Type and Structure of a legally binding Instrument on the Right to Development

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At its thirty-ninth session, the UN Human Rights Council requested the Working Group on the Right to Development to elaborate a draft legally binding instrument on the right to development. [[1]](#footnote-1)

Legally binding instruments in international law are generally referred to as treaties. They are agreements concluded between States in written form and governed by international law.[[2]](#footnote-2) A legally binding instrument may contain a variety of provisions, some written in language that is sufficiently precise to create State obligations, and others not. While the instrument may have the form of a legally binding instrument, the language used in each provision determines whether a legal obligation is created.

Every treaty in force is binding on the States that have consented to it. Consent is voluntary.[[3]](#footnote-3) A treaty does not create obligations for a State that does not consent to it (Article 34, VLCT).

Considering both these basic rules of treaty law and the vote on the resolution setting in motion the drafting process, the drafters of a treaty on the right to development are faced with a strategic choice: either to attempt a treaty that may command the consent of the largest possible number of States, or to draft a treaty that reflects the views of States that are currently strongly committed to the creation of a legally binding instrument. Both options have implications that may be perceived of as disadvantages: a treaty commanding wide support may need to focus on principles rather than on precise obligations, and may provide little in terms of means of enforcement. A treaty with clear, mandatory provisions may not be ratified by States whose compliance is essential for the realization of the right to development, particularly when one takes the view that extraterritorial and global obligations incumbent on developed States are crucial for the realization of the treaty’s objectives.

I will seek to engage constructively with both options, by investigating the merits both of a standard treaty focusing on legal obligations and enforcement, and of a framework convention[[4]](#footnote-4) – a type of treaty typically chosen when there is broad recognition that a problem needs to be addressed, but little agreement on specific measures to be taken.

As HRC resolution 39/9 indicates, the starting point of any future legally binding instrument is the reaffirmation of the Declaration of the Right to Development. [[5]](#footnote-5) The key features of the right to development as included in the Declaration should therefore be preserved:

* The right to development is a human right held by human beings and peoples;
* The right to development entitles human beings and peoples to active, free and meaningful participation in development (the procedural element, i.e. an entitlement to inclusive decision-making[[6]](#footnote-6)), and to the fair distribution of the benefits of development (i.e. the material element);
* State obligations under the right to development pertain to both the domestic and the international legal order.

The three dimensions of the right to development are equally well established:

* the domestic dimension (dealing with acts and omissions of a State within its territory);
* the extraterritorial dimension (dealing with acts and omissions that have effect on the enjoyment of the right to development outside of the State’s territory);
* and the global dimension (dealing with the impact of joint actions by States on the enjoyment of the right to development).

The inclusion of these key features in a treaty raises the right to development to the same level and on a par level and on a par with all other human rights and fundamental freedoms. [[7]](#footnote-7)

1. *The Standard Treaty model*

From a structural perspective a standard treaty is relatively straightforward. As a minimum, such a treaty would define key terms (reaffirm the key features of the right to development), state the treaty’s objective (the realization of the right to development); contain a number of mandatory, preferably enforceable State obligations that are deemed essential for the realization of the right to development, and include a monitoring mechanism.

Within the standard treaty model, there are still two different options. The first option is to draft a treaty confined to defining rights and obligations of States; for convenience, I will call this the ‘statist approach’. The second option is to draft a treaty that follows the model of existing human rights treaties.

In the statist approach, the realization of the right to development serves as the overall objective of the treaty, but the means to realize the right consist of obligations that States accept vis-à-vis each other. The emphasis of the treaty is not on the empowerment of rights holders, but on providing all States with the capacity to realize the right to development through the creation of State duties, with a particular emphasis on duties of the most affluent countries. The assumption of such an approach is that the benefits that the treaty produces will trickle down via the relevant State to rights holders at the domestic level. The NAM Proposal on Set of Standards regarding the implementation and realization of the Right to Development[[8]](#footnote-8) appears to follow this approach. The Standards included in the Proposal spell out extraterritorial and global duties of States vis-à-vis each other[[9]](#footnote-9), but contain little on empowering the holders of the right to development. A treaty on the right to development that includes only inter-State obligations makes the international enforcement of the right to development dependent on State action, and its character is more akin to an international economic law treaty than to a human rights treaty.

The second, more familiar option of a standard treaty is to stay close to the model of existing human rights treaties, and thus to focus on enabling the holders of the right to development to claim their right. Such a treaty would build on the Declaration on the Right to Development, spell out as clearly as possible the obligations of States (and other duty bearers?) pertaining to the different dimensions of the right to development, and include measures of safeguard, including means that would enable rights holders to ensure compliance, both at the domestic level, and at the global level (typically by providing for a treaty monitoring body).

