



Ideas for Peace Series

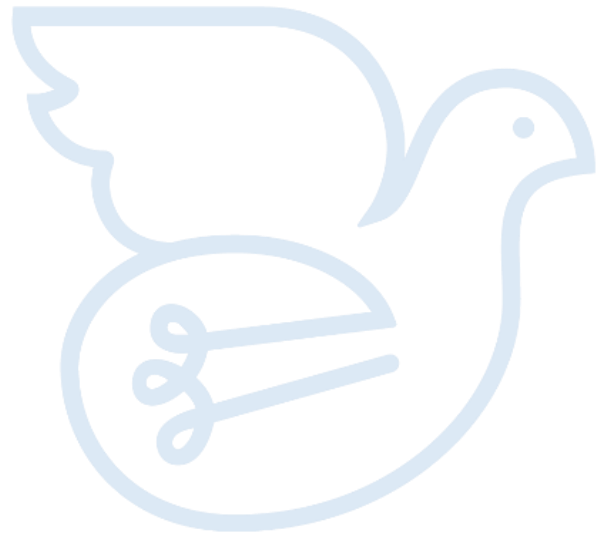
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**Towards a Legally
Binding Instrument on
the Right to Development**

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This paper has benefited from his personal engagement with this process.

INTRODUCTION

On 27 September 2018, at the United Nations Human Rights Council (HRC), a watershed moment was reached in the evolution of the right to development (RtD). More than three decades after the adoption of the 1986 Declaration on the Right to Development (DRTD) by the United Nations General Assembly (UNGA),¹ the process for elaboration and eventual adoption of a legally binding instrument (LBI) on the RtD was set into motion.² With this, a long-standing demand of the Global South for a binding treaty took its first baby step towards being met. Within less than one and a half years thereafter, following a rigorous consultative process, the zero draft of the LBI has already been published,³ along with exhaustive commentaries on each provision,⁴ and will form the basis for negotiations to formally commence among States for the eventual adoption of a binding treaty. The astounding velocity with which this process seems to have bolted ahead in this very short duration stands at odds with decades of political wrangling and stalemate among States over the meaning, nature, scope and content of the RtD as well as the appropriate course of action for its operationalization. Indeed, a keen observer of treaty-making processes generally adopted at the UN and other international fora might be intrigued and left with several questions regarding this entire process. Why did States set out on this path now? What changed considering that several previous attempts at setting into motion an LBI on the RtD had not borne fruits?⁵ Surely, the Global North could not have come on board suddenly. In any case, what procedure has the HRC adopted for elaboration of the LBI? How did a zero draft manage to emerge within a short time when similar processes in other treaty-making endeavours have taken several

¹ United Nations General Assembly, *Declaration on the Right to Development*, adopted on 4 December 1986, A/RES/41/128.

² United Nations Human Rights Council, *Resolution on the Right to Development*, adopted on 27 September 2018, A/HRC/RES/39/9.

³ United Nations, "Draft Convention on the Right to Development", *Report of the Chair-Rapporteur, Zamir Akram, to the UN Working Group on the Right to Development*, A/HRC/WG.2/21/2, 17 January 2020.

⁴ United Nations, "Commentaries to the Draft Convention on the Right to Development", Prepared by Mihir Kanade, *Report of the Chair-Rapporteur, Zamir Akram, to the UN Working Group on the Right to Development*, A/HRC/WG.2/21/2/Add.1, 20 January 2020.

⁵ For instance, see United Nations Commission on Human Rights, *Report of the Secretary-General on the Global Consultation on the Right to Development as a Human Right*, E/CN.4/1990/9/Rev.I, 26 September 1990, at p.24, para.86, recording suggestions that the UN should elaborate and adopt a binding treaty. The Non-Aligned Movement has passed several resolutions for a legally binding instrument. See for instance, *Final Document of the 12th Summit Conference of Heads of State or Government of the Non-Aligned Movement*, Durban, South Africa, 29 August–3 September 1998, and final documents of all summits thereafter, available at <http://cns.miis.edu/nam/>



years? Most importantly, does an LBI on the RtD add any value? Would it not be worthless, or even counterproductive, considering that the Global North seems unlikely to join?

These are all quite pertinent questions that must be answered if there is to be any realistic chance of success for an LBI on the RtD. This paper seeks to engage with and answer all these questions. It will begin by identifying the overall context for this newfound acceleration. Unsurprisingly, this has a lot to do with the adoption of the 2030 Agenda for Sustainable Development in 2015.⁶ The following section will then explain the procedures set in motion by the HRC for elaboration of the LBI and the process by which the zero draft was developed. It will be suggested that, irrespective of the eventual outcomes, the process adopted for arriving at a zero draft for this LBI might usefully serve as a template for future treaty-making ventures. The ensuing section will then extensively discuss the added value of an LBI on the RtD generally as well as with specific reference to the innovations incorporated in the zero draft. Finally, the paper will conclude with an evaluation of the challenges and prospects that lie ahead with respect to the adoption and entry into force of an LBI.

THE 2030 AGENDA AND REINVIGORATION OF THE RTD

As indicated above, the adoption of the 2030 Agenda for Sustainable Development on 25 September 2015 by the UNGA prominently brought the RtD back to the spotlight. It unleashed a flurry of activity at the United Nations Human Rights Council (HRC) as well as at the Office of the High Commissioner for Human Rights (OHCHR), building upon the visible symbiotic relationship between the RtD and the Sustainable Development Goals (SDGs) incorporated in the 2030 Agenda. On the one hand, the very adoption of the 2030 Agenda by States could be seen as an implementation by them of their duty stipulated in the DRTD to “take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”.⁷ In this sense, the SDGs could be seen as a policy expression by States of their intention individually and collectively to fulfil their

⁶ United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, Resolution A/RES/70/1, adopted on 25 September 2015.

⁷ FN 1, article 4(1).



obligations under the DRTD and a plan of action for operationalizing the RtD.⁸ On the other hand, operationalizing the RtD can in turn significantly bolster the realization of the 2030 Agenda by providing it with a normative framework effectively stipulating that the participation in, contribution to and enjoyment of sustainable development by all human persons and peoples ought not to be seen as a charity, privilege or generosity bestowed upon them by States, but as a human right with corresponding duties.

It was in this backdrop that three particularly noteworthy steps were undertaken by the HRC providing a much-needed boost to advancing the “RtD agenda” from its long-standing stalemate.⁹ The first of these steps was taken one year after the adoption of the 2030 Agenda by the UNGA, when the HRC decided to appoint a special rapporteur on the RtD with the mandate, among other things, of “contributing to the promotion, protection and fulfilment of the right to development in the context of the implementation of the 2030 Agenda for Sustainable Development”.¹⁰ This appointment was more telling because a special procedure on the RtD was established after a hiatus of about ten years.¹¹

This was then followed by the setting into motion of the process for elaborating an LBI on the RtD, the subject matter of this paper. Thus, on 27 September 2018, the HRC decided in Resolution 39/9, that its Working Group on the RtD,¹² shall at its twentieth session, “commence the discussion to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument.”¹³ It further decided that the Chair-Rapporteur of its Working Group on the RtD “shall prepare a draft legally binding instrument on the basis of the discussions held during

⁸ Mihir Kanade, “The Right to Development and the 2030 Agenda for Sustainable Development” in *Operationalizing the Right to Development in Implementing the Sustainable Development Goals*, E-learning Module, October 2019, (Geneva, Ciudad Colon and Kuala Lumpur, OHCHR, UPEACE and UNU-IIGH), Chapter 3, at p.9.

