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**A CRITICAL ANALYSIS OF THE CHALLENGES TO AND  
PROSPECTS OF THE RIGHT TO DEVELOPMENT AS A  
HUMAN RIGHT\***

***Abstract***

*Since 1972 when the Senegalese jurist Keba M'baye advanced it, and since 1986 when the United Nations adopted a Declaration on it, the idea of a 'right to development' has been the focus of an extensive debate. Stakeholders are polarised in their views and opinions, making the right to development one of the most contested rights. The question which has continued to attract the attention of stakeholders in the development discourse has remained whether a legal right to development truly exists. This article proposes to make a case for the recognition and practical implementation of the right to development as a human right. In making this case, it brings fresh insights into the discussion of the topic, explores the obstacles in the way, and the prospects, of recognizing and implementing the right to development as a legal right.*

**1. Introduction**

The Declaration on the Right to Development<sup>1</sup> which states unequivocally that the right to development is a human right and which came almost thirty-eight years after the Universal Declaration of Human Rights (UDHR),<sup>2</sup> was adopted by the United Nations in 1986 by an overwhelming majority, with the United States of America casting the only dissenting vote. Under the Universal Declaration of Human Rights, human rights were categorized into civil and political rights<sup>3</sup> and economic, social and cultural (ESC) rights.<sup>4</sup> From the original conception of human rights and at the inception of the drafting of the UDHR, there was a consensus over the unity and inseparability of civil and political

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<sup>1</sup> The Declaration on the Right to Development was adopted by the UN General Assembly, Resolution 4/128 on December 4, 1986.

<sup>2</sup> Adopted by UN General Assembly Resolution 217(A) II on December 10, 1948. Available at <http://www.unhcr.ch/html/menu3/b/74.htm>. Accessed on 30/08/2010.

<sup>3</sup> Arts. 1-21 of the UDHR.

<sup>4</sup> Arts. 22-28 of the UDHR.

rights and ESC rights. This consensus was, however, short-lived as certain international socio-political factors, including, and particularly, the spread of the Cold War, led to a division of opinions and divergence of views between the Eastern and the Western blocs over the nature and form which the proposed international bill of rights should take. This polarisation further resulted in the dichotomised emergence of two separate covenants. It took many years of hard international deliberations and shrewd negotiations for the world community to retrace its steps to the original conception of integrated and indivisible human rights. The Declaration on the Right to Development, adopted by the United Nations in 1986 was the outcome of those deliberations and negotiations. Regrettably, however, America's opposition to this declaration delayed the process by several years during which the right to development could have been translated into a reality. More people, particularly from the North (the developed world) opposed the idea of recognising the right, questioning its foundational basis, legitimacy, justiciability, and coherence. Developing countries were stoutly in support of according recognition and acceptance to this right. Finally, and happily, in 1993, a new consensus emerged in Vienna at the Second UN World Conference on Human Rights. The Declaration<sup>5</sup> adopted at that Conference reaffirmed the right to development as a universal and inalienable right and an integral part of fundamental human rights. This Vienna Declaration went on to state that human rights and fundamental freedoms are the birth-rights of all human beings and their protection and promotion, the first responsibility of government. It further commits the international community to the obligation of co-operation in order to realise these rights. It is therefore correct to say that the right to development emerged as a human right which integrated ESC rights and civil and political rights. The right to development in an international context is, therefore, partly the result of the struggle of developing countries for a new international economic order.<sup>6</sup> It belongs to the so-called third generation rights, which includes the right to a healthy

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<sup>5</sup> The Vienna Declaration and Program of Action, adopted by the UN World Conference on Human Rights, June 25, 1993.

<sup>6</sup> The collective struggle of developing countries for the establishment of an international order that favours their special needs culminated in the adoption of the UN Declaration on the Establishment of a New International Economic Order; GA Res 3201(S-VI) UN GAOR 6th special session Agenda Item 6, 2229th plenary at UN Doc A/RES/3201(S-VI) (1974).

environment and the right to peace.<sup>7</sup> According to the proponents of third generation rights, all actors, including the State, the individual, public and private firms and the entire international community are under an obligation to make an effort to realise these rights.<sup>8</sup>

## **2. A Brief Historical Outline of the Right to Development.**

The idea of a right to development was conceived in 1972 in an inaugural lecture at the International Institute of Human Rights in Strasbourg by the Senegalese jurist, Keba M'Baye, who was then the head of the United Nations High Commission on Human Rights.<sup>9</sup> From the moment of its inception, developing countries embarked on very serious and aggressive advocacy efforts aimed at garnering support for the inclusion of this right as a human right through the United Nations (UN). This advocacy paid off in 1986 when the UN adopted the Declaration on the Right to Development, which recognised the right to development as a fundamental principle of human rights.<sup>10</sup> Subsequently, scholars from the south articulated the notion and enumerated the possible subjects and objects of the right, while jurists from the north questioned whether such a right existed at all.<sup>11</sup>

The right to development was given greater impetus through its reaffirmation by the Vienna Declaration and Programme of Action (Vienna Declaration), adopted by 171 countries participating in the World Conference on Human Rights in 1993, as a universal and inalienable right and an integral part of fundamental human rights.<sup>12</sup> The right has also been given prominence in the mandate of the UN High Commissioner for

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<sup>7</sup> O. Sheehy 'The Right to Development and the Proliferation of Rights in International Law' (2002) 5 *Trinity Law Review* 253.