The African Charter on Human and Peoples’ Rights serves as an example of a regional human rights treaty that includes a justiciable right to development. Ratification of the treaty is open only to Member States of the African Union.[[10]](#footnote-10) The treaty cannot create obligations for States from other regions.

Unsurprisingly, the main contribution of the African human rights system has been with regard to the domestic dimension of the right to development, specifically in clarifying that ‘peoples’ as holders of the right to development peoples include sub-national groups, and indigenous peoples in particular.[[11]](#footnote-11)

The African Commission has been willing to explore the impact of foreign actors. African States are required to protect the rights of their peoples also against external threats.[[12]](#footnote-12) The Women’s Rights Protocol to the African Charter explicitly requires State parties to:

Ensure that the negative effects of globalization and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.[[13]](#footnote-13)

In addition, the African Commission has been willing to contemplate the extraterritorial human rights impact of State parties imposing an embargo on the holders of the right to development in the targeted State. [[14]](#footnote-14)

Even if States from the Global North would remain out of reach, for lack of consent, such a treaty would not be useless. There is a strong symbolic importance in the adoption of a treaty on the right to development that would command a significant number of ratifications from countries in the Global South. The treaty may increase the legitimacy of the right to development, and thus increase the pressure on non-ratifying States to align their practice, even if they are not legally obliged to so. Proponents of the recently adopted Treaty on the Prohibition of Nuclear Weapons, that has not yet garnered sufficient support to enter into force[[15]](#footnote-15), nevertheless argue that by its mere existence, the treaty changes the conversation on the issue. The treaty may have an impact on the functioning of intergovernmental organizations that have recognized the relevance of the right to development to their activities. The treaty may be able to contribute to the context in which other treaties are interpreted. [[16]](#footnote-16)

In addition, the treaty would obviously be binding on the States that do ratify it, and would thus potentially strengthen the position of rights holders in those States. In a scenario of non-ratification by States from the Global North, global obligations to cooperate and assist would apply within the Global South only. South-South solidarity then becomes crucial. South-South cooperation is untainted by colonialism. Ideally, the development of strategies to achieve common goals can be grounded in proximities of experience and a sense of shared identity.

1. *The Framework Convention model*

Framework Conventions are legally binding treaties, to which the general rules of international treaty law apply.[[17]](#footnote-17) The UN Framework Convention on Climate Change (9 May 1992)[[18]](#footnote-18), currently ratified by 197 **Parties**(196 States and 1 regional economic integration organization) is a well-known example.

A Framework Convention / Protocol Approach consists of the phased establishment of a legal regime. Framework Conventions have been described as hard law instruments with a soft law content. [[19]](#footnote-19) They usually contain both substantive provisions expressed as objectives, principles and/or general obligations; and institutional provisions creating a plenary forum for discussion among States and for engagement with non-State actors, that is endowed with the authority to agree further normative instruments.

Framework conventions typically contain few specific obligations. By setting up a plenary body that serves as the focal point for discussions within the international community, however, time and space are provided for consensus to grow among all relevant stakeholders facilitating the adoption by the parties of more specific commitments at a later stage, typically in the form of additional protocols. [[20]](#footnote-20)

The phased establishment of a legal regime requires that at the start of the process, a large majority of States ratify the framework convention, as was, for instance, the case for the Framework Convention on Climate Change. As framework conventions are built on compromise – they could be perceived of as agreements to amicably settle disagreement in the future - , reservations to such treaties are usually not allowed.

I would like to make a number of suggestions as to the possible content of both the normative and institutional parts. These suggestions are not meant to be exhaustive; they rather serve as clarifications of the function of the different types of provisions that tend to be included in framework conventions.

1. *Normative Provisions: objectives, principles and general obligations*
   1. *Objectives*

The provision on the objectives sets out the overall aim of the treaty: to make the right to development a reality for everyone (or another formulation to a similar effect)[[21]](#footnote-21), as a contribution to the realization of the 2030 Agenda for Sustainable Development[[22]](#footnote-22). The benefit of referring to the realization of the 2030 Agenda as a treaty objective would be to acknowledge that dimensions of development that were perhaps not as prominent in 1986 when the Declaration on the Right to Development was adopted should now be fully taken into account. Examples include the 2030 Agenda’s agreed language on the environmental dimension of development, on gender inequality and the empowerment of women and girls, on indigenous peoples and local communities, on the reduction of inequality within and among countries, and on the need for a global partnership. A further advantage of including a reference to the 2030 Agenda in the objectives section would be to clarify that the right to development is of domestic relevance not only in the Global South, but in the Global North as well.

