

A stylized world map composed of a grid of dots in various shades of gray, with several dots highlighted in red. The title is overlaid on this map.

Towards a Framework Convention on the Right to Development

KOEN DE FEYTER
April 2013

- On 4 December 1986, the United Nations General Assembly adopted the Declaration on the Right to Development. According to the Declaration, the right to development entitles every human person and all peoples to participate in, contribute to, and enjoy development, in which all human rights can be fully realized.
- Yet, interpretation of this resolution differs from one political group to another. The Global South emphasizes issues such as inequalities in the international financial system, greater participation of developing countries in global decision-making on economic policy, and promoting a fairer trade regime. The North insists on suitable domestic conditions in developing countries such as good governance, democracy and responsible economic management. And while the Non-Aligned Movement calls for an international legal standard of a binding nature, the European Union is opposed to such an upgrade of the Declaration.
- Drafting a Framework Convention on the Right to Development seems to be the best option for accommodating the concerns of the different political groups, as it allows for a step-by-step approach. A framework convention is a treaty under international law: such a treaty is open to States, and once it has entered into force, it is binding on States that have expressed consent.
- The potential added value of a Framework Convention on the Right to Development is to complement the current human rights regime with a treaty that goes beyond individual State responsibility and takes inspiration from principles derived from international development efforts, such as mutual accountability, alignment of policies among partner countries, and inclusive partnerships.



Table of Contents

1. Introduction: The Political Debate	2
2. The Declaration versus Convention Controversy	3
3. The Framework Convention/Protocol Approach in International Law	5
4. The Proposal: A Framework Convention on the Right to Development	7
4.1 Objective	8
4.2 Principles	11
4.3 General Obligations	13
4.4 Institutions	14
5. Protocols and Multi-Stakeholder Side Agreements	15
5.1 Protocols	15
5.2 Multi-Stakeholder Side Agreements	16
6. Conclusion and Recommendation	16
Bibliography	18

1. Introduction: The Political Debate

On 4 December 1986, the United Nations General Assembly adopted the Declaration on the Right to Development by a majority of 146 to 1 (United States) with 8 abstentions. According to the Declaration, the right to development entitles every human person and all peoples to participate in, contribute to, and enjoy development, in which all human rights can be fully realized.

After the adoption of the Declaration, various institutions on the right to development were set up by the UN Commission on Human Rights and its successor body, the Human Rights Council. In 1988 an open-ended inter-governmental working group mandated with monitoring and reviewing the implementation of the right to development was established. The working group, which continues until today, was assisted in its task first by an Independent Expert (1988–2004) and later by a High-Level Task Force (HLTF, 2004–2010), also composed of individual experts.

The HLTF defined what it called the 'core norm' of the right to development as 'the right of peoples and individuals to the constant improvement of their well-being and to a national and global environment conducive to just, equitable, participatory and human-centered development respectful of all human rights' (A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010, 8). It further identified three attributes of this core norm:

1. comprehensive and human-centered development policy,
2. participatory human rights processes,
3. social justice in development.

For each of the attributes, the HLTF drew up a table of criteria, sub-criteria and indicators.

The right to development is recognized regionally in the Charter of the Organization of American States, and more concretely in the African Charter on Human and Peoples' Rights¹. At the UN level, it appeared in a number of im-

portant soft law instruments, such as the World Conference on Human Rights' Vienna Declaration (1993), the Millennium Declaration (2000) and the Rio+20 Outcome Document (2012).² In 2007, the Human Rights Council created an opening for treaty making, by adopting without a vote resolution 4/4, deciding to take 'appropriate steps for ensuring respect for and practical application of these standards, which could take various forms, including guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement'.

Yet, interpretation of this resolution differs from one political group to another. The Non-Aligned Movement (NAM) reiterated that the right to development should be translated into an 'international legal framework on par with other human rights' – thus cast into a new human rights treaty. The European Union (EU) opposed an international legal standard of a binding nature. Instead, the EU favored implementation of the right to development through the elaboration of benchmarks and indicators for States to empower individuals as active agents in the development process. The EU argued that international human rights law only recognized clearly that States have obligations with regard to persons falling under their national jurisdiction.

At subsequent sessions of the Working Group little progress was made. Margot Salomon's description of the state of play (Salomon 2007: 99) remains accurate today: the Global South directs the debate towards issues such as inequalities in the international financial system, greater participation of developing countries in global decision-making on economic policy, and promoting a fairer trade regime. The North insists on suitable domestic conditions in developing countries such as good governance, democracy and responsible economic management. Bonny

laration on the Right to Development, by placing neither the individual nor the population as a whole, but the survival of an (African) indigenous group at the center of development (Gilbert 2011: 68); it also deals with a dimension of the right to development that is not at the forefront of concerns at the Geneva based intergovernmental debates. The African Commission recognizes the need to protect marginalized and vulnerable groups in Africa suffering from particular problems. Groups within this category qualify as peoples in the context of the African Charter, and enjoy collective rights, including the right to development.

2. These documents were adopted by consensus, not by a split vote, but provide insufficient evidence of a genuine legal conviction (*opinio juris*) supporting the right to development, and implied no commitment on behalf of developed States to move towards treaty-making on the right to development.

1. Parallel, but unrelated to the UN process, the African Commission on Human and Peoples' Rights in 2009 established a violation of the right to development of a sub-national group. The *Endorois* decision focuses on a domestic set of events in Kenya. The decision goes beyond the Dec-

Ibhawoh chastises both North and South: the debate on the right to development demonstrates how the legitimizing language of human rights has been used to press goals that have more to do with the international politics of power and resistance, and with the interests of regimes, than with welfare and empowerment of ordinary citizens (Ibhawoh 2011:104).

This paper suggests that one way to overcome the political controversy over the legal status of the right to development is to draw up a framework convention on the Right to Development.

2. The Declaration versus Convention Controversy

There are two parts to the controversy surrounding the adoption of a binding legal standard on the right to development. First, there is the controversy about the right to development itself. There are various other ways of integrating human rights and development that may lead to more immediate results in terms of protection of rights holders and enforcement of State obligations. Secondly, proponents of the right to development are divided on whether a treaty is the most appropriate way of giving effect to the Declaration. This paper argues that a framework/protocol approach may break the deadlock in intergovernmental negotiations and add a necessary layer of protection to the current human rights regime in a context of economic globalization.

Martin Scheinin argues that it may well be a viable option to strive for the realization of the right to development also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question (Scheinin in Andreassen, Marks (Eds.) 2006:274). When human rights are applied to an aspect of development policy, they *can* be read in a development-informed way and with full acknowledgement of the interdependence of human rights. As a result, the domestic dimension of the right to development may be largely covered.

While a development-oriented interpretation of existing human rights treaties is useful and commendable, it also has limits. It is difficult to see how interpretation can achieve all aspects of the right to development, and

in particular the peoples' right dimension and the mutual dimension of the duty of cooperation (see *infra*). Whether interpretation suffices to construct unilateral duties of cooperation (extraterritorial obligations) depends on the willingness of treaty monitoring bodies and – more importantly in terms of protection – on courts of law, to discover and enforce such extraterritorial obligations in the treaties. The treaty monitoring bodies are ill-equipped to assess collective State action (e.g. the human rights impact of intergovernmental agreements) and acts of intergovernmental organizations or of non-State actors. Treaty monitoring bodies can only deal with joint action by States and with acts by non-State actors indirectly, i.e. by framing these as issues of individual State responsibility. Since human rights treaty law is based on single State responsibility, collective acts or acts by non-State actors only come under the purview of the monitoring body if responsibility for these acts can be attributed to a specific State.