<sup>8</sup> *Ibid*, p. 254.

<sup>9</sup> K. M'Baye 'Le droit au développement comme un droit de l'homme' in *Revue internationale des droits de l'homme* (1972), cited in R.L Barsh 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* p. 322.

<sup>10</sup> Declaration on the Right to Development adopted by General Assembly Resolution 41/128 (4 December 1986).

<sup>11</sup> Barsh *loc. cit.*, p. 322, with respect to scholars from the South. For arguments forwarded by academics from the North, see J. Donnelly 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* p.475.

<sup>12</sup> Vienna Declaration and Programme of Action A/CONF 157/23 (12 July, 1993).

Human Rights,<sup>13</sup> and the General Assembly required the High Commissioner to establish 'a new branch whose primary responsibilities would include the promotion and protection of the right to development'.<sup>14</sup> The United States and some other Western countries feel uncomfortable at what they see as the determination of countries in the Non-Aligned Movement (NAM) to force their interpretation of this right on the group of donor countries. The NAM countries, on their part, claim that several years of development cooperation with the developed countries have yielded very little in the elimination of poverty and achievement of the objectives of numerous developmental strategies. They also claim that they continue to face difficulties in participating in the globalisation process, and that many of them run the risk of being marginalised and effectively excluded from its benefits.<sup>15</sup> This diplomatic disagreement continued until 22 April, 1998, when the U.N. adopted, by consensus, a resolution on the right to development<sup>16</sup>, recommending to the Economic and Social Council the establishment of a follow-up mechanism consisting of an Open-Ended Working Group (OEWG) and an Independent Expert to monitor the implementation of the right to development. In the year 2003, the Commission asked the Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document for the implementation of the right and their feasibility, including an international-standard legal document of a binding nature on the guidelines on the implementation of the right as well as the principles for development partnership, including issues which such instrument might address.<sup>17</sup> From the foregoing, it can be seen that there have been several efforts and initiatives by the U.N. through its charter-based bodies and resolution-based working groups aimed at the implementation of the right to development. Granted that there are

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<sup>13</sup> G. A. Res. 48/141, U.N. GAOR, 48<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/48/141 (1993) p. 261.

<sup>14</sup> G. A. Res. 50/214, U.N. GAOR, 50<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/50/214 (1995) p. 296.

<sup>15</sup> G. A. Res. 56/150, U.N. GAOR, 56<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/56/2150 (2001) p.341.

<sup>16</sup> Commission on Human Rights Res.72, U.N. ESCOR, 44<sup>th</sup> Sess., Supp. No. 3, U.N. Doc. E/CN. 4/1998/177 (1998) p. 229.

<sup>17</sup> Commission on Human Rights Res.2003/83, U.N. Doc. E/CN.4/RES/2003/83 (2003). 47 countries voted in favour of this resolution, with the United States, Japan and Australia voting against it while three countries, Canada, Korea, and Sweden abstained.

still lingering legal and theoretical controversies concerning the notion of the right to development, as testified to by the avalanche of literature on the subject,<sup>18</sup> there appears to be an emerging consensus on the subject which, in combination with the initiative of the UN under the Working Group on the Right to Development, reinvigorates the prospects of its implementation. The African Charter on Human and Peoples' Rights (African Charter), adopted in 1981, in article 22 expressly incorporates this right. In fact, it is the first and only legally-binding international document containing an express recognition of the right to development.<sup>19</sup>

### **3. Right to Development and Customary International Law**

Another source of legal validity for the right to development is the principle of international law whereby an act or conduct that has been accepted and repeatedly practised by a wide range of states over a long period of time develops into a rule of accepted customary usage and, so, creates a binding legal obligation on states. Some scholars contend that the series of resolutions and declarations on the right to development have transformed it into a norm of *juscogens* that creates a legal obligation on states.<sup>20</sup> Dugard appears to share this view when he asserts that 'an accumulation of declarations and resolutions on a particular subject may amount to evidence of collective practice on the part of States and hence, may constitute a customary rule.'<sup>21</sup> Even though the adoption of the Declaration on the Right to Development was greeted with series of debates and

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<sup>18</sup> See for example, Philip Alston, "Making Space for New Human Rights: The Case of the Right to Development" 1 *Harv. Hum. Rts. Y.B.* (1988) p. 20; Russell Barsh, "The Right to Development as a Human Right: Results of the Global Consultation", 13 *Hum. Rts. Q.* (1991) pp.322-338; N. J. Udombana, "The Third World and the Right to Development: Agenda for the Next Millennium," 22 *Hum. Rts. Q.* (2000) pp.753-758; James C. N. Paul, "The Human Right to Development: Its Meaning and Importance", 25 *J. Marshal L. Rev.* (1992) pp. 235-265; Arjun Sengupta, "Right to Development as a Human Right", *Econ. And Pol. Wkly.*, July 7, 2001 p.2527; Arjun Sengupta, "Theory and Practice on the Right to Development", 24 *Hum. Rts. Q.* (2002) p. 837.

<sup>19</sup> African Charter on Human and Peoples' Rights, adopted on 27 June 1981.

<sup>20</sup> M. Bedjaoui, *International Law: Achievements and Challenges* (1991), cited in H Steiner & P Alston (eds) *International Human Rights in Context: Law, Politics and Morals* (New York: Clarendon Press, 2000) p. 1321.

