

## The Right to Development: Towards a new approach?

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### Summary

Could the RTD be the "unknown saviour" of globalisation from its collateral injustices and dangerous turmoils? Can we finally implement this 20 years old "slogan"? This article answers in the affirmative and tries to demystify "*an inalienable human right*" which raised too much expectations and controversies. For some the RTD is the "missing link" between trade, development and human rights, the "father of all rights". For others it is just rhetoric, a political attempt to shift human rights from its normal course.

It is nevertheless not a miracle that we need to reconcile those two camps and reach a common workable vision for the realisation of the right to development. What we need is a new approach, a combination of political will, sustained commitment, conceptual clarity, creative thinking, collaborative action through partnerships involving all relevant stakeholders and finally sound combined expertise informing political discussions.

### Introduction

Like all believers in the right to development we wish Professor Stephen Marks could have titled his most recent article on the right to development "From Rhetoric to Reality." Unfortunately the title he chose is the more accurate "Between Rhetoric and Reality."<sup>1</sup> Indeed, the right to development is no longer just rhetoric, but it has not yet become a reality. It may be an ongoing process, "*a legal*

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<sup>1</sup> Stephen Marks, The Human Right to Development: Between Rhetoric and Reality, Harvard Human Rights Journal, Vol. 17, 2004, pp. 137-168.

*prophecy in the process of realisation.*"<sup>2</sup>, but this remains to be confirmed. Cautious optimism seems to be the most rational attitude as to the future of the right to development (RTD).

Is it possible to operationalise "the slogan" and implement "the prophecy"? This question combines the two facets of the current diplomatic crossroads of the governmental negotiating process on the RTD. On the one hand the international community has committed itself in the Millennium Declaration - at the highest world political level - to this inspiring slogan: making the RTD "*a reality for every one*". On the other hand we confront the well-known obstacles to the right to development. While obstacles cannot be minimised there seems to be an emerging new approach to address the realisation of the RTD.

How did the implementation process of the RTD evolve since its proclamation in 1986, and where is it heading in future? Exploring these questions is the main purpose of this article. We will analyse the following points:

- I - A functional approach to the definition of the RTD;
- II - Particularities of the RTD;
- III - The High Level Task Force;
- IV - Conceptual and methodological clarity;
- V - Overcoming obstacles to the RTD;
- VI - Changing dynamics of the RTD;
- VII- The way forward.

All these questions raised by most of the debates on the RTD will be examined from an operational perspective in light of the recently agreed conclusions of the 5th and 6th sessions of the Working Group on the RTD held in Geneva in February 2004 and February 2005.

### **A functional approach to the definition of the RTD**

Twenty years have elapsed since the RTD was formally recognised by the UN General Assembly as "*an inalienable human right*"<sup>3</sup>. Despite constant efforts, scholars and delegates alike continue to voice some degree of confusion with regard to its definition. Ultimately, the basic premise of the RTD finds its origin in article 28 of the UDHR: "*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.*" The

<sup>2</sup> George Abi-Saab, *Whither the International Community?* European Journal of International Law, 9 (1998), p. 265

<sup>3</sup> General Assembly resolution 41/128 of 4th December 1986, article 1.

similarities are clear between this article and the first article of the RTD General Assembly Declaration of 1986 stating that: *"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 realised"*, as well as article 3 of the same declaration emphasising that *"States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development."* Yet, if this is how the 1986 declaration defines the right to development, many would legitimately think this definition needs a definition. For a number of legal and political reasons, we do not share this view.

From a legal viewpoint, human rights instruments complement each other and should be seen in their entirety. Notwithstanding the established rules of interpretation in international law, one has to admit that the history of political negotiations have fragmented many human rights notions and led to artificial distinctions among certain human rights norms and the instruments outlining these norms. The political realities of diplomatic negotiations can only produce compromises reflecting power relations, hiding fundamental disagreements by "positive ambiguity" and limited to the lowest common denominator as a price for consensus. The RTD declaration is not an exception of these three political realities. The RTD declaration is not an isolated legal concept nor was it born in 1986. It should be read in conjunction with other human rights norms and standards<sup>4</sup>, and with many other "soft law" instruments that emphasised international cooperation which is among the constitutive elements of the RTD. Most of these instruments were not cast in human rights language and many of them were even elaborated prior to the adoption of the RTD declaration and enumerated some of its core elements<sup>5</sup>.