⁹ The language of the RtD as an “agenda” has often been used by States during debates on the topic. See, UN Human Rights Council, *Summary of the panel discussion of the Human Rights Council on the theme, “The way forward in the realization of the right to development: between policy and practice”*, Report of the UN High Commissioner for Human Rights, A/HRC/19/39, 24 November 2011, paras. 18 and 29; UN Human Rights Council, *Report of the Open-ended Working Group on the Right to Development on its twelfth session (Geneva, 14–18 November 2011)*, A/HRC/19/52, 19 December 2011, at para.19.

¹⁰ UN Human Rights Council, *Resolution on the Right to Development*, adopted on 29 September 2016, A/HRC/RES/33/14, para.14.

¹¹ An independent expert on the RtD, Mr. Arjun Sengupta, was appointed in 1998 by the UN Commission on Human Rights and the mandate terminated in 2004. For details, see: www.ohchr.org/EN/Issues/Development/Pages/Documents.aspx

¹² The Working Group on the Right to Development is an intergovernmental body established by the Commission on Human Rights in its Resolution 1998/72 of 22 April 1998, as endorsed by the Economic and Social Council in its decision 1998/269 of 30 July 1998, and continues to be the principal forum for States to deliberate on the RtD. For details regarding the mandate and programme of this working group, see: www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx

¹³ See FN 2, at para 17 (e).



the twentieth session of the Working Group and the resource material from previous Working Group sessions to serve as a basis for substantive negotiations on a draft legally binding instrument, commencing at its twenty-first session”.¹⁴ To further give a fillip to this process, the HRC also requested its Advisory Committee, “while taking into account the views of Member States, to prepare a research-based report on the importance of a legally binding instrument on the right to development”.¹⁵

Finally, on 27 September 2019, the HRC decided “in order to assist the Human Rights Council in the implementation of the right to development to establish a subsidiary expert mechanism to provide the Council with thematic expertise on the right to development in searching for, identifying and sharing best practices with Member States and to promote the implementation of the right to development worldwide”.¹⁶ The recently appointed expert mechanism comprises five independent experts elected for a term of three years, with the possibility of being re-elected for one additional period.¹⁷

As is evident from these three new processes on the RtD – the special rapporteur, the elaboration of the LBI, and the expert mechanism – the momentum has clearly shifted dramatically in favour of the RtD as a consequence of the adoption of the 2030 Agenda. These processes will undoubtedly feed on each other, and eventually influence to a considerable degree, the operationalization of the RtD in law, policy and practice in the near future, including for realization of the SDGs. It is in this factual matrix that the next section discusses the procedure set up by the HRC for elaboration of the LBI as well as the process then followed for developing the zero draft.

THE PROCEDURE FOR ELABORATION OF THE LBI AND THE PROCESS FOR DEVELOPING THE ZERO DRAFT

As noted above, HRC Resolution 39/9 of 27 September 2018 mandated the WG-RTD to commence the discussion on elaborating an LBI at its twentieth session, which took place from 29 April to 3 May 2019.¹⁸ Four meetings spanning two full days – 1

¹⁴ Ibid. Para 17 (f).

¹⁵ Ibid. Para 18.

¹⁶ UN Human Rights Council, *Resolution on the Right to Development*, adopted on 27 September 2019, A/HRC/RES/42/23, paras.29-34.

¹⁷ For details, see www.ohchr.org/EN/Issues/Development/EMD/Pages/Expert-Mechanism-on-the-Right-to-Development.aspx

¹⁸ For details, see www.ohchr.org/EN/Issues/Development/Pages/20thSession.aspx



and 2 May – were allocated to these discussions. The Chair-Rapporteur of the WG-RTD, in consultation with and support from the OHCHR, organized the discussions in four sub-items with participation of experts.¹⁹ Sub-item 1 corresponded to the theme of “discussion of the working method, preamble and final provisions of a legally binding instrument on the right to development” and observations were presented by Dr Makane Moïse Mbengue. The second sub-item related to a “discussion of the type and structure of a legally binding instrument on the right to development” and expert observations were rendered by Dr Koen de Feyter. Cross-cutting observations “concerning the role and rights of women in a legally binding instrument on the right to development” were also made by Meskerem Geset Techane. Pursuant to this set of expert presentations, several States and observer NGOs took the floor to make statements. Clarifications were also sought from the experts by several delegations on the legal and practical dimensions of the thematic presentations. Sub-items 3 and 4 were discussed on the following day. Sub-item 3 was titled “discussion of the content and scope of a legally binding instrument on the right to development” and was developed by this author. Additionally, observations were presented by Dr Carlos Lopez on the “advantages and disadvantages of imposing obligations on business enterprises and investors in relation to human rights and right to development”. The last sub-item corresponded to a “discussion of the institutional arrangements and compliance procedures of a legally binding instrument on the right to development”, with observations presented by Dr Diane Desierto. Like the previous day, statements were made by several States and observer NGOs. This was followed by an extensive session of questions and answers with the experts.²⁰

Following these discussions, as mandated by HRC Resolution 39/9, the Chair-Rapporteur of the WG-RTD then set out to prepare a draft LBI to serve as a basis for substantive negotiations on a draft legally binding instrument, commencing at its twenty-first session, scheduled originally to be held in April-May 2020 (and at the time of this writing postponed to November 2020 due to the COVID-19 pandemic). A step-by-step approach involving extensive consultations with stakeholders and elaboration of the zero draft by legal experts was devised. Thus, the first step undertaken by the Chair-Rapporteur was to send out an elaborate questionnaire to all Member States, observer NGOs, special rapporteurs of the HRC, international and regional organizations, global and regional human rights mechanisms, National Human Rights Institutions and offices of Ombudspersons, amongst other stakeholders.²¹ The questionnaire requested views and proposals on the proposed LBI. Questions were structured under the following heads – the type of instrument that could be adopted; the content of the instrument; types and structures of

¹⁹ UN Human Rights Council, *Report of the Working Group on the Right to Development on its twentieth session* (Geneva, 29 April to 3 May 2019), A/HRC/42/35, 25 June 2019.

²⁰ Ibid.

²¹ Office of the High Commissioner for Human Rights, *Note Verbale*, IGWGRTD/LBI/1, 24 May 2019.



institutional arrangements; compliance, monitoring and enforcement arrangements; and the final provisions. Each of these heads were further divided into several sub-questions.²² A *note verbale* containing the questionnaire was sent to Member States by the Secretariat of the WG-RTD on 24 May 2019 and responses were sought by 26 July 2019.²³ Similar communications were also sent to the other stakeholders mentioned above through appropriate means.

As a second step, the Chair-Rapporteur requested the OHCHR to provide him with requisite support in the implementation of the mandate to prepare a draft LBI. Consequently, the OHCHR, in agreement with the Chair-Rapporteur, “established a drafting group, composed of five recognized experts in the field of international law and with due respect to equitable gender and geographical representation, with the objective to draft a legally binding instrument, including commentaries”.²⁴ The drafting group thus established comprised the author of this paper, Mihir Kanade (India), as its Chair and Rapporteur.²⁵ Other members included Makane Moïse Mbengue (Senegal), Koen de Feyter (Belgium), Diane Desierto (Philippines) and Margarette May Macaulay (Jamaica).²⁶ As the Chair, this author was mandated with the preparation of a first draft of the treaty with detailed commentaries to be accomplished between 13 August 2019 and 30 September 2019. Responses by stakeholders to the aforesaid questionnaire were considered. On 26 September 2019, this author submitted the first draft along with commentaries to the drafting group for review.²⁷

Around this time, the HRC was also scheduled to adopt its annual resolution on the RtD as part of its September session. Using this opportunity, the Chair-Rapporteur held informal consultations with Member States to apprise them of the steps undertaken by him towards preparation of the draft LBI. On 27 September 2019, the HRC adopted Resolution 42/23 wherein it “welcomed the discussions held by the Working Group at its twentieth session on how a legally binding instrument would contribute to making the right to development a reality for all, by creating conducive national and international conditions for its realization and by halting all measures that may have a negative impact on the right to development, in accordance with the Charter, the Declaration on the Right to Development and other relevant international instruments and documents”.²⁸ The HRC also reiterated that “the Chair-Rapporteur of the Working Group, at its twenty-first session, would present a draft legally binding instrument on the basis of the discussions held during the twentieth session of the

²² Ibid, Annex.

