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Sub-item 3: Discussion of the Content and Scope of a Legally Binding Instrument on the Right to Development

Dr. Mihir Kanade

Observations Concerning the Formulation of the Right to Development and the Nature of Obligations of States Parties to a Legally Binding Instrument on the Right to Development

[SLIDE ONE]

Respected Delegates, [SLIDE TWO]

I have been requested to present observations concerning a) the formulation of the right to development and b) the nature of obligations of States parties to a legally binding instrument on the Right to Development. In other words, my brief is to elaborate on the normative basis for almost all the substantive rights and duties that may be incorporated in the Treaty. I shall make my best endeavour to be legally and academically true to the subject, and hopefully, through this process, clarify some of the theoretical misunderstandings on the Right to Development that have too often derailed collective progress in operationalizing it.

Let me then begin with the question of formulation of the right to development. This necessitates an unambiguous articulation of what specifically does the right to development entitle right-holders to, as well as clear identification of who the right-holders are. For this purpose, useful reference may be made to Article 1 of the 1986 Declaration. [SLIDE THREE] Paragraph 1 thereof reads as follows:

“The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

This formulation has not been without interpretative differences and enough academic ink has been shed over the last three decades on identifying its true purport. A legally binding instrument must not admit this possibility. To clearly formulate the right, a few key features of this provision may be highlighted.

A first feature relates to concerns among some scholars that this formulation in the Declaration is vague and theoretically problematic. On the one hand, the right to development is explicitly recognized as an inalienable self-standing human right. On the other hand, the last part of that paragraph employs the terms “*in which* all human rights and fundamental freedoms can be fully realized”. Some scholars have questioned how the right to development can be a self-standing

human right, and be at the same time, some sort of an amalgamation of all other human rights. Is the right to development to be considered as if it were a meta-right?

Since the Declaration's adoption in 1986, discourse on the right to development has been animated with this theoretical debate. In 1999, the Commission on Human Rights appointed Mr. Arjun Sengupta as the first independent expert on the right to development. This coincided with the paradigm shift in the field of economics, led by the publication of Mr. Amartya Sen's landmark book 'Development as Freedom' around the same time, in which he described development in pretty much the same terms as the Preamble of the 1986 Declaration. Both focus on the objectives of development in terms of *well-being* of people rather than mere income or wealth indicators.

In trying to demystify the formulation of the right to development in Article 1, Mr. Sengupta presented a Vector Model of the right, where he posited that the right to development, being a self-standing human right, must be understood as a Vector, with all other human rights as its elements. The vector of the right to development can be advanced only if there is an improvement in any one of these elemental rights and no deterioration in any other. Although he did not draw an image for his Vector model, his ideas could perhaps best be captured as follows [SLIDE FOUR]:



The rights noted in this diagram are only indicative of his ideas, they are not an exhaustive list, and are in no particular order of importance.

This explanation was however perceived as problematic by some delegations on the ground that it still conceptualizes the right to development as a meta-right; an all-encompassing umbrella right which subsumes all other human rights within it. If the Vector model is understood in that fashion, the conceptualization of the right does enter difficult theoretical terrain, because a violation of any human right would then automatically result in violation of the right to development as well *without* the need for any independent analysis. The model is, however, still very useful because it helps underline the obvious fact that development by its very nature is such that, as a right, it cannot be seen to have been improved, if in the development process, one human right is sought to be realized at the cost of violating some other human right. A water pipeline project in a rural area installed by forcibly taking lands of poor farmers without consultation or adequate compensation cannot be seen as an improvement in the right to development. In other words, the

nature of the development as a self-standing right is such that a trade-off with or between other human rights is not permissible in the development process. This specific characteristic of the right to development is a significant value-added to the corpus of existing human rights treaties because it provides the most comprehensive normative basis for the interdependence, indivisibility and interrelated nature of all human rights.

[SLIDE FIVE] The words “in which” in Article 1(1) do not unambiguously capture these dynamics, and may be replaced by clearer words that do not permit misinterpreting the right to development as a meta-right, but at the same time highlight that for a process of development to be seen as realizing the right to development, it cannot come at the cost of some other human right.

[SLIDE SIX] A second feature of Article 1(1) of the Declaration is that it incorporates what the right to development specifically entitles the right-holders to. As can be seen, it highlights that every person and all peoples are entitled to – that is they have a right to – participate in, contribute to, and enjoy economic, social, cultural and political development. This three-dimensional entitlement under the right to development – participation, contribution, and enjoyment – underpins the very essence of the right as including both the process as well as the outcome aspects of development. It stresses that the right to development is realized not only based on ‘what’ is achieved, but also on ‘how’ it is achieved. This is crucial because, as I will allude to presently, the right-holders of the right to development must always be human beings, and as such, it is *their* development priorities that must be given predominance rather than the priorities of either the donors, multilateral financial institutions, or the State concerned.

[SLIDE SEVEN] A third feature of Article 1(1) is that it does not mention the word ‘civil’, although it refers to economic, social, cultural, and political development. There is no theoretical reason why civil development of all human persons and all peoples must be omitted.