Even if one accepts the potential added value of the right to development, the question remains whether a treaty is necessary. A possible alternative to a treaty consists in the adoption of a set of guidelines on the implementation of the Declaration. Nico Schrijver, a former member of the High-Level Task Force, points out that the 1986 Declaration enjoys considerable support at the UN regardless of its formally non-binding legal status. Declarations are sometimes more effective in generating consensus and subsequently compliance (Schrijver in Marks (Ed.) 2008: 127–129). He argues that implementation of the right to development may be assisted more by guidelines – which, given the flexibility of soft law could also address intergovernmental organizations and private actors directly – than by embarking on a treaty-making process.

Nevertheless, there are drawbacks to the Declaration/Guidelines approach. As the Guidelines are meant to focus on implementation of the Declaration, there is a risk that necessary normative development will be unduly constrained by the need to revert to the original text of the Declaration.

The main difficulty, however, is that the addition of guidelines in no way alters the soft law character of the right to development. In no case will the legal status of the guidelines be higher than that of the Declaration. One of the main challenges facing the realization of the right to development is that multilateral, regional and bilateral

treaties in the area of international economic law (and other fields of international law) contain provisions that impair, or are interpreted by governments in such way as to impair the ability of States to comply with human rights obligations and human development objectives. The right to development can provide a counterweight, but only if the right itself is legally binding in international law. If that is the case, and a conflict with another treaty in international law arises, the right to development is a 'relevant rule of international law applicable in the relations between the parties' for the purposes of the Vienna Convention on the Law of Treaties, and can thus be used to interpret the potentially conflicting treaty in such a way that no harm is caused to the enjoyment of the right to development. Boyle and Chinkin, commenting on the Framework Convention on Tobacco Control, explain that the decision to negotiate a treaty on tobacco control rather than mere soft law was 'because it ensured that whatever was agreed would, once in force for most States, override any inconsistent commitments of a more general kind undertaken by States' (Boyle, Chinkin 2007: 129). As long as the right to development remains of a purely soft law nature, the conflicting treaty will prevail.

Similarly, treaty law impacts on domestic law in ways that soft law cannot. Treaties potentially restrain domestic law-making; soft law does not. Treaties may override contradictory domestic laws; soft law may at best be taken into account at the discretion of the domestic judge in interpreting domestic law. Claims based on the right to development, as any other human rights claim, will emerge locally, and will have to be addressed at least in part within the framework of the domestic legal system. If the domestic legal rules on the incorporation of international law into domestic law so permit, treaties may have an impact on local claims, while the impact of guidelines adopted by an international organization is bound to be very limited.

A final cluster of arguments in favor of the treaty option is political rather than legal in nature. At the United Nations General Assembly and at the Human Rights Council, the division of opinion between the Non-Aligned Movement and the European Union not only affects the debate on the right to development. It also extends to many other thematic and country-specific issues. The European Council on Foreign Relations has concluded for years in its annual reports on the EU and human rights at the UN that there is a gradual erosion of support for the EU's

positions in votes on human rights issues. The EU needs to forge coalitions at the Human Rights Council with non-Western States on issues prioritized in the EU's external human rights action. As Theodor Rathgeber has argued, in order to move beyond the bloc voting practice that is detrimental to the EU external human rights action, the EU needs to revise its policies in addressing some of the main concerns of countries from the Global South at the Human Rights Council (Rathgeber 2009:156). Global human rights law cannot be truly global if it does not engage with valid human rights concerns originating in the Global South. An EU position on the right to development that makes it possible to enhance the legal status of the right to development will create a new momentum in North-South human rights discussions at the UN.

The potential added value of a right to development treaty is to complement the current human rights regime with a treaty that goes beyond individual State responsibility and builds on principles derived from international development efforts, including the Paris Declaration on Aid Effectiveness that provides for mutual accountability (*donors and partners are accountable for development results*), alignment of policies among partner countries (donor countries align behind policy objectives set by developing countries), and inclusive partnerships (full participation of State and non-State actors). The focus on individual State responsibility in current human rights treaty law prevents the integration of human rights into the international development effort. It also hampers international human rights law in delivering on its promise of protection to those adversely affected by globalization.

In theory (i.e. conceptually, and leaving aside considerations of political feasibility for a moment), any treaty on the right to development should deal with four sets of relationships:

- Firstly, the relationship between the State and the rights holders within its jurisdiction. This relationship corresponds to the domestic dimension of the right to development, i.e. the State's obligation to ensure participation in decision-making and benefit-sharing in development at the domestic level. The relationship between the State and the rights holders within its jurisdiction is the familiar relationship dealt with in existing core human rights treaties. In fact, the State's obligation to ensure the human rights of *individuals* within its jurisdiction in the context of its domestic development policy in a non-discriminatory

manner is already part of current human rights law. The recognition of obligations owed to peoples within the State's jurisdiction would be a more novel aspect;

- Secondly, the relationship between a State and rights holders outside its jurisdiction (living in another State). Relevant issues include the impact of official development assistance (ODA) or of trade and investment policies on rights holders in the recipient country, or the need for the home State of a company to ensure that the actions of these companies respect human rights in the host country. Here, the unilateral dimension of the duty to cooperate is at stake: each State has a unilateral duty to observe the rights of rights holders outside of its jurisdiction. The added value of this dimension of the treaty depends largely on the view one takes on whether extraterritorial obligations are already part of existing human rights law. It should be noted that obligations to respect human rights in other countries do not only apply between developed and developing countries, but also between States of a comparable level of economic and human development;

- Thirdly, joint, mutually agreed action by States – through inter-State agreements or within international organizations – for the realization of the right to development. Partnerships by States for the realization of shared objectives respond to the mutual dimension of the duty of cooperation, and belong to the realm of classic (i.e. non-human rights) public international law. From a human rights perspective, the adoption of a classic inter-State reciprocal treaty containing mutually agreed obligations for the joint realization of human rights would be a novelty. In this area, inter-governmental dispute resolution and/or compliance mechanisms could be used. However, as the purpose of the inter-State agreement is the realization of the right to development, a mechanism ensuring accountability of the partnership to rights holders needs to be provided for;

- Finally, the creation of direct obligations of non-State actors vis-à-vis the holders of the right to development. This dimension takes the right to development back to its scholarly origins, when Keba M'Baye and Karel Vasak emphasized the need for the involvement of a variety of actors in the realization of the right to development. In Vasak's view (Vasak 1972), the right to development was held not only by individuals and States, but also by sub-national groups such as local collectivities and national,

ethnic and linguistic communities. The duty bearers included not only territorially responsible States but the international community as a whole. The desired effect was to humanise the international economic order. Only if all actors on the social scene participated both as holders and duty bearers would this objective be achieved.

3. The Framework Convention/Protocol Approach in International Law

Framework Conventions (as listed in the bibliography) are legally fully binding treaties, to which the general rules of international treaty law apply. They usually include: substantive commitments expressed as objectives, principles and/or general obligations; institutional provisions; implementation mechanisms; rules on the involvement of non-State actors; financial measures, and provisions enabling the adoption of protocols and annexes.