²³ Ibid.

²⁴ FN 3, at para.9.

²⁵ Ibid, at para.10.

²⁶ Ibid.

²⁷ Ibid.

²⁸ FN 16, para. 20(e).



Working Group and the resource material from its previous sessions, for substantive negotiations on the draft legally binding instrument prepared". In addition, the HRC decided that the Chair-Rapporteur of the Working Group "would conduct further consultations with all Member States, international organizations, the Special Rapporteur on the right to development, the Office of the High Commissioner, United Nations agencies, regional economic commissions and other relevant organizations on the elaboration of a draft legally binding instrument, taking into account the discussions held at the twentieth session of the Working Group, and the presentations made by the experts invited thereto".²⁹ The HRC lastly decided that the "Working Group, at its twenty-first session, would commence the elaboration of a draft legally binding instrument on the right to development on the basis of the draft prepared by the Chair-Rapporteur, through a collaborative process of engagement".³⁰

Following this, the drafting group met at the United Nations Headquarters in New York from 15 to 17 October 2019 for three full days of intensive deliberations on the draft.³¹ The drafting group benefited from the presence of the Chair-Rapporteur of the WG-RTD who shared his observations on the draft text. Technical advice and support were also received from the chief of the OHCHR's RtD Section and the Secretary of the WG-RTD. A meeting with a representative of the Treaty Division of the United Nations Office of Legal Affairs was held to confirm, by way of a second opinion, that the preambular and final provisions of the draft LBI complied with treaty practice. Extensive notes of the deliberations of the drafting group on every provision, akin to a *travaux préparatoire*, were recorded. On the final day of the meeting, the drafting group adopted the draft text with revisions. The updated draft text incorporating the agreed changes with corresponding revisions to the commentaries were submitted by this author to the OHCHR on 13 November 2019.³²

The third step of the process set out by the Chair-Rapporteur comprised sending an invitation to a select group of 10 human rights scholars representing all regions to review the draft text and to share any comments or suggestions they may have by 30 November 2019.³³ The comments and suggestions received by the deadline were collated by this author and detailed analysis was shared with the drafting group. Following further deliberations, the drafting group finalized a "zero draft" on 8 December 2019.³⁴ Final updates to the commentaries were then made by this author

²⁹ Ibid, para.20(f).

³⁰ Ibid, para.20(g).

³¹ FN 3, at para.10.

³² Ibid.

³³ Ibid, para.11. Comments and suggestions were received from Olivier de Schutter (Western European and Others Group), Obiora Okafor (African Group), Aslan Abashidze (Eastern European Group), Cosmin Corendea (Easter European Group), Carlos María Correa (Latin American and Caribbean Group) and Xigen Wang (Asia-Pacific Group).

³⁴ Ibid.



and both documents – the “zero draft” of the convention and the accompanying commentaries – were submitted to the Chair-Rapporteur on 9 December 2019.³⁵

The Chair-Rapporteur of the WG-RTD subsequently reviewed and endorsed the draft convention on the RtD. On 17 January 2020, the advanced edited version of the draft convention was published by the OHCHR on its website;³⁶ the registered version of the commentaries was similarly published on 20 January 2020.³⁷ Both documents were widely circulated through various channels with the objective of deliberations commencing during the 21st session scheduled originally for 4 to 8 May 2020.

The fourth step adopted by the Chair-Rapporteur was to request the OHCHR to encourage Member States and observers of the WG-RTD to submit “their oral and written statements and comments, general and/or specific to articles of the convention, prior to the session to the Secretariat”.³⁸ Thus, on 20 February 2020, the OHCHR sent out a *note verbale* to this effect to all Member States as well as communications through other means to other stakeholders.³⁹

As of the date of writing of this paper, due to the unfortunate public health emergency posed by the COVID-19 pandemic, the 21st session of the WG-RTD has been rescheduled for November 2020 after initially being postponed to July 2020, and is likely to be postponed further. Although the delay in commencement of the deliberations on the draft LBI is unfortunate and unavoidable, the aforesaid process adopted for developing the zero draft has important lessons for treaty-making in general. Irrespective of the time it takes for the treaty to be adopted, the combination of extensive consultations, preparation of a zero draft by a group of experts representing different parts of the world (much like the International Law Commission but with a more agile number of members), follow-up consultations and revisions with external experts, and the accompaniment of the draft by exhaustive expert commentaries, is a process that might serve as a guiding template for other similar future processes.

³⁵ Ibid.

³⁶ Ibid.

³⁷ FN 4.

³⁸ Office of the High Commissioner for Human Rights, *Note Verbale on Elaboration of a Draft Legally Binding Instrument on the Right to Development*, TESPRDD/DESIB/RTDS, 20 February 2020.

³⁹ Ibid.



ADDED VALUE OF AN LBI ON THE RTD

As noted above, through Resolution 39/9, the HRC had requested its Advisory Committee to prepare a research-based report on the importance of a LBI on the RtD while taking into account the views of Member States. At the date of writing of this paper, a second draft of the report has been published with the intention of being finalized and adopted at the 25th session of the Advisory Committee to be held in August 2020.⁴⁰ The draft report concludes with the observations that “early codification” of an LBI on the RtD would “create an enabling environment for development and favourable conditions for all human rights”, “constitute a hugely important and overdue step in the right direction”, and “help in meeting the challenge of securing for all, present and future generations, a life of dignity in a clean, safe, secure and healthy environment”.⁴¹ Since the report is likely to be updated before its final adoption in August 2020, this section does not prejudge its final contents; it, however, articulates a list of points which, according to this author, constitute the added value of an LBI on the RtD generally. Some of these points overlap with those outlined in the draft report of the Advisory Committee. However, this section also takes into account specific provisions of the draft LBI to indicate how the realization of the RtD can, in fact, benefit significantly from the adoption of an LBI.

The term ‘added value’ encompasses many shades to it. At one end of the spectrum, an LBI can be shown to have an added value merely because it improves the normative status of a right by transposing it from a Declaration to a binding convention. At the other end, its added value may be judged through a much stricter test of whether the adoption of the LBI is necessary for realization of the rights sought to be guaranteed. In the context of the draft LBI on the RtD specifically, while an overwhelming number of States remain in its favour, some have contended that it is unnecessary for promotion of the RtD. In other words, as exemplified by responses of Mexico, European Union and Switzerland to the questionnaire sent by the OHCHR regarding their views on an LBI on the RTD, the contention is that the RtD can adequately be promoted within the existing normative framework of the DRTD and an LBI is not needed for that purpose. For instance, Mexico responded that “there is already an international framework on which States should base themselves to make development effective, such as the Declaration on the Right to Development that serves as reference in the field of human rights as well as the 2030 Agenda”.⁴² It further contended that “the negotiation of a legally binding instrument would imply

⁴⁰ UN Human Rights Council, *Importance of a legally binding instrument on the right to development*, Study of the Human Rights Council Advisory Committee – Second draft, A/HRC/AC/24/CRP.3, 28 January 2020.

⁴¹ Ibid, para.79.