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<sup>4</sup>In paragraph 14 of its general comment 3, the committee of ESCR links economic, social and cultural rights directly to both the UN charter and the RTD through international cooperation: *"in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development is an obligation of all States. The Committee notes in particular the importance of the Declaration on the Right to Development and the need for States parties to take full account of all of the principles recognised therein."*

<sup>5</sup>The GA declaration on Social Progress and Development of 1969 touched upon "The improvement in the position of the developing countries in international trade, ...new and effective methods of international cooperation in which equality of opportunity should be as much a prerogative of nations as of individuals within a nation". The GA declaration on the Eradication of Hunger and Malnutrition of 1974, stated that "it is the common responsibility of the entire international community to ensure the availability at all times of adequate world supplies of basic food-stuffs... The GA declaration on the Use of Scientific and Technological Progress of 1975 stated that "All States shall promote international cooperation to ensure that the results of scientific and technological developments are used in the interests of strengthening... economic and social development of peoples and the realisation of human rights and freedoms in accordance with the Charter of the United Nations." and that: "All States shall cooperate in the ..., strengthening ... of the scientific and technological capacity of developing countries with a view to accelerating the realisation of the social and economic rights of the peoples of those countries."

Such "historical seeds" of the RTD are obviously additional tempting ingredients for scholars to launch interesting but probably endless debates on its definition. It was therefore very useful that the last two sessions of the UN Open Ended Working Group (OEWG) on the RTD in 2004 and 2005 deliberately avoided addressing the problem of the definition. Rigid definitions are in essence incompatible with the very nature of the RTD. Professor Sengupta, the independent expert on the RTD therefore outlined the features of the process of development that integrates the RTD. His analysis produced a descriptive model avoiding any controversies related to definitions which make the negotiating process somewhat self-defeating. A content analysis led the independent expert to the conclusion that the RTD is a right to "*a particular process of development.*" He describes this process as follows: "*a country can develop by many different processes..... However they will not be regarded as a process of development, as objects of claim, as human rights, so long as they are attended by increased inequalities or disparities and rising concentrations of wealth and economic power, and without any improvement in indicators of social development, education, health, gender balance and environmental protection and, what is most important, if they are associated with any violation of civil and political rights. It is only that process of development "in which all human rights and fundamental freedoms can be fully realised" that can be universal human rights, which is the entitlement of every person.*"<sup>6</sup>

Such functional approaches to the definition of the RTD is particularly useful as both developing and developed countries need a common clear ground beyond their traditional divides. Developing countries clearly voiced concern about controversial definitional debates and expressed during the 61st. session of the CHR, the need "*to by-pass a rather lengthy course of unnecessary and at times repetitive conceptualisation.*"<sup>7</sup> In the same session the representative of India voiced the same concern affirming that "*time has come for translating concepts and ideas into action.*"<sup>8</sup> The Indonesian delegate welcomed the outcome of the 6th session of the Working Group as "*a set of recommendations which embody a common understanding of a more practical application of the RTD.*"<sup>9</sup> The European Union position was equally categorical: "*Pour faire avancer le droit au developpement, nous soutenons pleinement l'approach visant a passer des généralités aux spécificités et du conceptual vers l'operational.*

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<sup>6</sup>3rd report of the independent expert on the RTD, E/CN.4/2001/WG.18/2 paragraph 5

<sup>7</sup>Statement of Malaysia on behalf of NAM at the CHR, 22 March 2005.

<sup>8</sup>Statement by the Permanent Representative of India under agenda item 7 of the 61st session of the CHR, March 22, 2005.

<sup>9</sup>Statement by the Indonesian delegate before the 61st session of the CHR, March 22, 2005.

