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## The Right to Development: Implications for International Economic Law

Isabella D. Bunn

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# THE RIGHT TO DEVELOPMENT:

## IMPLICATIONS FOR INTERNATIONAL ECONOMIC LAW

ISABELLA D. BUNN\*

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## INTRODUCTION

A measure of political and academic controversy has long accompanied the emergence of the right to development. The debate on the legal significance of the right ranges from hailing it as a major breakthrough in the history of human rights to debunking it as a distracting—if not dangerous—ideological initiative.<sup>1</sup> When discussions began within the United Nations Organization in the late 1970s, many commentators had high expectations.<sup>2</sup> The right to development would address the economic imbalance between the developed and the developing worlds, and integrate human rights and economic development issues. Furthermore, the right to development would enhance the ethical component in the analysis and conduct of international relations.

Yet, a number of critics maintained that the right would at best make no difference to the people in the poorer parts of the world, but instead was more likely to be detrimental to them. One writer claimed:

If it achieves any significance, the right of development will divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights, and provide increasing resources and support for the state manipulation (not to say repression) of civil society and social groups. It will keep the international and diplomatic community engaged for many years in useless and feigned combat on the urgency and parameters of the right.<sup>3</sup>

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\* Fellow, Centre for the Study of Christianity and Culture, Regent's Park College, Oxford University; former General Counsel of the California State World Trade Commission; member of the District of Columbia and California State Bars.

1. See generally THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (Subrata Roy Chowdhury et al. eds., 1992) (providing several critical essays with diverging viewpoints regarding the right to development within the context of international law).

2. See U.N. ESCOR Comm. on Hum. Rts., 33d Sess., 1389th mtg. paras. 2, 4, U.N. Doc. E/CN.4/S.R. 1389 (1977) (recognizing the right to development as one inextricably linked to economic, social and political rights); see also Philip Alston, *The Right to Development at an International Level*, in THE RIGHT TO DEVELOPMENT AT AN INTERNATIONAL LEVEL, HAGUE ACADEMY OF INTERNATIONAL LAW WORKSHOP 110-111 (rene-Jean Dupuy ed. 1980).

3. See Yash Ghai, "Whose Human Right to Development?" *Human Rights*

Since the United Nations ("UN") adopted the Declaration on the Right to Development ("UNDRD") in 1986,<sup>4</sup> the international and diplomatic community has indeed engaged in a debate on its urgency and parameters. But most participants would insist that such efforts amount to more than useless and feigned combat.

Over the last thirteen years, the UN has devoted substantial resources to elevating the significance of the right to development and promoting its implementation. In 1993, it was recognized as "a universal and inalienable right and an integral part of fundamental human rights."<sup>5</sup> A vital link between civil and political rights and economic, social and cultural rights, the right to development has prompted dozens of UN agencies and non-governmental organizations to transform their policies and programs. Last year, the UN General Assembly initiated efforts toward reformulating the right to development in terms of a binding convention.<sup>6</sup>

Nonetheless, over the last ten years, the right to development has received scant scholarly attention.<sup>7</sup> This is particularly so in the field of international economic law, despite the fact that the field is inexorably linked "to any respectable implementation of a right to devel-

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*Unit Occasional Paper, 5-6 (Commonwealth Secretariat, Nov. 1989).*

4. See *Declaration on the Right to Development*, U.N. GAOR, 41st Sess., Annex, Agenda Item 101, 97th plen. mtg. at 1, U.N. Doc. A/RES/41/128 (1987) (hereinafter *UNDRD*) (arguing that social, civil, political, economic, and cultural rights must accompany the right to development as a fundamental human right in order for it to reach its full potential).

5. See *Vienna Declaration on Human Rights, UN World Conference on Human Rights*, U.N. GAOR, at 23-24, U.N. Doc. A/CONF.157/24 (Part I) (1993) [hereinafter *Vienna Declaration*] (citing the right to development as one interconnected with other fundamental human rights and calling for international cooperation in the work towards its realization).

6. See G.A. Res. 155, U.N. GAOR, 53d Sess., at 4, U.N. Doc. A/RES/53/155 (1999).

7. See generally HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 1110-46 (1996) (providing excerpts of critical essays tracking the formulation of the right to development and its inclusion within the larger rubric of international human rights). For example, a search of both the Index to Legal Periodicals and the Index to Foreign Legal Periodicals on "right to development" reveals only a limited number of journal articles, most dating from the period immediately surrounding the adoption of the UNDRD.

opment.”<sup>8</sup> In addition to an interdisciplinary emphasis on human rights, a consistent theme in the debate on the right to development is reform of the “unjust international economic order” toward one based on obligations for human welfare and social justice. While the text of the Declaration is itself rather ambiguous, subsequent UN activities suggest major potential impacts on development assistance, debt burden and adjustment policies, foreign investment, and the international trading system.

The purpose of this paper is to discuss the concept of the right to development and to highlight its potential implications in selected areas of international economic law and policy. Part I considers the international legal framework of the right to development, leading up to the adoption of the UNDRD in 1986. The paper then provides a brief legal critique of the right to development, followed by a summary of UN efforts toward its implementation.

Part II attempts to extract some of the implications of the right to development for international economic law and policy, to include the scope of international obligations under the right, the identification of principles relevant to the fulfillment of such obligations, and lastly, the elimination of key obstacles to the realization of the right.

## I. OVERVIEW OF THE RIGHT TO DEVELOPMENT

### A. INTERNATIONAL LEGAL FRAMEWORK

The emergence of the right to development spans a forty-year period from the formation of the United Nations Organization in 1945<sup>9</sup> to the adoption of the Declaration on the Right to Development by the UN General Assembly in 1986.

The UN Charter, grounded in international cooperation, emphasizes the importance of social justice and human rights as the foun-

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8. See Michael K. Addo, *An Underlying International Economic Law Problem of the Right to Development*, *Human Rights Unit Occasional Paper*, 8 (Commonwealth Secretariat, Nov. 1989) (dealing largely with the problem of bilateral economic assistance); see generally FRIEDL WEISS ET AL. EDS., *INTERNATIONAL ECONOMIC LAW WITH A HUMAN FACE* (1998).

9. See generally U.N. CHARTER at preamble (declaring the formation of the United Nations and outlining the goals of the organization).

dition for a stable international order.<sup>10</sup> Its preamble, which states that the United Nations is determined "to promote social progress and better standards of life in larger freedom," hints at the relationship between human rights and development.<sup>11</sup>

Two strands of United Nations standard-setting are relevant to this inquiry: human rights law and international development law.<sup>12</sup> The 1948 Universal Declaration of Human Rights<sup>13</sup> urges all nations to respect specified rights and freedoms. While several of these rights are in the civil and political realm, a number expressly pertain to economic concerns.<sup>14</sup> For example, Article 22 provides:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.<sup>14</sup>

The Universal Declaration of Human Rights anticipated the preparation of a binding treaty on human rights. The legal and political complexities of this process will not be described here, but within

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10. *See id.* art. 55 (presenting a key provision in the legal framework of both human rights and development).

11. *See id.* at preamble.

12. While this expression is used here for ease of description, the very notion of an "international law of development" has been the subject of some controversy. International lawyers of a more positivist tradition see it as an aspect of international economic law, and are largely concerned with the enforcement of legal rules. Those of the Francophone persuasion, including many Third World scholars, see it as a new approach to the entire international system, one that blends the law with economic, political and social goals. *See* INTERNATIONAL LAW OF DEVELOPMENT: COMPARATIVE PERSPECTIVES 1-39 (Francis Snyder & Peter Slinn eds., 1987).

13. *See Universal Declaration of Human Rights*, U.N. GAOR, at 1, U.N. Doc. A/811 (1948) (encouraging nations to secure their universal and effective recognition and observance through progressive national and international measures).

14. *See generally* ASBJORN EIDE ET AL., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (1992) (providing explanations and legislative background on the Universal Declaration, especially on Articles 22-28). While the UNDRD features the observance of civil and political rights, much of the surrounding legal debate relates more to economic, social and cultural rights.

15. *See Universal Declaration of Human Rights*, *supra* note 13, art. 22.

two decades, two separate human rights agreements emerged: the International Covenant on Civil and Political Rights ("ICCPR"),<sup>16</sup> and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>17</sup> While neither covenant expressly refers to a right to development, many of the principles and rights specified therein are crucial to an understanding of such a right.

In addition to the evolution of human rights, changes in international economic relations have also shaped the legal framework of the right to development. One of the outgrowths of colonial independence was the entry of "less developed countries" ("LDCs") into the UN system.<sup>18</sup> The LDCs worked together in an effort to change the existing international economic regime, and to codify new norms into a legal document.<sup>19</sup> This strategy began to bear fruit in May

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16. *International Covenant on Civil & Political Rights*, G.A. Res. 2200A, U.N. GAOR 3d Comm., 21st Sess., 1496th plen. mtg., Annex, Agenda Item 62, at 16, U.N. Doc. A/RES/2200 (XXI) (1967).

17. *See International Covenant on Economic, Social & Cultural Rights*, G.A. Res. 2200A, U.N. GAOR 3d Comm., 21st Sess., 1496th plen. mtg., Annex, Agenda Item 62, at 3, U.N. Doc. A/RES/2200 (XXI) (1967). *See generally* MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 6-29 (1995) (analyzing the recognition of economic, social and cultural rights within the larger context of international human rights). For an example of a regional agreement recognizing the right to development, *see African Charter on Human and Peoples' Rights*, June 27, 1981, 21 I.L.M. 58, 59 (entered into force Oct. 21, 1986). Article 22 provides that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

18. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514 (XV), Dec. 14, 1960; *see also Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Report of the Special Political & Decolonization Committee*, U.N. GAOR 4th Comm., 54th Sess., at 5, U.N. Doc. A/54/584 (1999) (indicating that implementation of the Declaration is still on the UN agenda).