⁴² Permanent Mission of Mexico, *Note Verbale and Annex*, OGE02604, 16 July 2019.



the duplication of efforts, as well as the fragmentation of International Law and could even reverse the reached consensus”.⁴³ Instead, it contended, what is necessary is to first agree on the operational criteria and sub-criteria for the implementation of the RtD, an endeavour that had been initiated by the High-Level Task Force only to meet a political roadblock.⁴⁴ It is telling that the National Human Rights Institution of Mexico, more specifically the National Commission on Human Rights, in its response to the questionnaire fully supported the LBI.⁴⁵ The European Union, while reiterating its support to the RtD with qualifications regarding its interpretation and noting its participation in the WG-RTD, responded that “we are not in favour of the elaboration of an international legal standard of a binding nature as we do not believe that this is the appropriate mechanism to realise the [RtD]”.⁴⁶ Similar to Mexico, it added that “however, we remain open to consider the criteria and operational sub-criteria and the elaboration of standards, on the understanding that how they will be applied is not yet agreed and could take various forms, including the elaboration of guidelines on the implementation of the [RtD]”.⁴⁷ Finally, Switzerland, in its response, highlighted its conviction that “the options for achieving the [RtD], developed by the Working Group, can come in various forms”.⁴⁸ It further opined that the option of an LBI on the RtD “is far from being the subject of international consensus” and that “many states, including Switzerland, believe that the development of a [LBI] would not be an appropriate and effective means of achieving the [RtD]”.⁴⁹

In the face of these contentions, it is important to show not only that an LBI would enhance the normativity of the RtD, but that the adoption of the LBI is necessary for realization of the RtD and that its absence is counterproductive. It is also important to show how the LBI may itself become the platform for overcoming the political impasse and generating consensus among States on the meaning, nature, scope and content of the RtD and the mechanisms for its operationalization. The starting point for a serious analysis on these aspects is to pose the counterfactual: what would happen in the absence of an LBI on the RtD? The answer clearly is “business as usual”; the same *status quo* that has unfortunately underpinned the lack of operationalization of the RtD for more than three decades.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Comisión Nacional de los Derechos Humanos de México, *Aportaciones para un Instrumento Vinculante Sobre El Derecho Al Desarrollo*, SE/DG/1413/2019, 11 July 2019.

⁴⁶ European Union, Response to Request of 24 May 2019 made on behalf of the Chair-Rapporteur of the WG-RTD, 25 July 2019.

⁴⁷ Ibid.

⁴⁸ Permanent Mission of Switzerland, Response to Request of 24 May 2019 made on behalf of the Chair-Rapporteur of the WG-RTD, 19 June 2019.

⁴⁹ Ibid.



A. AN LBI ON THE RTD WILL BREAK THE SHACKLES OFF THE LONG-STANDING POLITICAL DEADLOCK

It is noteworthy that since the adoption of the DRTD, the RtD has unanimously been reiterated and reinforced by all States in several important declarations, resolutions and agendas, including the 2030 Agenda.⁵⁰ In the context of the global development agenda, the Millennium Declaration adopted unanimously in 2000, and from which the MDGs emanated as actionable and achievable goals, explicitly incorporated “making the right to development a reality for everyone” as one of its stated objectives.⁵¹ The normative link between the RtD and sustainable development was specifically recognized for the first time in the 1992 Rio Declaration on Environment and Development stipulating in its third principle that the “right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”.⁵² This was reiterated in the Vienna Declaration of 1993.⁵³ The 2030 Agenda also explicitly notes that it is “informed by” the DRTD.⁵⁴ It has been pointed out from the text of the 2030 Agenda, that it further reaffirms the RtD and acknowledges that the agenda is “grounded” in the “objective of making the [RtD] a reality for everyone” enshrined in the Millennium Declaration.⁵⁵

⁵⁰ These include, the Rio Declaration on Environment and Development of 1992, the Vienna Declaration and Programme of Action of 1993, the Cairo Programme of Action of the International Conference on Population and Development of 1994, the Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development of 1995, the Beijing Declaration and Platform for Action of 1995, the United Nations Millennium Declaration of 2000, the Monterrey Consensus of the International Conference on Financing for Development of 2002, the World Summit Outcome of 2005, the United Nations Declaration on the Rights of Indigenous Peoples of 2007, the outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals of 2010, the Programme of Action for the Least Developed Countries for the Decade 2011–2020, the outcome documents of the thirteenth session of the United Nations Conference on Trade and Development of 2012, the outcome document of the United Nations Conference on Sustainable Development “The future we want” of 2012, the quadrennial comprehensive policy review of operational activities for development of the United Nations system of 2012, the SIDS Accelerated Modalities of Action (SAMOA) Pathway of 2014, the Addis Ababa Action Agenda of the Third International Conference on Financing for Development of 2015, the 2030 Agenda for Sustainable Development and the Sustainable Development Goals of 2015, the Paris Agreement on Climate Change of 2015, the Sendai Framework for Disaster Risk Reduction 2015–2030 of 2015 and the New Urban Agenda, adopted at the United Nations Conference on Housing and Sustainable Urban Development (Habitat III), of 2016.

⁵¹ United Nations General Assembly, *United Nations Millennium Declaration*, adopted on 8 September 2000, A/RES/55/2, para.11.

⁵² United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, adopted on 12 August 1992, A/CONF.151/26 (Vol.I), principle 3.

⁵³ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted on 25 June 1993, A/CONF.157/24 (Part I), chap. III, para.10.

⁵⁴ FN 6, para.10.

⁵⁵ *Ibid.*, paras. 11 and 12. For an analysis, see: FN 8, p.4.



There is, however, ample evidence that despite these reassertions and continual reaffirmation of the RtD in numerous resolutions, declarations and agendas, its operationalization has been entirely lacking. Indeed, it has been pointed out that the reason why progress on the MDGs by the end of 2015 was “uneven, particularly in Africa, least developed countries, landlocked developing countries, and Small Island developing States”,⁵⁶ can be attributed to the absence of operationalizing the RtD in the implementation of the MDGs, including lack of participation of the right-holders as well as violations by States of their duty of international cooperation.⁵⁷ Despite the lofty ambitions of the SDGs and the textual acknowledgement of the importance of the RtD, it is gradually but clearly emerging that in the first five years of its existence, many goals and targets in fact have witnessed significant deceleration than previous year rather than progress.⁵⁸ Lack of operationalizing the RtD is writ large in the initial implementation of the 2030 Agenda.

This fact has not been lost on developing countries. For instance, the seventeenth Summit of Heads of State or Government of Non-Aligned Countries, in September 2016, recalled previous summits and conferences and stressed the need to operationalize the RtD as a priority, including through the elaboration of a LBI by the relevant machinery.⁵⁹ Similarly, the Final Document of the 18th NAM Summit of Heads of State and Government, held in October 2019, reiterated the need to strive for “greater acceptance, operationalization and realization of the [RtD] at the international level, urge all States to undertake at the national level necessary policy formulation and institute measures required for the implementation of the [RtD] as a fundamental human right”, and “to expand and deepen mutually benefiting cooperation with each other in ensuring development and eliminating obstacles to development, in the context of promoting an effective international co-operation for the realization of the RtD”.⁶⁰

Resolutions of the UNGA and as the HRC have as well constantly lamented the lack of operationalization of the RtD. For instance, the 2018 resolution of the UNGA on the RtD exhorted the WG-RTD to “consider ways and means to continue to ensure

⁵⁶ FN 6, para. 16. See also: OurWorldInData, *Millennium Development Goals: How many did the world achieve?*, available at <https://slides.ourworldindata.org/millennium-development-goals/#/title-slide> (retrieved on 05/05/2020); Emmeline Booth, *Millennium Development Goals: An Uneven Success*, 07 July 2015, available at <http://newirin.irinnews.org/dataviz/2015/7/7/millennium-development-goals-success-failure>.

⁵⁷ FN 8, p.4.