[SLIDE EIGHT] A fourth feature is the symbiotic relationship with the right to self-determination as incorporated in paragraph 2 of Article 1 of the Declaration:

“The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”.

Considering the overarching prominence of the right to self-determination as recognized in the very first Article of both the ICCPR and the ICESCR, this provision needs no major modifications. As with any other human right, the right to development cannot be realized without the right to self-determination. Conversely, the right to self-determination is also meaningless in the absence of the right to development for all peoples.

[SLIDE NINE] A fifth feature of Article 1 of the Declaration is that it explicitly identifies who the right-holders are. In Paragraph 1, the terms “every human person and all peoples” have been employed. This right is therefore both an individual right and a collective right, as has been rightly reiterated in the Frequently Asked Questions on the RtD prepared by the OHCHR. This dual framing is crucial. The individual nature of the right ensures that all human beings are equally

entitled to participate in, contribute to, and enjoy the right to development. The collective nature of the right of all peoples to development is, as we have seen, closely linked to the fundamental right to self-determination recognized in the UN Charter, the human rights Covenants, and several international and regional instruments. This includes right of all peoples to full sovereignty over all their natural wealth and resources, and as the ICCPR stipulates, the obligations on all States, whether acting individually or collectively through multilateral or regional institutions, to ensure that “in no case may a people be deprived of its own means of subsistence”.

Considering these five features, a clear reformulation of the right to development for the purpose of a legally binding instrument may be as follows: [SLIDE TEN]

Article 1.

1. Every human person and all peoples have the right to development by virtue of which they are entitled to participate in, contribute to, and enjoy economic, social, cultural, *civil*, and political development that is consistent with all other human rights and fundamental freedoms.

This formulation avoids the meta-right trap and highlights that right-holders are entitled to development that does not violate any of their human rights. The words “all *other* human rights and fundamental freedoms” reinforce that the right to development is not just about ensuring human rights in development, but more importantly, that development itself is a human right.

Paragraph 2 of Article 1 of the Declaration highlighting the indivisibility with right to self-determination needs to be retained.

[SLIDE ELEVEN] Article 2 of the Declaration has led to some confusion in the past. Paragraph 1 stipulates that “The human person is the central subject of development and should be the active participant and beneficiary of the right to development”. Paragraph 3 then stipulates that “States have the right and the duty to formulate appropriate national development policies [...]”

Based on this, questions have been raised whether the right to development can be called as a human right at all, if *States* have been identified as having the right to formulate appropriate national development policies. This is a misunderstanding of the provision and the right itself. Human beings, individually and collectively, always remain the right-holders. When States are identified in this provision as having the right to formulate appropriate national development policies, it is a right exercised by the State against other States and the international community on behalf of or as agents of their citizens or peoples – the principal right-holders. Importantly, States can never exercise this right *against* their own citizens to determine development priorities. A straightforward way of avoiding the misinterpretations in the legally binding instrument would be to stipulate that: [SLIDE TWELVE]

“States, on behalf of their peoples, have the right, as well as the duty, to formulate appropriate national development policies [...]”.

Let me now turn to the other limb of my brief. Because I have been asked to elaborate on the *nature* of State obligations, I will not go into the specific substantive duties, but will identify the overarching framework for how those substantive duties of States may be elaborated.

[SLIDE THIRTEEN] Let me first highlight three provisions of the 1986 Declaration. Article 3(1) stipulates that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development”. Similarly, Article 4(1) stipulates that “States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development”. Article 3(3) then incorporates the ‘duty of international cooperation’. It stipulates that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development.” These provisions have often raised the question: Why should a State have the legally binding obligation to ensure the right to development of others? Although there is significant merit in this contention, it is not entirely accurate, and a nuanced legal analysis is required.

A useful reference point in fleshing out the nature of the States’ obligations flows from the work done by the High-Level Task Force on the implementation of the right to development which, in 2010, had submitted to the Human Rights Council what were proposed as Right to Development Criteria and Operational Sub-Criteria. Although the criteria themselves achieved no consensus, the Task Force, rightly to my mind, articulated three main levels of obligations on States. These have been reiterated in the OHCHR’s Frequently Asked Questions on the Right to Development. The three levels of States’ obligations are: **[SLIDE FOURTEEN]**

1. Obligations of States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction;
2. Obligations of States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction, and;
3. Obligations of States acting collectively in global and regional partnerships.

The nature of States’ obligations across these three levels however is clearly not the same, and this needs clarification and elaboration. Let me take each of them sequentially. **[SLIDE FIFTEEN]**

The first level reflects the standard norm of international law that every State bears the primary duty to respect, protect, and fulfill human rights internally. In the context of the Right to Development, this means that States have the entire spectrum of obligations which international human rights law imposes on them. The obligation to respect requires that States refrain from interfering in the enjoyment of the right to development, that is, the “do no harm” principle. For instance, do not take away lands and traditional habitats of peoples without free, prior, and informed consultation, and in case of indigenous peoples, consent. Do not adopt policies under the guise of development that deny the right-holders their right to participate in, contribute to, and enjoy the right to development. The obligation to protect requires States to ensure that the right to development is not abused by third-parties, including businesses. The obligation to fulfill requires that States take concrete and deliberate measures to progressively and fully realize the right to

development. States, thus, have the duty to formulate appropriate national development policies to realize the right to development, but such policies must reflect the priorities of the principal right-holders – human beings and all peoples within their jurisdictions.