The provisions on the objective and principles of the treaty flow from the considerations spelled out in the preamble. The overall aim of the convention is set out, e.g. 'to protect man and his environment against air pollution' or 'to protect present and future generations from the devastating health, social and environmental consequences of tobacco consumption and exposure to tobacco smoke'. Secondly, the provisions denote the subject matter of the treaty as one that is of concern to the international community and requires international cooperation. In exercising jurisdiction, the sovereign State acts as the custodian (Scholtz 2008) of the common interest of the international community. Other States hold a legitimate expectation that the relevant state will offer protection in the interest of mankind, but they also have a joint responsibility to offer support to the relevant State to fulfill its obligations. In Scholtz' view, custodial sovereignty implies differential treatment of developing countries.

A final purpose of the provisions on the objective and principles is to set standards that give direction to subsequent normative development. None of these provisions impose immediate obligations on the State parties; rather they set criteria against which measures undertaken can be assessed.

The provisions on objectives and/or principles are complemented by provisions containing general State obligations. The number and nature of these general obligations varies in the different framework conventions. Examples of such obligations include:

- The obligation to collect information at the domestic level on the issue addressed in the convention;
- The raising of awareness at the level of the society on the issue addressed by the convention;
- The obligation to adopt domestic policy or legislation, taking into account the Convention's principles;
- The obligation to exchange information at the international level;
- The obligation to co-operate with other States to address the global dimension of the problem, including efforts to ensure access to and transfer of technology.

Framework conventions create at least two institutions: a plenary body of all State parties and a secretariat. Subsidiary bodies on scientific issues, on implementation, or on law-making may be provided for in the treaty as well, or may be established at a later stage by the plenary body (e.g. as open-ended working groups). The institutions are essential in the context of a framework convention approach, because they ›help ensure that the treaty is not static, but a robust and on-going process of law-making, normative discussion and agility‹ (Drumbl in Fitzmaurice, Ong, Merkouris (Eds.) 2010:10). This is crucial, as the general obligations included in the framework conventions may be vague and programmatic.

Plenary bodies, usually the ›conference of the parties‹, meet either annually or at two or three year intervals. They review the implementation of the framework convention (by considering information submitted by State parties) and take decisions to promote effective implementation (which may include the drafting of guidelines and recommendations for the implementation of different provisions). State parties are required to report periodically on their implementation of the convention; the conference of the parties then ›considers‹ the information provided. The level of detail of the information that is required from the State parties varies from conven-

tion to convention. Apart from reviewing implementation, plenary bodies may also have a role in promoting implementation.

The framework conventions contain only modest instruments for reviewing State compliance. Intergovernmental dispute resolution mechanisms are routinely included, but they are rarely used. The trend is to establish monitoring mechanisms only at the second stage of a framework convention/protocol approach – arguably because at that stage the obligations become more specific, and confidence between the parties has grown.

The framework conventions deal, sometimes explicitly, with issues that are of common concern ›to humankind‹. The reference to ›humankind‹ suggests that the subjects dealt with are not of concern to States only, but to the international community as a whole. All framework conventions therefore provide for a degree of involvement of non-State actors. Non-State actors include intergovernmental organizations, non-governmental organizations, the scientific community and the business community.

Another category of non-State actors involved in the preparation and implementation of framework conventions is the relevant scientific community. Peter Haas has written extensively about the role of ›epistemic communities‹ in international policy-making, which he defines as ›a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area‹ (Haas 1992:3). These professionals may be employed in intergovernmental organizations, work in state administrations, or at research institutes: as a community of knowledge they provide information that informs decision-making.

Apart from the Convention on long-range transboundary pollution, all global framework conventions explicitly envisage the adoption of protocols. Nele Matz-Lück has suggested that it would be effective to include the most relevant issues for further protocols already in the text of the framework agreement (Matz-Lück 2009: 452), but that is not the general practice. The WHO Framework Convention on Tobacco Control includes a specific procedure for the adoption of protocols: when efforts to reach consensus fail, protocols are a last resort adopted by a three-quarters majority vote of the Parties present

and voting. More flexible law-making mechanisms could enable adoption of protocols by majority-voting or even entry into force of the protocols for all parties without their express consent (Matz-Lück 2009: 457). In practice, the Protocol to the Tobacco Convention was adopted by consensus on 12 November 2012.

The protocols supplementing the various framework conventions strengthen the substantive and procedural provisions in the original conventions. Usually the protocols include new substantive commitments that elaborate on provisions in the relevant framework convention as well as creating mechanisms that monitor compliance with these obligations. When more specific substantive State obligations are included, the issue of differential treatment and financial assistance to developing countries comes to the fore. Protocols may further be used to ease decision-making procedures or to strengthen the role of non-State actors.

As States accept more specific obligations in Protocols, the need to monitor implementation increases, as does the need for remedial action when lack of implementation is established. Several protocols create compliance mechanisms that are not adversarial in nature, and therefore perhaps more user friendly and effective in contributing to implementation. Compliance mechanisms have been described as institutions that aim to avoid complexity; are non-confrontational; are transparent; leave the competence for the taking of decisions to be determined by the Contracting Parties; leave the Contracting Parties to each convention to consider what technical and financial assistance may be required within the context of the specific agreement; include a transparent and revealing reporting system and procedures, as agreed to by the Parties (see Luzern Declaration).

Compliance with the Kyoto Protocol to the UN Framework Convention on Climate Change is monitored by a compliance committee of twenty members serving in their individual capacity. The Committee has two branches: the facilitative branch and the enforcement branch. The Committee makes every effort to decide by consensus, but failing a consensus, it decides by a majority of at least three fourths of the members present and voting. In addition, decisions by the enforcement branch require a majority of members from Parties included in Annex I present and voting, as well as a majority of members from Parties not included in Annex I present and voting.

The Committee receives, through the secretariat, questions of implementation indicated in reports of expert review teams under Article 8 of the Protocol, together with any written comments by the Party which is subject to the report. In addition, the Committee also receives, through the secretariat, other final reports of expert review teams. Questions of implementation may also be submitted by any Party with respect to itself; or by any party with respect to another party, supported by corroborating information.

The facilitative branch is responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol. The enforcement branch is responsible for determining whether a Party included in Annex I is not in compliance. Procedures are spelled out in the Decision. As to the ›consequences‹: the facilitative branch applies ›soft‹ consequences such as the provision of advice, the facilitation of (financial) assistance including technology transfer and the formulation of recommendations. The enforcement branch can suspend the eligibility for mechanisms such as the clean development mechanisms, upon a finding that eligibility conditions are not met. When a Party fails to fulfill its reporting obligations, the branch can issue a declaration of non-compliance and require a plan proposing remedies. When an Annex 1 Party is found to exceed its authorized level of emissions, the enforcement branch may apply inter alia a deduction from the Party's assigned amount for the second commitment period. The compliance committee has decision-making power, but an appeal may be lodged against the decision of the enforcement branch to the conference of the parties.

4. The Proposal: A Framework Convention on the Right to Development

The Framework Convention/Protocol Approach consists of the phased establishment of a legal regime. Nele Matz-Lück explains that: ›(...) one might say that the specific characteristic of a ›typical‹ framework convention is the formulation of the objectives of the regime, the establishment of broad commitments for its parties and a general system of governance, while leaving more detailed rules and the setting of specific targets either to parallel or subsequent agreements between the parties‹ (Matz-Lück 2009:446).