In our view, the RTD remains valid even without a "perfect" corresponding obligation. Professor Sengupta rightly distinguishes between the "imperfection" of the obligations or duties and the feasibility of their content, and between the feasibility in principle of realising the RTD and its actual implementation.<sup>10</sup> In fact the only way to by-pass the problematics of an RTD definition and to avoid an unnecessary legalistic debate on the scope of obligations of different stakeholders in abstract is to adopt a progressive case by case functional approach to different situations.

A given situation, by exclusion, can be deemed incompatible with the RTD basic premises and requirements prescribed by the 1986 RTD declaration and other related human rights standards. This does not mean that the RTD is only a human right "in principle", but rather that this human right heavily depends on international cooperation as it involves numerous duty-holders if not the international community as a whole. The case by case approach to the RTD, and its close links to international cooperation does not reduce it either to a "right to international cooperation." The RTD addresses first and foremost the national environment where States, according to article 8 of the RTD declaration, should undertake *"all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure the women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices."* States do not always need international cooperation to assume such obligations as well as those stipulated by article 6 of the RTD declaration stating that *"States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights."*

Functional definitions of the RTD as the right to a "particular process of development" or the right to "an environment free from structural obstacles to development" are clearly not incompatible. These two formulations address a

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<sup>10</sup> According to Professor Sengupta *"feasibility in principle does not automatically lead to actual realisation. Realisation would depend on the agreement of all the duty holders to work together according to a programme and some binding procedures to make that agreement honoured. Legislation that converts a "valid" right into a "legal" right is one such procedure, but it need not be the only one. There are many other ways of making an agreement binding among different duty holders. This is particularly true if the duty holders are different States parties and the imperfect obligations cannot be reduced to legal obligations. Even if a right cannot be legislated, it can still be realised if an agreed procedure for its realisation can be established. In other words, such an agreed procedure, which can be legally, morally or by social convention binding on all the parties, would be necessary to realise a valid right, that is, a right that is feasible to realise through interaction between the holders of the right and of the obligations.*

<sup>11</sup> Report of the independent expert on the RTD pursuant to CHR resolution 2000/5, 17 August 2000, paragraph 9.

challenge which is more an of intellectual nature than a properly legal one. The challenge is how to translate an abstract declaration of principles into concrete suggestions to be understood and implemented by development practitioners. Such functional definitions show that the RTD is a constantly ongoing process, a permanent work in progress, a continuous effort to monitor developments that impact negatively on the core principles enumerated by the 1986 RTD declaration, a commitment to eradicate such obstacles which is the primary responsibility of every State within its own boundaries and a duty to cooperate at the international level to achieve the same objectives.

### Particularities of the RTD

Progressiveness of implementation, imperfection of obligations and flexibility of scope to adapt to various situations are among the main particularities of the RTD. By definition, the RTD means different things to different people in different times and places. It is a human right which is both individual and collective, which depends more than any other human right on international cooperation and which raises issues of norms and policy coherence among different disciplines and processes. The sixth session of the Working Group on the RTD recognised that *"this process requires time, inclusiveness, dialogue and the constructive engagement of all concerned parties in the implementation of their mutual commitments in line with the Declaration on the Right to Development."*<sup>11</sup>

Proceeding from the classical distinction between the "law of existence" and the "law of cooperation" approaches, features of the latter are paradoxically clarified by the controversies surrounding the RTD. The basic presumption of the "law of cooperation approach" is the existence of an international community with both common values and interests where certain tasks cannot be performed unilaterally. The RTD fundamentally falls within a sphere of a "law of cooperation." Human rights law in general grants States a certain "right of oversight" in return for a clear "duty to cooperate." The "right to oversight" relates more to the civil and political side of human rights, while the "duty to cooperate" links more with its economic social and cultural dimension. Both precisely converge in relation to the RTD, which demonstrates its holistic, comprehensive and multifaceted nature.