19. *See Adeoye Akinsanya & Arthur Davies, Third World Quest For a New International Economic Order: An Overview*, 33 INT'L & COMP. L.Q. 208, 211 (1984) (discussing how the UN Conference on Trade and Development (UNCTAD) became a forum for the LDCs to voice their concerns, and the role UNCTAD played in formulating the New International Economic Order). *See generally* Kamal Hossain, *General Principles, The Charter of Economic Rights and Duties of States, and the NIEO*, in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 1-9 (Kamal Hossain ed., 1980).

1974, when the General Assembly adopted a Declaration and Program of Action on the Establishment of a New International Economic Order ("NIEO").<sup>20</sup> A further step came with the adoption of the Charter of Economic Rights and Duties of States, asserting that every State has the responsibility to promote economic, social and cultural development and progress for both its own people and those of developing countries.<sup>21</sup>

The NIEO challenge to the status quo, and the far-reaching implications of its implementation, was met with substantial resistance by industrialized countries.<sup>22</sup> Notwithstanding such controversy, it is clear that many NIEO provisions have helped shape the right to development. While the documents associated with the NIEO make no mention of such a right, official UN reports on the right to development do take into account elements of the NIEO.<sup>23</sup> Indeed, the

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20. See *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Agenda Item 6, 2229th plen. mtg. at 1, U.N. Doc. A/RES/3201 (S-VI) (1974) [hereinafter *NIEO Declaration*]. The Declaration proclaims a united determination to work urgently for the establishment of a New International Economic Order

based on equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, making it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations.

See *id.*; see also *Program of Action on the Establishment of a New International Economic Order*, U.N. GAOR Ad. Hoc. Comm., 6th Sess., 2229th Mtg., U.N. Doc. A/RES/3202 (S-IV)(1974) [hereinafter *NIEO Program of Action*] (describing efforts needed to realize these goals, and addressing problems of raw materials and primary commodities, the restructuring of the international monetary system, increased industrialization in the developing countries, technology transfer, and control over the activities of transnational corporations).

21. See G.A. Res. 3281 (XXIX), U.N. GAOR, 2d Comm., 29th Sess., Agenda Item 48, arts. 7 & 9, U.N. Doc. A/RES/3281 (XXIX) (1975).

22. See GABE S. VARGES, *THE NEW INTERNATIONAL ECONOMIC ORDER LEGAL DEBATE* 39, 42-43 (1983) (explaining how the developing countries thought of the NIEO as having legal force grounded in international law, while developed countries did not).

23. See, e.g., *Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right*, U.N. ESCOR, 35th Sess., paras. 152-159, U.N. Doc. E/CN.4/1334 (1979); *Report of the Open-Ended Working*



UNDRD itself affirms that States should: "fulfill their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights."<sup>24</sup>

The NIEO framework also impacts an analysis of the legal status of the right to development. Georges Abi-Saab notes that Third World countries have staunchly put forth "this bundle of policy measures" that is gradually commanding the acceptance of Western industrialized countries.<sup>25</sup> He maintains that reaching the stage of a legally-sanctioned right to development must proceed from the NIEO, which is "the only blue-print of the right to development which stands a realistic chance of hardening into law."<sup>26</sup>

#### B. ADOPTION OF THE UN DECLARATION ON THE RIGHT TO DEVELOPMENT

As early as 1957, the UN General Assembly affirmed "that a balanced and integrated social and economic development would contribute towards the promotion and maintenance of peace and security, social progress and better standards of living, and observance of, and respect for, human rights and fundamental freedoms for all."<sup>27</sup> An International Conference on Human Rights, held in Teheran in 1968, asserted the profound interconnection between the realization of human rights and economic development.<sup>28</sup> Moreover, the 1969 Declaration on Social Progress and Development renewed the UN's

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*Group of Governmental Experts on the Right to Development*, U.N. ESCOR, 45th Sess., para. 25, U.N. Doc. E/CN.4/1989/10 (1989) (suggesting that some of the NIEO's tangential issues would prove to be barriers to the global implementation of the right to development).

24. *Declaration on the Right to Development*, *supra* note 4, art. 3.3.

25. See Georges Abi-Saab, *The Legal Formulation of a Right to Development*, in *THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL*, HAGUE ACADEMY OF INTERNATIONAL LAW WORKSHOP 167 (Rene-Jean Dupuy ed. 1980).

26. See *id.* at 167.

27. G.A. Res. 1161 (XII), U.N. GAOR, 3rd Comm., 12th Sess., Agenda Item 12, para. 12(3), U.N. Doc. A/3716 (1957).

28. See *Proclamation of the International Conference on Human Rights*, U.N. GAOR, at 4, paras. 12, 13, U.N. Doc. A/CONF.32/41 (1968).

commitment to the importance of a "just social order."<sup>29</sup>

In legal circles, Senegalese jurist Keba M'Baye is credited with the initiation of the "right to development."<sup>30</sup> In a 1972 lecture at the International Institute of Human Rights in Strasbourg, he asserted that it was a right belonging to all men, as "every man has a right to live and a right to live better."<sup>31</sup> He based his justification more in political-economic and moral terms, rather than in legal analysis.

The UN Commission on Human Rights, influenced by M'Baye's views, expressly referred to the right to development in a resolution adopted in 1977. The Commission invited the UN Secretary General, as well as UNESCO and other agencies, to examine the right to development as a human right, in relation with other human rights based on international cooperation, also taking into account the requirements of the NIEO.<sup>32</sup>

A second study, focusing on the regional and national dimensions of the right to development as a human right, soon followed. The re-

29. See *Declaration on Social Progress and Development*, G.A. Res. 2542 (XXIV), U.N. GAOR, 3d Comm., 24th Sess., 1829th plen. mtg. at 2, U.N. Doc. A/RES/2542 (XXIV) (1969) (asserting that peace and security will be maintained only through accelerated global social and economic progress).

30. For general overviews of the emergence of the UNDRD, see Hector Gros Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189 (1981); Roland Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287 (1983); Jack Donnelly, *In Search of the Unicorn: the Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473 (1985); and R.N. Kiwanuka, *Developing Rights: The UN Declaration on the Right to Development*, 35 NETH. INT'L L. REV. 257 (1988).

31. See Keba M'Baye, *Le Droit au Développement comme un Droit de L'Homme*, 5 REVUE DES DROITS DE L'HOMME (HUM. RTS. J.) 503, 515 (1972) (suggesting that since all humans theoretically are entitled to the same basic rights, the right to development should be included as an entitlement for all).

32. See E.S.C. Res. 4 (XXXIII), U.N. ESCOR Comm. on Hum. Rts., 62d Sess., Supp. No. 6, at 75, U.N. Doc. E/5927 (1978) (recognizing the widening gap between developed and developing countries and calling for the right to development to be understood as a fundamental human right). See *supra* note 23, for the *Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right*, the topic of which is: "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs."

port particularly highlighted the obstacles developing countries encountered in their efforts to secure enjoyment of the right.<sup>33</sup> In 1981, the UN convened a Working Group of Governmental Experts on the Right to Development, and later asked it to propose a draft declaration on the right to development.<sup>34</sup> Eventually, on December 4, 1986, the UN General Assembly voted overwhelmingly to adopt the Declaration on the Right to Development.<sup>35</sup>

### C. LEGAL CRITIQUE OF THE RIGHT TO DEVELOPMENT

The UNDRD's preamble recognizes that: "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom."<sup>36</sup>

While the fluidity of the definition of development within the UNDRD has not been particularly problematic, extracting the exact substance of the right has been a source of extensive legal critique. The Declaration's often vague language reflects both the complexity of the subject matter and the demands of political compromise.

The UNDRD defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."<sup>37</sup>

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33. See *Report of the Secretary-General on the Regional and National Dimensions of the Right to Development*, U.N. ESCOR, 38th Sess., U.N. Doc. E/CN.4/1421 and U.N. Doc. E/CN.4/1488 (1981).

34. See *Report of the Working Group of Governmental Experts on the Right to Development*, U.N. ESCOR, Comm. on Hum. Rts., 41st Sess., Annex 2, Agenda Item 8(a), at 3, U.N. Doc. E/CN.4/1985/11 (1985) (implores states across the world to work together to remove obstacles to development).

35. See *UNDRD*, *supra* note 4. One hundred and forty-six members voted in favor of the resolution, and only the United States opposed it. A further eight members abstained (Denmark, Finland, Federal Republic of Germany, Iceland, Israel, Japan, Sweden, United Kingdom). See *id.*

36. See *UNDRD*, *supra* note 4, preamble.

37. See *id.* at art. 1. Note that the definition is tautological in using the term

The concept of the right to development immediately poses a number of legal questions. There are arguments about the appropriate place of the right, if any, within the body of human rights law. There are difficulties in identifying the beneficiaries and duty-holders under the right, as the UNDRD holds both individual and collective dimensions. A further issue is that of enforcement or justiciability, reflecting doubts about how the right might be upheld at the national or international levels. While a full range of legal critiques cannot be explored here, the following points give a sense of the debate.

Some commentators, such as Bedjaoui, are effusive in their praise. He claims the right to development is the core right from which all others stem.<sup>38</sup> But for the most part, the legal analysis of the right to development has been critical. Ghai maintains:

The value of the concept of a right is that it creates entitlements, and the entitlements are easier to enforce if the contents and beneficiaries of the right are clearly specified. In the case of the right to development, it is not clear who are the right and duty bearers. Equally vague is the content of the right.<sup>39</sup>

Brownlie agrees that the content of the UNDRD reveals a problem of identity, and the result "is to perhaps blur the conceptual profile and make the task of promulgation of the right the more difficult."<sup>40</sup> Even more strident is Carty, who claims:

The debate about the right to development marks a crisis in legal theory, because it encompasses a determined attempt to place material content before form and yet retain whatever advantages are supposed to attach to the use of legal language.<sup>41</sup>

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"development" to explain the meaning of the right to development.