The framework convention/protocol approach is an appropriate regulatory technique for the right to development. The large majority of States currently agree that there is a need to further clarify the global and domestic dimensions of the right to development, but they are as yet unable to reach consensus on the details of further regulation. A framework convention typically contains principles rather than significant commitments; but it also creates a venue for negotiations, and a focal point for public opinion, allowing time for consensus to build among all relevant stakeholders. When consensus is achieved, specific commitments are agreed in protocols. Protocols are open only to State parties to the mother convention (of which, ideally, there are many), but States determine freely whether or not they ratify a protocol. The approach thus offers a great deal of flexibility.

Other characteristics of the framework convention/protocol approach also suit the right to development. There is a need for a holistic rather than a piecemeal approach to the issue. Agreements on specific issues singled out for cooperation (e.g. in a protocol) need to fit within a holistic framework (the framework convention) that defines the integration of development and human rights concerns. A degree of scientific uncertainty remains about the impact of economic globalization on the domestic capacity of States to realize human rights, and on how concepts such as the ›maximum available resources‹ or ›States in a position to assist‹ can reasonably be defined from a political economy perspective. Scientific expertise can help in building the cognitive consensus that is necessary for the adoption of specific commitments. Finally, the framework convention/protocol approach is geared towards defining State obligations. Arguably there is a greater need for a prospective right to development treaty to clarify State obligations (including mutual State obligations) than there is to create new rights (Siatitsa 2010:771).

No doubt the drafting process of a framework treaty on the right to development will be subject to intense political negotiation. The purpose of the following section is to identify elements that may be helpful to those entrusted with deciding on the usefulness and drafting of such a treaty.

4.1 Objective

The objective of the Framework Convention is to make the right to development, as laid down in the Declaration of the Right to Development, a reality for everyone.

The Framework Convention would reaffirm the Declaration on the Right to Development. It would not redefine the right to development as formulated in the Declaration, but create a platform for subsequent legal development (mainly through protocols and multi-stakeholder agreements). Nevertheless, the Framework Convention could provide an opportunity to clarify the contemporary understanding of some of the provisions of the Declaration such as the definition of peoples (Article 1(1)), the dimensions of development, (Article 1(1)), the reference to the new international economic order (Article 3(3)), the succinct reference to an active role for women in the national development process (Article 8(1)).

■ The definition of ›peoples‹:

In the UN Declaration, both individuals and peoples hold the right to development. Clearly the individual dimension should remain, and poses little conceptual difficulty.

The definition of peoples in the UN Declaration, however, should be interpreted in the light of the evolution of international and regional law subsequent to the adoption of the Declaration. It is suggested that inspiration should be taken from developments in the area of indigenous rights; from the case-law of the African Commission on Human and Peoples' Rights on the concept of ›people‹; and from international environmental treaties dealing both with indigenous and local communities.

The notion of peoples in the UN Declaration should be interpreted today as including indigenous peoples, taking into account the *Endorois* decision, rulings on indigenous rights by the Inter-American Commission and Court of Human Rights, and international legal documents attributing the right to development to indigenous peoples. In addition, there are strong arguments for encompassing local communities in the definition of peoples in the context of the UN Declaration. There are a number of global legal instruments in international environmental law that treat indigenous peoples and local communities equally

ELEMENTS OF A FRAMEWORK CONVENTION ON THE RIGHT TO DEVELOPMENT

OBJECTIVE

The realization of the right to development

Reaffirmation of the UN Declaration on the Right to Development

Clarification of the contemporary understanding of certain provisions of the Declaration. These include Article 1(1): the definition of peoples; the inclusion of the environmental dimension of the right to development; Article 3(3), updating the reference to the New International Economic Order; Article 8(1): elaboration of the gender/women's rights dimension of the right to development

PRINCIPLES

Setting the stage for normative developments at global, regional and domestic levels

- (1) The right to development as a common concern of humanity;
- (2) The principle of custodial sovereignty;
- (3) The principle of mutuality of obligations;
- (4) The principle of accountability to right holders;
- (5) The principle of equality and non-discrimination, requiring special attention to vulnerable groups;
- (6) The principle of public participation;
- (7) The principle of policy coherence.

GENERAL OBLIGATIONS

- (1) To collect information (e.g. on poverty levels);
- (2) To translate the principles into domestic policy and legislative measures;
- (3) To raise awareness and ensure transparency on development decisions;
- (4) To exchange information at the international level;
- (5) To cooperate internationally.

INSTITUTIONS

- (1) Conference of the Parties
 - Legislative role: provisions enabling the adoption of protocols on both substantive and procedural issues; multi-stakeholders side agreements;
 - Acts as a global forum on the right to development, including institutionalized links with IGOs and Non-State Actors [In lieu of the Working Group on Right to Development];
- (2) Secretariat [entrusted to the Office of the High Commissioner of Human Rights];
- (3) Advisory body to the COP representing the epistemic community [Successor to the High Level Task Force];
- (4) Enabling clause on Compliance Committee consisting of individual experts with a facilitative branch (domestic responsibility, individual and collective dimension of duty to cooperate) and an enforcement branch including recourse for individuals and peoples [The Treaty Body].

with respect to their rights in development issues.³ The reasoning in *Endorois* – that the right to development protects groups that are not accommodated by dominating development paradigms and are victimized by mainstream development policies – can be used to support the inclusion of local communities. Local communities could be understood as sub-state groups that share ›particular values‹: they come together by a concept of common good and are structured in some way, in the sense that they are isolated from other communities that share similar values (Newman 2011: 44). Circumstances of vulnerability or marginalization establish a priority: the likelihood of violations of the right to development of peoples in vulnerable situations is higher.

In a contemporary interpretation, not merely ›the entire population‹ but all peoples as thus defined should enjoy the right provided for in Article 2(3) to active, free and meaningful participation in development and to the fair distribution of the benefits resulting therefrom. It may well be that under other sources of international law indigenous peoples (but not local communities) enjoy the broader right to free, prior and informed consent.

The Rio+20 Outcome Document recognizes the need to involve a wide variety of social groups in the development process (in par.43). These social groups are arguably not ›peoples‹ for the purposes of the right to development, but it may be useful to acknowledge that ›meaningful participation‹ requires their involvement.

Finally, the inclusion of indigenous peoples and local communities in the definition of peoples in the Declaration on the Right to Development may require spelling out the matching responsibilities of local authorities, including lo-

cal governments and their administration, lawmakers (on the assumption that a degree of regulatory power was devolved), judges and human rights institutions.

■ **Acknowledging the environmental dimension of the right to development:**

Perhaps the Declaration's greatest achievement has been to ensure the integration of human rights into the international development effort. Later milestones in constructing a holistic approach to development included the publication of the UNDP Human Development Reports (starts 1990) that strengthened the social justice component of development, and the Rio Declaration on Environment and Development perceiving of environmental protection as an integral part of the development process. The Rio Declaration also adds an intergenerational aspect to the right to development: ›The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations‹ (Principle 3). The resolution also recommends that States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies‹ (Principle 8).

The clarification that the notion of ›development‹ includes an environmental dimension has an impact similar to Article 6(3) of the Declaration on the Right to Development, namely to ensure that States take steps to eliminate obstacles to development resulting from the failure to respect environmental commitments.