<sup>21</sup> J. Dugard, *International Law: A South African Perspective* (2005) p. 34, cited in Tadeq *loc. cit.* p. 334.

controversies, several declarations and resolutions were subsequently made on it and several states voted in favour of these declarations and resolutions. It is, therefore, not out of place to hold the view that the subsequent declarations, resolutions and decisions of UN human rights bodies and international conferences show that there is a major consensus emerging to respect the principles of the right to development. Advancing this argument further, Bedjaoui contends pointedly that “the right to development is, by its nature, so incontrovertible that it should be regarded as belonging to a norm of *jus cogens*”.<sup>22</sup>

#### **4. An Analysis of the Nature of the Right to Development as Provided for in the Declaration.**

According to the Declaration on the Right to Development: “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised.”<sup>23</sup> From this provision, some facts can be seen to have been settled. One is that there is a human right that is called the right to development, and that this right is inalienable, that is, it cannot be bargained away. Then, there is a process of economic, social, cultural, and political development which is recognised as a process in which all human rights and fundamental freedoms can be fully realised. The Right to Development (RTD) is a human right, by virtue of which “every human person and all peoples are entitled to participate in, contribute to and enjoy” that process of development. Further clarifications of the nature of this process are made in subsequent articles of the Declaration. They also elaborate on the principles involved in the exercise of the right to development. Article 1, for example, recognises that the beneficiaries of this right include “every human person” and “all peoples” and also recognises the right of peoples to self-determination.<sup>24</sup> It should be pointed out that this simultaneous provision for “peoples’ rights” and “every human person’s right” does not in any way presuppose that the former is contrary to or in contradistinction from the former nor that the two should be seen as mutually exclusive. It is also categorically stated in the Declaration that it is the ‘human person’ who is the central subject of development, in the sense of

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<sup>22</sup> Bedjaoui, *op. cit.*, p. 1323.

<sup>23</sup> Art. 1 Declaration on the Right to Development.

<sup>24</sup> *Ibid.* Art. 1(2).

the “active participant and beneficiary of the right to development”.<sup>25</sup> It is submitted that even if “peoples” or collectives of “human persons” are entitled to some rights, such as full sovereignty over the natural wealth and resources in terms of territory, it is still the individual human person who must be the active participant in and beneficiary of this right. In further clarification, the Declaration states that the process of development, “in which all human rights and fundamental freedoms can be fully realised” would lead to ‘the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active free and meaningful participation in development and in their fair distribution of benefits resulting therefrom’.<sup>26</sup> The Declaration is so clear on the nature of the RTD that even the measures and standards for realising the right are stated to be only those that will ensure “equality of opportunity for all” in their access to basic resources, education, health services, food, housing, employment and in the fair distribution of income.<sup>27</sup> The realisation of the right would also require that the vulnerable groups, such as women, be allowed to play an active role in the development process, and that “appropriate economic and social reforms be carried out with a view to eradicating all social injustices”.

#### **4.1 Who Are the Subjects and the Duty Bearers?**

Initially, advocates for RTD, principally the developing countries, believed that this right inhered only in the State. This is probably as a result of a very restricted understanding of article 1 of the Declaration. That view is no longer popular. The current general view on the subjects of RTD is that, depending on the context, different categories of entities may be the subjects of the right to development. These include individuals, peoples and states. All these parties are inhered with rights as well as duties. According to Arjun Sengupta, to realise this process of development to which every human person is entitled by virtue of his right to development, there are responsibilities to be borne by all the concerned parties: “the human persons”, “the states operating nationally,” and “the states operating internationally”.<sup>28</sup> The Declaration provides that “all human persons have a responsibility for development individually and collectively” and they must take

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<sup>25</sup> *Ibid.* Art. 2(1).

<sup>26</sup> *Ibid.* Art. 2(3).

<sup>27</sup> *Ibid.* Art. 8.

<sup>28</sup> *Loc. cit.*, p. 3.

appropriate actions, maintaining “full respect for the human rights and fundamental freedoms as well as their duties to the community.” So, much as individuals are the central subjects of the right to development, they also have a duty to promote and protect an appropriate political, social and economic order for development.<sup>29</sup> Every human person, therefore, has the duty to be able to develop his or her personality which development would enable him or her to lead a worthy and dignified life. He also has an added duty to help his family and the larger community to ensure the realisation of the RTD. It is noteworthy that one of the striking and unique features of the African Charter is its provision for the individual and collective duties of Africans to the respective communities from which they come. The logical implication, therefore, is that individuals should be active participants in development planning as well as in all the processes of its implementation. Human persons are, therefore, seen to function both individually and as members of collectives or communities and to have duties to communities that are necessary to be carried out in promoting the process of development.

It is an established fact that individual states are the traditional duty bearers in respect of human rights, including the right to development. The Declaration upholds this notion and makes it clear that states, both individually and collectively, have the primary responsibility to create national and international conditions favourable to the realization of the right to development.<sup>30</sup> This responsibility is complementary to that of the individual aforementioned. The actions of the states needed for the creation of such conditions are to be taken both domestically and internationally. At the municipal level, states have the right and the duty to formulate appropriate national development policies,<sup>31</sup> and should undertake all necessary measures to ensure the realisation of the right<sup>32</sup> and encourage popular participation in all spheres. Apart from this, states are required to take steps to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights<sup>33</sup> because the implementation, promotion and protection of these rights would be essential for the realisation of

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<sup>29</sup> *Ibid.* Art. 2(2).