38. See Mohammed Bedjaoui, *The Right to Development*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1177, 1182 (Mohammed Bedjaoui ed., 1991). It is "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 . . ." See *id.*

39. See Ghai, *supra* note 3, at 12.

40. Ian Brownlie, "The Human Right to Development" *Human Rights Unit Occasional Paper*, 11 (Commonwealth Secretariat, Nov. 1989).

41. A. Carty, *From the Right to Economic Self-Determination to the Right to Development: A Crisis in Legal Theory*, THIRD WORLD LEGAL STUDIES 73, 75 (1984).

A comprehensive evaluation of the legal standing of the UNDRD would require legal analysis of the normative resolutions of the UN General Assembly, of state practice and customary international law, of the doctrine of *jus cogens*, and even of obligations *erga omnes*. Nonetheless, the prevailing view is that the right to development is, at the very least, on the threshold of acceptance as a principle of positive international law.<sup>42</sup> As early as 1981, Alston noted that:

in terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.<sup>43</sup>

#### D. UN EFFORTS TO IMPLEMENT THE RIGHT TO DEVELOPMENT

Notwithstanding these conceptual difficulties and legal criticisms, the United Nations has made a tremendous effort to promote the realization of the right to development. Over the last thirteen years, it has adopted a range of new policies and programs, which can only be touched upon here.<sup>44</sup> Secretary General Kofi Annan's organizational reforms emphasize the centrality of human rights to all activities within the UN system. Thus, efforts to ensure peace and security, to provide humanitarian relief, or to promote development, must all consider the cross-cutting nature of human rights. The General Assembly has repeatedly underscored the need for action on the right to

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42. See Kiwanuka, *supra* note 30, at 271 (identifying the significance of the UNDRD). "Even if the Declaration cannot be endowed with legal authority, in positivist terms, that would not necessarily mean it is stripped of all relevance and utility in international law." See *id.*

43. Philip Alston, *Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy*, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 31, 106 (International Commission of Jurists eds., 1981).

44. See generally UN documents such as "Basic Facts about the United Nations" (1998), the "Human Rights Fact Sheets" series, "The United Nations and Human Rights, 1945-1995" (1995), "United Nations Action in the Field of Human Rights" (1994); the series of reports from the various working groups on the right to development; the United Nations general website and human rights website; other sources include "For the Record 1998: The UN Human Rights System" and the Human Rights Internet website.

development.<sup>45</sup> The right to development features prominently in the mandate of the UN High Commissioner for Human Rights (“UNHCHR”). It has been the subject of a global consultation<sup>46</sup> and of four different expert working groups. Further, a variety of UN World Conferences, including the 1993 World Conference on Human Rights in Vienna, have reiterated and reaffirmed the right to development as a “universal and inalienable right and an integral part of fundamental human rights.”<sup>47</sup>

On the development side, a key agency within this mandate is the UN Development Program (“UNDP”). Highlighting the crucial links between the three key goals of the United Nations Charter in the areas of peace, development, and human rights, the UNDP has set forth a policy to integrate human rights with sustainable development.<sup>48</sup> The UNDP outlines three levels of commitment to human rights. First, it “works for the full realization of the right to development,” particularly in the eradication of poverty.<sup>49</sup> Second, it advocates human rights as part of sustainable development and third, it promotes good governance. The overall approach reflects how development and human rights complement, as well as depend upon, each other.<sup>50</sup>

Other development-related agencies also play a role in the imple-

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45. See G.A. Res. 136, U.N. GAOR 3d Comm., 52d Sess., para. 8, U.N. Doc. A/RES/52/136 (1998) (noting the Secretary General’s concern for human rights and urging him to give high priority “to the promotion and realization of the right to development”).

46. See *Global Consultation on the Realization of the Right to Development as a Human Right*, U.N. Commission on Human Rights, 46th Sess., Agenda Item 8, U.N. Doc. E/CN.4/1990/9/Rev.1, at 39 (1990) [hereinafter *Global Consultation*]; see also Russell Lawrence Barsh, *The Right to Development as a Human Right: Results of the Global Consultation*, 13 HUM. RTS. Q. 322 (1991) (highlighting the debate over whether a “right to development” exists and the failure of the UNDRD to resolve the question).

47. *Vienna Declaration*, *supra* note 5, at para. 10.

48. See United Nations Development Program, *Integrating Human Rights with Sustainable Human Development* 14-16 (visited July 9, 2000) <<http://magnet.undp.org/Docs/policy5.html>> [hereinafter *Integrating Human Rights*] (outlining a policy for sustainable development that maintains human rights as a priority).

49. See *id.* at 2 (recognizing that poverty is a “brutal denial” of basic human rights).

50. *Id.* at 9.

mentation of the right to development, including the UN Industrial Development Organization, the UN Conference on Trade and Development, and the UN Development Fund for Women. The United Nations Development Group facilitates coordination amongst the agencies.

Several UN Specialized Agencies, such as the International Labor Organization and the World Health Organization, are also involved in the debate on the realization of the right to development. Efforts to coordinate the implementation of the right necessarily extend beyond the UN system. Thus, intergovernmental organizations such as the European Commission, the Organization for Economic Cooperation and Development ("OECD"), and the World Bank have also consulted with the various working groups and/or the UNHCHR. Moreover, reflecting the scope and diversity of human rights and development concerns, many non-governmental organizations ("NGOs") have worked to implement the right to development.<sup>51</sup>

While the foregoing discussion has highlighted some of the UN program and policy initiatives expressly related to the right to development, a further range of activities is also relevant. This includes efforts under all human rights treaties, which advocate, for example, the right to food, the right to health, the right to adequate shelter and services, the right to education, the right to culture, the right to work, the rights of workers, and the rights of minorities, indigenous peoples, women, and children.

Moreover, many topics not characterized in rights language also have direct influence on the realization of the right to development. These include, for example, debt relief and structural adjustment policies, the existing unjust economic order, protection of the environment, sustainable development, population planning, disarmament, among many others.

The United Nations has established a follow-up mechanism for the right to development, including a new open-ended working group as-

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51. These include the World Council of Churches, International Rehabilitation Council for Torture Victims, International Commission of Jurists, International Confederation of Free Trade Unions, International Planned Parenthood Federation, Commonwealth Medical Association, and Oxfam.

sisted by an independent expert.<sup>52</sup> The expert's work program confirms that "he will examine the theoretical aspects of the right and possible amendment, extension and reformulation of the Declaration to make it more accessible to implementation and enforcement."<sup>53</sup> Taking this a step further, a recent General Assembly resolution invited the follow-up mechanism "to consider the question of elaborating a convention on the right to development."<sup>54</sup> Thus, it appears certain that the UN will continue to focus on the issues surrounding the legal basis and significance of the right to development.

This section has detailed the considerable efforts the international community has made to advance the right to development and promote its realization. The following section attempts, however selectively, to provide some greater theoretical and practical understanding of the right to development by suggesting its implications for international economic law and policy.

## II. IMPLICATIONS FOR INTERNATIONAL ECONOMIC LAW AND POLICY

### A. OBLIGATIONS UNDER THE RIGHT TO DEVELOPMENT

Whose duty is it to fulfill the right to development, and what types of obligations fall under it? This question forms a threshold for examining the impact of this multi-faceted concept on international economic law and policy.

There are a variety of duty-holders under the UNDRD. The primary focus of the Declaration is upon the responsibilities of States, at both the national and international levels. There is, however, also an important individual dimension. Human beings have a duty, individually and collectively, "to promote and protect an appropriate po-

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52. See U.N. ESCOR, 269th Sess., 46th mtg., U.N. Doc. E/1998/269 (1998) (approving the establishment of a follow-up mechanism to facilitate the realization of the right to development).

53. U.N. ESCOR, 55th Sess., 118th mtg. at 2, U.N. Doc. E/CN.4/1999/118 (1999).

54. See G.A. Res. 155, *supra* note 6, at para. 21(b).



litical, social and economic order for development.”<sup>55</sup> It is worth recalling that other human rights documents integral to an understanding of the UNDRD, such as the Universal Declaration<sup>56</sup> and the preamble paragraphs of both human rights covenants, also place duties on individuals.

Nevertheless, States have the primary responsibility to create “national and international conditions favorable to the realization of the right to development.”<sup>57</sup> It is clear that the fundamental obligation for development lies with each national government, which is to undertake all necessary measures for the realization of the right to development and to ensure full exercise and progressive enhancement of the right.<sup>58</sup>

The UNDRD also specifies several collective obligations of States. These include duties to:

(1) cooperate in ensuring development and eliminating obstacles to development<sup>59</sup>

(2) eliminate massive and flagrant violations of human rights<sup>60</sup>

(3) respect the principles of international law concerning friendly relations and cooperation among states<sup>61</sup>

(4) take steps to formulate international development policies with a view to facilitating the full realization of the right to development<sup>62</sup>

(5) promote universal respect for and observance of, all human rights and fundamental freedoms for all<sup>63</sup>

(6) promote the establishment of international peace and security,

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55. See *UNDRD*, *supra* note 4, art. 2.2.

56. See *Universal Declaration of Human Rights*, *supra* note 13, art. 29(1).

57. See *Declaration on the Right to Development*, *supra* note 4, art. 3.1 (setting forth the obligations of States, both individually and collectively).

58. See *id.* art. 2.3, 10.

59. See *id.* art. 3.3.

60. See *id.* art. 5.

61. See *id.* art. 3.2

62. See *id.* art. 4.

63. See *Declaration on the Right to Development*, *supra* note 4, art. 6.1

achieve complete disarmament, and use the resources so released for comprehensive development<sup>64</sup>

Such cooperation in the "international community," has an important, though not exclusive, forum within the UN and its specialized agencies.<sup>65</sup> UN bodies and agencies are also increasingly expected to respect human rights instruments as though they themselves were parties.<sup>66</sup>

The increasing role of non-governmental organizations ("NGOs") also bears mention. While no express obligation is placed upon them within the text of the UNDRD, NGOs are cited in UN documents as "catalytic elements in the realization of the right to development" at the national, regional and international levels.<sup>67</sup> A recent General Assembly resolution makes several references to NGOs, including: "[t]he recognition that the implementation of the UNDRD requires effective development policies and support at the international level through the effective contribution of . . . non-governmental organizations active in this field";<sup>68</sup> and the request to ensure widespread dissemination and promotion of the UNDRD, "in close cooperation with States and intergovernmental institutions, national institutions, academia and interested non-governmental organizations worldwide . . . ."<sup>69</sup>

A further important question relates to the nature of duties imposed on other transnational entities. A 1979 Secretary-General's Report states that "the duty to promote the right to development is of general application, and thus applies to entities such as transnational

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64. *See id.* art. 7.