* 1. *Principles*

Principles are meant to give direction to subsequent normative development. They do not impose immediate obligations on the parties to the treaty, but rather set criteria that will need to be taken into account when obligations are drafted as a part of future law-making activities.

Examples of such principles may include:

* The 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.
* The principle of public participation: the principle requires broad participation by all relevant social groups in the formulation of development policies.
* The 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.
* The principle of mutual obligations: the right to development should be realized through relationships between partner countries based on mutual commitments. The principle creates a bias in favor of joint action. Bi- or multilateral solutions based on international cooperation and consensus are the most effective way to tackle development issues. The principle also requires that States should refrain from unilateral economic, financial or trade measures that impede the full achievement of the right to development.
* The principle of policy coherence: the principle requires coherence between nationally owned sustainable development strategies and an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced global economic governance.
  1. *General Obligations*

General obligations in framework conventions tend to serve two different purposes. One purpose is to ensure that States commit to giving legal, political and societal effect to the treaty at the domestic level. Secondly, States commit to sharing and discussing data and other relevant information at the global level (in practice: within the institutions set up by treaty) that is essential to arriving at a correct problem analysis that in turn informs the elaboration of a common approach that can be translated into subsequent law-making on more specific obligations.

General obligations that may usefully be incorporated include obligations:

* to collect development data at the domestic level (e.g. on poverty and inequality levels)[[23]](#footnote-23);
* to convert the framework convention principles into domestic and foreign policy and legislative measures;
* to raise awareness and ensure transparency on development data, issues and decisions at the domestic level, as a necessary precondition for ensuring active, free and meaningful public participation;
* to share information on policy and legal measures taken at the framework convention institutions (e.g. enabling a debate on inequality within and among countries);
* To cooperate internationally with a view to creating a political, economic and social environment necessary to allow the implementation of the right to development.[[24]](#footnote-24)

1. *Institutional Provisions: conference of the parties and compliance committee*

The institutions are essential in the context of a framework convention approach, because they ‘help ensure that the treaty is not frozen, but a robust and on-going process of law-making. [[25]](#footnote-25)

* 1. *Conference of the Parties*

A plenary body in the context of a framework agreement on the right to development would have a dual role. It would collect, review and discuss information shared by the parties, and liaise with the international community, and particularly with human rights and development actors. The plenary body would thus be the global forum to discuss the realization of the right to development, and more broadly, the interface between development and human rights.

Secondly, the plenary body would be explicitly entrusted with the task of further developing the legal regime on the right to development through the adoption of additional instruments (protocols) that represent the consensus that gradually builds during the discussions among the parties and with other stakeholders. The plenary body thus serves as the driving force behind further legislative development.

Protocols may be used to strengthen the substantive and procedural provisions in the original conventions. They may include new substantive commitments[[26]](#footnote-26) that elaborate on provisions in the relevant framework convention and create 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 also comes to the fore. Protocols may further be used to ease decision-making procedures.

Clearly, the right to development concerns not only States, but the international community as a whole. Existing framework conventions recognize the contribution of intergovernmental organizations and non-State actors, and enable a degree of involvement of non-State actors, by providing observer status for these actors to the plenary body.

Typically observer status is also granted to the United Nations and the specialized agencies, and to other intergovernmental organizations of relevance to the subject matter dealt with in the treaty. A bolder approach, building on the 2003 UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming [[27]](#footnote-27), would be to enable intergovernmental organizations to accede to the framework convention on the right to development, not only because intergovernmental organizations are the institutional emanation of the principle of mutual obligations and the general State obligation to cooperate, but also in recognition of the impact the right to development has had in particular on the integration of human rights in United Nations development activities. Another category of non-State actors often granted a role within framework conventions is the relevant scientific community.[[28]](#footnote-28) Arguably, 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’ should reasonably be defined from an interdisciplinary perspective. Scientific expertise could help in building the cognitive consensus that is necessary for the adoption of specific commitments.

* 1. *Compliance committee*

The trend in existing framework conventions is to establish supervision bodies only at the second stage of a framework convention/protocol approach – arguably because at that stage the obligations become more specific, or trust between the parties has grown. Such bodies – often called ‘compliance committees’ tend to be non-adversarial.

The framework convention on the right to development could set out key features of the compliance committee on the right to development – while leaving the details and modalities of its operation to further negotiation.

There is, nevertheless a crucial element that distinguishes a right to development framework convention from previous framework conventions, namely that it not only a treaty in which states owe duties to each other (such as the obligation to cooperate), but also a human rights treaty, and this must inevitably impact on the nature of the compliance committee. The ‘high purpose’ of a framework convention on the right to development would be to safeguard a life in human dignity to both individual and communities. It therefore follows that not only the State parties, but also the holders of the right to development should have access to the compliance committee.