⁵⁸ United Nations, *The Sustainable Development Goals Report 2019*, available at <https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf>

⁵⁹ *Final Document of the 17th Summit Conference of Heads of State or Government of the Non-Aligned Movement*, Island of Margarita, Venezuela, 17-18 September 2016, NAM 2016/CoB/DOC.1. Corr.1, at para.753.15.

⁶⁰ *Final Document of the 18th Summit of Heads of State and Government of the Non-Aligned Movement*, Baku, Azerbaijan, 25 - 26 October 2019, NAM 2019/CoB/Doc.1.



the operationalization of the [RtD] as a priority”.⁶¹ Similarly, HRC Resolution 39/9 which initiated the process of elaboration of the LBI emphasized “the urgent need to make the [RtD] a reality for everyone”,⁶² and acknowledged the need to strive for greater acceptance, operationalization and realization of the [RtD] at international and national levels.⁶³ It further encouraged all Member States “to engage constructively in discussions for the full implementation of the [DRTD] with a view to overcoming the existing political impasse within the Working Group on the [RtD]”.⁶⁴

The first and most important added value of the LBI is, therefore, undoubtedly, dismantling the *status quo* defined by the political impasse on the RtD at the WG-RTD. The last two preambular paragraphs of the zero draft of the LBI perhaps best capture the aforesaid. The penultimate paragraph notes that States Parties are “concerned that, despite the adoption of numerous resolutions, declarations and agendas, the right to development has not yet been effectively operationalized”,⁶⁵ and continues in the ultimate paragraph to stipulate that they are “convinced that a comprehensive and integral international convention to promote and secure the realization of the right to development, through appropriate and enabling national and international action, is now essential”.⁶⁶

It is in this backdrop that the following additional points may be made regarding the value-added of an LBI on the RtD.

B. AN LBI WILL PROVIDE A LEGALLY BINDING FRAMEWORK FOR OPERATIONALIZING THE RTD

To understand further what lack of operationalization of the RtD actually signifies and how this can be addressed through an LBI, it is important to highlight the three levels of obligations on States related to its realization which the High-Level Task Force identified as:⁶⁷

(a) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction;

⁶¹ United Nations General Assembly, *Resolution on the Right to Development*, A/RES/73/166, 17 January 2019, para.10(d).

⁶² FN 2, preambular paragraph 7.

⁶³ Ibid, para.6.

⁶⁴ Ibid, preambular paragraph 22.

⁶⁵ FN 3, Annex, preambular paragraph 25.

⁶⁶ Ibid, preambular para.26.

⁶⁷ United Nations, *Report of the High-Level Task Force on the Implementation of the Right to Development*, A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, annex, para.1



(b) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction; and

(c) States acting collectively in global and regional partnerships.

It is no secret that developed and developing countries have ascribed different weights to these levels of obligations split across North-South lines.⁶⁸ Developed countries have sought to interpret obligations related to the RtD as relevant only in the context of States realizing development objectives internally in a manner compliant with human rights of their citizens or persons within their jurisdictions. This aligns with the first level of obligation noted above. On the other hand, developing countries have sought to prioritize the second and third levels of obligations noted above in their interpretation of the RtD. The contention has been that obstacles to full realization of the RtD are not necessarily the result of them violating the obligations owed to their own citizens internally, but emerge from laws, policies and practices adopted by developed countries unilaterally (such as through unilateral sanctions or trade policies with adverse extraterritorial impacts) or those adopted at international organizations such as the IMF, World Bank or the WTO.⁶⁹ The South Centre, an inter-governmental policy think-tank of the G77, has contended for over 15 years now that international disciplines and instruments adopted at such international organizations controlled by the global North can limit the policy space that developing countries need to ensure their own development and, in turn, the RtD of persons subject to their jurisdictions.⁷⁰ In addition, the global South has argued that not only are obstacles to their own development thus created, but also that there is a complete lack of international cooperation in eliminating those obstacles and promoting the RtD for all.⁷¹

From a theoretical standpoint, the three levels of obligations of the RtD cannot be segregated into isolated compartments where States can pick and choose which level guides their interpretation of the RtD. The RtD encompasses all these three levels of obligations as a composite whole; undermining any one or more necessarily results

⁶⁸ B. Ibhawoh, 'The Right to Development: The Politics and Polemics of Power and Resistance', *Human Rights Quarterly*, 33:1(2011), pp.76-104

⁶⁹ D. Whelan, M. Kanade and S. Puvimanasinghe, 'The Right to Development: Origins, History and Institutional Development', in Kanade and Puvimanasinghe (eds.) *Operationalizing the Right to Development for Implementation of the Sustainable Development Goals*, E-Learning Module, October 2019 (Geneva, Ciudad Colon and Kuala Lumpur: United Nations, UPEACE and UNU-IIGH), Chapter 1.

⁷⁰ South Centre, 'Policy Space for the Development of the South', *T.R.A.D.E. Policy Brief*, No. 1, 2005, pp. 1 – 8, contending that policy space is about the freedom of each State to choose the best mix of policies possible for achieving sustainable and equitable development given their unique and individual social, political, economic and environmental conditions. On policy space, also see, H. Chang, 'Policy Space in Historical Perspective with Special Reference to Trade and Industrial Policies', *Economic and Political Weekly*, 41:7 (Feb. 18-24, 2006), pp. 627-633; K. Gallagher, *Putting Development First: The Importance of Policy Space in the WTO and IFIs*, London, Zed Books, 2005; Y. Yakyuz, "Multilateral Disciplines and the Question of Policy Space", *Third World Network Trade and Development Series*, Vol.38, pp. 1-88.

⁷¹ Ibid.



in a violation of the RtD obligations. At the international level, however, it is equally true that while most human rights mechanisms established under the core human rights treaties, in reality, focus on monitoring of obligations of States internally, there is a significant vacuum in any comprehensive monitoring of States' obligations extraterritorially or collectively at international organizations.⁷²

This is unfortunate because most of the important elements of the RtD, including the duty of international cooperation, were not established *de novo* by the DRTD. The duty of international cooperation is, in fact, an obligation on States individually and jointly, conferred upon by the UN Charter itself.⁷³ In terms of normative hierarchy, this obligation enjoys primacy over the obligations of States under any other international agreement in case of a conflict.⁷⁴ In the context of the SDGs, operationalization of the duty of international cooperation is key to their successful realization. Indeed, the 2030 Agenda identifies “means of implementation” for the successful realization of all the SDGs.⁷⁵ These are enumerated in SDG 17 comprising a list of targets whose operationalization is indispensable to any prospects of realizing the preceding 16 SDGs.⁷⁶ They are also enumerated additionally in each of the first 16 SDGs in alphabetical order (commonly referred to as the a, b, c targets and corresponding specifically to the SDG under which they are enumerated).⁷⁷ Unfortunately, all evidence thus far points to the fact that these means of implementation continue to be viewed through the “business as usual” lens of charity, privilege or generosity, rather than as a duty of States to cooperate internationally to operationalize these.⁷⁸

An LBI on the RtD will, as is the case with the zero draft, place equal importance to all the three levels of obligations on States, including on the duty of international cooperation, thereby providing a legally binding framework for its effective

⁷² FN 4, p.73.

⁷³ *Charter of the United Nations*, articles 1(3), 55 and 56.

⁷⁴ *Ibid*, article 103, stipulating that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

⁷⁵ FN 6, para 39.

⁷⁶ *Ibid*, SDG 17 and targets 17.1 to 17.19.

⁷⁷ There are 43 “a, b, c” targets collectively under the first 16 SDGs. Together with targets under SDG 17, there are in total 52 targets.