Another particularity of the RTD is the obvious weakness of its enforcement mechanisms. This fact raises in essence the question of the "operationability" of the RTD. After all, the RTD is a set of general principles embodied in the 1986 declaration, a specific qualified process of development. It is

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<sup>11</sup> E/CN.4/2005/25, paragraph 36

hard therefore to conceive a direct implementation of the RTD in relation to a given situation without prior negotiations based on the specific merits of the situation in question. Such intermediary phase of the implementation of the RTD is reflected in paragraph 44 of the agreed conclusions of the sixth session of the Working Group on the RTD which addressed this question in its proper perspective and right sequence by stating that *"mutual commitments, as part of the duty of international cooperation, can lead to specific binding arrangements between cooperating partners to meet the right to development requirements. Such arrangements can only be defined and agreed upon through genuine negotiations"*. Such case by case, progressive and sectorial approach to international cooperation reveal the potential contributions and flexibility of a right to development framework in concrete terms adapted to different situations.

In fact, if we approach the RTD in its totality we should agree with Professor George Abi-Saab that<sup>12</sup> *Malheureusement la Déclaration sur le droit au développement adoptée par l'Assemblée Générale lors de sa 41ème session en 1986 (Res. 128/41) n'a pas tranché toutes les controverses soulevées par cette notion et ne nous aide guère à cerner davantage sa nature et ses contours. Etant donné les clivages qui existaient à ce moment là entre les groupes d'Etats sur le sujet, on a abouti à un texte qui n'énonce - consensus oblige - qu'une série fragmentaire et non structurée de propositions (pour satisfaire minimalement tout le monde), portant davantage sur le thème du "respect des droits de l'homme dans le processus du développement " que sur le droit au développement en tant que tel. A combination of bottom-up and case by case approach to different applications of the RTD seems therefore to be the only feasible method to its realisation that suits its complex environment and multiple addressees.*

### **The High Level Task Force on the RTD**

Experience has shown that early attempts to "push" the RTD from the sphere of general principles to the concrete implementation level were still premature. The challenge of bringing the RTD abstract concepts all the way down to development practitioners has always seemed to be almost insurmountable. Two main phases can be distinguished in this respect. Prior to CHR resolution 1989/46 of 6 March 1989 the UN efforts to address the RTD were of exploratory nature and could hardly stimulate genuine negotiations. It was a phase of contradictory claims and general opposite assertions. Successive RTD agendas were characterised by their too wide scope which in fact did not allow the debates to be focused on specific areas.

<sup>12</sup> Professor George Abi-Saab, *Droit de l'Homme et Développement : Quelques Elements de Feffexion*, African Yearbook of International Law, 1996, pp. 5-6

The CHR resolution 1998/72 was the starting point for a new phase which took shape progressively towards the realisation of the RTD. This resolution created a follow up mechanism for an initial period of 3 years consisting of a governmental open-ended working group mandated to review progress in the promotion and implementation of the RTD at the national and international levels and to formulate recommendations in this respect. This resolution introduced two elements of great importance from a methodological and, subsequently, substantive points of view. The first was that this new mechanism should operate *"focusing each year on specific commitments of the Declaration."* The second major addition enhancing the specificity of this follow-up mechanism and its capacity to stimulate focused and fruitful debates was the appointment of an independent expert *"with a mandate to present to the Working Group at each of its sessions a study on the current state of progress in the implementation of the RTD as a basis for a focused discussion, taking into account, inter alia, the deliberations and suggestions of the Working Group."* The Working Group naturally continued to act as a political body in the sense that its debates related more to political inclinations than to the technical merits of the issues under consideration. Nevertheless, the independent expert was successful in providing the Working Group with substantive reports that tried to bridge gaps between the abstract notions of the 1986 RTD declaration and the realities on the ground.

The fifth session of the Working Group on the Right to development, held in Geneva in February 2004 witnessed the emergence of a new approach to the realisation of the right to development. In his statement to the third committee of the General Assembly in 22 October 2004, the chairperson of the Working Group enumerated the methodological features of this new approach as follows: *"to avoid legal definitions and conceptual controversies; to accommodate the progressive nature of the realisation of RTD; to divide the problems of RTD into smaller sections and address them separately, progressively and consensually; to resort to technical expertise as a tool to study those sections; to encourage a bottom - up approach; to rely on ground experiences and to involve developmental institutions, NGOs and civil society in a more structural manner to the process of realisation of the RTD."*

The Commission on Human Rights (CHR) with its resolution 2004/7 endorsed the agreed conclusions and recommendations adopted by the Working Group on the Right to Development at its fifth session. The Working Group had agreed to establish a High-Level Task Force on the implementation of the right to development within the framework of the Working Group with a view to help fulfil its mandate. The Task Force was composed of high-level representatives from



the identified trade, finance and development institutions/organisations, in addition to five experts from diverse background with practical experience related to the implementation of the right to development. The UN High-level Task Force on the RTD was an innovative approach inspired by lessons of the past attempts to negotiate the realisation of the RTD as well as by its increasingly visible particularities.

