Convention that was cited in the Belgian Linguistic case. For example, in a "minorities" case in 1935, the Permanent Court of International Justice advised that it would be a treaty violation for the Albanian government to abolish all private schools in Albania because such abolition would have a disproportionate impact upon a protected minority group in Albania that relied on private schools to preserve and protect the minority group culture.

2. *Accounting for an Increase in Freedom.* I suggest that giving special protection to minority groups may actually decrease the quantum of individual human freedom in the world. This is partly an empirical question. We see that there is considerable human liberty in the world today, and yet we also see the increasing demands of minority groups for autonomy, self-determination, and ultimate political power. Why haven't groups by now reduced human liberty almost to the vanishing point?

The answer may be largely due to the fortuity of history. If we look at a map of the nations of the world today, and superimpose upon it another map that delineates the zones of autonomy claims of minority groups, we will find little congruence of borders between the two maps. Indeed, the boundaries between nations are clearly more determined by natural topological factors than by the beliefs of the inhabitants. In the continent of Africa where topology does not generally determine boundaries, the boundaries were more or less arbitrarily determined by colonization; those boundaries have persisted even as the colonies have become independent. Surely if the beliefs of cultural groups and tribes had been significant in demarcating national boundaries, the end of colonialism in Africa would have been followed by a radical shifting of boundaries so as to maximize the self-determination of existing groups. The opposite happened; the old oppressive colonial boundaries are still there.

Of course, national governments have had a lot to do with the location of boundaries; geographical topology is certainly not a complete explanation. With the rise of the nation-state in the sixteenth century, governments became increasingly suspicious of minority groups within their territory. France's persecution of the Huguenots in the sixteenth and seventeenth centuries was arguably less the product of religious messianism on the part of the Catholic majority than of kingly suspicion that the Huguenots were potentially disloyal to the throne. This pattern of minority-group suppression has repeated itself in state after state ever since that time. Whenever a minority group wishes to assert and preserve its identity, the dominant forces in society increasingly view that group as disloyal and a potential source of sabotage and secession.

In the modern era, governments have resorted to population relocations to dilute the potential disloyalty of minority groups. Some fifty-five million citizens of the U.S.S.R. were shifted and relocated during the Bolshevik era, clearly part of the policy of Stalin and his successors to dilute the dragging effect of the "nationalities" on central state control. Today in Latvia, for instance, a resurgent "democratic" movement is attempting to expel citizens of other republics who permanently reside on Latvian territory. The nationalistic forces in favor of expulsion seem to exemplify the draconian solution to dissenters within a society-banish them. The end result could be a severe diminution in

human freedoms of all the Latvian people. Even more controversial is the Israeli policy of "settlements" in the West Bank. Despite the overwhelming media opposition to these settlements, we might raise the question whether, after all, the net effect of the settlements might be to increase the scope of human liberties by diluting the minority-group monolithism of the Palestinians. Conversely, if the Palestinians achieve autonomy, the question of the individual liberties of the Palestinians could still be the most important remaining issue (although group leaders may suppress dissemination of information about personal lack of freedom). On the Israeli side there is increasing opposition to immigration to Israel by Jews of cultures strange to the Israelis (such as the Ethiopian Jews). Yet these people may help bring pluralism and freedom to the Judaic culture. A different effect is found in the South and South West African cases. Until recently, population relocations-of blacks into designated "homelands"- was viewed by right-wing whites as the best "solution" to the problem of apartheid. It would have isolated the "minority groups" and unified them, thus curtailing the quantum of human liberty. When the attempt failed, the only alternative left was the dismantling of apartheid and the integration of blacks into the voting ranks. The quantum of individual human liberty will clearly be increased by the intermingling of the races if the intermingling can be accomplished peacefully.

3. Should All Cultures Be Preserved? Some observers might argue that a lowering of the quantum of human freedom is a price worth paying if all cultures are preserved. The idea is like saying that although slave labor created the Sphinx and the pyramids, at least we now have cultural monuments instead of just more sand. Since in any particular case the trade-off appears at the margins-whether a slight lowering of the quantum of human freedom is worth a raising of a particular stream of culture that contributes to world civilization-reasonable people may differ. I want to challenge at least one large assumption behind the question.

The assumption is that a particular culture always contributes to the advancement of civilization. Last year a student in my International Human Rights seminar contributed a paper on the Yanomami Indians who inhabit the Brazilian rainforest along the Venezuelan frontier. The paper did not address environmental issues. A by-product of Brazilian development policies is the cultural disintegration of Indian tribes such as the Yanomami. The author of the paper and the fourteen other students in the seminar all deplored the apparently inevitable extinction of Yanomami culture. However, the author acknowledged the importance of fierceness and aggression in Yanomami society:

> Men commonly physically abuse their wives, and cases of female infanticide have been reported. In addition, villages periodically raid one another in a cycle of revenge and in order to steal women.

The question "is *this* a culture *worth* preserving?" might be answered quite differently by (a) outside observers such as the participants in our seminar, (b) Yanomami male tribal leaders, and (c) Yanomami women. My students were sufficiently committed to cultural pluralism that they said they would preserve the Yanomami society despite its abuse of Yanomami women. This was not my reaction; is it yours? But suppose we decide that a given culture does contribute to the advancement of civilization. The question then becomes: whose civilization? As an outsider, I can certainly say that letting different cultures flourish enriches me because it increases world diversity and my own capacity for choice-the essential elements of human freedom. But what about insiders? To them, the

group's culture can be stifling. The monolithic culture that they are offering to the world may be denying them the right to make counter-cultural choices. They may suffer the loss of both negative and positive freedom. My guess is that many otherwise liberal minded people tend to ignore the loss of freedom of persons trapped within a culture, and tend too readily to praise that culture as contributing in its own way toward human progress. No liberal-minded person wants to be a snob; no one wants to condemn foreign practices because they are foreign. Airline advertisements are replete with pictures of "quaint" foreign cultures, and people want to travel to these exotic places. Our "tolerance" (shaped and nurtured by the profit motive of travel companies) may lead us to overlook the impact of the foreign culture on freedom of the members of the cultural group. To be sure, in many cases the group members participate because tourism is good business for them. But at least I think we should retain a certain amount of skepticism that a foreign culture (or our own culture, for that matter) may seem interesting to us because of group conformity that is imposed upon the local inhabitants. Confonnity can result in colorful costumes, but those costumes can be fetters to the individuals who must wear them.

2. The Primacy of Group Freedom

I will defend the right of groups to some form of autonomy by attacking the reduction of self-determination to the rights of individuals.

The reductive view of self-determination is a form of moral myopia, involving a sociologically naive reduction of morality to justice. Proponents of reduction say that our moral obligations to one another are pretty much exhausted once we get our rights. This leaves us free autonomously to choose and pursue our own ends.

Yet it is a mistake to suppose that people either choose or pursue their vision of the good autonomously. They do not so much choose ends as choose cultural identities through which they can participate in collective decision and action. Thus, they forgo the autonomy celebrated by philosophers in order to gain access to one another's powers and judgment. They do this because the pursuit of genuinely private ends would be emotionally meaningless and politically ineffectual.

Rather than reduce morality to justice, we should view morality as a faun of politics in which each person's ability to identify and pursue worthy goals depends on the cooperation of others. From this view it follows that only when we act together can we be the self-determining moral agents philosophers describe.

My argument against reducing group self-determination claims to instruments for the protection of individual autonomy proceeds in three steps.

1. The protection of cultures is a collective good. Indigenous separatists want to shield shared cultures from homogenization, not just to shield individuals against discrimination. We cannot explain such demands for cultural preservation as indirect means to the pursuit of individual ends. Cultures are not reducible to the shared backgrounds or experience of individuals; cultures also commit individuals to shared conceptions of the good. Since we cannot distinguish individual ends from the cultures that constitute them, we cannot explain the value of cultures to their members by describing them as shared resources permitting the pursuit of individual ends. Instead we must admit that in choosing to preserve

a culture, we are thereby shaping the identities and the ends of future individuals.

The choices that culture informs are never merely private, because they affect the identity of every participant in the culture. Why do participants in a culture so often contest the meaning of its constitutive traditions instead of politely agreeing to disagree about future goals? The answer lies in the fact that by contesting a common past they are asserting political claims over one another's powers. They refuse to separate their individual ends from their shared history because they refuse to separate from one another- they refuse to treat the collective determination of their selves as a matter of individual choice.

Any argument for group autonomy based on a right of cultural preservation must acknowledge that cultural traditions are not simply inherited by individuals. They are common property that we can make use of only by invoking- or inventing- a common purpose. Cultures cannot be disentailed.

2. *Respecting the moral autonomy of individuals entails respecting the autonomy of the group through which they pursue their moral ends.* My second point is not that some particularly attractive moral view requires embodiment in a culturally bounded community; my point is that any moral view demands this. We can only effectively advance any conception of the good in a social world by making a cause of it-that is, by consulting and cooperating with like-motivated others. Such causes exclude the uncommitted and entail the collective governance of some of the powers of their members. Thus, any seriously entertained moral end is a reason for bounding and empowering a group.

Common sense tells us that identification with others encourages us to act morally. As vain as we are selfish, we are more likely to behave morally if our obligations to others are incorporated into our sense of identity. People are clannish, and moral argument ignores this truth at its peril.

Nor is this clannishness an unfortunate tendency that morality must work its way around. Morality is inherently a collective enterprise, and inherently intolerant.

Why is morality inherently collective? Suppose you think yourself obliged to bring about a certain state of affairs. While you are concerned about the consequences of your actions, those consequences are going to depend on the actions of others. If you can get others to commit to your moral view, and to cooperate with you in planning action, you can plan more effectively because you have more information. You can also act more effectively because more people will be trying to achieve the results you desire. Therefore, no consequentialist moral view can leave you indifferent to the beliefs and actions of others; indeed, any such moral view gives you compelling reasons to cooperate with others committed to the same view.

Why is morality not just inherently collective, but also inherently intolerant? Because the collective pursuit of a moral end is open only to believers. Cooperators in the pursuit of a moral end will have obligations to one another to share information and fulfill expectations, and perhaps to accede to the majority will about how best to pursue the mutually desired consequences. These are obligations that cooperators don't have towards outsiders and that outsiders don't have towards them.

3. *Democracy depends upon group autonomy, while the autonomy rights of groups depend upon their democracy.* My characterization of moral action as a kind of politics rests on a conception of politics

as collective action, coordinated by such communicative practices as deliberation, persuasion, and negotiation. On this view, politics is more than a matter of opinion privately held. A right to participate in politics therefore means more than the right to answer an opinion poll; it entails a right to coordinate action with others. Accordingly, democracy is more than a mere assemblage of individual rights. It requires a society mobilized for political action- organized, that is, into movements.

But what if the individual members of a moral community simply serve as foot-soldiers subject to the command of a charismatic leader? Can we really say that members are committed to a community's moral ends if they do not themselves reflect on the meaning of those ends and evaluate the community's conduct in light of them? Wouldn't we say that these community members were motivated only by loyalty to the leader rather than by their own moral beliefs? If individuals unquestioningly follow orders, don't they act as mere agents rather than as members of the community? We will feel strongly tempted to say that to exercise moral autonomy an individual must participate in the decisions as well as the *actions* of her community. Only if a moral community is democratic in this sense, we might conclude, can it claim a right to autonomy.

The modem philosopher may see freedom in each individual's pursuit of her own conception of the good. But for the philosophical tradition from Rousseau to the young Hegelians, *expressing* oneself in this way was nothing more than a surrender to impulse, an index of necessity rather than freedom. True freedom was to be found in the onerous but creative task of *realizing* one's self. Thus her conception of the good was never simply her own- it was always mediated by some community.