65. *See Integrating Human Rights, supra* note 48, at 24.

66. *See THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW, supra* note 1, at 16-18 (discussing the responsibility of the UN and its agencies to respect human rights).

67. U.N. ESCOR, 50th Sess., 21st mtg. para. 38, U.N. Doc. E/CN.4/1994/21 (1994).

68. *See G.A. Res. 155, supra* note 6; *see also G.A. Res. 144, U.N. GAOR 3d Comm., 53d Sess., U.N. Doc. A/RES/53/144* (1999) (discussing the expansion of human rights responsibilities of both individuals and institutions).

69. *See G.A. Res. 155, supra* note 6.

corporations, producers, associations, trade unions and others.”<sup>70</sup> The UNDRD itself, however, makes no mention of such entities. Nonetheless, their inclusion as duty-holders has been urged throughout the debate on the right to development.<sup>71</sup>

Additionally, corporate accountability for human rights has become a prominent topic within the business, academic, policy-making, and NGO communities.<sup>72</sup> There is increasing pressure upon transnational corporations for greater social responsibility with respect to human rights. This will influence the implementation of the right to development.

## B. PRINCIPLES GUIDING THE FULFILLMENT OF RESPONSIBILITIES

One can extract dozens of concepts from the texts of the UNDRD and subsequent documents to provide for a new way to examine international economic law and policy. Such principles could include fundamental ones like the need for development cooperation, to more recent ones like environmental sustainability.<sup>73</sup> For the purposes of this discussion, five guiding principles are presented: respect for human rights, participation, equality of opportunity, differential treatment for developing countries, and accountability.

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70. See *supra* note 32, Report of the Secretary-General on the International Dimensions of the Right to Development, at par. 109.

71. See U.N. ESCOR, 50th Sess., 21st mtg. para. 87, U.N. Doc. E/CN.4/1994/21 (1993) (noting that the International Council of Voluntary Agencies emphasized that the Declaration was incomplete “because it included no reference to the responsibility of other players besides States, in particular transnational corporations and multilateral agencies”).

72. See, e.g., HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997) (analyzing existing and proposed human rights guidelines for transnational corporations).

73. The text of the UNDRD makes no mention of the environment whatsoever; however, subsequent legal and political developments now squarely link the concept of environmental sustainability with those of human rights and development.

### 1. *Respect for Human Rights*

One word pervades the text of the UNDRD: *rights*. “Right” or “rights” is mentioned no less than forty-five times. The principle of respect for human rights undergirds the understanding and realization of the right to development in several different ways.

First, and most obviously, the right to development is itself deemed an inalienable human right. (Art. 1.1)

Secondly, the type of economic, social, cultural and political development it envisages is one in which “all human rights and fundamental freedoms can be fully realized.” (Art. 1.1)

The right to development implies two specific rights of particular relevance to the law of development. These are the full realization of the right of peoples to self-determination, and the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. (Art. 1.2)

Next, all human beings have a responsibility to promote and protect an appropriate political, social and economic order for development. But this is subject to the important limitation of accounting for “the need for full respect of their human rights and fundamental freedoms as well as their duties to the community.” (Art. 2.2) Article 9 reiterates a similar limitation prohibiting any activity in violation of the Universal Declaration or the International Covenants on Human Rights. This is intended to avoid any “trade-offs” between promoting development and protecting human rights.

States should fulfill their duties in ensuring development in such a manner as to “encourage the observance and realization of human rights.” (Art. 3.3) Further, States are to take resolute steps to eliminate the massive and flagrant violations of human rights. These include: apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war, and refusal to recognize the fundamental right of peoples to self-determination. (Art. 5)

The UNDRD reaffirms two general principles of human rights law found in numerous other declarations. First, all States should cooperate to strengthen universal observance of all human rights and fun-

damental freedoms for all without any distinction as to race, sex, language or religion. Second, States should give equal and urgent consideration to the implementation, promotion and protection of civil, political, economic, social and cultural rights. (Art. 6.1, 6.2) Finally, States should take steps to eliminate obstacles to development that may arise from a failure to observe human rights. (Art. 6.3)

The inescapable conclusion is that there is a profound interconnection between development and human rights. Approximately twenty years ago, the Director of the Division of Human Rights of the UN Secretariat, T. van Boven, made the following statement about the need for an interdisciplinary approach:

It is a challenge of utmost importance, for unless we can effectively bridge the gap between the realms of human rights and economics we risk the pursuit, on the one hand, of an international economic order which neglects the fundamental human development objective of all of our endeavours, and, on the other hand, of a shallow approach to human rights which neglects the deeper, structural causes of injustice,<sup>74</sup> of which gross violations of human rights are often only the symptoms.

The right to development is an important step in meeting this challenge. If policy-makers take the right seriously—and this is a big if—that would hold substantial implications for the formulation of international economic law and policy. It is not enough for them to consider the potential human rights consequences of international trade, investment, and financial activities. Rather, they must be proactive in probing how economic policies can help eliminate human rights violations and the obstacles to development they cause.

## 2. Participation

A second important theme within the context of the right to development is that of participation. Every human person and all peoples

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74. See *The New International Economic Order and the Promotion of Human Rights, Study of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/1983/24/Rev.1 (citing a seminar held in Geneva in July 1980 on “The Effects of the Existing Unjust International Order on the Economies of the Developing Countries and the Obstacle that this Represents for the Implementation of Human Rights and Fundamental Freedoms” in ST/HR/SER. A/8, annex II, at note 156).

are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development. (Art. 1) The human person is the central subject of development, and should be the active participant and beneficiary of the right to development. (Art. 2.1) States must formulate appropriate national development policies to further the "active, free and meaningful participation in development" of both individuals and of the entire population. (Art. 2.3). Finally, Article 8 provides that "States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights."

Participation has been described as "the right through which all other rights in the Declaration on the Right to Development are exercised and protected."<sup>75</sup> It is an on-going process at the local, regional, national, and international levels. It is the primary mechanism for setting goals toward the realization of the right to development, and for assuring the compatibility of development activities with human rights and cultural values. Participation is also important in evaluating progress toward the realization of the right. Thus, it holds ramifications in areas of policy-making and practical implementation.

An important related element is the inclusiveness of participation. NGOs, for instance, are increasingly important vehicles for encouraging popular participation in society. The upcoming discussion on Equality of Opportunity also supports inclusiveness; there should be no limits on participation on the basis of race, sex, language or religion.<sup>76</sup>

Inevitably, the theme of participation within the UNDRD leads to the question of democracy. Although the UNDRD makes no mention of the word, UN reports identify "failure to implement and respect the principles of democratic government" as an obstacle to the realization of development.<sup>77</sup> Democracy is now a recurrent theme in al-

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75. See *Global Consultation*, *supra* note 46, at 48.

76. U.N. ESCOR, 53d Sess., 98th mtg. at 7, U.N. Doc. E/CN.4/1997/98 (1999) (noting the right to development is an increasingly important vehicle for combating social, economic, and cultural exclusion).

77. See *Global Consultation*, *supra* note 46, at 45.

most all recent documents on development and/or human rights.<sup>78</sup> One scholar even heralds the right to development as “the perfection of democracy,” and urges the fulfillment of basic needs in the interest of a truly democratic society.<sup>79</sup>

Within the context of international economic law and policy, the protests at the WTO’s ministerial meeting in Seattle, in December 1999, underscored the need to respond to demands for expanded participation.<sup>80</sup> In addition to the grass-roots level promotion of involvement in the development process, there is now a growing demand for organizational reform. This highlights an acute challenge to intergovernmental bodies of all types, including international financial and trade institutions: increased participation implies that greater equality and democracy should characterize their operations.

### 3. *Equality of Opportunity*

The right of development is both individual and collective. While the human being is the primary subject and beneficiary of the right to development, the right also holds a societal dimension in its application to peoples.

How does the UNDRD affirm equality for its beneficiaries? First of all, development policies are aimed “at the constant improvement of the well-being of the entire population and of all individuals.” (Art. 2.3) Echoing well-established principles, State cooperation in promoting and observing all human rights and fundamental freedoms is intended “for all without any distinction as to race, sex, language or religion.” (Art. 6.1)

States are to ensure “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.” (Art. 8.1) Moreover,

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78. See, e.g. G.A. Res. 155, *supra* note 6, at para. 5 (reaffirming democracy, development and respect for all human rights and fundamental freedoms, including the right to development, are interdependent and mutually reinforcing).

79. See THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW, *supra* note 1, at 193-211 (examining the relationship between a state’s right to development and its ability to choose a political system).

80. See Chi Carmody, *Beyond the Proposals: Public Participation in International Economic Law*, 15 AM. U. INT’L L. REV. 1321.

all individuals are entitled to “the fair distribution of the benefits” resulting from development. (Art. 2.3)

There is no differentiation based on types of individuals or peoples, except for the specific reference that women should have an active role in the development process. (Art. 8.1) Recent resolutions go further in affirming that “the empowerment of women and their full participation on a basis of equality in all spheres of society is fundamental for development.”<sup>81</sup>

The UNDRD also seeks to protect disadvantaged individuals and minorities who are discriminated against, by advancing “[a]ppropriate economic and social reforms” in order to eradicate social injustices. (Art. 8.1) Further, the repeated references in the UNDRD to the observance of cultural rights infers the need to provide special protection for indigenous populations. (Art. 6)

Although there is only one reference to “injustice” within the text of the UNDRD (Article 8.1), it is nevertheless clear that much of the Declaration’s underlying intention is aimed precisely at eliminating it. While international social and economic justice is an entire topic in itself,<sup>82</sup> the right to development can help provide a vision for the international order. The right seeks to address complex issues of equality, fairness, distribution of benefits and burdens within and among societies. The right focuses on solving problems of exploitation and oppression, fulfilling basic human needs, and maintaining respect for all persons. It serves as a reminder of our responsibility to future generations. Finally, on a global scale, it raises the classic question of justice: how to render to each person what is due.