⁷⁸ The following reports demonstrate an overwhelming deceleration in the means of implementation targets. United Nations, *The Sustainable Development Goals Report 2019*, available at <https://unstats.un.org/sdgs/report/2019/The-Sustainable-Development-Goals-Report-2019.pdf>; United Nations, *Financing for Sustainable Development Report 2019*, Prepared by the Inter-Agency Task Force on Financing for Development (New York, United Nations, 2019), available at <https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR2019.pdf>; United Nations, *Financing for Sustainable Development Report 2020*, Prepared by the Inter-Agency Task Force on Financing for Development (New York, United Nations, 2020), available at https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR_2020.pdf.



operationalization. This normative codification of all three levels of obligations on States pertaining to realization of the RtD is a significant value-added of an LBI.

C. AN LBI IS AN INDISPENSABLE AND LOGICAL NEXT-STEP IN THE EVOLUTION OF THE RTD

It is only a logical trajectory for a Declaration on a human right such as the RtD, that has been reaffirmed in so many human rights instruments, to evolve into an LBI. The Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Elimination of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the Convention on the Protection of All Persons from Enforced Disappearance, all evolved from previous declarations on the same themes adopted by the UNGA.⁷⁹ It may be argued that an LBI on the RtD may not be ratified by several States, especially the developed countries, and hence may be inutile and without any value. This argument, however, ignores the fact that none of the core human rights treaties enjoys universal ratifications; indeed, they have been ratified in varying degrees. This fact, by itself, has not rendered these treaties meaningless. Instead, they represent an evolution of the human rights project in general, and on the subject of the treaty in particular. Since the emergence of the UN in 1945, the human rights project has been a constant process of evolution rather than a sudden emergence of a legally binding framework universally acceptable to all. LBIs have played an indispensable part in this evolution, and an LBI on the RtD can hardly be singled out through any rational process of thinking as flowing against this stream. At the very least, an LBI ratified by majority of the States in the world, albeit developing, will raise the threshold of efforts to operationalize it far beyond its current status.

⁷⁹ These Declarations, respectively were, the Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 adopted through UNGA Resolution 1904 (XVIII); Declaration on Elimination of Discrimination against Women adopted through UNGA Resolution A/RES/2263(XXII) on 7 November 1967; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by UNGA Resolution 3452 (XXX) of 9 December 1975; Declaration of the Rights of the Child adopted by the UNGA on 20 November 1959 in Resolution A/RES/14/1386; AND DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE ADOPTED BY THE UNGA IN RESOLUTION 47/133 OF 18 DECEMBER 1992.



D. AN LBI WILL HELP PRIORITIZE THE OPERATIONALIZATION OF THE RTD

Linked to the aforesaid is the point that by its very nature, an LBI does not only elevate the normativity of a particular right or set of rights, it is also an expression by States of the priority they accord to it in the context of the international social and economic order. It helps develop, implement, and scrutinize international and national policies with reference to the LBI and the obligations contained therein. In the context of the LBI on the RtD specifically, this would mean that existing laws, policies and practices at national and international levels will be evaluated with reference to whether they undermine or promote the legally guaranteed RtD, or whether they pose obstacles to its realization, including by limiting governance/policy space of States in discharging their RtD obligations. From the perspective of the global South, adoption of an LBI will be the loudest statement that the existing *status quo* in the global social and economic order is untenable and they accord the highest priority to humanizing it.

E. AN LBI WILL PROVIDE A FRAMEWORK FOR IMPROVED RESPONSES TO CONTEMPORARY AND EMERGING CONCERNS AND CHALLENGES

Prioritization of the RtD is important for its own sake, but it is equally important to guide individual and collective responses to contemporary and emerging issues, concerns and challenges. Even though developed countries may not ratify an LBI on the RtD, positions of developing countries with respect to international responses to contemporary and emerging concerns such as trade, investment, pandemics or climate change are bound to be guided by their obligations under the LBI. This will, in turn, inevitably influence the direction of global policies adopted in response to such challenges. It is noteworthy that the zero draft requires States Parties to conduct impact assessments of laws, policies and practices at national *and* international levels with reference to their RtD obligations.⁸⁰ The generation of data from these impact assessments, even if conducted only by States Parties to the LBI, will undoubtedly influence approaches to responses at the global and regional levels.

⁸⁰ FN 3, Annex, draft article 19.



F. AN LBI ON THE RTD WILL BRING IT AT PAR WITH ALL OTHER HUMAN RIGHTS

An unfortunate, but evident, result of the lack of adoption of an LBI thus far has been to deny the RtD a status equivalent to all other human rights incorporated in the core human rights treaties. While other human rights benefit from an institutional platform through the various treaty bodies, the RtD “lacks a firm institutional platform to stand on”.⁸¹ This lack has also resulted in underdevelopment of academic and policy guidance on operationalization of the RtD. An LBI on the RtD will help rectify this anomaly. For instance, the zero draft establishes two *sui generis* mechanisms for implementation of the draft convention viz. a Conference of States Parties and a subsidiary Implementation Mechanism comprising experts.⁸² The establishment of these treaty bodies, albeit with some differences in the structures and mandates, will help bring it at par with existing human rights treaty bodies. These bodies will also enable development of policy guidance to States and other stakeholders on operationalizing the RtD at par with the Committees under current core human rights treaties. An important consequence of this is also that it will enhance the justiciability of the RtD, which except for the African region, is currently lacking.⁸³ National implementation of the RtD obligations under the LBI might, depending on the domestic legal structure, also permit enforceability before domestic courts.⁸⁴ Finally, the absence of an LBI on the RtD has hindered the consideration of this right during the Universal Periodic Reviews.⁸⁵ An LBI will help rectify this anomaly bringing the RtD at par with all other human rights.

⁸¹ FN 40, para.57.

⁸² FN 3, Annex, draft articles 24 and 26 respectively.

⁸³ The only regional human rights instrument to incorporate the RtD as a justiciable right is the African Charter on Human and Peoples Rights in its article 22. For the only two cases thus far where violations of the RtD have successfully been enforced, see *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*, 276/03, 2009; *African Commission on Human and Peoples' Rights v. Republic of Kenya*, 006/2012, 2017.

⁸⁴ See in general, M.S. Alam, 'Enforcement of International Human Rights Law by Domestic Courts: A Theoretical and Practical Study', *Netherlands International Law Review*, 53:3 (2006), pp. 399–438.

⁸⁵ The human rights obligations of States considered during the UPRs are those set out in: (1) the UN Charter; (2) the UDHR; (3) human rights treaties ratified by the State concerned; (4) voluntary pledges and commitments made by the State and, (5) applicable international humanitarian law. See, OHCHR, *Basic Facts about the UPR*, available at www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx. Because the DRTD does not directly fall under this list, it has not been considered in UPRs.



G. AN LBI ON THE RTD WILL PRESENT AN OPPORTUNITY TO CLARIFY THE SCOPE, CONTENT AND NATURE OF THE RTD

The very process of developing the zero draft and its contents highlights the massive opportunity aspect inherent in elaborating an LBI in terms of clarifying the nature and scope of the RtD. Current debates at the Working Group are replete with generic reiterations of standard positions of countries across North-South lines year after year, leaving no scope for meaningful progression on its several dimensions. A process of elaborating the LBI necessarily forces countries to engage with the draft provisions that provide a reference point for discussions to gravitate around. It helps concentrate attention to the nature, scope and content of the RtD as well as means to operationalize it beyond the regular rhetoric. The accompaniment of the expert commentaries to the zero draft already provides States with interpretative and theoretical guidance on the provisions. Positions in support or in opposition will have to engage with concrete legal analysis, sharpening the discussions and debates to a level hitherto improbable.