If we see our own best selves as contingent on the existence of a certain sort of community, we won't see the right to pursue our chosen ends as an adequate vision of freedom; we won't see merely respecting this right as an adequate standard of morality; and we won't see the right to approve or disapprove our leaders as an adequate conception of self-rule. We will see our own ability to define ourselves, to act on our moral beliefs, and to govern ourselves as requiring the creation and protection of a particular culture.

"Self-determination of peoples" is more than a misleading euphemism for the political and civil rights of individuals. It rightly asserts the connections among solidarity, self-government, and self-realization.

BEYOND INDIVIDUAL RIGHTS

(Louis Henkin et al (ed) Human Rights, 1999)

1. GROUP RIGHTS

With few exceptions, the rights set forth in the principal postwar human rights instruments are framed in terms of individual rights. The Universal Declaration of Human Rights provides that "everyone" is entitled to the rights set forth therein (Article 2) and, with one notable exception (Article 1), the International Covenant on Civil and Political Rights (ICCPR) defines protected rights in similar terms. Moreover, apart from its assurance of rights "without distinction of any kind" (Article 2), the Declaration does not include any provision specifically protecting the rights of individuals belonging to minority groups as such. Such a provision does appear in Article 27 of the ICCPR, but the rights that it seeks to secure are defined in reference to individuals belonging to certain minorities (specifically, ethnic, religious and linguistic minorities), and not the groups themselves.

This general approach is noteworthy, not least because the principal impetus behind adoption of the postwar human rights instruments was the experience of Nazi persecution of victims targeted because of their membership in such minority groups as Jews, homosexuals, and Roma and Sinti communities. In light of this experience, one might have expected to find a special emphasis on minority rights in the postwar instruments. Indeed, Hitler's crimes provided the impetus for one postwar treaty concerned specifically with atrocities against groups - the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which aims at preventing the destruction of "national, ethnical, racial or religious groups."

But the prevailing sentiment in the aftermath of World War II was to eschew a special concern with rights of minorities, affirming instead the rights of everyone to enjoy fundamental rights on a basis of equality. Key considerations underlying this preference were expressed during the drafting of the Universal Declaration: The UN Secretariat and some states proposed including in the Declaration a provision that would protect the rights of a "minority to use its own language and to maintain schools and other cultural institutions." But other states believed that vulnerable groups could be adequately protected by assuring every person a core set of human rights and explicitly assuring that each person was entitled to enjoy those rights without discrimination on such grounds as national origin, race, religion, or sex. In addition,

It was even said that the very concept of "minorities" is inconsistent with the principle of absolute equality enshrined in the Charter of the United Nations and in many national constitutions, as the term "national minority" signifies "a category of citizens whose political, economic, and social status was inferior to that of citizens belonging to the majority."

Some thought an article on minorities was not only unnecessary but undesirable. The Universal Declaration should not deal with rights which did not have universal applicability, did not apply to all human beings, and did not apply in all countries in the same way. Some thought that it was undesirable to perpetuate protections for minorities because it would discourage their assimilation. Others thought it might result in cutting them off from the mainstream of national life, frustrating their emancipation and full development, and denying them equal opportunity.

Louis B. Sohn, *The Rights of Minorities,* in The International Bill of Rights 270, 272 (L. Henkin ed. 1981).

The postwar approach was in part a reaction against the regime of minority rights treaties that had been imposed on various states in Central and Eastern Europe as part of the settlement of World War I. Whatever its salutary effects may have been, the interwar regime was widely judged a failure, not least because of the barbaric ends for which the Nazis invoked the rhetoric of minority rights. The delegates who drafted the postwar instruments had recent memories of Hitler invoking the banner of minority rights to justify Germany's annexation of Czechoslovakia in 1938 and its invasion of Poland in 1939, purportedly to protect German minorities in those countries. Further, World War II had amply demonstrated the dangers attending the elevation of collectivities over the fundamental unit of moral concern - individual persons.

But if a special focus on minorities and other groups is largely absent from treaties drafted in the aftermath of the Second World War, an explicit focus on minority rights is more common in recently adopted instruments. The latter include the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which was adopted by the UN General Assembly in 1992; the European Framework Convention on the Protection of National Minorities, which was adopted in 1994 and entered into force in 1998; and the European Charter for Regional or Minority Languages, which was adopted in 1992 and entered into force in 1998.

In view of the special concern with minority rights reflected in recently drafted instruments, the rich jurisprudence of the interwar period has acquired renewed relevance. Accordingly, this section includes material on the interwar minority rights regime as well as on postwar human rights law. Before turning to relevant law, we explore preliminary issues relating to the adequacy and appropriateness of the individual rights framework that dominates postwar human rights protections, as well as critiques of "collective rights."

a. GROUP RIGHTS AND INDIVIDUAL RIGHTS

The term "group rights" can be ambiguous and misleading. Literally, the term seems to refer to - and often is intended to connote - rights that vest in a collectivity, such as the "peoples" who are entitled to exercise the right of self-determination recognized in common Article 1 of the ICCPR and the ICESCR. Often, the term is used more imprecisely to refer to rights that are framed in terms of individuals who "belong to" certain groups. Article 27 of the ICCPR exemplifies the latter type of right:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In the terminology of international law, it would be more accurate to say that Article 27 recognizes "minority rights" than "group rights." As the following article makes clear, there has been considerable debate concerning the conceptual coherence of "group rights," as well as the desirability of recognizing rights that vest in groups themselves.

In reading the following materials, consider why the distinction between "group rights" and rights of individuals belonging to certain groups has been thought consequential.

OTHER "GENERATIONS" OF RIGHTS

Louis Henkin

in International Law: Politics and Values 196-202 (1995).

The Universal Declaration is a noble instrument but there was no suggestion that it was exhaustive. The human values of human rights have been so politically appealing, and the human rights mantle so attractive, they have inspired moves to add new rights to those identified as in the first two generations, and to promote additional "generations" of rights.

In general, the new rights that have been added, or proposed for addition, to those listed in the Universal Declaration have been "collective" rather than individual rights. Of course, all human rights are collective in that they are universal: all human beings are entitled to them. They are collective in that rights are enjoyed in society and society is required to organize itself to realize them for all. They are collective in that, according to the human rights ideology, respect for the rights of each inures to the benefit of all and is essential to the good society. But in essence, the rights in the first two generations are rights of individuals; in a later development the mantle of human rights has been claimed also by groups of varying dimension, invoked even by the society and by the state as a whole.

It is useful to distinguish individual rights from group rights, and both from communal, societal goods, as well as from what I have called state values. For example, the right not to be a victim of genocide is both a right of the group threatened and of each individual member of the group. But the group threatened may constitute only a small minority in the state. The right not to be a victim of genocide is clearly a human value, not directly the "right" or the "good" of the society as a whole, or a reflection of values of state autonomy. As with other individual rights the claim to freedom from genocide is a claim upon the state, and the state - the government - is required itself to refrain from genocide and to ensure that the right is protected against violation by others. The minorities treaties, too, protected rights of the ethnic group, as well as the rights of their members, against the majority and against the society as a whole. Similarly, the rights of cultural and religious groups, or of trade unions and other voluntary associations, also assert individual human values for their members as against the interests of the majority, or against alleged goods for the society as a whole. Such group rights are rights within a society, are claims by an aggregation of individuals upon society, and the state is required to respect and ensure them.

Other "collective rights," however, are not "constitutional" limitations on society, or claims upon the society for the benefit of individuals or small groups; they are really values asserted by the society as a whole to override individual or minority claims. A state may assert the needs of national security or public order as limitations on individual rights; it is not entitled to dress these values in the garb of human rights and individual human dignity. States have many rights under international law, but they are not human rights.

Self-Determination

Both International Covenants include the right of every people to self-determination and to sovereignty over its natural resources ("economic self-determination"). Those provisions were added over opposition that insisted that these are not individual rights, and that they were not in fact being integrated (and could not be integrated) into the scheme of obligations and implementation of the rest of the Covenant. At bottom, the objection to including the right of self-determination was not that it was a collective or group right (a right of a "people"), but that, unlike the other rights in the Covenants, it was not a continuing claim by some elements in society against the society, but ordinarily a one-time claim by a "people" to leave a society. The right of a people to sovereignty over its resources, too, seems not to be a claim against the state by persons or groups subject to its jurisdiction.

It is not clear what has been added to human rights law by declaring these principles to be human rights, or how states parties to the Covenants are to respect and ensure them. Their inclusion in the Covenants, however, confirms their legal character at least for states parties to those Covenants, and has helped them become principles of customary law. Controversy as to the scope, content and implications of these principles has not been resolved. There is no agreement as to what (or who) is a people or what the right of self-determination implies. It is accepted that self-determination outlaws traditional colonialism over unwilling peoples; apparently it does not include a right of secession from an existing state for a "people" or for the inhabitants of part of the territory of a state. There is even less agreement as to the consequences of the provision that a people has sovereignty over its resources. * Those who have invested in these resources (with the consent *of* the state) have insisted that state sovereignty over its resources does not justify or legitimate expropriation *of* foreign investments, or breach *of* concession contracts with foreign nationals, without just compensation.

The Right to Development

Some have claimed the human rights mantle for third, fourth, fifth and even more generations of rights, principally rights to development, peace, a healthful environment. There has been no resistance in the political system to recognizing and accepting these values, but much resistance to denominating them human rights and giving them legally binding character.

There has been strongest support for-and least resistance to-a human right to development. Efforts to establish its character as a human right have been frustrated by lack of definition of the right and of the obligations it may imply. There has been particular uncertainty as to whether the right addresses political, social or economic development, and whether it speaks to individual or societal development.

It is arguable that the right to development, both individual and societal, and the obligation *of* a state (and perhaps of the international system) to contribute to such development, are already provided or at least prefigured in the Universal Declaration. In a large sense, the right to development is the sum, or the aim, *of* all the rights in the Declaration, especially the right to an education and of other economic and social rights, but also of civil and political rights. The Declaration also includes specific references that point to development: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" (Art. 28). "Everyone has duties to the community in which alone the free and full development of his personality is possible" (Art. 29 (1)).

In 1986, the United Nations General Assembly capped many debates by adopting the Declaration on the Right to Development. The Assembly declared it to be an "inalienable human right" of every human person and all people to participate in, contribute to, and enjoy economic, social, cultural and political development. The right declared is a skillful blend of individual rights and individual responsibility, of individual rights as well as people's rights, and of various opinions and values. It attempts to declare the relation to development of the first and second generations of rights.

The Preamble affirms that failure to respect human rights (civil-political as well as economic-social-cultural) is a serious obstacle to development and that there must be equal attention to civil-political and to economic-social-cultural rights. The Declaration calls for disarmament and for devoting resources released thereby to development, especially for developing countries. Efforts to promote human rights should be accompanied by efforts to establish a new economic order "based on sovereign equality, interdependence, mutual interest and cooperation among all States."

The Declaration on the Right to Development is a declaration, not a convention, and its significance for the international law of human rights is uncertain. But it is interesting as a political reflection on human rights generally, and as interpretation of the international law of human rights. The General Assembly does not declare the right to development to be a new generation of rights, perhaps not even an independent human right, but it links development with established human rights as cause and effect. The Declaration is notable for its reaffirmation that all human rights are indivisible and interdependent; that respect for some rights does not justify violation of others; and that the right to development itself cannot serve as reason (or pretext) for violating any of the rights in either of the first generations of rights.

A Human Right to Peace

Peace between states is a primary value of the inter-state system, the objective of the law of the United Nations Charter. Every state can be said to have a right to peace. Assertions of a human right to peace have generally been dismissed as yet another exercise in rhetoric: states generally have seen no need to establish obligations for states in this regard beyond those already assumed in the United Nations Charter.

Yet, conceptually at least, an individual human right to peace cannot be dismissed out of hand. The state's right to peace under international law is designed not merely to safeguard state autonomy but to secure the deepest values of its society and of each of its inhabitants. Surely, human dignity requires that the individual not be subject to the horrors of war. But is peace a human right like those listed in the Universal Declaration and legislated in the Covenants?