The main added value of the Task Force already demonstrated in light of its first meeting in Geneva in December 2004 was:

a- Creating a space for a structured dialogue between the human rights community and the real world of trade rules makers and development practitioners. This dialogue produced tangible results. The agreed conclusions of the 6th session of the Working Group emphasised *"the importance of continued partnerships, within the framework of the Working Group, between the Commission Human Rights and United Nations bodies, agencies, funds and organisations, with a view to benefiting from their experience and expertise in identifying concrete measures to implement the right to development and to mainstream it into their spheres of action, in order to progressively achieve a fuller realisation of the right."*<sup>13</sup>

b- Addressing the discrepancies in vocabulary which sometimes hide divergent concepts and approaches towards the links between development, trade and human rights. In this context, the Working Group *"encourages all stakeholders – Member States, experts, development practitioners, international institutions and the civil society – to move towards a common understanding of the substantive components of the right to development regardless of the possible nuances in the use of terminology in the discussions on the right to development. The Working Group considers that such nuances have no bearing on the right to development as embodied in the Declaration on the Right to Development."*<sup>14</sup>

c- Studying a limited number of issues which allowed the most focused discussion related to the RTD since the Working Group was established in 1998. The Working Group on the RTD in its sixth session adopted this methodology for future work as well, *"The Working Group, recognising that many issues have been raised and proposed for the future follow-up work on the right to development, decides to prepare a list of issues to guide its future work. The Working Group believes that such an approach is important to retain a focus in the task force in order to make progress in specific areas relevant to the implementation of the right to development."*<sup>15</sup>

<sup>13</sup> E/CN.4/2005/25, paragraph 35

<sup>14</sup> E/CN.4/2005/25, paragraph 38

<sup>15</sup> Ibid, paragraph 55

A road map for the future course of negotiations has thus been announced. This constitutes an opportunity for contributions from research centers in order to keep the RTD on a technically sound track, which is a prerequisite for the success of the new approach to its realisation.

### **Conceptual and methodological clarity**

The new approach to the right to development that the CHR endorsed in its 60th session in 2004, namely the establishment of a High-level Task Force within the framework of the Working Group, is the main factor which stimulated collective thinking, focused debates and conceptual clarity of the RTD on many fundamental points of legitimate concern for both developed and developing countries. The potential implications of the RTD indeed raise legitimate concerns at both sides of the international political spectrum. The very notion of a "right to" creates a profound doubt that an "ambiguously claimed and ill-drafted" right to development may be nothing more than a rhetorical exercise designed to score political points and distort the human rights notions and agenda by shifting its focus from State's obligations towards its citizens to State's obligations towards other States. The RTD could also be seen as an antithesis of free market economy and a "natural ally" of a certain concept of social justice. Even if we sideline ideological perceptions, many western countries have an understandable concern that the RTD becomes a valid basis for countries of the South to claim direct specific entitlements to which their partners from the North did not subscribe.

Although the 6th Session of the Working Group in February 2005 avoided conceptual debates, both the letter and spirit of its agreed conclusions and recommendations based on the report of the Task Force clearly indicate that the RTD is not a right to assistance, not a license to claim the fruit of the work of others or share their wealth, not a negation of the voluntary basis of international commitments and not a romantic remnant of a certain idea of social justice. The agreed conclusions and recommendations also excluded that the right to development would be seen as a simple addition of all human rights, a synonymous of the rights based approach to development, an act of charity, a wishful thinking, or merely an impossible mission.