In principle the compliance committee could monitor compliance with all dimensions of the right to development: the domestic, extraterritorial and the global dimension (dealing with the impact of mutually agreed actions by States on the enjoyment of the right to development). Monitoring compliance with the latter dimension would be particularly innovative.

1. See HRC resolution 39/9, 27 September 2018. The recorded vote was 30 votes in favor to 12 votes against, with 5 abstentions. The voting was as follows: In favor: Afghanistan, Angola, Brazil, Burundi, Chile, China, Côte d’Ivoire, Cuba, Democratic Republic of the Congo, Ecuador, Egypt, Ethiopia, Iraq, Kenya, Kyrgyzstan, Mongolia, Nepal, Nigeria, Pakistan, Peru, Philippines, Qatar, Rwanda, Saudi Arabia, Senegal, South Africa, Togo, Tunisia, United Arab Emirates, Venezuela (Bolivarian Republic of). Against: Australia, Belgium, Croatia, Georgia, Germany, Hungary, Slovakia, Slovenia, Spain, Switzerland, Ukraine, United Kingdom of Great Britain and Northern Ireland. Abstaining: Iceland, Japan, Mexico, Panama, Republic of Korea [↑](#footnote-ref-1)
2. The VLCT applies only to treaties between States, but art.3 VLCT clarifies that this does not preclude that international agreements between States and other subjects of international law or between such other subjects of international law have legal force. [↑](#footnote-ref-2)
3. Article 51 VLCT explicitly provides that the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. [↑](#footnote-ref-3)
4. A fleeting reference to the framework convention option having added value is included in the most recent report of the Working Group on the Right to Development, see A/HRC/39/56, 29 June 2018, par. 49. [↑](#footnote-ref-4)
5. UN General Assembly resolution 41/128, 4 December 1986. [↑](#footnote-ref-5)
6. See also the conclusions and recommendations in the latest report of the Special Rapporteur on the Right to Development, UN doc. A/HRC/39/51, 20 July 2018, in particular par.65-67. [↑](#footnote-ref-6)
7. HRC resolution 4/4, 30 March 2007, adopted without a vote. [↑](#footnote-ref-7)
8. See A/HRC/WG.2/18/G/1, 5 April 2017. [↑](#footnote-ref-8)
9. In such an approach, it may be useful to take into account SDG 10 on reducing inequality within and among countries, which includes language on the domestic dimension of development, next to the extraterritorial land global dimensions. See UN General Assembly resolution 70/1, 25 September 2015, par. 10. [↑](#footnote-ref-9)
10. The right to development is enshrined in Article 22 of the African Charter on Human and Peoples Rights, 27 June 1981 and complemented by Article 5 of the African Charter on the Right and Welfare of the Children, 11 July, 1990 and Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July2003. See in more detail on the right to development in Africa, including on the modest impact of the right to development in the domestic law of State parties: De Feyter, K., “The Right to Development in Africa” in Brems, E., Van Der Beken, C., Yimer, S.A.. (Eds.), *Human Rights and Development.* Leiden: Brill, 2015, 23-50. [↑](#footnote-ref-10)
11. See 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), AHRLR 75 (ACHPR 2009). In *Endorois* the African Commission found that ‘people’ was not synonymous with the entire population of a State. The Commission held that there is a need to protect “marginalized and vulnerable groups in Africa” suffering from particular problems. These are groups that are not accommodated by dominant development paradigms, are victimized by mainstream development policies, and have their basic human rights violated. (at par. 148). See also Application 006/2012, African Court on Human and Peoples’ Rights, African Commission on Human and Peoples Rights v. Republic of Kenya, judgment of 26 May 2017, particularly par. 105-112 on the Ogiek as an indigenous community, and par. 207-212 on the community’s right to development. [↑](#footnote-ref-11)
12. 279/03, ACHPR, *Sudan Human Rights Organisation and COHRE v. Sudan* (2009), AHRLR 153 (ACHPR 2009), at par. 222. Traditionally, external threats were associated primarily with external aggression, oppression, and colonization. [↑](#footnote-ref-12)
13. Article 19, par.f, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 11 July 2003. [↑](#footnote-ref-13)
14. The complainants argued that the sanctions violated Article 22 of the African Charter as they prevented Burundians from having access to means of transportation by air and sea. The ACHPR held that the sanctions were not indiscriminate and that the respondent States did not violate any provision of the African Charter. O.c.., at par. 76. [↑](#footnote-ref-14)
15. Treaty on the Prohibition of Nuclear Weapons, 7 July 2017, A/CONF.229/2017/8. At the time of writing, 22 States have ratified the Treaty; none have nuclear weapons. Fifty ratifications are necessary for the treaty to enter into force. [↑](#footnote-ref-15)