An individual human right to peace is perhaps implied in Article 28 of the Universal Declaration: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." That Article, however, has not been converted by the Covenants into specific legal rights which the state must recognize, respect, ensure and strive to realize.

As with the individual's share in a people's right to self-determination or in a society's right to development, it would not be easy to integrate a human right to peace in the scheme of the existing

covenants or to make it the subject of a new meaningful convention. An explicit human right to peace would surely be resisted if it were seen as binding a state to prefer individual rights over "national security" or other "reasons of state" and to give human values dominance over sate values to a degree greater than the international system is accustomed to or is likely to accommodate. Without any new conventions or provisions, however, it is plausible to insist that if a state launches war, courts war, or engages in policies likely to lead to war, anyone of its inhabitants might claim a violation of one or more established human rights: war would invade or jeopardize rights to life, liberty and property, and would lead to derogations from other rights under Article IV of the Covenant on Civil and Political Rights. The individual could claim also that unnecessary resort to war diverts resources that should be available to realize economic-social rights, in violation of the Covenant on Economic, Social and Cultural Rights. Whether such arguments would be heard, whether they would contribute directly to either the cause of peace or the cause of human rights is open to debate, but they illuminate the intimate links between the values of peace and the values of human rights.

A Right to a Healthful Environment

A right to a healthful environment also requires special conceptualization if it is to fit comfortably within the framework of established human rights law. Obviously, the healthful environment is a "good" which states should pursue. Obviously, it is related to individual health and well-being. As such, it can be argued, a state party to the Covenant on Economic, Social and Cultural Rights is required to pursue a healthful environment progressively to the extent of available resources as part of its obligations to realize the specific rights recognized in the Covenant. A right to a healthful environment can perhaps be linked also to civil-political rights, since purposeful, knowing, or even negligent assaults on the environment amount to inhuman treatment by a state of its inhabitants, in violation of Article 7 of the Covenant on Civil and Political Rights. If so, as with other civil-political rights, the state (the government) itself must respect that right and must ensure respect for it by private persons subject to its jurisdiction. Some will suggest also an obligation to respect the environment of other states, to seek respect for it by other states, and to co-operate with other states to protect the common environment - a form of commonage.

All these new generations suggested have several things in common. They are accepted "goods" seeking the mantle of human rights for political-rhetorical uses. They are not "individuated" individual rights like the traditional civil-political rights or even like those in the economic-social generation, but rather claims for the whole society that are of vital concern to every individual member of society. They cannot be readily couched in normative terms and incorporated into the international law of human rights we now have, if only because they cut across state lines and challenge the basic assumptions of the state system. At bottom, efforts to declare these to be human rights are pleas for international co-operation to address major problems facing the human race.

Human rights are not the only "good," and some "goods" may be even more important than many human rights. In fact, the proposed generations may have already been recognized as individual rights in Article 28 of the Universal Declaration and may be implied in the existing Covenants. To make them explicit in new provisions or new conventions might be redundant, but that is not a compelling objection: the international system has developed special conventions on numerous human rights

clearly covered by the Covenants-on genocide, racial discrimination, apartheid, torture, women's rights, children's rights. There is little harm, and some potential benefit, in recognizing additional goods as human rights, and in developing human rights already recognized, if to do so would serve human values significantly, so long as it is clear (as the Declaration on the Right to Development makes clear) that pursuit of these newer rights does not justify easy sacrifice of the older rights."

The proposed new generations may lead us along paths further removed from the state-oriented values and methods of the international political system we have known. Additional commitment to human values may require further derogations from state values, additional penetrations of state societies, additional interference with the free market, perhaps even additional deviations from the consent principle. The system still resists these even when they are required to ensure respect for the two accepted generations of rights.

The end of the Cold War has not produced, and does not promise, major change in the international law of human rights. Additional conventions can be expected, especially on the rights of minorities. Whether by interpretation or by new agreement, some of the lacunae in existing law may be filled - recognition of the right to property, and of economic liberties (in addition to economic welfare rights), perhaps the elimination of all forms of religious discrimination (by a convention, analogous to the Convention on the Elimination of All Forms of Racial Discrimination). Without formal amendment, "cold-war" ambiguities in some provisions, notably in the Covenant on Economic and Social Rights, will lose significance. Additional rights may be recognized as customary law. The right to development will continue to rally support from the developing states. A right to a healthful environment will probably gain adherents, but the environment will be less a human rights concern than a global issue with a focus for tension between environmental rights and obligations, and economic development and international trade.

* Perhaps individuals or groups within a state, claiming to represent the people, can argue that the state violates the provision if it alienates the people's "patrimony" in its resources by corrupt or unwise concessions *to* foreign bodies. A claim of this kind was advanced in 1992 before the International Court of Justice. Nauru claimed that Australia breached "the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources" by exploiting certain phosphate lands before Nauru's independence, at a time when Australia was an Administering Authority for Nauru under the Trusteeship System provided for by Chapter XII of the U.N. Charter. See Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections), 1992 I.C.J. 240, 243.

THE CHANGING DEVELOPMENT LANDSCAPE

Shahid Yusuf

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Since the birth of the modern nation-state, countries have gone back and forth between seeking closer integration with the rest of the world (globalization) and retreating into isolationism and protectionism, while local groups have sought greater autonomy (localization). However, despite the long history of globalization and localization, their impact has been weak and fleeting, until now. The dramatic acceleration of globalization and localization and the enduring changes they have brought about distinguish the closing decades of the twentieth century from earlier periods. . . .

Why globalization?

. . . The word is now common currency and denotes both positive developments, such as the integration of markets for goods and factors of production, and negative developments, such as damage to the environment and the increasing exposure of countries to external shocks that can precipitate banking and currency crises. The growth of international trade and of factor movements was as swift in the first 10 years of the twentieth century as in the century's last decade, but the current phase of globalization is of a different order, in particular because of the increasing share of tradables now exported, advances in technology, changes in the composition of capital flows, and the larger role of international agencies, nongovernmental organizations (NGOs), and transnational corporations. The completion of the Uruguay Round of trade talks in 1994 was a milestone: trade barriers were lowered; the ambit of trade liberalization was expanded to include services, intellectual property rights, agricultural commodities, and textiles; and the new rules of the game that grew out of the talks were anchored in the World Trade Organization (WTO).

In the 1980s, many countries-industrial as well as developing-began dismantling controls on capital movements and adopting policies that encouraged foreign direct investment. Declining transport costs and impressive advances in communications technologies and information processing boosted the integration of goods and capital markets. The adoption of common rules to regulate banking and financial reporting decreased information asymmetry and lent further momentum to globalization, as did the creation of the World Wide Web and international coalescence around product standards such as ISO 9000.

As countries began to welcome foreign direct investment and transacting business ver long distances grew easier, companies were motivated to reorganize their activities; [their response] ... has also reinforced the openness resulting from trade liberalization and the removal of barriers to capital mobility.

Even with these changes, globalization might not have taken off were it not for a seismic shift in attitudes. Countries worldwide have moved to market-based economies and democratic forms of government, the decisive events being the tearing down of the Berlin Wall in 1989 and the spread of democracy during the early 1990s. This broadening of political participation is feeding centrifugal pressures. ; within nations.

The 19905 could be called the decade of globalization. The General Agreement on Tariffs and Trade (GATT) had 102 members in 1990; its successor, the WTO, had 134 _embers in 1999. !rade in goods and servi_es has gro,:n _ice as _ast as " GDP durIng the 1990s, wIth the share of developIng countrIes In·total International trade climbing from 23 percent to 29 percent. All forms of capital are circulating more widely and in far larger amounts than ever before. For instance, developing countries received $155 billion (net) of foreign direct investment in 1998, 16 times the amount they received in 1990.

Localization and its causes

Localization is the demand for autonomy and political voice expressed by regions and communities. It has many causes. Dissatisfaction with the ability of the state to deliver on promises of development is one. The strength of local and ethnic identity-reinforced by education, better communications, and the rising concentration of people in urban areas- is another. A third cause, in a world where globalization is leveling cultural differences, is the desire to deepen a sense of belonging to a place. And a fourth is the sharpening competition between sub national units in an open environment, combined with the reluctance of richer communities to share resources with their less well off neighbors.

The pull of local identity is strikingly manifested by the doubling of the number of nation-states-from 96 in 1960 to 192 in 1998-a development that derived additional impetus from the geopolitical changes that followed the end of the Cold War. Furthermore, the demand for political voice is striking firm roots. . . . In 1980, only 12 of the world's 48 largest countries had national elections. Today, 34 hold both national and local elections.

The political and functional decentralization of both large and small states is another manifestation. Half the countries that decentralized politically also devolved major functional responsibilities-for example, primary and secondary education in Poland, and primary health care and local road maintenance in the Philippines. Often, this devolution has raised the subnational share of public expenditures: for example, from 1987 to 1996, it increased from 11 percent to 30 percent in Mexico and from 21 percent to 50 percent in South Africa.

One phenomenon driving localization and contributing to the emerging sense of local identity is urbanization. As we enter the twenty-first century, half of the , world's population is living in urban areas. As recently as 1975, this share was just over a third; by 2025 it will rise to almost two-thirds. . . .

Globalization and localization enhance the prospects for rapid and sustainable growth in developing countries. The increased availability and more efficient allo cation of resources, freer circulation of knowledge, more open and competitive milieus, and improved governance could all contribute to faster growth. But there are also risks. Globalization entails greater exposure to capital volatility-as the financial crisis that erupted in 1997 demonstrated. Decentralizing measures introduced to satisfy local demands may lead to macroeconomic instability if fisal imprudence by subnational entities is not vigorously disciplined. MoreovC1'. although the concentration of industry and skills in growing urban areas could raise living standards in these areas, the promise of these 'agglomeration econ. omies' could prove elusive in the absence of national policies designed to curb the spread of poverty, violence, and squalor. Globalization and localization demand a multifaceted response. . . . At many levels, institutions will be decisive in making sustainable development a reality.

DEVELOPMENT AS FREEDOM

Amartya Sen
(1999), at 35

Chapter 2: The Ends and the Means of Development

Let me start off with a distinction between two general attitudes to the process of development that can be found both in professional economic analysis and in public discussions and debates. One view sees development as a 'fierce' process, with much 'blood, sweat and tears' -a world in which wisdom demands toughness. In particular, it demands calculated neglect of various concerns that are seen as 'soft-headed'. .. [T]he temptations to be resisted can include having social safety nets that protect the very poor, providing social services for the population at large, departing from rugged institutional guidelines in response to identified hardship, and favoring- 'much too early' -political and civil rights and the 'luxury' of democracy. These things, it is argued in this austere attitudinal mode, could be supported later on, when the development process has borne enough fruit: what is needed here and now is 'toughness and discipline'. The different theories [diverge] in pointing to distinct areas of softness that are particularly to be avoided, varying from financial softness to political relaxation, from plentiful social expenditures to complaisant poverty relief.

This hard-knocks attitude contrasts with an alternative outlook that sees deve!0pment as essentially a 'friendly' process. Depending on the particular version of this attitude, the congeniality of the process is seen as exemplified by such things as mutually beneficial exchanges (of which Adam Smith spoke eloquently), or by the working of social safety nets, or of political liberties, or of social development- or some combination or other of these supportive activities.

The approach of this book is much more compatible with the latter approach than with the former. It is mainly an attempt to see development as a process of expanding the real freedoms that people enjoy. In this approach, expansion of freedom is viewed as both (1) the *primary end* and (2) the *principal means* of development. They can be called respectively the 'constitutive role' and the 'instrumental role' of freedom in development. The constitutive role of freedom relates to the importance of substantive freedom in enriching human life. The substantive freedoms include elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on. In this constitutive perspective, development involves expansion of these and other basic freedoms. Development, in this view, is the process of expanding human freedoms, and the assessment of development has to be informed by this consideration.