■ **Updating the reference to the New International Economic Order:**

Article 3(3) of the Declaration on the Right to Development provides that in co-operating for development, ›States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order (...).‹ The reference to the new international economic order serves as a reminder of the historical context in which the UN Commission on Human Rights started its work on the right to development. This is not to say, however, that the concerns of developing countries about global obstacles to the realization of the right to development beyond the responsibility of domestic States have in any way diminished. In recent discussions on the right to development, the Non-Aligned Movement argued that such obstacles lie in the malfunction-

3. Principle 22 of the Rio Declaration on Environment and Development (14 June 1992) provides that indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. The Convention on Biological Diversity, Article 8 (j) provides that: ›Each Contracting Party shall, as far as possible and as appropriate: (...) subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge (...). The UN-REDD program (the UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries). The UN REDD-program systematically refers to ›indigenous peoples and other forest-dependent peoples. The program seeks to help ensure the protection of the rights of indigenous and forest-dwelling people and the active involvement of local communities and relevant institutions in the design and implementation of REDD plans.

ing of the international economic, financial and political systems, including the lack of democracy in global decision-making. The High-Level Task Force referred to the ›unjust structures of the global economy that must be addressed through genuine development agendas, that is, negotiated and agreed modifications in terms of trade, investment and aid‹ (see A/HRC/15/WG.2/TF/2/Add.1, 25 March 2010, par. 82).

Recent attempts at the Human Rights Council to address aspects of the global enabling environment conducive to the right to development include the Guiding Principles on Foreign Debt and Human Rights (A/HRC/20/23, 10 April 2011) and the Guiding Principles on Human Rights Impact Assessments of Trade and Investment (A/HRC/19/59/Add.5, 19 December 2011). In the 2010 Least Developed Countries Report, UNCTAD proposed a new international development architecture for the least developed countries, i.e. ›a new set of formal and informal institutions, rules and norms, including incentives, standards and processes, which would shape international economic relations in a way that is conducive to sustained and inclusive development‹ in least developed countries. Human rights, however, are largely absent from the report. Another relevant UNCTAD initiative is the Investment Policy Framework for Sustainable Development, launched in 2012, supporting ›new-generation investment policies that focus on inclusive growth and sustainable development‹. The policy framework promotes a balanced approach between investment liberalization and promotion and ›the need to protect people and the environment‹.

It should be possible to agree on language building on the reference to the new international economic order that reflects contemporary concerns with regard to the trade, aid, investment and financial system, stressing the need to create international conditions favorable to the realization of the right to development, while insisting also on the maintenance of sufficient national regulatory space to allow the domestic realization of the right to development.

■ Gender Equality and Empowerment of Women:

Article 8(1) of the Declaration on the right to development calls for effective measures to ensure that women have an active role in the development process. Subsequent international instruments use the more specific

formula of promoting gender equality and empowerment of women. As the socially-constructed roles between men and women tend to be unequal, empowerment of women through women's rights is essential to achieve equality.

Article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa contains a women's right to sustainable development that may serve as a source of inspiration. The provision requires States to introduce the gender perspective in national development planning procedures; ensure participation of women at all levels and stages of development policies and programs; promote women's access to and control over productive resources such as land and guarantee their right to property; promote women's access to credit, training, skills development and extension services; take into account indicators of human development specifically relating to women in the elaboration of development policies and programs; and ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programs are reduced to the minimum for women.

4.2 Principles

The main purpose of the inclusion of a list of principles in the framework convention is to give direction to future law-making on the right to development at global, regional and domestic levels. The principles should be fully reflected in agreements additional to the framework convention, such as protocols and multi-stakeholder agreements. They also serve a wider purpose, in that they can be used to scrutinize the extent to which economic and other agreements impacting on development reflect a right to development approach.

Ideally, each of the principles is gradually realized to the greatest extent possible (e.g. through rule setting), but the principles are also interrelated, and should therefore be realized without, or with the least possible (given the advantage gained), detriment to each other.

■ **The right to development as a common concern of humanity:**

Designating the right to development as a common concern of humanity implies that the realization of the right is not only a concern of the primarily responsible State exercising jurisdiction, but of the international community as a whole, i.e. of all States and non-State actors that together make up humanity.

As Kiss and Shelton have argued, the international concept of common concern does not connote specific rules and obligations, but establishes both a right and duty for action by the concerned community (Kiss and Shelton 2007: 14). The reference to humanity facilitates addressing non-State actors in initiatives building on the framework convention.

■ **Principle of custodial sovereignty:**

The principle of custodial sovereignty implies that the realization of the right to development depends first and foremost on the State exercising jurisdiction. The primary responsibility of the domestic State is based on its sovereign rights to determine policy choices on development strategies and exploitation of natural resources. Sovereignty has to be exercised in such a way, however, that it contributes to the realization of the right to development.

All States have an interest in compliance by the custodial State with this duty, and are entitled to claim the cessation of an alleged breach by the relevant State. On the other hand, all States also have a duty to support the primarily responsible State in fulfilling its obligations. Monitoring rights and duties of assistance go hand in hand.

The designation of the realization of the right to development as of common concern does not necessarily imply that responsibility for the realization of the right is attributed equally among States. In international environmental law, differentiated responsibilities of States are prominent. In human rights treaty law, however, a single norm applies to all countries, but a degree of contextualization in the application of the norm is accepted. For example, all States need to progressively realize economic, social and cultural rights to the maximum of their available resources (= the single norm applying to all countries), but in practice the amount of available resources varies from State to State, and it is accepted that this will have an impact on the application of the norm. The same approach

could be adopted here. All State parties are ›a primarily responsible State‹, and ›a State entitled to monitor and required to assist‹, but the application of these duties can be contextualized taking into account available resources.

■ **Principle of mutual obligations:**

The principle of mutuality suggests that the right to development should be realized through relationships between partner countries based on mutual commitments. Parties make such commitments voluntarily to each other, but once they are undertaken, they become binding. Mutual accountability is one of the five core pillars in the OECD Paris Declaration on Aid Effectiveness. The concept was included in the Paris Declaration in order to signal a move away from the traditional one-way donor-to-recipient accountability towards a contractual approach, where each party is understood to have obligations, and where mutual progress is jointly assessed. Joint assessment takes place within an institutional set-up, and as a minimum the framework convention should therefore contain a clause enabling the creation of a compliance mechanism.

The principle of mutual obligations creates a bias in favor of joint action. It suggests that the measures needed to realize the right to development are of the type that normally requires international cooperation. Bi- or multi-lateral solutions based on international cooperation and consensus are the most effective way to tackle a problem of a global nature, such as development. In any case, the principle requires that States should refrain from unilateral economic, financial or trade measures that impede the full achievement of the right to development.

■ **Principle of accountability to right holders:**

An essential feature of human rights law, including of the right to development, is to establish accountability of the duty bearer to the holders of the right. When a violation that can be attributed to a State occurs, the State has a duty to repair the injury, i.e. to restore the original condition, and, when that is not feasible, a duty to provide full compensation. State responsibility for human rights violations is well established in international law.

In the context of the right to development, rights holders may wish to challenge the adverse impact of other agents than the jurisdictionally-responsible State on the realization of the right to development. In such cases, it

may not always be possible to establish legal responsibility, but as a minimum some form of accountability should be available. In contrast to legal responsibility, accountability is not clearly defined in international law. An agent may be deemed accountable when the agent recognises that it is subject to a duty to publicly justify its conduct against previously agreed public standards; is prepared to have its conduct assessed by a credible, sufficiently independent assessment mechanism; and commits to taking some form of remedial action when its action cannot be justified.