<sup>30</sup> Art. 3(1) Declaration on the Right to Development.

<sup>31</sup> *Ibid.*, 2(3).

<sup>32</sup> *Ibid.*, Art. 8.

<sup>33</sup> *Ibid.*, Art. 6(3).

RTD, since all human rights and fundamental freedoms are indivisible and interdependent<sup>34</sup>. In summary, the state has the obligation to undertake all measures necessary for the realisation of the right to development and the progressive enhancement of the right.<sup>35</sup>

At the international level, the Declaration emphasizes the importance of international cooperation for the realisation of RTD. It should be recalled that a great deal of the impetus for the adoption of the Declaration centred on the needs of developing countries.<sup>36</sup> The states have a duty to cooperate with each other in ensuring development and diminishing obstacles to development and should fulfil these duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, and mutual interest,<sup>37</sup> maintaining that all human rights deserve equal attention in their implementation and promotion.<sup>38</sup> The Declaration also imposes a duty on the states, individually and collectively, to formulate international development policies to facilitate the realisation of the right to development. Argument in favour of the bindingness of the international cooperation provided under article 4 of the Declaration can further be buttressed by reference to other international human rights instruments which also create the same binding obligation to cooperate.<sup>39</sup> The UN General Assembly also adopted the Charter of Economic Rights and Duties of States which reaffirmed the responsibility of every state to promote economic, social and cultural development of its own people and those of developing countries.<sup>40</sup>

The modes of promotion may include financial and technical assistance, providing better terms of trade, and the

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<sup>34</sup> *Ibid.* Art. 6(2).

<sup>35</sup> *Ibid.* Arts. 2, 3, 7 & 10.

<sup>36</sup> Report of the Secretary-General on the International Dimensions of the Right to Development as a Human Right, UN Doc E/ CN.4/1334 (1979) paras.152-159. See also Report of the Open-Ended Working Group of Governmental Experts on the Right to Development, UN Doc E/CN.4/1989/10 (1989) para. 25.

<sup>37</sup> Art. 3(3) Declaration on the Right to Development.

<sup>38</sup> *Ibid.* Art. 6(2).

<sup>39</sup> See, for example, Arts. 1, 55, and 56 of the U.N. Charter. See also the UDHR, ICCPR, ICESCR *et cetera*.

<sup>40</sup> GA Res. 3281 (XXIX), UN GAOR, 2nd Comm. 29th session, Agenda Item 48 Arts.7 & 9, UN Doc A/RES/3281 (XXIX) (1975).

transfer of technology to developing countries.<sup>41</sup> In respect of socio-economic rights, there is a collective duty for countries that have ratified ICESCR to promote the fulfilment of socio-economic rights.<sup>42</sup> In its General Comment on the Nature of States Parties' Obligations, the Economic, Social and Cultural Rights Committee of the U.N. stated that the phrase 'to the maximum of its available resources' was intended to include both resources existing within a state and those available from the international community, clearly indicating the obligations of the international community, in particular that of the developed countries, in that regard.<sup>43</sup> In concluding this analysis of the text of the Declaration on the Right to Development, it may be necessary to summarise the principal propositions of the said Declaration thus: (a) The right to development is a human right. (b) The human right to development is a right to a particular process of development in which all human rights and fundamental freedoms can be fully realised. This means that the RTD incorporates all the rights enshrined in the ICCPR and ICESCR and each of the rights has to be exercised with freedom. (c) Exercising these rights consistently with freedom implies free, effective, and full participation of all the individuals concerned in the decision making and the implementation of the process. What this further means is that the process must be transparent and accountable; individuals must have equal opportunity of access to the resources for development and receive fair distribution of development and income. (d) There are existing entities on which the right confers unequivocal obligation. These include individuals in the community, states at the national level, and states at the international level.

## **5.0. Obstacles to and Controversies over the Right to Development.**

### **5.1. Political Considerations.**

One of the major obstacles bedevilling the recognition and implementation of the TRD is the divergence in the political inclinations of the various state parties to the Declaration. This conflict of opinions between the West and the East which was at

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<sup>41</sup> G. S. Vargas, *The New International Economic Order Legal Debate* (1983) 39 42-43, cited in I.D. Bunn 'The Right to Development: Implications for International Economic Law' (1999-2000) 15 *American University International Law Review* p.1431.

<sup>42</sup> Art. 2 ICESCR.

<sup>43</sup> General Comment 3 para. 13.

its peak during the Cold War period led to the creation of the two different covenants on human rights. This divide has been carried over to issues concerning the RTD. The political discourse of the various working groups on the RTD and the Commission on Human Rights is often characterised by predictable posturing of political positions rather than practical dialogue on the implementation of the RTD. From the beginning, the concept of the RTD has been controversial. It emerged from the legitimate preoccupation of newly independent countries with problems of development and the dominance of East-West issues on the agenda of the U.N. Commission on Human Rights, marginalising the concerns of the political South. Third World delegations to the U.N. had made efforts to use that platform to advance the idea of a New International Economic Order. The level of success and the support they received in this regard had emboldened them and they saw the RTD as a vehicle which could take the world to the destination of the new Order. This politicisation of the RTD discussion in the U.N. has been maintained any time the RTD comes up on the agenda. According to Marks,<sup>44</sup> the political positions can be roughly categorised into four groups. One group, comprising delegations from the most active members of the Non-Aligned Movement, fights to use the RTD to reduce inequities of international trade, the negative impacts of globalisation, differential access to technology, the crushing debt burden, and similar factors they see as detrimental to the enjoyment of human rights and development.<sup>45</sup> The second group is one which consists of the more moderate developing countries that want to integrate human rights into their national policies and want to maintain a positive relationship with the donor community, the international development agencies, and financial institutions. Marks states that a third group is made up of countries in transition and developed countries that tend to support the RTD as a vehicle to improve the dialogue between developed and developing countries and would like to see some progress made in the implementation of this right. This group which is sometimes sceptical about this right also sees its role as damage-limitation and would support a resolution that is not particularly