Let me refer here to an example.... Within the narrower views of development (in terms of say, [Gross Domestic Product] growth or industrialization) it is often asked whether the freedom of political participation and dissent is or is not <conducive to development'. In the light of the foundational view of development as freedom, this question would seem to be defectively formulated, since it misses

the crucial understanding that political participation and dissent are *constitutive* parts of development itself. . . . Development seen as enhancement of freedom cannot but address [deprivations of freedom]. The relevance of the deprivation of basic political freedoms or civil rights, for an adequate understanding of development, .

does not have to be established through their indirect contribution to *other* features of development (such as growth of GDP or the promotion of industrialization). These freedoms are part and parcel of enriching the process of development.

This fundamental development point is distinct from the 'instrumental' argument that these freedoms and rights may *also* be very effective in contributing to economic progress. . .. [T]he significance of the instrumental role of political freedom as *means* to development does not in any way reduce the evaluative importance of freedom as an *end* of development.

The instrumental role of freedom concerns the way different kinds of rights, opportunities, and entitlements contribute to the expansion of human freedom in general, and thus to promoting development. . . . The effectiveness of freedom as an instrument lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other types. The two roles are thus linked by empirical connections, as relating freedom of one kind to freedom of other kinds.

I shall consider the following types of instrumental freedoms: (1) *political freedoms,* (2) *economic facilities,* (3) *social opportunities,* (4) *transparency guarantees,* and (5) *protective security.* These instrumental freedoms tend to contribute to the general capability of a person to live more freely, but they also serve to complement one another. While development analysis must, on the one hand, be concerned with the objectives and aims that)l1ake these instrumental freedoms consequentially important, it must also take note of the empirical linkages that tie the distinct types of freedom *together,* strengthening their joint importance. Indeed, these connections are central to a fuller understanding of the instrumental role of freedom. The claim that freedom is no't only the primary object of development but also its principal means relates particularly to these linkages.

Let me comment a little on each of these instrumental freedoms. [Discussion of political freedoms omitted.]

Economic facilities refer to the opportunities that individuals respectively enjoy to utilize economic resources for the purpose of consumption, or production, or exchange. The economic entitlements that a person has will depend on the resources owned or available for use as well as on conditions of exchange, such as relative prices and the working of the markets. Insofar as the process of econoJ11ic development increases the income and wealth of a country, they are reflected in corresponding enhancement of economic entitlements. It should be obvious that in the relation between national income and wealth, on the one hand, and the economic entitlements of individuals (or families), on the other, distributional considerations are important, in addition to aggregative ones. How the additional incomes generated are distributed will clearly make a difference.

Social opportunities refer to the arrangements that society makes for education,

health care and so on, which influence the individual's substantive freedom to live better. These

facilities are important not only for the conduct of private lives (such as living a healthy life and avoiding preventable morbidity and premature mortality), but also for more effective participation in economic and political activities. For example illiteracy can be a major barrier to participation in economic activities that require production according to specification or demand strict quality control (as globalized trade increasingly docs). Similarly, political participation may be hindered by the inability to read newspapers or to communicate in writing with others involved in political activities.

Finally, no matter how well an economic system operates, some people can be typically on the verge of vulnerability and can actually succumb to great deprivation as a result of material changes that adversely affect their lives. *Protective security* is needed to provide a social safety net for preventing the affected population from being reduced to abject misery, and in some cases even starvation and death. The domain of protective security includes fixed institutional arrangements such as unemployment benefits and statutory income supplements to the indigent as well as ad hoc arrangements to generate income for destitutes.

These instrumental freedoms directly enhance the capabilities of people, but they also supplement one another, and can furthermore reinforce one another. These interlinkages are particularly important to seize in considering development policies.

Similarly the creation of social opportunities, through such services as public education, health care, and the development of a free and energetic press, can contribute both to economic development and to significant reductions in mortality rates. Reduction of mortality rates, in turn, can help to reduce birth rates, reinforcing the influence of basic education-especially female literary and schooling-on fertility behavior.

This approach goes against-and to a great extent undermines-the belief that has been so dominant in many policy circles that 'human development' (as the process of expanding education, health care and other conditions of human life is often called) is really a kind of luxury that only richer countries can afford. Perhaps the most important impact. of the type of success that the East Asian economies, beginning with Japan, have had is the total undermining of that implicit prejudice. These economies went comparatively early for massive expan_ sion of education, and later also of health care, and this they did, in many cases, *before* they broke the restraints of general poverty. And they have reaped as they have sown. . . .

THE LEGAL FORMULATION OF A RIGHT TO DEVELOPMENT

Georges Abi-Saab

in Hague Academy of International Law) The Right to Development at the International Level (1980)) at 163

[Abi-Saab begins by noting that, for the right to development to be considered a legal right, it must be possible to identify the active and passive subjects of the right and its content. But those elements depend on the legal basis of the right, which in turn depends on whether the right is an individual or collective one.]

It is possible to think of different legal bases of the right to development as a collective right. The first possibility. . . is to consider the right to development as the aggregate of the social, economic and cultural rights not of each individual, but of all the individuals constituting a collectivity. In other words, it is the sum total of a double ilggregation of the rights and of the individuals. This version. . . has the merit of shedding light on the link between the rights of tpe individual and the right of the collectivity; a link which is crucial. . . .

Another way. . . is to approach it directly from a collective perspective. . . by considering it either as the economic dimension of the right of self-determination, or alternatively as a parallel right to self-determination, partaking of the same nature and belonging to the same category of collective rights.

As far as the beneficiaries or active subjects are concerned, the first answer that comes to mind is that they are those societies possessing certain characteristics which lead the international community to consider them wanting in terms of development and to classify them as 'developing' or 'less developed' countries (LDC). . . .

Up to now, we have used societies, communities, countries and States as interchangeable, which they are not. In fact, here as with self-determination, the common denominator of these different ways of describing the beneficiary

S. Marks, 'Emerging Human Rights: A New Generation for the 1980s?', 33 Rutgers 1. Rev. 435, 451 (1981).

collectivity is the 'people' they designate, which constitutes the socially relevant entity or group in this context. ... Suffice it to say here that the distinction between 'people' and 'State', though in theory it is as important in relation to the right to development as to the right of self-determination, in practice it is not. . . .

[T]he passive subject of the right to development can only be the international community as such. But as the international community does not have at its disposal the means (organs, resources) of directly fulfilling its obligations under tbe right to development, it can only discharge them through a category of its members, tbat of the 'developed' States. . . .

[S]atisfaction of the collective right is a necessary condition, a conditionprecedent or a prerequisite for the materialization of the individual rights. Thus without self-determination it is impossible to

imagine a total realization of the civil and political rights of the individuals constituting the collectivity in question. Such rights can be granted and exercised at lower levels, such as villages and municipalities, but they cannot reach their full scope and logical conclusion if the community is subject to colonial or alien rule.

The same with the right to development, which is a necessary precondition for the satisfaction of the social and economic rights of the individuals. And here, even more than in the case of self-determination, the causal link between the two levels is particularly strong; for without a tolerable degree of development, the society will not be materially in a position to grant and guarantee these rights to its members, i.e., of providing the positive services and securing the minimum economic standards which are required by these rights.

THE RIGHT TO DEVELOPMENT

Mohammed Bedjaoui

in M. Bedjaoui (ed.), International Law: Achievements and Prospects (1991) at 1182

14. The right to development is a fundamental right, the precondition of liberty, progress, justice and creativity. It is the alpha and omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the *core right* from which all the others stem. . . .

15. ... In reality the international dimension of the right to development is nothing other than *the right to an equitable share in the economic and social well_ being of the world.* It reflects an essential demand of our time since four fifths of the world's population no longer accept that the remaining fifth should continue to build its wealth on their poverty.

IV. Basis of the Right to Development

19. The most essential human rights have, in a sense, a meta-juridical founda tion. For example, the right to life is independent both of international law and of the municipal laws of States. It pre-exists law. In this sense it is a 'primary' or 'first' law, that is to say a law commanding all the others. . . . Thus the right to development imposes itself with the force of a self-evident principle and its natural foundation is as a corollary of the right to life. . . .

22. The 'right to development' flows from this right to self-determination and has the *same nature.* There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize *at the same time* a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination.

23. ... [This makes the rightto development] much more a right of the State or of the people, than a right of the individual, and it seems to me that it is better that way.

26. The present writer considers that international solidarity means taking into account the interdependence of nations. One may identify three stages in this search for the foundation of the right to development based on international solidarity:
    (i) interdependence, the result of the global nature of the world economy;
    (ii) the universal duty of every State to develop the world economy, which makes development an international problem *par excellence;*
    (iii) preservation of the human species as the basis of the right to development.

V. Content of the Right to Development

34. ... [This right] has several aspects, the most important and comprehensive of which is the right of each people freely to choose its economic and social system without outside interference or

constraint of any kind, and to determine, with equal freedom, its own model of development. . . .

48. ... [T]he State seeking its own development is entitled to demand that all the other States, the international community and international economic agentS collectively *do not take away from it what belongs to it, or do not deprive it of what is or 'must be' its due in international trade.* In the name of this right to development, the State being considered may claim a *'fair price'* for its raw materials and for whatever it offers in its trade with the more developed countries.

49. This second meaning of the right to development which is due from the international community seems much more complex. It implies that the State is *entitled if not to the satisfaction of its needs at least to re.ceive a fair share of what belongs to all, and therefore to that State also.*

50. ... [T]he satisfaction of the needs of a people should be perceived as a right and not as an act of charity. It is a right which should be made effective by *norms and institutions.* The relation between the donor and the recipient States is seen in terms of responsibility and reciprocal rights over goods that are considered as belonging to all. There is no place in such an analysis for charity, the 'act of mercy', considered as being a factor of inequality from which the donor expects tokens of I submissiveness or political flexibility on the part of the receiving State. The con I cept of charity thus gives place to that of justice. *The need,* taken as a criterion of equity, gives greater precision to the concept of *'equitable distribution'* which would otherwise be too vague.

VI. Degree of Normativity of the Right to Development

53. Learned opinion is divided in its view of the legal validity of the right to development. Many writers consider that while it is undoubtedly an inalienable and imperative right, this is only in the moral, rather than in the legal, sphere. The present writer has, on the contrary, maintained that the right to development is, by its nature, so incontrovertible that it *should* be regarded as belonging to *jus cogens.*

55. It is clear, however, that a right which is not opposable by the possessor of the right against the person from whom the right is due is not a right in the full legal sense. This constitutes *the challenge which the right to development throws down to contemporary international law* and the whole of the challenge which the underdevelopment of four fifths of the globe places, in political terms, before the rulers of the world. . . .

IN SEARCH OF THE UNICORN : THE JURISPRUDENCE AND POLITICS OF THE RIGHT TO DEVELOPMENT

Jack Donnelly

15 Calif. Western Int. 1. J. 473 (1985), at 482

III. Legal Sources of the Right to Development

If the right to development means the right of peoples freely to pursue their development, then it can be plausibly argued to be implied by the Covenants' right to self-determination. However, such a right to development is without interest; it is already firmly established as the right to self-determination.

A substantially broader right to development, however, cannot be extracted from this right to self-determination. The right to self-determination recognized in the Covenants does not imply a right to live in a developing society; it is explicitly only a right to *pursue* development. Neither does it imply an *individual* right to development; self-determination, again explicitly, is a right of peoples only. In no sense does it imply a right to be developed. Thus the claim that the right to development is simply the realization of the right to self-determination is not based on the Covenants' understanding of self-determination.