16. Note however that, in law, context as an element that can be into account in the interpretation of treaties is strictly defined. See Vienna Convention on the Law of Treaties, art. 31. [↑](#footnote-ref-16)
17. Existing framework conventions complemented by protocols include: the UN Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution, 13 November 1979, 1302 UNTS 217 (No. 21623); the Vienna Convention on the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 3 (No. 26164), the WHO Framework Convention on Tobacco Control, 21 May 2003, 2302 UNTS 16 (No. 41032), the Convention on Biological Diversity, 5 June 1992, 1760 UNTS 9 (No. 30619). The Council of Europe has adopted two treaties that are called framework conventions, but that do not envisage the adoption of additional protocols, but rather rely on secondary national legislation and policy, i.e. the Framework Convention for the Protection of Minorities, 1 February 1995, ETS No. 157 and the Framework Convention on the Value of Cultural Heritage of Society, 27 May 2005, ETS No.199 [↑](#footnote-ref-17)
18. UN Framework Convention on Climate Change, 9 May 1992, UNTS 1907 (No.30822). [↑](#footnote-ref-18)
19. Siatitsa, I. (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, 771. [↑](#footnote-ref-19)
20. Nevertheless, the emergence of such a consensus cannot be guaranteed. See Susskind, L., Ozawa, C. “Negotiating more effective international environment agreements” in Hurrell, A., Kingsbury, B. (Eds.), *The International Politics of the Environment*. Oxford: Clarendon Press, 147. [↑](#footnote-ref-20)
21. It may be an option to spell out in broad terms what would be expected from various actors if the objective is to be achieved. The Chair-Rapporteur of the Working Group on the Right to Development in his proposal on Standards for the Implementation of the Right to Development proposed some non-controversial language in this regard, e.g.: ‘The right to development, as in the case of all human rights, shall be centered on the individual and promoted at the national level, which requires a comprehensive and inclusive approach based on good, responsible governance. Since there are different levels of development, however, national efforts must be strengthened by regional cooperation, international assistance and contributions by development agencies at the national, regional and international levels, as well as by inputs from civil society bodies and the media’. See A/HRC.WG.2.18/CRP.1, 16 March 2016, par.30. [↑](#footnote-ref-21)
22. UN General Assembly resolution 70/1, 25 September 2015. [↑](#footnote-ref-22)
23. Compare also the latest report of the Special Rapporteur on the Right to Development, A/HRC/39/51, 20 July 2018, in particular par.62-64. [↑](#footnote-ref-23)
24. The duty to cooperate already appears in Article 3, par. 3 of the Declaration on the Right to Development. The UN Committee on Economic, Social and Cultural Rights has long held the view that ‘international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States’ (UN Committee on Economic, Social and Cultural Rights, General Comment No.3: The nature of States parties obligations, 1990, E/1991/23, par. 14). Following the Committee’s approach, 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. In the UNESCO World Heritage Convention the duty to cooperate extends to the international community as a whole [UNESCO Convention concerning the protection of world cultural and natural heritage, 16 November 1972, art. 6, par.1]. The use of such a formula allows including private actors. On this point, see Sarkar, A., *International Development Law.* Oxford: Oxford University Press, 2009, 100. In the context of the framework convention’s section on general obligation, the aim such a further elaboration of the obligation to cooperate is to enable a negotiating environment in which parties are ready to seek compromise and common ground. [↑](#footnote-ref-24)
25. Drumbl, M., “Actors and law-making in international environmental law” in Fitzmaurice, M., Ong, D., Merkouris, P. (Eds.), *Research Handbook on International Environmental Law.* Cheltenham: Edward Elgar, 2010, 10. [↑](#footnote-ref-25)
26. The High-Level Task Force on the Implementation of the Right to Development identified a wide variety of issues that could benefit from a right to development approach. Examples include 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 crises etc. See HLTF Report A/HRC/WG.2/TF/2/Add. 2, 8 March 2010. [↑](#footnote-ref-26)
27. The document is available from <https://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies>. [↑](#footnote-ref-27)
28. Compare Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, Article 2, par.4, 6, par.4b, Convention on Long-range Transboundary Air Pollution, 13 November 1979, Article 10, par. 3) Convention on Biological Diversity, 5 June 1992, Article 25; UN Framework Convention on Climate Change, 9 May 1992, Article 9. [↑](#footnote-ref-28)