H. AN LBI ON THE RTD WILL ALSO PRESENT AN OPPORTUNITY TO ADDRESS THE MISSING ELEMENTS IN THE DRTD AND ENRICH IT

The opportunity aspect of the LBI process extends also to the possibility of improving and enriching the content of the DRTD. The DRTD was adopted at a time when several of the contemporary human rights standards were themselves underdeveloped. For instance, the human rights regimes related to rights of the child, persons with disabilities, and indigenous peoples were in their infancy or non-existent in 1986. The concept of sustainable development had not yet been introduced at the global policy making level.⁸⁶ Climate change did not pose an existential crisis for humanity and the planet. The WTO regime had not yet been established. Technology was not as advanced, and the internet had not been born. Non-state actors, including businesses, did not play as significant a role in governance at any level as they do in the post-cold war deregulated global environment.⁸⁷ Conflicts were still traditional,

⁸⁶ See, World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987), introducing the concept of 'sustainable development' for the first time at the level of global policy.

⁸⁷ For an analysis, see B. Rajagopal, 'Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On', *Human Rights Quarterly*, 35:4 (2013), pp. 893–909.



unlike today's mixed conflicts.⁸⁸ It was a world where awareness and the need for coordinated and collective global action for realizing common development goals, whether through the MDGs or the current SDGs, was nowhere on the global agenda. An LBI on the RtD permits an 'update' of the DRTD to bring its content in sync with and relevant to contemporary times by incorporating several of the aforesaid 'missing elements'.

I. AN LBI WILL HELP OPERATIONALIZE THE RTD FOR BETTER IMPLEMENTATION OF GLOBAL DEVELOPMENT AGENDAS

As indicated earlier, the 2030 Agenda gave an impetus to the process of elaborating the LBI. The LBI will, in turn, enable a better realization of the SDGs by infusing its implementation with a legally binding normative framework. In general, an LBI will help codify an understanding of development from a human rights lens.⁸⁹ More specifically, an LBI will give proper shape, colour and texture to the SDGs by purposely stressing on the right and duty aspects of sustainable development.⁹⁰ By insisting that development is a human right which has clearly identified duty-bearers, an LBI on the RtD "hammers down the point that the only way development can be sustainable is if it is itself treated as a right and not as a charity, and if it encompasses all human rights as equally important and ensures that no human right is undermined".⁹¹ This is especially the case with respect to the means of implementation of the SDGs identified in the 2030 Agenda so that their realization is judged and evaluated from the perspective of the duty of international cooperation. Furthermore, it will provide a legally binding normative framework for the "leaving no one behind",⁹² and the "reaching the furthest behind the first" principles inherent to the 2030 Agenda.⁹³

⁸⁸ S. Vite, 'Typology of Armed Conflicts In International Humanitarian Law: Legal Concepts And Actual Situations', *International Review of the Red Cross*, 91:873 (2009), pp.69-94.

⁸⁹ See, FN 1, preambular para.4, describing development. For identical description in the zero draft, see: FN 3, Annex, preambular para.4.

⁹⁰ FN 8, p.9.

⁹¹ Ibid.

⁹² FN 6, paras. 4, 48 and 72.

⁹³ Ibid, para. 4 and 74(e).



J. AN LBI ON THE RTD WILL HELP FILL EXISTING GAPS IN THE CURRENT HUMAN RIGHTS SYSTEM

Current human rights system is disadvantaged in practice, if not in theory, from three major gaps. The first relates to the interdependence, indivisibility and interrelated nature of all human rights, whether civil, political, economic, social or cultural.⁹⁴ While this is sought to be ensured in development practice through “conceptual frameworks” such as Human Rights Based Approaches (HRBA),⁹⁵ it has not been mainstreamed in any human rights treaty in explicit terms. As is well known, this void has resulted in differential importance given to different sets of rights by States on the ground.⁹⁶ The nature of development as a self-standing right is such that a trade-off with or between other human rights is not permissible in the development process. This specific characteristic of the RtD crystalized through an LBI will be a significant value-added to the corpus of existing human rights treaties because it will provide the most comprehensive normative basis for the interdependence, indivisibility and interrelated nature of all human rights.⁹⁷

The second gap relates to the dominant focus of international human rights treaties on individual rights and not equally on collective rights of all peoples, with the only exception of the right to self-determination enshrined in articles 1 common to both the ICCPR and the ICESCR. Even the rights of minorities under article 27 of the ICESCR are in the nature of individual rights.⁹⁸ International human rights law has progressed adequately to recognize rights of peoples in other contexts, including indigenous peoples.⁹⁹ An LBI on the RtD, in the spirit of the DRTD which identifies right-holders as both human persons and peoples, will permit crystallization of peoples as right-holders.

The third gap relates to the dominant focus of current international human rights system, including treaty bodies and charter-based bodies, on monitoring the

⁹⁴ The Vienna Declaration and Programme of Action stipulates in its paragraph 5 that “All human rights are universal, indivisible and interdependent and interrelated”. It further highlights that they are all equally important by stipulating that “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”. See, A/CONF.157/24 (Part I), chap. III, paragraph 5. For detailed analysis of this principle in international human rights law, see, FN 4, p.34.

⁹⁵ See, United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (Geneva, United Nations, 2006). See also, United Nations Development Group, *UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming (the Common Understanding)* (New York, United Nations, 2003).

⁹⁶ FN 8, pp.13-14.

⁹⁷ For their incorporation in the zero draft, see: FN 3, Annex, draft articles 3(c) and 6.

⁹⁸ R. K.M. Smith, ‘Minority Rights’ in *Textbook on International Human Rights* (Oxford: Oxford University Press, 2014), Online.

⁹⁹ ILO, Indigenous and Tribal Peoples Convention, 1989 (No. 169); United Nations General Assembly, *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 13 September 2007. On rights of peoples in general, see: P. Alston (ed), *People’s Rights* (Oxford, Oxford University Press, 2001).



realization of obligations by States (mostly internally), rather than identifying the obstacles they face in doing so, whether at the domestic level or international level.¹⁰⁰ An LBI on the RtD will permit rectification of this gap by channelling attention to the “obstacles to development”.¹⁰¹ For instance, in terms of the zero draft, both the Conference of States Parties as well as the implementation mechanism envisaged thereunder, pay special attention to the consideration of obstacles faced by the States Parties to the realization of the RtD, “including those resulting from conduct of other States or international organizations, *whether parties to the convention or not*”.¹⁰² As the commentaries explain, “the generation of comprehensive information on the obstacles that States Parties face, especially those emanating externally, is a significant value-added over existing mechanisms under other treaty bodies and avoids duplication”.¹⁰³ Equally importantly, such a process will help generate documented information and awareness of factors necessary for informed international cooperation to realize the RtD for all.

K. AN LBI ON THE RTD WILL HELP CLARIFY HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS AND INTERNATIONAL ORGANIZATIONS

Current human rights debates are animated with sharp differences of opinions on human rights obligations of non-state actors and of international organizations.¹⁰⁴ An important reason for this is that human rights treaties do not specifically and explicitly engage with these obligations, leading to diverse interpretations of law on this aspect.¹⁰⁵ An LBI on the RtD can help clarify these obligations. The very nature of the RtD is such that non-state actors and international organizations can play a crucial role both in its realization and in its violation. The zero draft, for instance, contains provisions that recognize that all legal persons, including non-state actors and international organizations, have the minimum duty to respect the RtD of the right-holders, that is, do no harm to their RtD.¹⁰⁶ In addition, directly based on the legal principles recognized by the International Law Commission in the Draft Articles on

¹⁰⁰ FN 4, p.73.

¹⁰¹ FN 1, articles 3(3) and 6(3).

¹⁰² FN 4, p.4 and 74.

¹⁰³ *Ibid.*, p.4.

¹⁰⁴ See in general, A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006); A. McBeth, ‘A Right by Any Other Name: The Evasive Engagement of International Financial Institutions with Human Rights’, *George Washington International Law Review*, 40:4 (2009), pp.1101-1156; A. McBeth, ‘Every Organ of Society: The Responsibility of Non-State Actors for the Realization of Human Rights’, *Hamline Journal of Public Law and Policy*, 30:1 (2008).