Ideally, the Framework Convention should include a broad principle of accountability vis-à-vis the holders of the right to development (individuals and peoples) of all agents affecting the realization of the right.

■ **Principle of equality and non-discrimination, requiring special attention to vulnerable groups:**

The principle requires that national and international development policies are designed and implemented in a manner that is consistent with the principle of equality and non-discrimination, paying special attention to groups in society that are particularly vulnerable.

Inclusion of this principle in the Framework Convention is of a particular importance to the collective dimension of the right to development. Human rights are by their nature inclusive of all, and therefore allow social orders based on exclusion to be challenged. This leads to claims to equal treatment by those previously or currently excluded such as: non-white peoples, women, sexual minorities and so on. To the extent that inclusiveness is achieved in practice, human rights deliver on the promise of the protection of human dignity.

■ **Principle of public participation:**

The principle requires broad participation by all relevant social groups in the formulation of development policies.

Given that both individuals and peoples are holders of the right to development, it may be useful to spell out in some more detail the individual and collective dimensions of public participation. The rights of individuals could inter alia include appropriate access to information, the opportunity to participate in public decision-making pro-

cesses on development, and effective access to judicial and administrative proceedings, including redress and remedy. The African Charter for Popular Participation in Development and Transformation refers to the central role of independent people's organizations (interestingly also across national borders) in the realization of public participation, and the need for governments to create consultative machinery.

■ **Principle of policy coherence:**

Within the donor community, policy coherence relates primarily to the growing acknowledgment of the importance of non-aid policies for development. The relative importance of development assistance for development is declining, and at a follow-up meeting to the Paris Declaration on Aid Effectiveness, participants agreed to increase over time independence from aid. This required an examination of the interdependence and coherence of all public policies – not just development policies – to enable countries to make full use of the opportunities presented by international investment and trade, and to expand their domestic capital markets.

Policy coherence for the realization of the right to development is, however, equally relevant at the domestic level, both in terms of internal and foreign policy, and for developing and developed countries alike.

4.3 General Obligations

General State obligations in framework conventions apply to all State parties. They aim primarily at gathering the data that enable domestic societies and the international community to engage in further legislative activity and action.

The obligations suggested below are broadly formulated, and not particularly intrusive on State sovereignty. They rely on traditional international law techniques promoting both domestic implementation through law, policy-making and awareness-raising, and on international cooperation on information sharing and on achieving the framework convention's objective:

- The obligation to collect development data at the national level (e.g. this requires an active poverty monitoring program, preferably including disaggregation, allowing determination of poverty levels of different groups);
- The obligation to raise awareness and ensure transparency on domestic development data, issues and decisions as a necessary precondition for ensuring public participation. Implementation may require legislation on disclosing public information, the organization of public hearings among affected populations, etc.;
- The obligation to adopt domestic legislation on the right to development (e.g. by ensuring constitutional protection) and to reflect the right to development in domestic and foreign policy decisions;
- The obligation to share information on domestic legislation and policy on the right to development with the other parties of the Framework Convention;
- The duty to cooperate for the realization of the right to development. The duty to cooperate already appears in Article 3, par. 3 of the Declaration on the Right to Development. It may be useful to specify that, as a minimum, the principle of cooperation requires that States should respect the enjoyment of the right to development in other countries, and thus should refrain from actions with a harmful extraterritorial impact on the right to development (as clarified by the UN Committee on Economic, Social and Cultural Rights in general comments dealing with various provisions of the International Covenant on Economic, Social and Cultural Rights).

4.4 Institutions

The Framework Convention on the Right to Development could usefully establish or envisage the establishment of four institutions: a Conference of the Parties, a Secretariat, an Advisory Group and a Compliance Committee. The new institutional set-up would create an environment that blends elements from international human rights and international development law, and creates a platform for sharing between human rights and development actors.

The Conference of the Parties is the plenary body of the States parties. It has three main functions: to act as a forum for debate on the right to development; to review

implementation of the Convention on the basis of information received from the States parties and other stakeholders; and, on the basis of this information, to consider or engage in law-making.

As a forum for discussions, the Conference of the Parties should create institutional arrangements for interaction with the variety of actors. A systematic dialogue with the UN development agencies and financial institutions, but also with regional organizations, should be provided for. The Conference of the Parties could equally host a multi-stakeholder forum on the right to development, inviting all stakeholders (local governments, IGOs, the private sector, NGOs, community organizations, individual resource persons) to informally identify and discuss issues, best practices, and strengthen dialogue and cooperation between governments and their constituencies. The annual (or bi-annual) meetings of the Conference of the Parties would thus develop into a focal point for global public opinion on the right to development.

The review of implementation could be based on criteria of the type currently under discussion at the Working Group on the Right to Development, and lead to the adoption of specific measures or recommendations promoting improvement. The Framework Convention should explicitly envisage the adoption of protocols, may wish to identify specific issues on which such protocols could be adopted, and should also enable stakeholders to adopt side agreements.

The Secretariat of the Convention could be entrusted to the Office of the High Commissioner for Human Rights (in the current structure to the Research and Right to Development Division of the Office). This would imply a fairly modest approach to the secretariat function, mainly in terms of support of the activities of the treaty's institutions. A more ambitious approach would involve cooperation in the field – between OHCHR country offices, governments and non-State actors on capacity building for the implementation of the right to development.

The Conference of the Purpose could usefully be assisted by an advisory body representing the epistemic community on both international cooperation for development and on human rights perspectives on development issues. The establishment of such an advisory body, preferably composed of individuals chosen on the basis of their expertise, would strengthen the science-policy interface

and international research collaboration on human rights and development. The advisory body could, on the basis of the information provided to the Conference of the Parties, or on its own initiative, assess the extraterritorial impact on the right to development of foreign policy decisions, analyze the impact of international agreements on the right to development (similarly to the High-Level Task Force on the Right to Development), or identify best practices in safeguarding the right to development at the domestic level.

As a minimum, the Framework Convention should include an enabling clause envisaging the setting up of a compliance committee. The details of such a committee could be left to an optional protocol, as has been the case for previous framework conventions. This would depend largely on whether State obligations contained in the Framework Convention are sufficiently specific to be tested through a compliance mechanism.

In comparison with current and previous institutions dealing with the right to development, the Conference of the Parties of the Framework Convention would replace the current Working Group on the Right to Development; the advisory body could serve as the successor to the High-Level Task Force, and the compliance committee would be a treaty body, building both on previous framework conventions and monitoring mechanisms in existing human rights treaties.

5. Protocols and Multi-Stakeholder Side Agreements

Protocols and multi-stakeholder agreements are instruments ancillary to the Framework Convention building on the objective, principles and general obligations contained in the convention. They represent the second stage in the construction of an international legal regime on the right to development. Protocols are treaties open to States, while multi-stakeholder agreements are flexible instruments open to a wide variety of State and non-State actors.

5.1 Protocols

Protocols contain more specific substantive obligations and/or develop the powers of the institutions.