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<sup>44</sup> See Stephen Marks, "The Right to Development: Between Rhetoric and Reality" *Harvard Human Rights Journal* Vol. 17. Available at <http://www.law.harvard.edu/./marks.pdf>, last accessed on 16/5/2010.

<sup>45</sup> *Ibid.* Members of this group include Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam.

objectionable. The fourth group, which is almost always headed by the United States, votes against any resolution in favour of RTD and includes Australia, Japan, Denmark and other smaller countries which are usually influenced by America. It is submitted with respect that, much as Marks's observations may be substantially correct, especially with respect to America, his categorisation may not be entirely watertight as countries flow in and out of the various groups depending on the circumstances at the time.

Apart from the purely political and Cold War reasons for the countries taking their respective positions, the reasons for Western countries supporting civil and political rights but opposing ESC rights as human rights can be summarised as follows:

(a) Human rights are individual rights, (b) they have to be coherent, in the sense that each right-holder must have some corresponding duty-holder whose obligation it would be to deliver the right, and (c) human rights must be justiciable.

It is here noted that all these allegations are also held against the right to development which has been defined by the Independent Expert as a composite right to the process of development and can be likened to a "vector" of human rights composed of various elements that represent the various ESC rights as well as the civil and political rights.<sup>46</sup> The above allegations have been subjects of controversies as to their correctness or otherwise and as to whether or not they hold against the RTD. It is to an analysis of these controversies that this article now turns.

## 5.2. Controversies Regarding the Right to Development.

Those who advocate that human rights are individual or personal rights contend that since this is the case, there cannot be anything like a group or collective right, collectively inhering in a group of humans and to be collectively enjoyed by the said group. According to a major critic of the RTD, the UDHR clearly and unambiguously conceptualises human rights as being inherent to humans and as being universal and held equally by all, not as the product of social cooperation.<sup>47</sup> In that paradigm, human rights are only personal rights, based on negative freedom,<sup>48</sup> imposing only

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<sup>46</sup> Fifth Report of the Independent Expert on the Right to Development, U.N. Doc. E/CN.4/2000/WG.18/6(2000).

<sup>47</sup> See Jack Donnelly, *loc. cit.*, p.479.

<sup>48</sup> Such as the rights to life, liberty, and free speech.

negative obligations on the duty-bearers. The implication is that any right which imposes positive obligations on the duty-bearers<sup>49</sup> does not qualify as a human right. It is also argued that any purported right which does not have a corresponding duty-bearer is not a right. Sengupta does not subscribe to this view, maintaining that, logically, there is no reason to conclude that the right of a group or a collective is fundamentally different in nature from an individual's human rights, so long as it is possible to define the obligation to fulfil them and duty-holders to uphold and secure them. It has also been noted that even personal rights can be protected by individuals and groups. He further contends that the identification of civil and political rights with negative rights and ESC rights with positive rights is too superficial because both would require negative as well as positive actions.<sup>50</sup> It is submitted that the view of Sengupta that, logically, it is hard to regard only civil and political rights as human rights while the ESC rights as well as collective rights are not human rights is unimpeachable.<sup>51</sup> Collective rights, as pointed out earlier on, has been recognised and built upon by several legal and institutional agreements and covenants. The Declaration on the Right to Development is one such legal instrument.

### **5.2.1 Controversy over Justiciability**

Theoretically speaking, positivists believe that formal validity is a fundamental feature of every right.<sup>52</sup> A great deal of the opposition mounted against RTD comes from the allegedly non-justiciable nature of the right. This criticism is further strengthened by the fact that this right appears to be comprehensive in nature and declaratory in its normative content.

From a legalistic perspective, critics of the right to development argue that it was adopted only as a declaration of the General Assembly and does not have a binding nature as is the case with a multilateral treaty.<sup>53</sup> They point out that, in other international human rights instruments, state parties have obligations to protect, respect and fulfil different categories of

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<sup>49</sup> Such as the ESC rights and the RTD.

<sup>50</sup> See A. Sengupta, "Right to Development as a Human Right" *loc. cit.* <http://www.globalgovernancewatch.org/resources...> Last accessed 6/8/2010.

<sup>51</sup> *Ibid.*

<sup>52</sup> S. Marks "Making Space for New Human Rights: The Case of the Right to Development" (1998) 1 *Harvard Human Rights Year Book* p. 33.

<sup>53</sup> L. Irish "The Right to Development Versus a Human Rights-based Approach to Development" (2005) 3 *International Law Journal of Civil Society* p. 6.

rights. Donnelly, one of the most prominent critics of the right to development, characterises the right as a ‘search for the unicorn’ and contends that it is pointless within the framework of international legal argument.<sup>54</sup> He notes that its language confuses rights with moral claims without indicating specific right holders and duty bearers.