#### *4. Differential Treatment of Developing Countries*

The UNDRD does not differentiate among States based on level of development: all States are subjects of the right, and duty-holders

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81. G.A. Res. 155, *supra* note 6, at para. 11 (affirming the need to apply a gender perspective in the implementation of the right to development).

82. See Frank J. Garcia, *Trade and Justice: Linking the Linkage Debates*, 19 U. PA. J. INT’L ECON. L. 391, 411-24 (1998) (examining conflicting claims of justice in the context of international economic law).



under it.<sup>83</sup> Several provisions, however, emphasize the special status of developing countries.<sup>84</sup> Although developing countries must take steps to help themselves, effective international cooperation is needed to provide them with appropriate means to foster comprehensive development.<sup>85</sup> Further, Article 7, relating to international peace and security, seeks “to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.”<sup>86</sup>

That said, however, it is clear that much of the impetus for the UNDRD centers on the needs of developing countries.<sup>87</sup> Such preferential treatment is grounded in a duty to cooperate for development, and has emerged over several decades of state practice.<sup>88</sup> A number of observations may be made in this regard. First, the advancement of development is a major goal of international organizations, which have expanded greatly since 1945.<sup>89</sup> The Constitution of the United Nations Industrial Development Organization (“UNIDO”), for example, describes international development cooperation as “the shared goal and common obligation of all countries . . . .”<sup>90</sup>

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83. See *Declaration on the Right to Development*, *supra* note 4, art. 4.

84. See *id.* (noting the requirement of sustained action “to promote more rapid development of developing countries”).

85. See *id.*

86. *Id.* art. 7.

87. See, e.g., Reports of the Secretary General, *supra* notes 23 and 33. Both reports fall under the general heading entitled:

Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights and study of special problems which the developing countries face in their efforts to achieve these human rights.

88. See Roland Rich, *The Right to Development: A Right of Peoples?*, in *THE RIGHTS OF PEOPLES* 39, 46-50 (James Crawford ed., 1988) (indicating that the increasing, seemingly obligatory role of states in development lays the foundation for state practice in the context of human rights and development).

89. See *id.* at 48 (indicating that the constitutions and programs of international organizations reveal these groups' efforts to aid developing countries).

90. See U.N.I.D.O. CONST. preamble (declaring that the shared goal of UNIDO and UN countries is to foster industrialization through technological advancements, and to establish a “new economic order”).

Second, developing countries are, in some respects, treated as special subjects of international law.<sup>91</sup> There is no fixed definition of what constitutes a “developing nation.”<sup>92</sup> Nonetheless, this is an important distinction under international law. Many documents, particularly those relating to the establishment of a New International Economic Order, refer to the category of “developing countries.”<sup>93</sup>

Thirdly, there is recognition of the “substantive inequality” between developing and industrialized nations.<sup>94</sup> This is a vital notion in an international legal system characterized by the sovereign equality of states. The obligation of development cooperation holds within it an acknowledgement of the need for “affirmative action” in relations with the developing world.<sup>95</sup>

A variety of programs incorporate more favorable treatment for poorer nations. For example, the WTO framework explicitly recognizes that developing countries should receive differential and more favorable treatment under certain international trading rules.<sup>96</sup>

International financial institutions also grant concessional terms to underdeveloped countries. For example, as early as 1960 the World Bank set up a “soft-loan” arm known as the International Development Association (IDA) to provide long-term loans at little or no interest. Additionally, a number of treaties, such as the Law of the Sea

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91. See, e.g., Rich, *supra* note 88, at 48.

92. See F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT: A NEW DIMENSION OF INTERNATIONAL ECONOMIC LAW* 59 (1990) (explaining that different stages of development account for discrepancies in, e.g. resource allocation and trade preferences, in developing nations). Even organizations such as the IMF, the GATT, and the UNDP all have different definitions and different lists of developing countries. See *id.* at 59-60.

93. See, e.g., *NIEO Declaration*, *supra* note 20; *NIEO Program of Action*, *supra* note 20.

94. See Rich, *supra* note 88, at 48.

95. See *id.* at 48-49 (alleging that the notion of affirmative action in the relationship between developed and developing countries is an integral component of the right to development).

96. See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 1108-1138 (1995) (examining the attitudes of developing countries towards the General Agreement on Tariffs and Treaties (GATT), and the establishment of the Generalized System of Preferences (GSP)).

Convention, grant preferences to developing countries in matters such as special access to foreign fishing zones.<sup>97</sup>

A final and more difficult question is whether nations behave as though they are under an obligation to provide development assistance. More than twenty years ago, Oscar Schachter argued that the evidence for this is not only the international resolutions the rich nations have endorsed, but also their actions to grant assistance and preferences to those in the less-developed world: "the scale and duration of the response have been substantial enough to demonstrate the practical acceptance of a responsibility based on the entitlement of those in need."<sup>98</sup> He concluded that this notion dominates the contemporary law of international development.

Acknowledgment of entitlement, however, does not appear to be linked to any acceptance of a corresponding legal obligation to fulfill those needs. It is true that many nations administer aid programs for developing countries, and many organizations, including the Development Assistance Committee of the OECD, monitor aid flows and policies.<sup>99</sup> One commentator notes the remarkable development that it is now "standard practice for richer states to give aid to poorer states" given the fact that before the World War II era no government provided aid to help the economic development of other states on a continuing basis (as opposed to temporary disaster relief).<sup>100</sup> However, the same writer also noted that the richer industrialized states are usually reluctant to recognize any legal obligation to aid poorer states.<sup>101</sup>

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97. See Third United Nations Conference on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261, 1281 (entered into force Dec. 10, 1982) (establishing that States should allow developing countries access to the surplus portion of their catch that is beyond the allowable quota).

98. See Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 1, 9-10 (1976) (exploring the issue of international entitlement to aid and preferences).

99. See Rich, *supra* note 88, at 49-50.

100. See MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 236 (1987) (noting that permanent development aid is a relatively recent phenomenon).

101. See *id.* at 237 (indicating the concern that poorer states would eventually demand too much aid from donors).

Thus, while one principle of the right to development is differential treatment of developing nations, this stops short of any entitlement to such assistance or aid.

### 5. Accountability

A 1980 study by the Secretary-General, leading to the adoption of the UNDRD, referred to the concept of accountability.<sup>102</sup> This concept is closely connected to both human rights and development. The study noted the recent increase in support for accountability and that it has "considerable potential significance as a means of promoting realization of the right to development."<sup>103</sup> While the text of the UNDRD makes no mention of accountability, this principle has featured in much of the related policy and program activity.

Accountability, which carries with it ideas of answerability and responsibility, is frequently invoked in the context of institutional reform of the UN and other international agencies.<sup>104</sup> Accountability also takes shape in several other important themes that characterize the realization of the right to development.

One such theme is anti-corruption. Corruption has long been identified as an obstacle to the implementation of the right to development.<sup>105</sup> Corruption involves greed and gross mismanagement by public officials, as well as bribery and illicit payments by corporations to secure unfair business advantages. The problem cuts across a wide range of international economic activity, including foreign aid, lending, investment, and trade. In fulfilling responsibilities under the right to development, governments must pay greater attention to anti-corruption efforts at the local, national, and international levels. An international example is the OECD's Convention on Combating Bribery of Foreign Public Officials in Business Transactions.<sup>106</sup>

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102. See *Report of the Secretary-General on the Regional and National Dimensions of the Right to Development*, *supra* note 33, at 14 (explaining that accountability is closely connected to the assessment of various activities in light of promoting human rights in harmony with development).

103. *Id.*

104. See, e.g., *Integrating Human Rights*, *supra* note 48 (indicating the UNDP is promoting good governance, accountability, decentralization, and the rule of law).

105. See *Global Consultation*, *supra* note 46, at para. 165.

106. See *Convention on Combating Bribery of Foreign Public Officials in Inter-*

Another theme related to accountability that is gaining acceptance in the implementation of the right to development is “good governance.” UN Secretary General Kofi Annan deemed it “perhaps the single most important factor in eradicating poverty and promoting development.”<sup>107</sup> Good governance means “creating well-functioning and accountable institutions—political, judicial and administrative—that citizens regard as legitimate, through which they participate in decisions that affect their lives, and by which they are empowered.”<sup>108</sup> The concept of “rule of law,” which is now frequently invoked in a variety of political and commercial contexts, is also connected to notions of good governance.<sup>109</sup>

### C. OBSTACLES TO THE REALIZATION OF THE RIGHT TO DEVELOPMENT

The United Nations has focused on devising a plan of action for the realization and implementation of the right to development.<sup>110</sup> Many of the UN’s efforts are aimed at identifying and removing “obstacles” to the realization of the right.<sup>111</sup> The UN considers the issue as an open-ended process of changing the way the international system works, rather than as a right to be enforced.

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*national Business Transactions*, Organization for Economic Co-operation and Development (1997) (visited June 17, 2000) <<http://www.oecd.org/daf/nocorruption/20novle.htm>> (adopting the position that bribery is widespread in international business transactions, and that efforts to deter and prevent bribery are necessary to promote economic development and good governance).

107. See KOFI A. ANNAN, PARTNERSHIPS FOR A GLOBAL COMMUNITY, at 39, U.N. Sales No. E.99.I.3 (1998).

108. *Id.*

109. See, e.g., Alston, *supra* note 43, at 67-68 (linking the rule of law to development and human rights and emphasizing direct individual participation within a community).