Substantive protocols may deal with issues relating to the implementation of the right to development on which the Parties are ready to accept more specific commitments. In terms of the choice of subject of the Protocols, it may be politically expedient to focus on issues with a transboundary dimension, which are of interest to States both in the global South and North. Alternatively, and perhaps more idealistically, the choice of topic could be determined on the basis of an assessment of the urgency of the needs of holders of the right. In such a case, one may wish to focus on mutual commitments on service delivery for the provision of minimum essential levels of development to groups in States that manifestly lack the domestic resources.

The High-Level Task Force on the Implementation of the Right to Development listed a wide variety of issues that could benefit from a right to development approach, such as access to essential drugs, reducing and mitigating impacts of international financial and economic crises, policies regulating private investment, development and transfer of pro-poor technology, access to natural resources, ease of immigration for education, work and revenue transfers, establishing safety nets to provide for the needs of vulnerable people in times of natural, financial or other crisis, etc.

An institutional Protocol could take inspiration from the Kyoto Protocol compliance committee. One could envisage a compliance committee consisting of individual experts, with a facilitative branch assisting individual States with the implementation of the right to development, either at the State's own request, or on a recommendation of the Conference of the Parties and its advisory body, and an enforcement branch deciding on non-compliance, with the possibility of an appeal to the Conference of the Parties.

Individuals and peoples should have the opportunity to petition the enforcement branch of the compliance committee. In comparison with existing human rights treaty bodies, the most innovative aspect of the procedure would be the possibility to question the impact on the right to development of the plaintiffs of agreements

expressing mutual commitment of States, such as development partnerships. If non-compliance were to be established, the States involved could mutually agree on the attribution or sharing of the responsibility to provide remedial action.

5.2 Multi-Stakeholder Side Agreements

The need for multi-stakeholder agreements is premised on the assumption that adequate human rights protection in a context of economic globalization requires that ›every organ of society‹ that is involved in human rights abuses should accept accountability – an idea that can be traced back to the preamble of the Universal Declaration of Human Rights. International development efforts have for a long time not been the sole province of States and a variety of agents have contributed to the global development effort. From a somewhat different perspective, it has been argued that the democratic legitimacy of international law can be enhanced through progressively opening the governance process to non-State actors (Benedek in Fastenrath, Geiger, Khan, Paulus, von Schorlemer, Vedder (Eds.) 2011: 203), but that this result is only achieved if certain principles are respected in the law-creating process, including: ›the principle of inclusiveness, i.e. to involve all relevant stakeholders, taking their interests into account, of transparency and participation to ensure that all stakeholders are informed about the structure and dynamics of the multi-stakeholder partnership and can participate in the decisions made, of internal and external accountability, i.e. both to the members of the multi-stakeholder partnership and the public at large, who might be effected by the multi-stakeholder partnership‹. (Ibid. 209–210).

Multi-Stakeholder side agreements would be ancillary to the Framework Convention, and would need to reflect its objective and principles. Side agreements could come in various shapes and sizes: multi-stakeholder partnerships currently range from ›concrete and time-limited cooperation projects working towards financing and carrying out national or international political goals to networks to coordinate state and non-state actors in a particular sector‹ (Martens 2007: 8). The Conference of the Parties could encourage the adoption of multi-stakeholder initiatives through its multi-stakeholder forum, or engage in a

system of accreditation of agreements that are deemed to reflect the objective and principles of the Framework Convention.

In the context of the Framework Convention on the right to development, multi-stakeholder side agreements should be governed by international law, and thus be binding. Such agreements would be concluded by coalitions of the willing, consisting of a variety of public and private actors, committed to demonstrating that the right to development can be implemented in a meaningful way through joint initiatives. It is not at all impossible to make multi-stakeholder agreements subject to international law, as Article 3 (a) of the Vienna Convention on the Law of Treaties demonstrates: ›The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law⁴, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements (...).‹ Whether an ›agreement‹ is governed by international law is autonomously determined by the parties to the agreement. An agreement is governed by international law when the parties so intend; their intention is to be gathered from the terms of the instrument and the circumstances of its conclusion. It would be useful to include a clause in the side agreements declaring that they are governed by international law, and that disputes arising under the instruments will be settled through international arbitration.

6. Conclusion and Recommendation

Human rights are aimed at safeguarding the dignity of all human beings. If existing human rights treaties are normatively inadequate to provide protection to the many in the world population that are currently deprived, then the need for the further normative development of human

4. The reference to ›subjects of international law‹ in Article 3, par. a, should not prevent private actors from acceding to the Agreement. Although companies and NGOs are not usually considered as subjects of international law, this has not prevented them from concluding agreements governed by international law, or from submitting claims to (certain) international tribunals on an ad hoc basis. The reference to ›subjects of law‹ in Article 3 is somewhat circular, as international law defines its subjects as entities capable of possessing rights and duties under international law and having the capacity to maintain their rights by bringing a claim. To the extent that international law enables agents to hold rights and duties upon which they can act, they graduate into the category of subjects of international law. The concept of ›subjects of international law‹ is therefore a dynamic one.

rights instruments is established. The focus on individual State responsibility in current human rights treaty law prevents the integration of human rights into the international development effort. It also prevents international human rights law from delivering on its promise of protection to those adversely affected by globalization.

New thinking is required if the political stalemate at the UN between those favoring a classical human rights treaty on the right to development and those advocating a soft law approach is to be overcome. The option of drafting a Framework Convention on the Right to Development seems most adequate to accommodate the concerns of different political groups, as it allows for a step-by-step approach. A framework convention is a treaty under international law: such a treaty is open to States, and once it has entered into force, it is binding on States that have expressed consent. Even if the starting point of the framework convention is the reaffirmation of the Declaration, the Framework Convention could provide an opportunity to clarify the contemporary understanding of some of the provisions of the Declaration.

The potential added value of a right to development treaty is to complement the current human rights regime with a framework convention that goes beyond individual State responsibility and takes inspiration from principles derived from international development efforts, such as mutual accountability (*donors and partners are accountable for development results*), alignment of policies among partner countries (donor countries align behind policy objectives set by developing countries), and inclusive partnerships (full participation of State and non-State actors).

The main purpose of the inclusion of a list of principles in the framework convention is to give direction to future law-making on the right to development at global, regional and domestic levels. The principles need to be formulated broadly in order to serve as a source of inspiration for regulation on a variety of aspects of development. General State obligations aim primarily at gathering the data that will enable domestic societies and the international community to engage in further legislative activity and action.

The Framework Convention on the Right to Development could establish or envisage the establishment of four institutions: a Conference of the Parties, a Secretariat, an

Advisory Group and a Compliance Committee. The new institutional set-up would create an environment that blends elements from international human rights and international development law, and brings actors from both fields together.

Protocols and multi-stakeholder agreements should be established to further specify obligations under this Framework Convention. While protocols are treaties open to States, multi-stakeholder agreements are flexible instruments that in principle are open to a wide variety of State and non-State actors. Both are additional to the Framework Convention, building on the objective, principles and general obligations contained in the convention. They represent a further stage in the construction of an international legal regime on the right to development.