It is hereby humbly submitted that the closest the UN General Assembly has come to prescribing the requirements for a norm to be considered a human right is Resolution 41/120 of 1986.<sup>55</sup> The General Assembly noted that new human rights instruments should, among others, ‘be sufficiently precise [as] to give rise to identifiable and practicable rights and obligations [and] to provide, where appropriate, realistic and effective implementation machinery, including reporting systems’.<sup>56</sup> Two separate requirements are laid down under Resolution 41/120. The first requirement is that the articulation of any right needs to have normative precision.<sup>57</sup> It is said that the term ‘identifiable’ requires a degree of specificity as to the content of the right. In the case of the right to development, the Declaration on the Right to Development sets out the nature and content of the right as well as the right holders and duty bearers and hence meets the requirements of Resolution 41/120. This, however, does not mean that the content of a certain human right has to give a complete picture of its meaning and application. Initially all human rights, such as equal protection or due process, emerge as general and imprecise formulations.

The second requirement of Resolution 41/120 is that new instruments should ‘provide, where appropriate, realistic and effective implementation machinery, including reporting systems’.<sup>58</sup> This requirement raises two fundamental questions. The first is whether implementation mechanisms are always required and, secondly, whether a reporting system *per se* is sufficient.

With respect to the first, the inclusion of the phrase ‘where appropriate’ may be intended to imply that new rights could be proclaimed without a simultaneous implementation provision. It may also be that supervision mechanisms in existing

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<sup>54</sup> Donnelly, *loc. cit.*, p. 475.

<sup>55</sup> G.A. Res. 41/120, para. 4 (d), 41 UN GAOR Suppl. (No 53), UN Doc. A/41/53 (1986).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

instruments are adequate. In relation to the second possibility, it has for long been accepted by most prominent international lawyers that an international system for the 'supervision' of states' compliance with international human rights obligations is sufficient to satisfy the requirements of 'enforceability'.<sup>59</sup> The right to development is 'a composite of rights' encompassing civil and political as well as socio-economic rights'.<sup>60</sup> Thus, from a traditional conception of justiciability, it would be difficult to enforce this whole set of rights in a formalised and rigid judicial or quasi-judicial body. Nevertheless, the right to development is a legally-enforceable human right reaffirmed in the Declaration on the Right to Development and numerous other declarations and resolutions of the General Assembly and its subsidiary bodies. The manner in which this right may be implemented is something that is evolving under its Working Group on the Right to Development. It suffices to say that it is a legal right with identifiable duty bearers. One has to recognise that much of the international human rights mechanism is based on supervision and implementation rather than adjudication. The right to development can well fit under such a system. Thus, depending on the nature of the right, the nature of the obligations involved and the factual circumstances, judicial remedies are not the only ways of implementing a right.<sup>61</sup>

Although no concrete enforcement mechanism has yet been established for the right to development under a treaty-based system, there is no reason why it cannot be done in the future. Whenever there is the political will, a binding international human rights treaty may be devised within the framework of the right to development. Moreover, the Working Group, through the Special Task Force, serves as a supervising organ for different development actors, including developed countries, international financial institutions and other inter-governmental organisations complying with the principles of the right to development. The experience of the Working Group and the Special Task Force on

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<sup>59</sup> H. Lauterpacht, *An International Bill of the Rights of Man* (1945), cited in Marks *loc. cit.*, p. 38.

<sup>60</sup> Andreassen and Marks, *loc. cit.*, p. 5.

<sup>61</sup> See Jill Cottrell and YashGhai, "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in YashGhai and Jill Cottrell (eds.) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004) pp. 65-66.

the Right to Development demonstrates that a supervisory mechanism may be devised in the framework of the right.

The experience of the African Charter clearly demonstrates that the right to development could be justiciable under a supra-national human rights system if there is the political commitment of states in that regard. The landmark decisions of the African Commission in the *Endorois*<sup>62</sup> and *DRC* cases<sup>63</sup> show that the judicial application of the right to development is feasible in the current legal discourse. Recently,<sup>64</sup> the Community Court of Justice of ECOWAS confirmed that rights guaranteed under the African Charter are justiciable in that court. It also held that in public interest litigation such as this one, the plaintiff need not show that he has suffered any personal injury or has a special interest to establish *locus standi*. In that case, SERAP, on behalf of Nigerian children alleged that the defendants violated the right to quality education, right to dignity, right of people to their wealth and natural resources and right of people to economic and social development guaranteed under the African Charter. The court, dismissing all preliminary objections brought by the defendants on jurisdiction, justiciability and *locus standi*, held that the right to education can be enforced before the court. That was the first time an international court recognized Nigerian citizens' right to education. Thus, one can say that serious concerns about justifiability cannot be raised in the case of a failure to implement the right to development.

### 5.2.2. Controversy over Feasibility

Another major objection to the idea of a right to development is the claim that development is not likely to be fulfilled for all.<sup>65</sup> This argument has a common origin with the argument against the

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<sup>62</sup> *Endorois case (supra)*.

<sup>63</sup> *DRC case (supra)*.