110. See e.g., *Global Consultation*, *supra* note 46, at 3-9 (serving as a forum to address issues pertaining to development and human rights, and recommending programs at both the national and international levels to improve aspects of trade, development, and finance).

111. See *id.* at 45-46 (citing lack of respect for individual self-determination, violations of human rights, racial discrimination and apartheid, ignorance of the human dimension of development, and economic and political inequality as examples of such obstacles).

The obstacles to the implementation of the right to development are formidable. They include broad conceptual problems, such as "misconceptions of the State" and "insufficient political will" to more specific issues, like removal of trade barriers and increased technology transfers. Major political problems, such as armed conflict, also lend themselves to re-examination in this light. The UNDRD reaffirms the connection between disarmament and development, for example, and urges that the resources released as a result of disarmament should be used for comprehensive development.<sup>112</sup> But disarmament also points to limitations on the international arms trade, an issue which has far-reaching implications for international economic policy.

This paper addresses six obstacles to the realization of the right to development, each of which is of particular concern to international economic law and policy. They are (1) insufficient foreign aid; (2) the debt problem and structural adjustment; (3) the activities of transnational corporations; (4) unilateral coercive measures; (5) unfair trading rules; and (6) the negative consequences of globalization.

### *1. Insufficient Foreign Aid*

It must again be emphasized that the UNDRD contains no explicit obligation to provide development assistance. There is, however, a duty to cooperate with other States in ensuring development, and to provide developing countries with "appropriate means and facilities to foster their comprehensive development."<sup>113</sup> The Global Consultation on the Realization of the Right to Development, for instance, favors "affirmative action in favour of the disadvantaged groups and increased assistance to disadvantaged countries" in order to reverse the growing inequalities between developed and underdeveloped countries.<sup>114</sup>

That said, the lack of sufficient foreign aid remains an impediment to the realization of the right to development. The UN target for offi-

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112. *UNDRD*, *supra* note 4, art. 7.

113. *Id.* art. 4.2.

114. *See Global Consultation*, *supra* note 46, at 45 (indicating a less strident demand than in the NIEO).

cial development assistance is 0.7% of Gross Domestic Product (“GDP”).<sup>115</sup> The volume of external aid to developing countries declined steadily throughout the 1990s, and by 1997, it stood at 0.22 percent of annual GDP of the industrialized countries, probably the lowest level since target-setting began in the 1960s.<sup>116</sup>

Aside from the overall level of assistance, there are shortcomings in the manner of its distribution. First, donor countries are increasingly earmarking aid for specific purposes. Another problem is the limited allocation of development aid. The United States, for example, spends half of its rather meager foreign aid budget on Egypt and Israel.<sup>117</sup> This highlights a third problem—political motivation for giving aid, where donors tie the assistance to foreign policy goals, such as protection of human rights, or discouragement of nuclear proliferation.<sup>118</sup> These restrictions show that the actual economic development needs of the recipient countries are not a priority.

The Right to Development may encourage a higher level of development assistance. In a 1999 resolution, the General Assembly expressed “*deep concern* about the overall decline in official development assistance flows,” and called upon developed countries to mobilize their collective resources for development assistance in order to better support the Right, with a goal of reaching UN targets as soon as possible.<sup>119</sup>

As noted above, the principle of differential treatment for devel-

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115. See *NIEO Declaration*, *supra* note 20 (affirming the “Development Decade” goal that each developed country should provide 0.7% of its annual gross national product as official development assistance).

116. See, e.g., the *Human Development Report*, published annually by the United Nations Development Program. Chart 37 shows aid flows, including net official development assistance as a percentage of GNP.

117. See THE COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD 191 (1995) (citing self-interest as an obstacle to aid distribution, where the United States, for instance, sends aid primarily to promote exports or security initiatives).

118. See BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS 1, 44-48 (1988) (discussing various forms of aid conditions, such as demonstrated safeguards against nuclear activity, without which the donor nations will deny assistance).

119. See G.A. Res. 155, *supra* note 6.

oping countries has not solidified into a corresponding legal obligation to provide such assistance. Nonetheless, the right to development does seem to advance a *moral* obligation, which may eventually bolster the chances of elevating it to a full legal obligation. As Secretary General Annan noted:

The rights-based approach to development describes situations not simply in terms of human needs, or of developmental requirements, but in terms of society's obligation to respond to the inalienable rights of individuals. It empowers people to demand justice as a right, not as charity, and gives communities a moral basis from which to claim international assistance where needed.<sup>120</sup>

## 2. *The Debt Burden and Structural Adjustment Policies*

The text of the UNDRD does not mention debt, although there is regular mention of debt burden and structural adjustment policies in the discussions on obstacles to development. At one point, some representatives of poorer countries objected to consultations with the World Bank and IMF, because they saw those institutions as part of the problem and not part of the solution.<sup>121</sup>

The magnitude of the debt is substantial, and the economic requirements associated with its repayment are often onerous. Since the poorest countries bear the greatest burden, the implications in human terms are acute. One UN expert noted that “[a]lmost 20 years of futile experimentation with structural adjustment programs has eroded the social welfare of millions of poor people across the third world and denied their economic, social and cultural rights.”<sup>122</sup>

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120. See ANNAN, *supra* note 107, at 62 (indicating also that the promotion of human rights, and implementation of a “rights-based approach to development,” is becoming more widespread as more organizations acknowledge the connection between human rights and international peace).

121. See, e.g., *Progress Report of the Intergovernmental Group of Experts on the Right to Development*, Commission on Human Rights, 53rd Sess. at 36-38, E/CN.4/1997/22 (1997) (summarizing comments of the expert member from Malaysia that he and other delegations have concerns over collaboration with the World Bank, as it and other financial institutions have themselves been identified as obstacles to the realization of the right to development due to the effects of their structural adjustment policies).

122. *Report of the Independent Expert on the Effects of Structural Adjustment*



A breakthrough occurred in October 1996, when the World Bank and IMF agreed on the first comprehensive debt-reduction mechanism for the poorest countries, termed the "Heavily Indebted Poor Countries" ("HIPC") initiative. Nonetheless, many UN documents reveal a tone of "too little, too late."

An alternative UN vision is that of "adjustment with transformation," which emphasizes sustainable economic growth combined with social justice. Consistent with the Copenhagen Declaration on Social Development, structural adjustment programs must include and protect social development goals.<sup>123</sup> Underlying principles of "adjustment with transformation" include: (a) Promoting human development and gender equality; (b) Placing a priority on meeting basic human needs; (c) Ensuring democratic representation and decision-making; (d) Guaranteeing fair reward for labor; (e) and Sharing the debt burden equitably.

The Independent Expert on the effects of structural adjustment policies on the full enjoyment of human rights made a number of recommendations on the type of actions to be taken at various levels.<sup>124</sup> At the international level, these include:

(A) Debt cancellation for the heavily-indebted poor countries. Priority should be accorded to countries emerging from civil wars and those devastated by natural disasters.

(B) Human rights conditionality in future lending. Recognizing that conditionality is a contentious issue, it must be based on human development and human rights criteria in broad consultation with civil society organizations and national governments. Greater transparency and accountability of lenders, such as the IMF and World Bank, will help ensure that debt relief is used effectively and not squandered on corruption, military expenditure or grandiose projects.

(C) International mechanisms to retrieve money stolen by corrupt

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*Policies on the Full Enjoyment of Human Rights*, Comm. on Human Rights, 55th Sess., Prov. Agenda Item 10, para. 28, E/CN.4/1999/50 (1999).

123. See World Summit for Social Development, at 85, U.N. Doc. A/CONF.166/9 (1995) (citing as relevant social development goals the elimination of poverty, the creation of adequate employment, and "social integration").

124. See *supra* note 122, paras. 122-128.

leaders. Establishment of such plans could look to efforts in tracking money-laundering in the drug trade and compensating survivors of the Nazi holocaust, for example.

(D) Reform of the international economic, financial and trade systems. Long-term development requires a basic re-structuring of these systems, in particular to increase exports and attract various forms of financing.

(E) Natural resource preservation: Future lending should be made conditional on an assessment of the impact of proposed projects on the environment and on the resource base for the poor.

Serious consideration of these recommendations would lead to significant changes in international economic law, both at the national and international levels.

### *3. Activities of Transnational Corporations*

The Working Group on the Right to Development identified the concentration of economic and political power in a few countries and corporations, as one of the obstacles to the realization of the right to development. It also recommended the adoption of new international legislation and the creation of effective international institutions to regulate the activities of transnational corporations and banks. In particular, it urged the resumption of multilateral negotiations on a code of conduct for transnational corporations.<sup>125</sup>

Under the heading “The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations,” the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered these issues.<sup>126</sup> In 1998, a work-

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125. The Working Group was established in accordance with Commission on Human Rights Resolution 1993/22 of March 4, 1993, and met for five sessions during its three year mandate. Its main purpose was to identify obstacles to the realization of the right to development and to recommend ways and means toward the realization of the right. An important recent development regarding multinational corporations is the “Global Compact” initiative on business and human rights. See *The Global Compact* (visited Sept. 15, 2000) <<http://www.unglobalcompact.org>>.

126. See E/CN.4/SUB.2/RES/1998/8 (validating that, effective July 1999, this

ing group was mandated to make recommendations relating to the activities of transnational corporations to ensure that they follow the economic and social objectives of the countries in which they operate, and to consider the scope of States' obligations to regulate them.<sup>127</sup>

Of particular note in this context is the unsuccessful Multilateral Agreement on Investment ("MAI").<sup>128</sup> Negotiations for the MAI took place under the auspices of the OECD in Paris from 1995-1998, given the fact that almost all the world's foreign direct investment derives from enterprises based in the OECD's twenty-eight member countries. For reasons that cannot be examined here, the negotiations failed. One contributing factor, however, was the widespread protests by NGOs concerned about the MAI's adverse effects on human rights, the environment, and sustainable development.<sup>129</sup>

The Subcommittee expressed concern about the extent to which the MAI might limit the capacity of states to take steps to ensure the enjoyment of economic, social, and cultural rights by all people. It also urged that future negotiations on the MAI or analogous agreements take place within a human rights framework.<sup>130</sup>

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Sub-Commission was renamed the Sub-Commission on Promotion and Protection of Human Rights).