It might also be argued that because development is necessary for self determination, development is itself a human right. Such an argument, however, is fallacious. Since we will come across this form of argument again, let us look briefly at this 'instrumental fallacy'. Suppose that A holds mineral rights in certain oil-bearing properties. Suppose further that in order to enjoy these rights fully, she requires $500,000 to begin pumping the oil. Clearly A does not have a right to $500,000 just because she needs it to enjoy her rights. . . . The same reasoning applies to the link between development and the right to self-determination. Even assuming that development is necessary for, rather than a consequence of, full enjoyment of the right to self-determination, it simply does not follow that peoples have a right to development.

Allowing such an argument to prevail would result in a proliferation of bizarre or misguided rights. . . .

The second promising implicit source of a right to development is Article 28 of the [UDHR] . . .

[O]ne might question whether 'development' falls under the notion of a social and international order referred to in Article 28. 'Development' suggests a process or result; the process of development or the condition of being developed. 'Order_, by contrast, implies a set of principles, rules, practices or institutions; neither a process nor a result but a structure. Article 28, therefore, is most plausibly interpreted as prohibiting *structures* that deny opportunities or resources for the realization of civil, political, economic, social or cultural human rights. . . .

. . Suppose, though, that Article 28 *were* to be taken to imply a human right to development. What would that right look like? It would be an *individual* right, and only an individual right; a right of persons, not peoples, and certainly not States. It would be a right to the enjoyment of traditional human rights,

not a substantively new right. It would be as much a civil and political as an economic and social right-Article 28 refers to *all* human rights-and would be held equally against one's national government and the international community. . .

[v. Subjects of the Right to Development]

If human rights derive from the inherent dignity of the human person, collective human rights are logically possible only if we see social membership as an inherent part of human personality, and if we argue that as part of a nation or people, persons hold human rights substantively different from, and in no way reducible to, individual human rights. This last proposition is extremely controversial.

. . .

The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail. The idea of collective *human* rights represents a major, and at best confusing, conceptual deviation.

I do not want to challenge the idea of collective rights *per se* or even the notion of peoples' rights; _roups, including nations, can and do hold a variety of rights. But these are not *human* rigpts as that term is ordinarily understood. . . .

A further problem with collective human rights is determining who is to exercise the right; the right-holder is not a physical person, and thus an institutional 'person' must exercise it. In the case of a right held by a people, or by society as a whole, the most plausible 'person' to exercise the right is, unfortunately, the state. Again this represents a radical reconceptualization of human rights-and an especially dangerous one.

DO HUMAN RIGHTS REQUIREA PARTICULAR FORM OF DEMOCRACY?

Henry Steiner

in Eugene Cotran and Adel Gmar Sherif (eds.) Democracy, the Rule of Law and Islam (1999) at 202

In this period of rapid and culturally unsettling transformation, forceful argument has asserted (or denied) causal relationships between, for example, the penetration by multinational enterprises of states throughout the world within a regime of free trade and investment, and the gradual inculcation in those states of values associated with human rights generally. For example, the rule oflaw, so vital to the growth of liberalism and democratic government, is invoked to urge greater predictability in the application of laws bearing on foreign investment and on business generally, a predictability that would serve as a magnet for further investment. In turn, it is argued, heightened business investment and activity under such a legal regime will ultimately strengthen the rule of law with respect to civil and political rights as well. Foreign investment and the development of the local economy in the broad western model thus will contribute importantly toward, if not make inevitable, the realization of democratic and human rights culture.

In such ways, human rights principles have become part of a many-sided argument for globalization and the beliefs informing it: deregulation and free markets under an international regime of free trade, privatization, minimal governmel'it, and, perhaps inferentially, the related cultural characteristics [of individualism and materialism] noted above. The causal flows are argued to be reciprocal, as global business activity both inspires and responds to the growth of democratic rule and its associated rule of law. . . .

States or advocates seeking to preserve or develop modes of national life alternative to the West may then perceive their choice to lie between accepting the human rights framework together with the associated economic structures and cultural characteristics of the West, or rejecting important parts of that framework in the effort to protect or develop a different culture. Such an attitude would be deeply. mistaken. . Although interest groups or theorists may stress for strategic or policy reasons the complementary and mutually reinforcing nature of different discourses and systems-such as links between globalization, privatization, or deregulated markets on the one hand, and democracy and human rights on the other-these are not linkages proposed, let alone imposed, by human rights instruments. To state the obvious, the ICCPR does not require states to pursue policies of free trade or deregulation of markets as necessary routes towards democracy. Governments' decisions about such vital matters will draw on interrelated factors that touch human rights concerns only in part-for example, the relative political and eco-nomic power of states on different sides of these arguments; the economic appeal of and evidence supporting different theories of development and trade and their casual links to the protection of human rights; technological changes in manufacturing, transportation and communication that bind economies and culture to each other more closely than ever.

Over the half century of the human rights movement, arguments about linkages and causation have changed with circumstances, and will continue to. However dominant or persuasive they may appear at a given time, such ideas and advocacy are open to challenge and rethinking from both empirical and normative perspectives. They should not be conflated with a human rights movement with a more I restricted agenda whose deep faith lies not in any particular national or interi national economic system but in the capacity of human beings for critical thought and change.

GLOBALIZATION AND THE DEVELOPING WORLD (1992), AT 90

Keith Griffin and A. R. Kahn

The most important issue linking human development and international capital revolves around the role of foreign aid. Foreign aid includes the highly concessionalloans and outright grants to developing countries from the OECD and other rich countries, channelled both bilaterally and through multilateral development agencies such as the World Bank and the Regional Development Banks. It is often taken for granted that foreign assistance actually assists developing countries. Often, alas, this is not the case. The Committee for Development Planning reflects an emerging consensus when it states that:

far too much aid serves no developmental purpose but is used instead to promote the exports of the donor country, to encourage the use of (imported) capital-intensive methods of production or to strengthen the police and armed forces of the recipient country.

But while agreeing that much aid in the past has been wasted, there is evidence that when donor and recipient act responsibly, foreign aid can indeed be of benefit.

The first thing that needs to be done is to depoliticize aid by bringing it under the control of a supranational authority operating under clearly defined and agreed principles. These principles should include both the mobilization and allocation of aid funds. It may be too much to expect that the leading donor countries I would agree to channel all foreign assistance through a supranational authority, but it should be possible to reach agreement to channel most foreign aid through I such an authority while leaving individual countries free to supplement multilateral assistance with bilateral programmes if they wish to do so. This would not be a radical departure from present practice although it would change the balance decisively in favour of multilateral assistance.

Agreement among donors might be facilitated if it were understood that all multilateral aid would be allocated to countries representing the poorest 60 per cent of the world's population. This implies that only countries with a per capita income of about 700 US dollars or less would be eligible for assistance. Having determined which countries are eligible, the next step is to agree on how the available funds would be distributed among the recipients. We suggest that the criteria for determining the amount of aid to be allocated to eligible countries reflect (a) the severity of poverty as measured by the shortfall of real per capita income from the agreed threshold of 700 US dollars; (b) the degree of commitment to human development as demonstrated by recent success and current programmes; and (c) the size of the population.

The desired total amount of foreign aid available for distribution might be set as an agreed proportion of the combined GNP of all potential recipients. The burden of financing this total should be distributed among the donor countries progressively so that a richer country contributes a higher proportion of its per capita income than a less rich country. This would make the total volume of aid f predictable and the distribution of its burden among the contributors equitable.

HOW TO MAKE AID WORK

The Economist, June 26, 1999, at 23

Over the past 50 years rich nations have given $1 trillion in aid to poor ones. This stupendous sum has failed spectacularly to improve the lot of its intended beneficiaries. Aid should have boosted recipient countries' growth rates and thereby helped millions to escape from poverty. Yet countless studies have failed to find a link between aid and faster economic growth. Poor countries that receive lots of aid do no better, on average, than those that receive very little.

Why should this be? In part, because economic growth has not always been donors' first priority. A sizeable chunk of Saudi Arabian aid, for example, aims to tackle spiritual rather than material needs by sending free Korans to infidels. During the cold war, the Soviet Union propped up odious communist despots while America bankrolled an equally unsavoury bunch of anti-communists. . . . Even today, strategic considerations often outweigh charitable or developmental ones... .

Even where development has been the goal of aid, foul-ups have been frequent. Big donors like to finance big, conspicuous projects such as dams, and sometimes fail to notice the multitudes whose homes are flooded. Gifts from small donors are often strangely inappropriate: starving Somalis have received heartburn pills; Mozambican peasants have been sent high-heeled shoes. . ... .

Aid faces further hurdles in recipient countries. War scuppers the best-laid plans. A shipment of vaccines was destroyed in Congo when rebels cut the power supply to the capital, shutting down the refrigerators where the medicines were stored. In Afghanistan, Taliban zealots have closed aid-financed hospitals for employing female doctors. Less spectacularly but more pervasively, corruption, incompetence and foolish economic policies can often be relied on to squander any amount of donor cash. . . .

. . . A recent study by the World Bank[7] sorted 56 aid-receiving countries by the quality of their economic management. Those with good policies (low inflation, a budget surplus and openness to trade) and good institutions (little corruption, strong rule of law, effective bureaucracy) benefited from the aid they got. Those with poor policies and institutions did not. Badly run countries showed negligible or negative growth, and no amount of aid altered this. Well run countries that

7 *Assessing Aid: What Works, What Doesn't, and Why* (1998) and www.worldbankorgiresearch/aid.

received little aid grew steadily, with GDP per head increasing by 2.2% a year. Well run countries with a lot of aid grew faster, at 3.7% per head a year.

Several things explain these differences. In countries with poor management. I aid is sometimes stolen. Its effectiveness is often limited anyway by the fact that it tends to displace, rather than complement, private investment. In countries with good management, aid <crowds in' private investment: if an economy is growing fast, the returns on road-building or setting up a new airline are likely to be high.A , poorly managed, stagnant economy offers private investors fewer opportunities. I It seems clear that aid should be directed towards countries with good management and lots of poor citizens. Yet many donors continue to behave as if it were I not. Bilateral aid has tended to favour allies and ex -colonies. . . .

Can aid persuade countries with bad policies and institutions to adopt good 1 ones? It is not easy. For years the IMF and World Bank have made their loans Iconditional on policy reform, but the record is mixed, to put it kindly. Governments often agree to cut subsidies or tackle corruption, but later backtrack.... Even when recipients blatantly flout aid conditions, donors often hand over the money anyway, for fear of sparking an economic collapse or even bloodshed.

Good policies cannot be imposed on unwilling pupils. Attaching conditions to aid can strengthen the arm of governments that are trying to push through wise but unpopular measures. Broadly, however, reforms rarely succeed unless a gOYernment considers the reform programme essential, and its own. A recent study by David Dollar and Jakob Svensson found that elected governments were much more likely to implement reforms than unelected ones, and new regimes more likely than old ones.

Rethinking aid

A condition of the G8's new debt-relief plan is that the cash it frees be spent on worthy things like education and health. The World Bank is well aware of the difficulties in ensuring that this actually happens but many donors are not. Aidgivers often finance specific projects, such as irrigation and the building of schools. Since the schools are usually built and the ditches dug, donors are satisfied that their money has served its intended purpose. But has it? Probably not.

Most evidence suggests that aid money is fungible-that is, that it goes into the pot of public funds and is spent on whatever the recipient wants to spend it on. If donors earmark money for education, it may cause the recipient government to spend more on education, or it may make available for something else the money that it would otherwise have spent on education.

If the government is benign, the alternative may be agriculture or tax cuts. If the government is crooked, donors' funds may be spent on shopping trips to London for the president's wife or fighter planes to strafe unpopular minorities. The important factor is not the donor's instructions but the recipient's priorities.. ..

This does not mean that donors should never support specific projects. Some_ times the real value of a donor-financed dam or telephone network lies in the technology that is transferred, and the advice given on how to operate and maintain the infrastructure. But the fact of fungibility suggests that aid-giving could be greatly simplified if most took the form of unconditional 'balance-or-payments support'. That is, cash.