<sup>64</sup> In *Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria and Universal Basic Education Commission*, Suit No. ECW/CCJ/APP/08/08 available at <http://www.bing.com/search?srch=106cform=4868cq> accessed 13/8/2010. Judgment delivered 27/10/1009. See also Adam Adedimeji, "Judicial Activism and Public Interest Litigation," available at [allafrica.com/stories/200908130402.html](http://allafrica.com/stories/200908130402.html) "Public Interest Litigation: Setting in Africa," <http://www.africanexecutive.com/modules/magazines/articles.php?article=640>, last accessed on 13/8/2010. See further <http://www.reliefweb.int/rwb.msfd/db900SID/MYA1-7Y28UM?OpenDocument> last accessed on 18/9/2010; <http://www.crin.org/RM/ecowas.asp> last accessed on 22/9/2010.

<sup>65</sup> Andreasen & Marks *loc. cit.*, p. 6.

enforcement of ESC rights which claims that the full enjoyment of these rights is impossible and hence, attempts to enforce them will always be an effort in futility and should therefore be abandoned. This conception puts the right to development and most socio-economic rights which are central to it outside the scope of human rights. The proponents of this argument posit that, in the face of the paucity of resources, particularly in the developing countries, it would be impossible to fulfil and guarantee these rights for all.

Several prominent human rights advocates and scholars have debunked this idea, describing it as a lame and untenable argument. It has for example, been stated that feasibility should not be a standard by which the cogency of human rights is measured when the objective itself is to work towards expanding their feasibility and full realisation.<sup>66</sup> It is submitted that the fact that certain rights cannot be realised under current circumstances does not rule out the fact that they can be realised at all. Difficulty in the realisation of a right does not remove the fact that such a right remains a right. This argument holds in favour of the right to development.

According to the learned author, Tadeg,<sup>67</sup> efforts are being made under the UN not only to articulate and elaborate the notion of the right to development, but also regarding its implementation. First, under the Global Consultation on the Right to Development and later on under the Working Group on the Right to Development, the UN has been working towards a meaningful realisation of the right to development through consultations with international financial institutions (IFIs),<sup>68</sup> intergovernmental organisations and other development actors.

As argued earlier on in this article, the series of international agreements, custom and practices on this right have created legal obligations on states and other non-state actors for which they will be held accountable. It can, therefore, be confidently asserted that the right to development satisfies the requisite characteristics of a human right. It has specifically identifiable duty bearers, the obligations of such duty bearers, as well as the corresponding national,<sup>69</sup> regional<sup>70</sup> and international monitoring and enforcement mechanisms. It is also important to

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Loc. cit.*, p. 338.

<sup>68</sup> *Ibid.*

<sup>69</sup> See art 43 of the Ethiopian Constitution which expressly guarantees the right of the people of Ethiopia to development.

<sup>70</sup> Art 22 African Charter.

note that the discourse of international human rights law adopts notions of implementation and supervision rather than those of justiciability and enforceability.<sup>71</sup> This fits with the current trend on implementing the right to development through the Working Group on the Right to Development.

## 6. Suggestions

The following suggestions are hereby put forward to enhance the status of the right to development and ensure its practical implementation:

### (a) A Binding International Treaty to the Rescue.

Although the view is maintained that the right to development is a legal right, it is however conceded that one of the major problems in its implementation, from a global perspective, is the nature of the Declaration on the Right to Development. The normative basis of the right to development still remains in the 1986 Declaration. Unlike a treaty that has the effect of imposing a legally-binding obligation on ratifying states, a declaration merely shows willingness and the statement of intent by a state to give effect to the principles embodied in the declaration. Moreover, the 10-provision Declaration is written less specifically and most of its provisions are framed in a general manner. An international treaty on the right to development would be indispensable, not only in terms of imposing a legally-binding international obligation, but also in terms of coming up with more specific and elaborate legal obligations that have greater normative precision.

It is natural to think that, given the negative attitude of developed countries towards the notion of a right to development, the possibility of adopting a binding international treaty would either be very slim or may not exist at all. Nevertheless, the recent attitude of developed countries shows that they are tacitly accepting the right, at least on theoretical grounds. In the Vienna Declaration, which was important for the universality, interdependence and indivisibility of human rights, many developed countries that were against the idea of the right to development adopted and endorsed the inherent nature of the right to development as a fundamental human right. This changed attitude of developed countries towards a notion of a right to development and the general emerging consensus call for efforts to come up with a binding international human rights instrument. The UN, through the Human Rights Council, should take the

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<sup>71</sup> Marks, *loc. cit.*, p. 35.

initiative in drafting the treaty and taking the whole process of adopting a treaty on the right to development. This in many ways strengthens implementation mechanisms already initiated under the UN through the Working Group on the Right to Development.

One may wonder how a new treaty on the right to development will take shape, given its comprehensive nature and issues of justiciability and feasibility. In this regard, the lessons to be drawn from the recently-adopted Convention on the Rights of Persons with Disabilities are significant. Some commentators state that the recent Convention expresses new developments in human rights thinking which are important in the context of the right to development.<sup>72</sup> The inclusion in the new treaty of the possibility of ratification by intergovernmental organisations and the provision of a monitoring body which would receive collective complaints are significant developments in this regard.