With respect to the second level of obligations of States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction, there is much confusion. There is strong legal basis to argue that unless specifically required by an international agreement, States do not generally have the obligation to fulfill the right to development of those not strictly within their jurisdiction, but this does not mean that they do not have the obligation to respect their right to development, or under some circumstances, the obligation to protect right-holders elsewhere from their rights being violated by third parties.

The right to development essentially means that development is not a charity, generosity, or privilege. It is a human right. This right must therefore entail corresponding duties on those States that are, at a minimum, in a position to deny the realization of the right to development of right-holders elsewhere. States surely have the ability to violate the right to development of human beings beyond their strict jurisdictions. Unilateral sanctions which international law does not consider legal, as well as national trade policies in violation of multilateral trade agreements can affect livelihoods and right to development of others. Bilateral aid practices by donor States may be based on imposition of development priorities and interests of the donors rather than of the recipients. Sectors to which aid is provided may not be those prioritized or decided upon by the recipients. Conditionalities on such aid might not leave any space for recipients to determine their own implementation policies. Worse, conditionalities may themselves be predatory and violate the right to development of the recipients by resulting in human rights violations.

Under certain circumstances, the individual duty of States at this level also entails the duty to protect the right to development of those strictly beyond their jurisdiction from being abused by third parties. The broader issue of legal obligation to protect human rights on home States of corporations is already a matter of discussion in the Working Group on Business and Human Rights, but without preempting the outcome of that process, it is clear that there are certain obvious cases where the obligation to protect will be triggered for the Home State. For instance, if a donor State requires as a conditionality that development projects they support must be implemented by companies domiciled in the donor State, such State then has the clear obligation to protect right-holders in recipient countries from their right to development being abused by such third-parties.

An important normative framework for human rights duties of States affecting persons beyond their jurisdiction is the duty of international cooperation incorporated in the UN Charter as well as in the Declaration on the Right to Development. In the context of the second limb related to States acting individually, the duty of international cooperation does not extend to the duty on a State to individually fulfill human rights elsewhere, including the right to development, but it certainly does incorporate the duty to respect and protect the right to development. Therefore, there may be no legally binding obligation on a State individually to fulfill the right to development of others by providing aid whether through North-South or even South-South cooperation, but when States do so, they must respect and protect the right to development of the recipients.

The third level of obligations of States relates to them acting collectively in global and regional partnerships, including through multilateral or regional organizations such as the international and regional financial institutions, World Trade Organization, the United Nations, or regional organizations. The duty of international cooperation assumes a different strength here as compared to the second limb where the frame of reference was States acting individually. Under Article 56 of the UN Charter, States have a legal obligation to take joint and separate action in cooperation with the UN to promote higher standards of living, full employment, conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and universal respect for, and observance of, human rights and fundamental freedoms for all. In other words, this obligation is about establishing an enabling international environment where the right to development is facilitated at the domestic levels. It includes all dimensions of human rights obligations – the obligation to respect, protect, and fulfil. For instance, groups of States have the ability to collectively undermine the right to development of others by voting in favour of imposition of adverse conditionalities on loans granted at multilateral financial institutions. This power to deny the right to development of others through multilateral or regional institutions, enjoins upon such States acting collectively at such organizations, the obligation to respect – that is, do no harm – to the right to development of others. It also entails the obligation on States to collectively protect the right to development of others when multilateral or regional organizations, or even third parties, may violate it. Most importantly, States do have an obligation to collectively, through international and regional partnerships, fulfill the right to development everywhere. This entails the obligation not only to eliminate existing obstacles to the realization of the right, but also to actively promote and fulfill it through international cooperation. The 2030 Agenda for Sustainable Development by States is an illustration of collective action by States in adopting a programmatic plan of action for operationalizing the right to development under this limb.

Finally, let me note that the Declaration does not factor in ‘sustainable development’, and understandably so, since the concept itself was elevated to the global policy level by the Brundtland Commission in 1987 – one year after the adoption of the 1986 Declaration. Clearly, for the right to development to be realized, development cannot be unsustainable. A possible provision in a legally binding instrument, following the language of the consensual 1992 Rio Declaration and the 1993 Vienna Declaration, may therefore be: **[SLIDE SIXTEEN]**

“States undertake to ensure that international and national development policies and programmes will seek to equitably meet developmental and environmental needs of present and future generations”.

I hope that my observations today have helped clarify important elements of the right to development, and, will help forge common understanding for moving things forward in drafting a legally binding instrument.

Thank you.