¹⁰⁵ FN 4, draft article 7 and commentaries.

¹⁰⁶ *Ibid.*



Responsibility of International Organizations,¹⁰⁷ the zero draft recognizes that all international organizations have the obligation “to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach that State’s or that other international organization’s obligations with regard to the right to development”.¹⁰⁸ These are significant value additions with direct implications for how policies of international organizations such as the international development banks and financial institutions and the WTO are judged in terms of impacts on States that may become parties to such an LBI.

L. AN LBI ON THE RTD WILL HELP TRANSLATE THE NEED FOR “GOVERNANCE/POLICY SPACE” FROM A POLITICAL DEMAND TO A LEGAL NORM

Developing countries have for long complained that international disciplines related to finance, trade and investment limit the policy/governance space that they need to determine their own development priorities and adopt a mix of policies that enable their promotion. The 2030 Agenda contains several references to the need for developing countries to retain their policy space.¹⁰⁹ An LBI on the RtD will help transpose these political demands into a legal norm and entitlement. For instance, the zero draft incorporates the right to regulate as an important principle of the RtD, and stipulates that “realization of the right to development entails the right for States Parties, on behalf of their peoples, to take regulatory or other related measures to achieve sustainable development on their territory”.¹¹⁰ The incorporation of this principle in an LBI on the RtD will have major implications, including transposing it as applicable law, in investment disputes brought against States Parties, thereby providing Host States with the ability to legally justify use of policy/governance space, which otherwise can be quite difficult.¹¹¹

¹⁰⁷ See, articles 14 to 16 of the *Draft Articles on the Responsibility of International Organizations*, adopted by the International Law Commission at its sixty-third session, Yearbook of the International Law Commission, 2011, vol. II, Part Two

¹⁰⁸ FN 3, Annex, draft articles 11.

¹⁰⁹ The 2030 Agenda reiterates the importance of retaining “policy space” on at least 6 occasions. In particular, SDG 17.15 contains the commitment to “respect each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development”.

¹¹⁰ FN 4, draft article 3(f) and commentaries.

¹¹¹ Ibid.



CONCLUSION

This paper has provided a detailed overview of the process set in motion by the HRC for elaborating an LBI on the RtD as well as the process leading to the preparation of the zero draft. Although the journey thus far has been admirably smooth and quick, the next stages are likely to face a lot more hurdles. Traditional positions adopted by the Global North (including Mexico in this case) have been in opposition to an LBI. The US, EU and Japan did not participate in the initial discussions on the LBI during the 2019 meeting of the Working Group. That might sound like a death-knell for the LBI even before negotiations begin. However, the manner in which the zero draft is prepared can provide significant incentives for the Global North to join forces. Indeed as the zero draft demonstrates, non-State Parties will inevitably also be affected by any LBI on the RtD. Their individual policies and practices may be scrutinized under mechanisms established under the LBI as well as under the UPR, not necessarily because such non-State Parties have reporting obligations, but because such conduct may be reported by a State Party as creating “obstacles to development”. This is also true of policies and practices of international organizations in which non-State Parties may have large presence. Additionally, principles such as “right to regulate” and provisions on obligations of legal persons are bound to impact on investors from non-State Parties. Finally, despite the high threshold, conduct by a non-State Party that coerces a State Party into a situation that the RtD of persons subject to its jurisdiction are violated, will fall foul of the international law on State Responsibility.¹¹²

The COVID-19 pandemic of 2019-2020 has undoubtedly served as a grim reminder of the urgent need for taking RtD seriously enough to support an LBI. Quarantines, travel restrictions and lockdown of cities and countries instituted to contain the spread of the virus have resulted in a significant reduction in demand and supply, disruptions in the supply chains, halt to manufacturing sectors, the falling of commodity prices including oil, and collapse of global financial markets, resulting in investors’ rush to pull funds out of emerging-markets and other high-risk sectors.¹¹³ Unsurprisingly, the most severe impacts are bound to be on the weakest and poorest countries.¹¹⁴ The UNSG has raised the alarm that “the situation in developing countries, LDCs, LLDCs and SIDS in particular, is of special concern”, where even before the crisis, debt accumulation has outpaced the growth of income.¹¹⁵ 44% of

¹¹² See, International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, 2001, vol. II, Part Two, article 18.

¹¹³ United Nations, *Shared Responsibility, Global Solidarity: Responding to the Socio-Economic Impacts of COVID-19*, Report of the UNSG, March 2020, available at <https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf>, p.8.

¹¹⁴ J. Stiglitz, *World Must Combat Looming Debt Meltdown in Developing Countries*, 7 April 2020, available at www.theguardian.com/business/2020/apr/07/world-must-combat-looming-debt-meltdown-in-developing-countries-covid-19.

¹¹⁵ FN 113, p.8.



LDCs and other low-income developing countries are currently at high risk or in debt distress, and this figure is likely to rise.¹¹⁶ This represents a doubling of debt risk in under five years from 22% in 2015 when the 2030 Agenda was adopted.¹¹⁷ A consortium of African ministers has recently requested financial support, including a “debt holiday waiver” of \$44 billion.¹¹⁸ Worryingly, middle-income countries are also highly vulnerable to a debt crisis, lost market access and capital outflows.¹¹⁹ The pandemic has plunged an already struggling global economy into a recession that may mark the beginning of the worst economic downturn since the Great Depression.¹²⁰ The UN points out that Latin America and the Caribbean is facing the worst recession ever and Africa may be in its first recession in the last 25 years. Other regions, including Asia and the Middle East are staring at similar decelerations.¹²¹ According to the ILO, the crisis could wipe out the equivalent to 195 million full-time jobs globally in just the second quarter of 2020.¹²² Resultantly, both the UNSG, and several special procedures of the UN,¹²³ have called for unprecedented debt-relief and lifting of sanctions on countries as part of immediate measures to handle the crisis. As the UNSG has pointed out, “this is much more than a health crisis [...] it is a human crisis [...] the coronavirus disease (COVID-19) is attacking societies at their core”.¹²⁴

There has undoubtedly never been a more urgent moment for an LBI on the RtD to be elaborated and adopted. An LBI is, indeed, the difference between rhetoric and reality.

¹¹⁶ United Nations, *Financing for Sustainable Development Report 2020*, Prepared by the Inter-Agency Task Force on Financing for Development (New York, United Nations, 2020), available at https://developmentfinance.un.org/sites/developmentfinance.un.org/files/FSDR_2020.pdf, pp.7 and 129.

¹¹⁷ Ibid, p.XVII.

¹¹⁸ United Nations, *Debt and COVID-19: A Global Response in Solidarity*, 17 April 2020, available at https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_debt_relief_and_covid_april_2020.pdf, p.6.

¹¹⁹ Ibid, p.4.

¹²⁰ Ibid, p.5.

¹²¹ Ibid, p.6.

¹²² ILO, *COVID-19 Causes Devastating Losses in Working Hours and Employment*, 7 April 2020, available at www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_740893/lang--en/index.htm.

¹²³ OHCHR, *UN Rights Expert Urges Governments to Save Lives By Lifting All Economic Sanctions Amid COVID-19 Pandemic*, 3 April 2020, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25769&LangID=E; OHCHR, *US Must Lift Its Cuba Embargo To Save Lives Amid COVID-19 Crisis, Say UN Experts*, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25848&LangID=E; Obiora Okafor, *Solidarity Key to Post COVID-19 Response*, 28 April 2020, available at www.openglobalrights.org/solidarity-key-to-post-covid-19-response/?lang=English.

¹²⁴ FN 113, p.1.