Gouwenberg also states that another option could be to adopt a framework convention on the right to development similar to the UN Framework Convention on Climate Change (UNFCCC).<sup>73</sup> Framework conventions are treaties which show the commitment of states on principles that will be developed in order to bring action-oriented rules into international politics. In brief, the legal status of these conventions is similar to that of a declaration. This is because framework conventions provide generally-phrased obligations which are open-ended and seek further elaboration.<sup>74</sup>

With respect to the right to development, a framework convention may stipulate a commitment to ensure the right, the basic principles underlying the right, right holders and duty bearers, and the general mechanisms of implementation and review of state obligations. The UNFCCC can provide important guidance on the structure of the framework convention on the right to development and the above procedural issues. After laying down such a framework convention, different protocols may then provide specific obligations and detailed matters in relation to different aspects of the right to development. This flexible legal framework would elevate the legal recognition of the right to development, while still giving states time to agree on the specifics of the right and states' obligations. This whole range of

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<sup>72</sup> A. E. Gouwenberg "The Legal Implementation of the Right to Development" unpublished LL.M Thesis, Leiden University (2009) cited in Tadeq, *loc. cit.*, p. 340.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

possibilities demonstrates that the right to development can indeed be brought under the framework of international human rights conventions if the political will exists.

**(b). Strengthening the Working Group and Creating other Implementation Monitoring Agencies.**

According to Sengupta, for many of the positive rights, implementability is often more important than enforceability. He suggests that designing a programme of action that would facilitate the realisation of the right might be a better way of going about it than legislating on those rights. He opines that democratic institutions of local bodies, or non-governmental organisations, or public litigation agencies may prove to be quite effective in dealing with the rights-based issues which are not amenable to exactly-formulated legislative principles. He therefore believes that monitoring agencies or consultative for a may be prove very effective ways of ensuring the implementation of the right to development. Much as the foregoing views are acceptable given the present nature of the legal framework on this right, it is submitted that if there comes into existence any legally binding international treaty on the RTD, nothing stops an aggrieved state, group or individual from seeking the appropriate remedies in the appropriate institutions, including the court or other arbitral bodies.

The UN Charter-based system, such as the General Assembly and ECOSOC, as well as its resolution-based organs that are created by the different organs of the UN, such as working groups, are important mechanisms of ensuring human rights accountability mechanisms. The Working Group on the Right to Development is among the first international monitoring bodies that made clear and direct attempts to make formal consultation and institutionalised ties with intergovernmental organisations, IFIs and the wider donor community.

Through the Working Group, supported by the High-Level Task Force on the Right to Development, a series of discussions are being conducted between IFIs in order to ensure the right to development in their institutional framework. The emphasis in recognising the role of these institutions in ensuring the right to development and human rights in general shows their crucial roles and elaborates some of their legal positions in this regard.

The High-Level Task Force on the Right to Development, under the Working Group on the Right to Development, has now become an important body that applies human rights standards to

international organisations. It evaluates the human rights impact of IFIs and other important development actors from the perspective of the right to development. Recently, reflecting on the possibility of evaluating a World Bank plan for Africa, the Task Force stated:<sup>75</sup>

Given the preponderant role of the World Bank in the development of Africa and the influence of its thinking and operations on the donor community at large, its partnership should be critically scrutinised. Accordingly, the Bank should therefore be invited by the Working Group to allow the African Action Plan and its partnerships with governments of sub-Saharan Africa to be evaluated against the criteria of the right to development.

In brief, the Working Group on the Right to Development provides a tremendous opportunity to integrate the notion of the right to development in a comprehensive and multi-disciplinary manner. It serves as a forum whereby states, IFIs, donor communities, NGOs, intergovernmental organisations and other stakeholders can deliberate on mechanisms of implementing the right to development in a wider context.

## **7. Conclusions**

This article has tried to argue that the right to development is a legal right and qualifies as an enforceable human right. From the findings made by the article, it can be seen that the right to development prompts an examination of human rights issues in a comprehensive and much wider context than has traditionally been the case; encouraging an interdisciplinary analysis of human rights problems and showing the inadequacy of the existing human rights framework to address structural problems.<sup>76</sup> The right to development provides a unique opportunity to promote an international economic order that is based on equity, social justice, and one that integrates human rights in different dimensions. It has been argued in this article that the right to development, though conceived under a declaration, has evolved into a legal right through a series of declarations and resolutions. The fact that it is a composite right that incorporates all other rights also makes its normative foundation implicit in the different international human rights instruments.

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<sup>75</sup> Report of the High-Level Task Force on the Implementation of the Right to Development, 3rd session (2007) UN Doc A/HRC/4/WG 2/TF/2, para. 87.

<sup>76</sup> Marks (above n 61) 7.

By emphasising the indivisibility and interdependence of human rights, the right to development shows that any development process must acknowledge that the promotion and protection of human rights are part of that process. Importantly, development is defined as a human right that has the objective of fulfilling the continuing improvement of the well-being of individuals by expanding their capabilities and their freedom. The adoption of a legally-binding treaty on the right to development with more normative precision of its contents and clear obligations on duty bearers is indispensable for a meaningful realisation of the right. Thus, a binding treaty with a competent supervisory body that is able to monitor the implementation of the right to development is crucial for its effective realisation. In this regard, if there is a political commitment, the experience of the African Charter has shown that the right to development can be a legally-enforceable right through a treaty body. The adoption of framework conventions and the advent of new types of international human rights conventions, such as that of the Convention on the Rights of Persons with Disabilities that brought new developments in human rights thinking and implementation mechanisms, are important lessons relevant for the right to development. With the above suggested measures put in place, the right to development is surely weathering the storm of recognition and implementation, and surely holds great prospects for the development of mankind.