Rich countries should be much more ruthless about how they allocate their largesse, whether earmarked or not. Emergency relief is one thing. But mainstream aid should be directed only to countries with sound economic management. . . .

RELEASE THE POOREST COUNTRIES FROM DEBT BONDAGE

Jeffrey Sachs

International Herald Tribune, June 12-13, 1999, at 8

About 700 million people-the very poorest-are held in debt bondage by the rich countries. The so-called Highly Indebted Poor Countries are a group of 42 financially bankrupt and largely destitute economies. They owe more than $100 million in unpayable debt to the World Bank, the International Monetary Fund development banks and governments, often reflecting the failures of past loans.

Many of those loans were made to tyrranical regimes to suit Cold War aims. Many simply reflect misguided ideas of the past. The moral and practical case for freeing those countries from their debt bondage is overwhelming.

Jubilee 2000, an organization supported by people as diverse as Pope John Paul II, Jesse Jackson and Bono, the rock star, has called for outright elimination of the debt burden of many of the world's poorest countries. This idea is often scoffed at as unrealistic, but it is the realists who fail to understand the economic opportunities facing the world today.

The financial bankruptcy of the poorest countries has been evident for at least 15 years, but the IMF, the World Bank and the rich countries have delayed real solutions to the chronic problem. . . .

In 1996 . . . the IMF and World Bank announced a relief program with great fanfare, but without including any true dialogue with the affected countries. Three years later, these plans have failed. Just two countries (Bolivia and Uganda) were given about $200 million, while 40 others continue to wait in line.

In this same period, the stock market wealth of the rich countries has grown by more than $5 trillion, more than 50 times the debt owed by the 42 poor countries. I

So it is a cruel joke for the world's wealthy governments to protest that they I cannot afford to cancel the debts. . . .

The commercial banks in total have claims of about $19 billion [most of which is already written off in their balance sheets]. . . .

The United States, for its part, is not so foolish as to count its $6 billion of claims on the poor nations at face value. These loans are already carried on the books at about 10 percent of their face value, or around $600 million. The situation is I analogous for other creditor governments.

Rough guidelines might hold that 80 percent or so of the debts would be I canceled outright. The remaining 20 percent would be repaid in local currency, for uses in new social programs aimed at overcoming the multiple crises of health, nutrition, water and sanitation that threaten the very survival of these societies.

CONSTRUCTING AN INTERNATIONAL FINANCIAL, TRADE AND DEVELOPMENT ARCHITECTURE : THE HUMAN RIGHTS DIMENSION

Mary Robinson

Zurich, 1 July 1999, www.unhchr.org

The design of the post -War international financial system was based on the idea .. . that, in return for economic liberalization on the international level, national governments would provide for the social welfare needs of their citizens. For a long time the separation of the rules for international economic transactions,

whether financial or in the area of trade, from the welfare of the individual was carefully maintained. But in recent years concern has been growing at the negative human impact of some economic policies and of structural adjustment programmes in particular. These concerns have been reinforced by the recent financial crisis and have led many to urge that the human impact of policies and actions be considered as an integral part of policy formulation and implementation.

Promoting economic development has, of course, been high on the international agenda. However, as Joseph Stiglitz of the World Bank stated some time ago in a thoughtful speech:

the experience of the past fifty years has demonstrated that development is possible, but not inevitable. While a few countries have succeeded in rapid economic growth, narrowing the gap between themselves and the more advanced countries, and bringing millions of their citizens out of poverty, many more countries have actually seen that gap grow and poverty increase. . . .

What can be done to remedy the situation?

It is not beyond the capacity of the international community to devise strategies to help to secure economic, social and cultural rights for all and to honour the often repeated pledges to support the right to development. I would like to suggest five ways in which progress can be made. . . .

(i) Development

A new strategy of development should be adopted which would seek to achieve, not just GDP growth, but society-wide change. The strategy should foster participation and ownership and' should embrace the public and private sectors, **the** community, families and the individual. This approach would place the human person at the centre of the development paradigm. The basis for this approach would be an emphasis on the human rights objectives of development.

(ii) Role of international financial, economic and trade institutions

Human rights must permeate macro-economic policies, embracing fiscal policies, monetary policies, exchange rate policies, and trade policies. To take the example of children. . . , one economist has noted that 'Trade and exchange rate policies may have a larger impact on children's development than the relative size of the budget allocated to health and education. An incompetent Central Bank can **be** more harmful to children than an incompetent Ministry of Education'.

The international economic institutions should lead the way. They must take greater account of the human dimension of their activities and the huge impact which economic policies can have on local economies, especially in our increasingly globalized world. . . .

(iii) Debt

More and more attention is focussed these days on the crushing burden of debt faced by the poorest countries, a huge obstacle to their meeting economic: challenges and, hence, strengthening the human rights of their citizens. . . .

[In June 1999] the G-8 nations agreed to what is being called 'the Cologne Initiative', a package of measures designed to reduce the debt burden of the 33 poorest countries of the world. These countries collectively owe $127 billion to industrialised countries and institutions such as the IMP and the World Bank. Sceptics of debt relief have argued that previous measures did not filter through to ordinary citizens as the savings made were often diverted to wasteful or corrupt purposes. The Cologne Initiative would require debtor nations to show that they are using the benefits primarily for expenditure on education and health.

Properly structured debt relief initiatives could bring tremendous benefits to countries gripped by poverty but committed to economic and political reform. In virtually all of the countries I visit, I encounter a willingness to embrace modern economic practices but I am constantly told of the strangling effect which debt repayments have on governments trying to put their economies on a sound footing. In Mozambique, to quote just one of the most critical examples, 30% of all revenue goes on debt servicing. And this is one of the poorest countries in the world. If debt payments were relieved resources could be freed to restore the health and education systems which are in a dire state.

(iv) The private sector

Undoubtedly, the most powerful player in international economic relations is the private sector. In fact, a great deal of international activity, be it via the World Trade Organization or the International Monetary Fund, is aimed at providing a stable environment for international economic exchanges. On an international level, corporations are indeed important. The largest 100 companies have combined annual revenues that exceed the GDP of half of the world's nations.

Big corporations have the power to bring great benefits to poor communitiesbut they can cause great damage too: through degradation of the environment, exploitation of economically weak communities, the use of child labour. In recent years there has been an increasing awareness on the part of business that it must face up to its responsibilities in the human rights field. Corporations and business associations contact my office asking for information and guidance. Human rights in business is taking root, through internal ethical statements, corporate codes of conduct, sectoral agreements on issues such as child labour in the clothing industry, or wider codes such as Social Accountability 8000, the International Code of Ethics for Canadian Business and the new Sullivan principles.

HUMAN RIGHTS QUANDARY

Robert Cullen

71 Foreign Afairs 79-88 (Winter 1992/93)

Around the globe the assertion of collective rights by one or another national group roils the status quo. Francophone residents of Quebec agitate for distinct status within, or perhaps secession from, Canada. In Asia Tibetans seek independence from China, and Tamils want to partition Sri Lanka. In Africa a civil war tears apart Ethiopia. In the Middle East Kurds wish to carve their own country out of Iraq, Iran and Turkey, and Palestinians demand the right to create a state in the West Bank and Gaza Strip territories occupied by Israel - itself the product of one of this century's more successful campaigns for the collective right of self-determination.

Yugoslavia most dramatically demonstrates the disastrous potential of the assertion of collective rights in the post communist era. The Yugoslavs, as constituted from 1918 to 1991, were divided by nationality, religion and history. Repression by the communist government and the personal authority of Josip Broz Tito held this unlikely amalgam together for 35 years after World War **II.** But Tito's death in 1980 inaugurated a process of disintegration....

Yugoslavia's war [in the early 1990s], as well as others in the former Soviet republics, demonstrates several sobering realities. . . .

[One is that] conflicting assertions of collective rights cannot be resolved by simply endorsing the right to political self-determination via referendum in a given geographic area. Populations are not cleanly divided. There are too many areas with two, three or four claimants...... Finally, in the absence of countervailing factors there is more than enough suffering and injustice in the history of virtually any national group to prompt it toward vindictiveness and vengeance against its neighbors.

Collective rights..... span a spectrum from simple freedom of association to a variety of special remedies and protections. The ultimate collective right, of course, is the right to create an independent state. Short of that, groups may assert the right to their own schools and to make their language the official language in a given area. They may seek to block the entrance of other nationalities into their homeland. They may seek special political rights.

For both philosophical and pragmatic reasons. . . Americans have good reason to be troubled by the assertion of collective rights. The United States was founded on the idea that citizenship and political rights cannot be based on ethnic or religious identity. The idea that within a given European, Asian or African country groups of people cannot coexist because of their religious or ethnic differences is fundamentally alien to American values. The [expanding definition of the cultural and linguistic rights of minorities by the Conference on the Security and Cooperation in Europe] has already reached the point where it begins to challenge the American ideal engraved on U.S. coins, e pluribus Unum. And from a practical standpoint the tendency for the assertion of collective rights to be accompanied by violent conflict has been adequately demonstrated.

Yet, as Yugoslavia showed, an American policy that opposes national independence movements whose time has come runs the risk of being overwhelmed by tides of nationalist passion.

The cornerstone of the solution to this dilemma is a human rights policy focused firmly on individual, rather than collective, rights. The demise of communism has not ended assaults on individual rights. In some areas of the world communism's disappearance has only increased the number of actors.... bent on depriving individuals of their rights to free speech, to security from torture, to travel and to all the rights enumerated in the 1948 U.N. Universal Declaration of Human Rights....

At the same time the United States should resist the trend toward expanding collective rights. A policy based on American support for collective rights, including political self-determination, will inevitably fail. First, it would tend to put the United States increasingly in the position of arbiter among conflicting claims to a particular homeland. These claims are generally rooted in assertions about ancient history that are difficult to prove one way or another. No one is likely ever to know with certainty, for instance, whether Romanians or Hungarians were the original inhabitants of Transylvania. Second, it would inevitably be applied selectively. The United States could conceivably support the right of Iraq's Kurds to self-determination, but it is never going to support the right of Scots, for instance, to secede from an unwilling Great Britain. A human rights policy applied selectively deservedly loses much of its moral authority. Third, the expansion of internationally recognized collective rights could lead to conflict with American domestic policies. The United States cannot, without a fatal measure of hypocrisy, demand that foreign governments grant minority languages equal status and simultaneously insist on the dominant role of English within its own borders.

The appropriate American attitude toward collective rights is skeptical neutrality. . .. If American policy concerns itself with whether governments afford their people, as individuals, the full spectrum of political rights-the right to speak out and publish, the right to form associations, the right to worship, the right to call for change without fear of repression-then the issue of collective rights will in many cases take care of itself.

Minorities that are treated properly by their governments, as individuals, will probably be less likely to join separatist movements.

SPARK THAT LIT GLOBAL REVOLT AGAINST POVERTY

C. Denny and 1. Elliott

Guardian Weekly, January 6, 2000, at 7

Five years ago aid agencies and development groups found it difficult to get politicians interested in third world debt. The international institutions argued that writing off debts would only encourage other countries to default, and that any money saved would be wasted on bureaucracy or the military.

Jubilee 2000 changed the terms of the debate. Drawing on Old Testament ideas, it proposed once-and-for-allioan write-off to coincide with new millennium. The proposal caught the public imagination and turned the discussion on debt relief from a purely technical discussion into a moral argument about justice between rich and poor.

This culminated in the Group of Seven leading industrial countries in Cologne in June [1999] promising to reduce the debt stock of the most severely affected states by $1OObn. To qualify, countries have to prove that the money saved on servicing these debts will be spent on anti-poverty measures. . .