Bibliography

Authors

- Andreassen, Bard Anders, Marks, Stephen P.** (Eds.) (2006): *Development as a Human Right*. Cambridge: Harvard University Press
- Boyle, Alan, Chinkin, Christine** (2007): *The Making of International Law*. Oxford: Oxford University Press
- Fastenrath, Ulrich, Geiger, Rudolf, Khan, Daniel-Erasmus, Paulus, Andreas, von Schorlemer, Sabine, Vedder, Cristoph** (Eds.) (2011): *From Bilateralism to Community Interest*. Oxford, Oxford University Press
- Fitzmaurice, Malgosia, Ong, David M., Merkouris, Panos** (2010): *Research Handbook on International Environmental Law* Cheltenham: Edward Elgar
- Gilbert, Jeremie** (2011): Indigenous Peoples' Human Rights in Africa: the Pragmatic Revolution of the African Commission on Human and Peoples' Rights. *International and Comparative Law Quarterly*, Vol. 60, 254–270
- Haas, Peter, M.** (1992): Epistemic Communities and International Policy Coordination. *International Organization*, Vol. 46, 1–35
- Ibhawoh, Bonny** (2011): The Right to Development: The Polemics of Power and Resistance. *Human Rights Quarterly*, Vol. 33, 76–104
- Hurrell, Andrew, Kingsbury, Benedict** (Eds.) (1992): *The International Politics of the Environment*. Oxford: Clarendon Press
- Kiss, Alexandre, Shelton, Dinah** (2007): *Guide to International Environmental Law*. Leiden, Martinus Nijhoff
- Marks, Stephen P.** (Ed.) (2008): *Implementing the Right to Development. The Role of International Law*. Geneva, Friedrich-Ebert-Stiftung
- (2011): *The Politics of the Possible. The Way Ahead for the Right to Development*. Berlin: Friedrich Ebert Stiftung
- Martens, Jens** (2007): Multistakeholder Partnerships – Future Models of Multilateralism? Berlin: Friedrich Ebert Stiftung Occasional Paper No. 29
- Matz-Lück, Nele** (2009): Framework Conventions as a Regulatory Tool. *Goettingen Journal of International Law*, Vol. 1, 439–458
- Newman, Dwight** (2011): *Community and Collective Rights*. Oxford: Hart Publishers
- Rathgeber, Theodor** (2009): Dialogues as a Challenge: The EU in the Human Rights Council 2007 and 2008 *European Yearbook on Human Rights 2009* Vienna: NWV
- Salomon, Margot** (2007): *Global Responsibility for Human Rights*. Oxford: Oxford University Press
- Siatitsa, Iliia M.** (2010): The Evolution of the Monitoring Mechanism of the Framework Convention for the Protection of National Minorities: Co-operation of Independent and Political Bodies in the Interest of Effectiveness. *Revue Hellénique de Droit International*, Vol. 63, 768–789
- Scholtz, Werner** (2008): Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism LV. *Netherlands International Law Review*, 323–341
- Vasak, Karel** (1972): Le droit international des droits de l'homme. *Revue des droits de l'homme*, Vol. 51, 43–51

Cases

- 276/2003, African Commission on Human and Peoples' Rights (ACHPR), *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya* (2009)

Instruments

- Convention on Long-range Transboundary Air Pollution, 13 November 1979, 1302 UNTS, 217 (No. 21623); for the full list of Protocols, see http://www.unece.org/env/lrtap/status/lrtap_s.html
- Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 3 (No. 26164)
- Declaration on the Right to Development, 4 December 1986, A/RES/41/128
- Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 3 (No. 26369)
- African Charter for popular participation in development and transformation, 16 February 1990, available at <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf>



UN Framework Convention on Climate Change, 9 May 1992, *1771 UNTS 1907 (No.30822)*; Kyoto Protocol to the UN Framework on Climate Change, 11 December 1997, *UNTS A-30822*. On 8 December 2012, at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), the Parties adopted an amendment to the Kyoto Protocol by decision 1/CMP.8, 8 December 2012, C.N.718.2012.TREATIES-XXVII.7.c. The amendment includes inter alia a second commitment period from 1 January 2013 to 31 December 2020.

Convention on Biological Diversity, 5 June 1992, *1760 UNTS 9 (No. 30619)*; Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, *UNTS A-30619*; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity, 29 October 2010, *UNTS NEW-30619*.

Rio Declaration on Environment and Development, 14 June 1992, *A/CONF.151/26 (Vol. I)*

Ministers of the Environment of the region of the United Nations Economic Commission for Europe (UN/ECE) and the Member of the Commission of the European Communities responsible for the Environment, Luzern Declaration, 30 April 1993, available at <http://www.unece.org/fileadmin/DAM/env/efe/history%20of%20Efe/Luzern.E.pdf>.

Framework Convention for the Protection of National Minorities, 1 February 1995, *ETS No. 157*

Millennium Declaration, 8 September 2000, *A/56/326*

WHO Framework Convention on Tobacco Control, 21 May 2003, WHO Document WHA56.1, *2302 UNTS 16 (No.41032)*; Protocol to Eliminate Illicit Trade in Tobacco Products, 12 November 2012, Decision FCTC/COP5 (1)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 in Heyns, Christof, Killander, Magnus (Eds.)(2010): *Compendium Key Human Rights Documents of the African Union*. Pretoria: PULP, 61–71

Paris Declaration on Aid Effectiveness and the Accra Agenda for Action, February 2005 available at <http://www.oecd.org/dac/effectiveness/34428351.pdf>

Framework Convention on the Value of Cultural Heritage for Society, 27 May 2005, *ETS No. 199*

HRC Council resolution 4/4, 30 March 2007

Rio+20 UN Conference on Sustainable Development Outcome Document, 19 June 2012, *A/CONF.216/L.1*



About the author

Koen De Feyter is the Chair of International Law at the Law Faculty of the University of Antwerp (Belgium), and a member of the Law and Development Research Group at the same faculty.

Imprint

Friedrich-Ebert-Stiftung | Global Policy and Development
Hiroshimastraße 28 | 10785 Berlin | Germany

Friedrich-Ebert-Stiftung | Geneva Office
6 bis, Chemin du Point-du-Jour | 1202 Geneva | Switzerland

Responsible:
Dr Matthes Buhbe, Director, FES Geneva

Phone: +41-22-733-3450 | Fax: +41-22-733-3545
www.fes-globalization.org/geneva

To order publications:
info@fes-geneva.org

Dialogue on Globalization

As part of the international work of the Friedrich-Ebert-Stiftung, Dialogue on Globalization contributes worldwide to the debate on globalization and global governance. It is based on the premise that – through an inclusive and responsive global policy approach – globalization can be shaped into a direction that promotes peace, democracy and social justice. The program draws intensely on the international network of the Friedrich-Ebert-Stiftung – a German non-profit institution committed to the principles of social democracy with offices, programs and partners in more than 100 countries. Dialogue on Globalization addresses »movers and shakers« both in developing countries and in the industrialized parts of the world. The program is coordinated by the head office of the Friedrich-Ebert-Stiftung in Berlin and by the FES offices in New York and Geneva.

The Friedrich-Ebert-Stiftung office in Geneva serves as a liaison between the United Nations offices and agencies, other Geneva-based International Organizations and FES field offices as well as partners in developing countries to strengthen the voice of the Global South. It contributes to the debates in »International Geneva« on trade and sustainable development, decent work and social norms, environment and climate policies, human rights and peace and security issues. FES Geneva's activities include conferences, seminars, expert workshops and dialogue sessions, training and information programs with international participation, studies, consultancy reports and publications.

The views expressed in this publication are not necessarily those of the Friedrich-Ebert-Stiftung.

This publication is printed on paper from sustainable forestry.



ISBN 978-3-86498-529-4