127. See *id.* at para. 4; see also E/CN.4/SUB.2/2000/WG.2/WP.1 (presenting a working paper on principles relating to the human rights conduct of companies).

128. See *Multilateral Agreement on Investment*, OECD Policy Brief (1997) (visited June 17, 2000) <[http://www.oecd.org/publications/pol\\_brief/1997/9702\\_POL.HTM#4](http://www.oecd.org/publications/pol_brief/1997/9702_POL.HTM#4)> (providing a framework for international investment, and for settlement of investment disputes among states). Negotiations ended in April 1998. See *id.*

129. See E/CN.4/SUB.2/RES/1998/12 (showing this problem is explicitly recognized by the Subcommittee in its resolution); see, e.g., *Oxfam Update on the Proposed Multilateral Agreement on Investment*, Apr. 1998 (reflecting an NGO perspective that without major reforms the MAI will remain "a seriously unbalanced agreement which is likely to exacerbate inequality and social tensions . . ."); see generally High-Level Group on the Environment, *Guiding the Transition to Sustainable Development: A Critical Role for the OECD* (Nov. 25, 1997) (visited June 17, 2000) <<http://www.oecd.org/sge/documents/exemple.htm>> (indicating a new level of concern within the OECD for sustainable development, and noting OECD strategic policy measures should sustain human and environmental growth, in addition to economic and capital growth).

130. See E/CN.4/SUB.2/RES/1998/8, *supra* note 126 (bearing the title "human

Thus, the elaboration of the right to development will entail further scrutiny of transnational corporations, and possible efforts to regulate their activities. Any attempt to put into place a global agreement on investment will similarly be examined in light of its impact on developing countries and respect for human rights.

#### 4. *Unilateral Coercive Measures*

Unilateral coercive measures are considered as obstacles to the realization of the right to development. States should avoid the unilateral imposition of coercive economic measures and extraterritorial application of domestic laws, which run counter to the principles of free trade and hamper the development of developing countries. The Commission on Human Rights, and the UN General Assembly, have both endorsed this view.<sup>131</sup> In a 1998 resolution, the General Assembly called upon all States to refrain from adopting or implementing unilateral measures not in accordance with international law, citing them as an impediment to the right of individuals and peoples to development. It also rejected “the application of such measures as tools for political or economic pressure against any country, particularly against developing countries, because of the negative effects on the realization of all human rights.”<sup>132</sup>

This leads to a consideration of the question of economic sanctions, or “coercive economic measures taken against one or more foreign countries to force a change in policies, or at least to demonstrate a country’s opinions about the other’s policies.”<sup>133</sup> At issue here are not multilateral sanctions such as those authorized under the UN

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rights” as the primary objective of trade, investment and financial policy).

131. See G.A. Res. 141, U.N. GAOR, 53th Sess., 85th mtg., U.N. Doc. A/RES/53/141 (1999) (calling for countries to refrain from implementing unilateral sanctions); see also G.A. Res. 11, U.N. GAOR, Hum. Rts. Comm., 38th mtg. at 1, U.N. Doc. E/CN.4/RES/1998/11 (1998); G.A. Res. 21, U.N. GAOR, Hum. Rts. Comm., 52d mtg. at 1, U.N. Doc. E/CN.4/RES/1999/21 (1999) (stating that States should not impose measures contrary to international law).

132. See G.A. Res. 141, *supra* note 131, at 2 (discussing how obstacles to economic advancement prevent the realization of the right to development).

133. See CARTER, *supra* note 118, at 4 (discussing economic sanctions in the realm of foreign policy and relations between nations).

Charter,<sup>134</sup> but rather unilateral sanctions imposed by one nation against another. In certain circumstances, resorting to economic sanctions is legitimate under international law; countries may act unilaterally to ensure compliance with internationally agreed norms or obligations.<sup>135</sup> The thrust of UN concern, however, is to limit the adverse consequences of sanctions on human rights and development, and to guard against the use of “illegal” unilateral coercive measures.<sup>136</sup>

One can make several observations about the potential impact of addressing sanctions from a right to development perspective. First, there will be increased debate and scrutiny as to what constitutes an “illegal” sanction.<sup>137</sup> Elements of extra-territorial reach will be of particular importance in such an analysis, and legal initiatives to clarify these matters may result.<sup>138</sup> Here, a further caution is in order against any unilateral resort to trade restrictions, even in an avowedly good cause, which runs afoul of the international legal regime. As noted, in the context of accountability and good governance, the “rule of law” is one of the guiding principles in the advancement of the right to development. To act outside the law undermines this principle.

A related area of scrutiny pertains to the justification of the use of coercion as such. By definition, some degree of coercion is a feature

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134. See U.N. CHARTER, *supra* note 9, art. 39 (outlining the circumstances under which the imposition of economic measures may be authorized, based on a determination by the Security Council of the existence of “any threat to the peace, breach of the peace or act of aggression.”).

135. *Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries, Report of the Secretary-General*, U.N. GAOR 54th Sess., Agenda Item 97(c), at 4, U.N. Doc. A/54/486 (1999) [hereinafter *Unilateral Economic Measures*] (indicating U.S. insistence that such measures are legitimate).

136. See *id.* at 2 (stating that the UN seeks to prevent the negative consequences that flow from economic sanctions on developing nations).

137. See *94th Annual Meeting of the American Society of International Law* (visited June 8, 2000) <[http://www.asil.org/annual\\_meeting/am2000.htm](http://www.asil.org/annual_meeting/am2000.htm)> (indicating the ongoing debate on the issue of illegal sanctions).

138. See *e.g., Unilateral Economic Measures, supra* note 135, at 3 (discussing how the Act to Protect Trade and Investment from Foreign Norms that Contravene International Law would address extraterritorial reach of imposed sanctions).

of economic sanctions. As one writer put it, “[e]conomic sanctions are a species of warfare. To invert Clausewitz’s famous aphorism, they are in a very real sense war—war by other means.”<sup>139</sup>

The effectiveness of economic sanctions is also worthy of further study, as many writers have commented on their failure to achieve desired objectives.<sup>140</sup> This casts further doubt on the validity of their use, especially in light of their negative consequences.

Further, in the context of the right to development, there will be a re-examination of the underlying logic of economic sanctions, which is to exact as much harm as possible upon the target country to exert as much persuasive pressure as possible.<sup>141</sup> The negative consequences in the target country can include loss of jobs, higher consumer prices, economic stagnation, and, in the extreme, impoverishment and ill health. A great moral concern is the suffering such sanctions bring upon innocent individuals—a harm which the UN will attempt to mitigate.<sup>142</sup> Sanctions can also readily escalate into retaliation and “trade wars”—involving other countries, resulting in further economic difficulties and threatening international stability. All of this can have a damaging impact upon the realization of the right to development.

Finally, the issue of sanctions will prompt a renewed debate on the linkage between trade and social values. Would the expansion of trade, rather than the restriction of it, not best serve human rights and other non-economic objectives? Some argue that trade promotes in-

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139. See John P. Giraud, *Waging Economic Warfare: the Sanctions Power under the Constitution*, 19 N.Y.U. J. INT’L L. & POL. 935, 935 (1987); see also CARTER, *supra* note 118, at 1 (discussing how economic sanctions are a non-violent threat against a country).

140. See, e.g., Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155, 168 (1982). “[T]he effectiveness of trade sanctions as a means by which to punish or to compel compliance with international legal norms has been questioned by the vast majority of writers who have analyzed the issue.” See *id.* Also, note that more recent evaluations of the effectiveness of sanctions tend to support this conclusion.

141. See CARTER, *supra* note 118, at 25.

142. See *Unilateral Economic Measures*, *supra* note 135, at 10 (noting the UN’s desires to spare innocent victims who have no control over the sanctions imposed upon them).

terdependence and stimulates shared values. Greater interchange will open societies, diminish suspicion, and promote mutual understanding. Taking this a step further, trade can provide support for advocates of economic and political reform. Democratic systems can more easily address popular concerns about social values—the environment, labor conditions, and human rights. Thus, the interrelationship with the realization of the right to development is clear.

### 5. Unfair Trading Rules

While this obstacle to the realization of the right to development holds wide ramifications, the focus here will be on the treatment of developing countries within the institutional framework of the World Trade Organization (“WTO”).<sup>143</sup> One of the reasons trading rules are said to be “unfair” is because of the huge disparities in levels of income and development between countries.<sup>144</sup> In 1965, the forerunner of the WTO, the General Agreement of Tariffs and Trade (GATT), added a new section entitled “On Trade and Development.”<sup>145</sup> Still, it was not until the Uruguay Round of trade negotiations in the 1980s that developing countries became more fully integrated into the multilateral system.<sup>146</sup> Reflecting this new stance, the preamble to the Agreement Establishing the World Trade Organization recognized the need for positive efforts to ensure “that developing countries, and especially the least developed among them, secure a share in the

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143. See BERNARD HOEKMAN & MICHAEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO* 240 (1998) (discussing the change in developing countries’ position within international economic institutions).

144. See *United Nations Human Development Program* (visited June 8, 2000) <<http://www.undp.org/hdro/e98over.htm>> (reporting statistics that demonstrate the differences between developed and developing nations).

145. See *General Agreements on Tariffs and Trade*, Oct. 30, 1947, 55 U.N.T.S. 188. The GATT protocol to introduce Part IV on Trade and Development dates from Feb. 8, 1965.