THE WORLD BANK

The World Bank (formally the International Bank for Reconstruction and Devel. opment) is an intergovernmental organization, established in 1944, that currently has 181 member countries. Its importance derives from three factors: (i) it lends $30 billion annually, making it the world's largest source of development assist. ance; (ii) its imprimatur is, in effect, a prerequisite for loans and investment from many other sources, both public and private; and (iii) it is the single most prolific and influential source of research and policy on development issues. Much of the Bank's work in 2000 is focused on the Comprehensive Development Framework (CDF) which calls for a development plan 'owned' by the country concerned and supported by strong partnerships among governments, donors, civil society, the private sector and other development actors. Among the key issues identified by the Bank in this context are 'structural issues' such as 'good governance and clean government, an effective legal and judicial system, a well-organized and supervised financial system, and social safety net and social programs'.

Although technically classified as a UN Specialized Agency, it keeps itself very much at arm's length from the UN, and strongly rebuffed attempts in the 19605 by the General Assembly to influence its policies towards South Africa. Until the early 1990s human rights issues were entirely absent from th<; Bank's agenda. Although it has become involved in a growing range of such issues in recent years, it con. tinues to lack a coherent human rights policy. Many of its staff remain convinced that, for the most part, such matters are extraneous to the Bank's mandate and that the addition of a human rights agenda would politicize the institution and undermine its ability to work with governments.

This section considers some of the human rights-type activities that the Bank has recently engaged in. It raises the question of how far the Bank should go in developing a full-fledged human rights agenda of its own, and what such an agenda might look like. Consider at the outset the following excerpts from the Bank's Articles of Agreement (as amended effective February 16, 1989, www.worldbankorg):

Article 1

The purposes of the Bank are:

(i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, . . .

(ii) To promote private foreign investment. . .

(iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard ofliving and conditions of labor in their territories.

Article Iv, Section 10

The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be

influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.

A. LETTER FROM HUMAN RIGHTS WATCH TO THE WORLD BANK PRESIDENT

December 14, 1999, http://www.hrw.org/press/1999/dec/chech1215.htm

Dear Mr. Wolfensohn:

We are writing to you with the utmost urgency to ask you to withhold payment of the forthcoming $100 million disbursement under the Bank's structural adjust, ment loan to the Russian Federation, and to use your relationship with representa, tives of the Russian government to press for an end to the abuses being committed " in Chechnya. . . .

We understand of course that the Bank is constrained by its Articles of Agreement, as well as its loan agreement with the Russian Federation. As is elaborated below, however, we cannot accept that these restrictions could be read to require the Bank to finance a government engaged in activities that so clearly violate international law and undermine the Bank's fundamental development goals as is currently the case in Russia.

I' . . . [I]n Chechnya, . . . tens of thousands of civilians are cowering in the baserments of Grozny. They are facing the Russian forces' ultimatum that they leave the city or face imminent 'destruction' together with Chechen rebels, yet they have not been able to flee due to on-going aerial bombardment and limited means of transportation. . . .

The Russian government maintains that it is conducting an 'anti-terrorist' operation in Chechnya . . . No one doubts the right, and indeed responsibility, of the Russian government to protect its citizens from terrorism. But the actions of Russian forces in Chechnya have gone far beyond anti-terrorist measures and have had a severe impact on the civilian population of Chechnya. Russia is today a party to an internal armed conflict, and must observe its obligations under the Geneva Conventions and other international humanitarian law that regulates such conflicts. To date, in Chechnya, Russian forces have flouted these standards.

If the Bank pays the forthcoming installment on its structural adjustment loah, it will be implicated in this human suffering and held accountable by citizens of the world who are in fact its ultimate shareholders. As a direct payment to tht Russian Central Bank for purposes of general budgetary spending, there is a clear danger that World Bank funds will fuel the military engine at work in Chechnya. . . .

Finally, the Bank should take a stand against the Russian government's actions in Chechnya, because they violate international humanitarian law and reflect a broader disrespect for Russia's international commitments. A government should not be considered a reliable investment partner if it undertakes specific commitments and then blatantly abrogates them, as the Russian government has done [in its dealings with the Organization for Security and Co-operation in Europe]. There is a global system of international law that encompasses the Geneva Conventions and other humanitarian norms as well

as international financial agreements; the Russian Federation should not be allowed to pick and choose among its commitments.

The Bank's Articles of Agreement and its loan agreement with Russia must be interpreted in the context of this broader international legal framework. Given the Bank's origins and purposes, there must be an implied understanding in any Bank undertaking that it cannot be allowed through its financing to become complicit in the kinds of violations of international law being perpetrated by Russian armed forces in Chechnya, nor for that matter, to underwrite conduct that is so contrary to its fundamental development goals. Put another way, the Bank is required to weigh only 'economic considerations', but it is further required to do so in a manner consistent with its core purpose.

. . . [T]he IMF, . . . withheld funds for one set of stated reasons when everyone including the Russian people knows well that it is another. The more credible and effective course is to clearly articulate the real conditions for continued financial support, which should in this case be a clear and verifiable commitment on the part of the Russian government to abide by international law in Chechnya, specifically desisting from attacks on heavily populated areas; implementing well-publicized cease-fires along exit routes to allow civilians to flee; and allowing unfettered access and necessary security for international observers and that of humanitarian organizations seeking to provide relief in Chechnya.

Kenneth Roth, Executive Director

B. IBRAHIM F. I. SHIHATA, THE WORLD BANK AND HUMAN RIGHTS

in International Commission of Jurists, Report of a Regional Seminar on Economic, Social and Cultural Rights, Abidjan 1998 (1999) at 145.

[Dr Shihata was Senior Vice-President and General Counsel of the World Bank]

10 'Development and Human Rights: The Role of the World Bank' (1998), <www.worldhank.org/htmlIextdr/ rights/hrintro.htm>.

In spite of the Articles' clear provisions, both with respect to the mandates of the institutions and the prohibition of political considerations, some academics, politicians and NGO activists suggest that the Bank must recognize the relevance and importance of political rights and democracy to economic development and should use its powers to serve these objectives. The academics base their argument mainly on three grounds. The first is that human rights are indivisible and interdependent. The second is that the Articles of Agreement should not be read literally but should be subject to the overriding values and policies that they are meant to serve, taking into account the evolution of such values and policies over time. In other words, questions of the Articles' interpretation should be addressed as issues of conflict of interests and values where the higher interests and values should be given preference, even if this would contradict the language of the text. The third argument assumes that human rights is of a higher order than the Bank's Articles which should only be read in a manner consistent with that law.

As to the first argument, I agree that human rights are indeed interdependent and mutually reinforcing.

This docs not mean, however, that each international organization must concern itself with every and all human rights. Each of these organizations is a juridical body, the legal capacity of which is confined by its respective mandate as defined in its charter. It does not belittle any international organization if its charter specifies its specialized functions in a manner that excludes concern for certain aspects of human rights. But it demeans the organization to ignore its charter and act outside its legal powers. This is simply it matter of specializàtion of international organizations.

As to the second argument, I also agree that the Bank's Articles of Agreement should not always be read literally. This may suggest that they should be interpreted in a purposive, teleological manner. It cannot reasonably suggest that they should be interpreted in a way thai totally negates the ordinary meaning of the text in the light of its object. Nor can it require the Bank to do the opposite of the clear injunctions of its charter by taking political considerations into account for the sake of what is perceived as the higher value of the interpreter. To do so would give the interpreter the authority to apply the Articles in any way he sees fit. It renders the text meaningless for practical purposes.

The third argument is really irrelevant, as the Articles of Agreement in no way contradict human rights law.

Some writers, mainly non-lawyers, have tried to belittle the distinction made in the Articles between economic and political considerations, pointing to the inevitable overlapping between the two. Such overlapping exists; it cannot mean, however, that we must or can correctly disregard the Articles' explicit distinction. It can. . . allow for taking economic considerations into account even when they originate from, or are otherwise associated with, political factors.

In my official opinions in the Bank, I have taken the view that the Bank is not authorized in principle to interfere in the political relationship between a member country and its citizens. However, an extensive violation of individual political rights which takes pervasive proportions could impose itself as an issue in the Bank's decisions. This would be the case if the violation had significant directr, economic effects or if it led to the breach of international obligations relevant to the Bank, such as those created by binding decisions of the UN Security Council. This position respects the Articles' injunctions that 'only economic considerations' shall be taken into account by the Bank and its officers in their decisions. It realizes, however, that political events can have economic effects, and authorizes the taking of these effects into account when they are clearly established. It also recognizes the supremacy of the UN Charter over other international agreements. But it does not accord the Bank, as an international financial institution, the role of a political or ethical reformer of its members.

C. VIEWS OF THE PRESIDENT OF THE WORLD BANK

Letter to President of Indonesia

8 September 1999

[For the background on the East Timor case see pp. 672-93, *supra].*

Dear Mr. President,

I am writing to seek your personal intervention to restore peace in East Timortand to ensure that those

who would use violence to thwart the result of the referendum do not succeed. The World Bank, as you know, has closely monitored events in East Timor in the months preceding the vote, so we would be ready with appropriate assistance whatever the outcome. In this, we were particularly heartened by the assurances of your government at Consultative Group meeting in Paris that the international community should *'rest assured that. . . we are determined to implt. ment our part of the agreement, and give our full support to the operations of tht United Nations in East Timor.* The CGI donors based their commitments on these assurances. However, reports from Dili and elsewhere in East Timor in the past f(W days have described military and police personnel standing by as civilians have been wounded and killed by armed militias.

As you know, the Bank and Indonesia have a long and positive relationship. stretching back many years. We have been through many ordeals together, and 1 am sure we will go through many more. For the international financial community to be able to continue its full support, it is critical that you act swiftly to restore order and that your government carry through on its. public commitment to honor the referendum outcome. The World Bank stands ready to do all we can to assist in the long and difficult task of building an independent East Timor. consistent with the decision of the August 30 referendum.

Sincerely yours,

James D. Wolfensohn

D. JAMES WOLFENSOHN, POOR COUNTRIES MUST HAVE A FREE PRESS

Int'l Herald Tribune, November II, 1999, p. 9

A free press is not a luxury. A free press is at the absolute core of equitable development, because if you cannot enfranchise poor people, if they do not have a right to expression, if there is no searchlight on corruption and inequitablt practices, you cannot build the public consensus needed to bring about change.

When I came to the bank nearly five years ago, I was told we did not talk about corruption. Corruption was political. It was the 'C-word', and if you could not use the C-word you surely could not talk about press freedom. What could be more intrusive on politicians than a free press? What is it that could enfranchise people more than a free press?

But it soon became very clear to me that corruption and the issue of press freedom, while they may have political impact, are essentially economic and social issues, both key to development.

So we redefined corruption, not as a political issue, but as an economic and social issue. Corruption is the largest single inhibitor of equitable economic development, and in redefining the issue in this way our shareholder countries reacted very favorably.

Indeed, six months later at a meeting of our development committee, ministers all made speeches about corruption and asserted that it was at the core of the problems that affect development.

So, too, is press freedom. Studies at the bank show that the more press freedom a country has, the more it can control corruption. Studies show, too, that there is a strong positive correlation between voice and accountability and measures such as per capita income, infant mortality and adult literacy.

And yet we know from Freedom House that just 1.2 billion people live in countries with access to a free press, that 2.4 billion live without a free press and 2.4 billion have access to a partially free press.

Because we understand better now the links between development and issues of voice, accountability and transparency, the World Bank is running courses for journalists in all regions of the developing world and doing so with government approval.

POPULAR PARTICIPATION AS AN IMPORTANT FACTOR IN THE REALIZATION OF HUMAN RIGHTS

The Declaration on Social Progress and Development also called for the adoption of measures to ensure the effective participation, as appropriate, of all elements of society in the preparation and execution of national plans and programmes of social and economic development.

The Economic and Social Council, in its resolution 1746 (LIV) of 16 May 1973, recommended to Governments that appropriate measures should be taken at all levels to ensure more active participation by the entire population, including the labour force, in the production, preparation and execution of economic and social development policies and programmes. In its resolution 1929 (LVIII) of 6 May 1975, the Council noted that, to be effective, popular participation should be consciously promoted by Governments with full recognition of civil, political, social, economic and cultural rights and through innovative measures, including structural changes and institutional reform and development, as well as through the encouragement of all forms of education, particularly compulsory primary education, designed to involve actively all segments of society.

The International Development Strategy for the Third United Nations Development Decade, annexed to General Assembly resolution 35/56 of 5 December 1980, declared that the ultimate aim of development is the constant improvement of the well-being of the entire population on the basis of its full participation in the process of development and a fair distribution of the benefits therefrom.

In its resolution 37/55 of 3 December 1982, the General Assembly recognized that social progress and development were founded on respect for the dignity and value of the human person and should ensure the promotion of human rights and social justice; and requested the Commission on Human Rights to consider the question of popular participation in its various forms as an important factor in the development and realization of human rights, taking into account the report of the Secretary-General on the International Seminar on Popular Participation held at Ljubljana, Yugoslavia, from 17 to 25 May 1982.

On the recommendation of the Commission, the Economic and Social Council, in its resolution 1983/31 of 27 May 1983, requested the Secretary-General to undertake a comprehensive analytical study of the right to popular participation in its various forms as an important factor in the full realization of all human rights, taking into account the concept and practice of popular participation that had been carried out by relevant United Nations organs, specialized agencies and other bodies, the views expressed in the Commission, and the relevant national experiences of Governments.

A preliminary report by the Secretary-General containing a provisional outline for the studies was presented to the Commission at its fortieth session. The study was examined by the Commission at its forty first session, and was noted with appreciation in resolution 1985/44 of 14 March 1985. The Commission requested the Secretary-General to circulate the study to Governments, United Nations organs, specialized agencies and non-governmental organizations, and to submit a report containing their comments. In response to similar requests made at subsequent sessions, the Secretary-General submitted a report to the Commission at its forty-second, forty-third and forty-fourth sessions. In its

resolution 1987/21 of 10 March 1987, the Commission also requested the Secretary-General to prepare a study of laws and practices of countries regarding the question of the extent to which the right to participation had been established and had evolved at the national level and to submit it at the forty-fifth session.

At its forty-fifth session, in 1989, the Commission, in its resolution 1989/14 of 2 March 1989, took note of the study by the Secretary-General of laws and practices regarding popular participation and of the report containing further comments on the study on popular participation as a factor in development. In its resolution 1990/14 of 23 February 1990, the Commission requested the Secretary-General to prepare a further study on the basis of the information collected. That study was submitted to the Commission at its forty-seventh session. In its resolution 1991/12 of 22 February 1991, the Commission asked the Secretary-General to update the study taking into account additional information from Governments, United Nations organs, specialized agencies and non-governmental organizations.

INDIVIDUALISM, COMMUNITARIANISM, AND THE RIGHTS OF ETHNIC MINORITIES

Adeno Addis

66 Notre Dame L. Rev. 1219 (1991)

This Article. . . argues that the only plausible way to understand the notion of ethnic rights is to conceive of it as being a right of a group.

The dominant perspective, "the individualist perspective" as I shall refer to it, holds that the notion of ethnic rights, if it is not meant to refer to secession, can ultimately be understood only as individual rights. The individualist seeks to persuade us of the conceptual plausibility.... of this position [with an argument], which for convenience sake we might refer to as "methodological individualism," [which] contends that, since the individual is the ultimate agent of action, it is only to that agent a moral right could attach. Groups here are merely seen as simple collections of individual agents, aggregations of the constituent parts. To the methodological individualist, the concept of group rights is "a metaphysical absurdity." Only individuals can have rights, for only they can be treated justly or unjustly.

But is the individualist correct? ... Let me first make the point that the individualist might, in fact, recognize group rights more than he thinks he does. Take, for example, secession..... If the individualist supports secession as one institutional manifestation of ethnic rights, ... then his support is informed not by the rights of individuals, but by the right of the group. Presumably, even if there are some individuals who do not support the idea of seceding from the larger political unit, the individualist will feel justified in supporting the wish of the majority to establish itself as a new political unit.

In any case, on the conceptual level, the individualist's claim that there can never be circumstances in which the appropriate unit of agency is the community (or the group) to which the individual belongs seems to be incorrect. There are circumstances in which simple aggregation of the activities and functions of individual members will not tell us the whole story about the community or the group to which the individuals belong.

Consider, for instance, the example Ronald Dworkin gives to highlight the importance of community as a point of departure, the orchestra. Individual members of an orchestra are

> exhilarated, in the way personal triumph exhilarates, not by the quality and brilliance of their individual contributions, but by the performance of the orchestra as a whole. It is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members.

In Dworkin's example, one could legitimately talk about the group, the orchestra, being a unit of agency. To say that the community or the group is the unit of agency is to make the claim that the lives of the members of the group or of the community "are bound in their communal life, and that there

can be no private accounting of the critical success or failure of their individual lives one by one." Accordingly, one cannot understand the success of the enterprise in terms of the statistical summary of the success or failure of individual members.

If groups can be units of agency, then they can be units of our moral concern in the same way individuals are or can be. Groups as units of agency can be treated justly or unjustly; conversely, they can treat others justly or unjustly. Since rights are conferred, and duties imposed, on individuals precisely for those reasons, as the individualist is quick to remind us, it seems logical to insist that once the capacity of groups to be units of agency is admitted, then it must be accepted that it is not metaphysical nonsense to talk about the rights of groups.

[Having countered the argument that the idea of "group rights" is conceptually incoherent. Addis proceeds to advance a strategic argument for his vision of "group rights."]

.... The individualist claims that her objective is to treat individuals equally, and that she does so by treating them as abstract individuals rather than as members of a group. In reality, for members of minority ethnic groups, having equal treatment turns out to be merely the right to be turned into some version of the members of the dominant culture. One can treat individuals equally only if one is comparing them from a given point of view. That point of view is not the abstract individual, for there is not such a creature, but rather the individual who is located in and circumscribed by the dominant culture and tradition.

In addition, the individualist argument that to treat individuals equally is to simply allow them to associate with whomever they want has, although seemingly neutral in relation to each individual and each cultural group, a greatly disproportionate negative impact on ethnic minorities. [W]hat this apparent neutrality masks is the fact that minority cultures, unlike the dominant culture, are vulnerable to the decisions of non-minority groups. Dominant majority groups are able to outvote and outbid the minority groups regarding the resources crucial to the survival of the latter's cultures. This is a threat that the dominant group does not face.

Take, for example, the Aboriginal people of Australia, a people which was, and has been, subjected to one of the most brutal treatments of an indigenous people by a colonizing power. What does it mean to say that Aboriginal people enjoy the same right as European Australians for their culture to compete in the marketplace of cultural values? It is a hollow right. Aboriginal people number slightly more than one percent of the population. In the past, their culture was systematically undermined by the government. Under such circumstances, to claim that the Aboriginal people can place their cultural practices in the marketplace of cultures is to be oblivious to two crucial facts. First, the government has had an important role in undermining the competitive capacity of the Aboriginal culture. Secondly, the Aboriginal people will be outvoted and outbid by European Australians in relation to the resources needed for the survival and the flourishing of their culture. The majority will determine the fate of the culture that it has always seen as the Other.

[In the following passage, Addis argues against one prevailing approach to group differences, which he terms "paternalistic pluralism," and argues that "critical pluralism" is better able to address the concerns outlined in the preceding passage.]

[One of the three common responses of dominant groups to ethnic minorities], which I have referred to as pluralism, holds that differences are to be celebrated rather than feared..... Actually, there are two kinds of pluralism. The first could be referred to as paternalistic.... pluralism....

Paternalistic pluralism "protects" the culture of minorities as the Other. Here, the toleration of the culture of ethnic minorities is motivated by a desire to save a particular group and its cultural practices from the majority's own actions which threaten to annihilate the minority. Under this model, the minority group cannot engage, and is not regarded as capable of engaging, the majority in a creative and constant dialogue. And the structure and resources that will enable such a dialogue are denied this group. What governments have done to indigenous peoples in Australia, Canada, New Zealand and the United States is a good example of this. Indigenous peoples in these countries are treated in the same way one would treat a "vanishing species of nonhuman fauna. . . ." 13 They are to be preserved as Another, rather than to be engaged as partners in the creation and recreation of the social world that both inhabit. Pluralism of the paternalistic kind is as dehumanizing as negation itself, for it is based on the assumption that the minority has little to impart to the majority and cannot therefore be regarded as a partner in dialogue.

What I have elected to refer to as "critical pluralism" does more than "protect" the minority. In fact, it is not even comfortable with the notion of protection. Rather, it is committed to doing two things. First, it actively intervenes to provide the resources that will enable the minority culture to flourish. But that alone is not sufficient. It is also committed to developing institutional structures that will enable the majority to open itself up to the minority, to accept the minority as a dialogue partner. Put simply, critical pluralism will adhere simultaneously to the politics of difference and dialogue. When the dominant group engages the oppressed in a dialogue it is acknowledging two things. First, it assumes that the dialogue partner cannot be understood either as an imitation of or deviation from the dominant culture. One does not engage a deviant in a dialogue. Rather, one seeks to heal the deviant, either medically or with divine guidance. Healing, by its very nature, is one-directional. Second, the dominant group sees its experience and culture not as universal and neutral, but as specific and located in the same way it sees the marginal cultures to be.

[C]ritical pluralism argues against what Jean-Francois Lyotard calls the "great story," the grand narratives within which all of us are supposed to find ourselves and through which each of us is to be inscribed. It argues that both descriptively and normatively it is better to think of societies as contests of narratives, "struggle[s] for the privilege of recounting the past." Unlike paternalistic pluralism, which defines ethnic minorities as the "Other," critical pluralism starts with the proposition that the right of ethnic minorities is not merely one to be preserved from the cultural threat of the majority, but also to have the institutional capacity to interrogate the majority.....

Critical pluralism is pluralist in the sense that its objective is to provide the necessary resources and institutional structures for the cultures of the minorities to flourish. It believes in multiplicity. In its vision, the good society does not eliminate (or transcend) group differences. On the other hand, unlike paternalistic pluralism, where multiplicity is accompanied by the attitude of the Other, critical pluralism sees society as a constant and desirable mutual interrogation of various narratives. As such, critical pluralism is concerned not only with providing resources for minorities so as to enable them

to maintain and develop their culture, to produce and tell their stories, but it seeks also to develop institutional structures that will enable the minority cultures to engage the dominant culture in a dialogue. . . .

Why is institutional dialogue an important aspect of critical pluralism? First, if it is true, as I have argued it is, that groups are contingent rather than essential, and that their very meaning can be rearranged and recast, then dialogic engagement becomes the means by which this recasting takes place. Second, it is through the process of dialogue, where different cultural groups are recognized as dialogue partners rather than as either negations or imitations of the dominant groups, that dominant groups might cease to see their norms as neutral and universal. When the traditions of ethnic groups are positively affirmed, the dominant group will slowly discover its own specificity. This feeling of specificity is the most important condition for the respect and celebration of difference. When, for example, African Americans' culture is positively affirmed, European Americans will realize that their cultures and attributes are not neutrally American and universal, but specific, perhaps European.

Third, institutional dialogue among cultural groups will serve the same function Roberto Unger saw being served when theoretical insights are considered along with their institutional realizations: there will be necessary mutual correction. Dialogue among cultural groups is likely to lead to mutually corrective engagement... The process of mutual correction might be understood to be the recasting and reconceptualizing of groups, a process that is the result of the contingency of groups.

Fourth, it is in the process of dialogue, where social groups attempt to accommodate in their "own normative world the objective reality of the other," that the dominant group will come to understand how it feels to be oppressed.