146. See HOEKMAN & KOSTECKI, *supra* note 143, at 235-45 (discussing the role of developing countries within the WTO). Reasons for greater involvement include the debt crisis, advice from the World Bank, IMF, and OECD, and the example of rapid development in South East Asia. The LDC’s desire to gain access to industrialized country markets prompted a willingness to engage in reciprocal bargaining. See *id.*

growth of international trade commensurate with the needs of their economic development.”<sup>147</sup>

As a second matter, it is helpful to distinguish between the developing countries understanding of “unfair trading rules” and the growing concern in industrialized countries with “unfair trade.” For example, one such concern relates to the exploitation of workers. A so-called “social clause” under the WTO is one possible mechanism to improve labor conditions. The underlying goal would be to better promote a set of internationally-recognized workers’ rights throughout the world.<sup>148</sup> At first glance, the adoption of a social clause appears to be a laudable objective. However, it would also mean allowing countries to impose duties against imports when the goods were produced in sub-standard conditions. This is known as “social dumping,” and the procedures would operate along the lines of existing United States federal antidumping law.<sup>149</sup> As expected, the developing countries have put up strong resistance, claiming it would undermine their international competitive advantage, which is largely due to labor costs. Moreover, given their lack of economic resources, many developing nations are simply unable to afford substantial improvements in working conditions. Finally, they fear that richer countries may invoke the “social clause” as a means of protectionism, thereby closing off vital export markets.<sup>150</sup>

The United States has been a leading proponent of such a clause for the WTO, but other WTO members have squarely blocked it from having a place on the trade agenda. The WTO has affirmed its

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147. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1 (1994).

148. See Raj Bhala, *Clarifying the Trade-Labor Link*, 37 COLUM. J. TRANSNAT’L L. 11, 29-40 (1998) (discussing the composition of a core set of workers’ rights). These rights include: (1) Freedom of association, including the right to organize and bargain collectively; (2) Freedom from forced labor; (3) A minimum age for child labor; (4) Certain minimum standards for working conditions (i.e. safety and health standards, number of work hours and rest periods, and elimination of employment discrimination). See *id.*

149. See The Antidumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.*

150. See 1 FAIR TRADE AND HARMONIZATION 163 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (discussing concerns about regulatory harmonization and its potentially protectionist motivations and consequences).



commitment to the observance of core labor standards, but insists that the competent body to deal with these issues is the International Labor Organization.<sup>151</sup> Given the resistance to considering labor conditions under the proposed Millennium Round of trade negotiations, and the increased voice of the developing countries in this matter, it is unlikely a social clause or similar mechanism will make its way into the WTO framework. Again, the issues highlight the varying perceptions of fairness and unfairness in international trade.

It is also appropriate to mention some of the improvements proposed to make trading rules less "unfair" to developing countries:

(1) Continue to apply the principle of Special and Differential Treatment ("S & D")<sup>152</sup> for developing countries, in ways such as:

- (a) a lower level of obligations
- (b) more flexible implementation timetables
- (c) a lower threshold of "best endeavor" commitments
- (d) more favorable treatment for least developed countries, and

(2) provide greater technical assistance, as well as training and resources to allow developing countries to participate more fully in trade negotiations and dispute settlement procedures.<sup>153</sup>

(3) Ensure that the agricultural sector, as well as trade in textiles and clothing, continues to be brought within the WTO disciplines.<sup>154</sup>

(4) Reduce tariff and non-tariff barriers in industrialized countries

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151. This was asserted at the first WTO Ministerial Conference in Singapore. See also Kenneth Klee, *The Battle of Seattle*, Newsweek, Dec. 13, 1999, at 32, 36 (noting that the WTO conference in Seattle was unproductive due to massive protests). A key issue was the Clinton administration's desire to use the WTO to raise labor standards, and the concern of the developing countries that this would result in protectionism. See *id.*

152. See HOEKMAN & KOSTECKI, *supra* note 143, at 241. Nonetheless, proponents of trade liberalization still caution that allowing developing countries to avoid reciprocal obligations deprives them of many of the benefits of WTO membership. To some commentators, the S & D strategy remains ill-advised, costly, and often counter-productive.

153. See Kim Van der Borgh, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 2 J. INT'L ECON. L. 723 (1999).

154. See HOEKMAN & KOSTECKI, *supra* note 143, at 206-210 (discussing the Multifiber Arrangements concerning textiles and clothing).

to provide greater access for developing country products.<sup>155</sup>

(5) Monitor intellectual property rights policy in light of increased costs and reduced access to technology transfers: "Intellectual property rights must balance the need to provide incentives for innovation against the need of poor countries to get the results of innovation."<sup>156</sup>

(6) Assess the impact of trade negotiations on the developing world from a variety of public policy perspectives.<sup>157</sup>

Finally, it is worth noting that the WTO has shifted its approach to the issue of rights and development as well.<sup>158</sup> In 1995, the UN asked the GATT to contribute to a UN consultation on the realization of social, economic and cultural rights, including problems of foreign debt and the realization of the right to development.<sup>159</sup> The response, on behalf of the Director-General, was that "GATT had no relevant information to offer in regard to the subject-matter."<sup>160</sup> In October of 1999, Mike Moore, the Director-General of the WTO, indicated a change in perspective when declaring his priorities for the outcome of the Seattle ministerial meeting. Significantly, he noted that: "A world now exists polarized by poverty and opportunity as it was once polarized by the cold war. I will judge my term in office by how much we could improve the conditions and opportunities for the most vulnerable economies."<sup>161</sup> It appears, therefore, that the con-

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155. See *id.* at 94-95 (discussing the structure of WTO tariffs and how they affect developing countries).

156. Jeffrey Sachs, *Helping the World's Poorest*, *The Economist*, Aug. 14, 1999, at 17, 20. Sachs is an Economist at Harvard University. See *id.*

157. See, e.g., HOEKMAN & KOSTECKI, *supra* note 143, at 221-22 (explaining how the WTO's Committee on Trade and Development is responsible for focusing on these issues).

158. See *Moore Spells Out Priorities for Seattle Ministerial Conference* (WTO Press Release, Sept. 2, 1999).

159. See *Report of the Secretary General in the Pursuance of Commission on Human Rights Resolution 1994/11*, U.N. ESCOR, 51st Sess., at 3, U.N. Doc. E/CN.4/1995/25 (requesting the help of heads of multinational financial institutions and specialized agencies, including GATT, on proposals for debt-reduction measures and relieving the debt burden).

160. See *id.* at para. 8 (indicating GATT's reply to the request).

161. See *Moore Spells Out Priorities for Seattle Ministerial Conference*, *supra* note 158 (discussing how poverty should no longer mean a lack of opportunity).

cerns of the less developed countries will at least be heard when "unfair trading rules" are discussed in the new round of trade negotiations.

### 6. *Negative Consequences of Globalization*

The following statement was prominently positioned on the back cover of a recent UN report: "[o]ne of the most profound challenges that we face as a community of nations is to understand better the emerging socio-economic forces and forms of globalization, to shape them to serve our needs and to respond effectively to their deleterious consequences."<sup>162</sup>

As an obstacle to the realization of the right to development, globalization limits the freedom of action governments have in setting their own economic policies, and diminishes the predictability of economic conditions in general. In 1998, the Committee on Economic, Social and Cultural Rights ("CESCR") held a general session on "Globalization and its impact on the enjoyment of economic and social rights."<sup>163</sup> The committee concluded that the process of globalization risks downgrading the central place accorded to human rights by the UN, unless it is complemented by additional policies. Specific rights seen to be at risk, included the right to work, the right to just and favorable working conditions, the right to unionize, and the right to have social security.<sup>164</sup> International organizations have the responsibility to promote respect for human rights in their policies and programs.<sup>165</sup> The realms of trade, finance, and investment are not exempt from these general principles, and the international organizations with specific responsibilities in those areas should play a

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162. See ANNAN, *supra* note 107 (outlining the UN Secretary General's plans for a global economy).

163. ECOSOC, *Report on the Eighteenth and Nineteenth Sessions, Official Records*, Supp. 2, at paras. 436-514, E/1999/22 (1999) (summarizing a general discussion on the phenomenon of globalization).

164. See Virginia A. Leary, *Globalization and Human Rights*, in *NEW DIMENSIONS AND CHALLENGES* 265-276 (Janusz Symonides ed., 1999).

165. See ECOSOC, *supra* note 163 (obligating international organizations to promote human rights).

positive and constructive role in relation to human rights.<sup>166</sup>

To the extent that globalization contributes to global economic inequality, the debate in human rights terms becomes even more acute. Discussions on the right to development point out that the uneven character of economic development among countries and peoples constitutes "a threat to humanity." One report indicates that "not only did certain internationally illegal acts constitute massive and flagrant violations of human rights but so also did unemployment, starvation, poverty, and the absence of access to health services and education."<sup>167</sup>

Indeed, the financial crises of 1997 highlighted the dangers of globalization in terms of economic instability and social costs.<sup>168</sup> One response was to revisit the idea of "international economic security," which would address issues such as the viability of the financial sector, the relationship between borrowers and lenders, and the key objectives of eradicating poverty and promoting development.<sup>169</sup>

## CONCLUSION

In short, there is widespread acknowledgement that modern international economic policy agenda is "beset with complex problems that were unimaginable when the rules for managing the post-war economic order were written in the late 1940s."<sup>170</sup> It would be too much to suggest that the right to development is the most important catalyst in the re-writing of these rules, but it does play a role in ensuring that efforts to strengthen the legal and institutional frameworks for global economic activity will take into account the demands of both human rights and development.

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166. *See id.*

167. *See Global Consultation, supra* note 46, at 24.

168. *See ANNAN, supra* note 107, at 53 (discussing the financial crisis and the instability that came with it).

169. *See also Report of the Secretary-General on the Financial Crisis and its Impact on Growth and Development, Especially in the Developing Countries*, U.N. General Assembly, 54th Sess., Agenda Item 97(b), A/54/471 (1999).

170. *See ANNAN, supra* note 107, at 53.