The Working Group agreed that "*the implementation of the right to development requires growth with equity*"<sup>6</sup>. The added value of the right to development cannot be stated in simpler words than those. On the other hand, this "noble mission" of the right to development does not transform it into a "baguette magique" with "super universal jurisdiction" in the socio-economic field over other

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<sup>6</sup>Ibid, paragraph 42

legally established mandates in the name of human rights. The role of the Working Group as a follow-up mechanism is, inter alia, to send credible thoughtful messages from a human rights perspective to the trade and development community. The Working Group recognised in this respect that some of its recommendations "*relate to the activities of other international organisations and, therefore, agrees that its role, as a part of its mandate as a follow-up mechanism to contribute to making further progress towards the realisation of the right to development, is to draw the attention of those organisations to the importance of including the right to development perspective*".<sup>17</sup> This role, if continued on technically sound basis in a coherent, consensual and consistent manner, can ensure an incremental progress in the mainstreaming of the right to development.

The link between the national and international dimensions of the RTD is a problem which obscured discussions on the RTD for a long time. The 6th session of the Working Group recognised in this respect "*the multifaceted nature of the Right to Development*" it also recognised "*the need to employ a multi-pronged approach at both national and international levels to continuously address the constraints in the attainment of the Millennium Development Goals*"<sup>18</sup> and finally the Working Group welcomed "*the growing acceptance of the simultaneous levels of actions required at the national and international level in the implementation of the right to development*".<sup>19</sup> The link between both levels of required action is clear: "*While the importance of the responsibility of States to implement the right to development cannot be over emphasised, this does not in any way reduce the importance of international cooperation in providing an enabling environment at the international level*".<sup>20</sup> Another important agreed point of clarification is the difference between the RTD and the rights based approach to development. The Working Group agreed that "*a rights based approach to economic growth and development contributes to the realisation of the right to development while it does not exhaust its implications and requirements at both national and international levels*".<sup>21</sup>

### **Overcoming obstacles to the RTD**

Contrary to the general view we are not sure that the first obstacle to the realisation of the RTD is a political one. We believe the first obstacle is rather the

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<sup>17</sup> Paragraph 54 of the report of the 6th session of Working Group. The same paragraph formulated recommendations concerning debt burden of developing countries and its impact on the achievement of the Millennium Development Goals, financial assistance, ODAs, The Doha Ram...., special and differential treatment, impact assessment of trade agreements on the RTD.

<sup>18</sup> E/CN.4/2000/25, Paragraph 51.

<sup>19</sup> Ibid, paragraph 49.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, paragraph 46.

lack of conceptual clarity, namely on the major points we have just briefly touched upon. The two major obstacles in this respect are the weakness of innovative conceptual thinking on the RTD within both development literature and human rights literature. The second major deficiency is almost the total lack of empirical knowledge on the matter. These two points explain that despite their rhetoric of human rights, partnership agreements, including those concluded among developing countries, such as NEPAD, do not invoke the RTD. The same applies to United Nations Development Assistance Framework UNDAFs, Common Country Assessments CCAS and PRSPs.

It is also striking to note the growing convergences between the RTD and the outcome of numerous UN conferences such as Beijing+5, Copenhagen+5 and the Monteray consensus on Financing Development. At Copenhagen in 1995 a declaration and programme of action were elaborated as a strategy for social development at all levels. Not only are objectives similar but also the main principles guiding the implementation of social development strategies are the same defining an RTD framework, namely popular participation, transparency, accountability, equity and non-discrimination, as well as international cooperation.

Avoiding explicit reference to the RTD in all these related areas of international cooperation is indeed quite significant and it is far from being an accidental omission. It rather indicates that the RTD framework is not yet an understandable convincing operational tool for development policies. What is lacking in fact is not just some more explicit references to the RTD but a clear understanding of what this right could and should mean if taken seriously in a particular context. The problem is not to find an "agreed language" from human rights instruments to be inserted in future statements, but a genuine common understanding, a shared workable vision of the RTD in practice. This situation indicates that the realisation of the RTD cannot be achieved by the human rights community alone. Despite, and even because of the sporadic efforts in this respect, there is a need to take stock of where human rights stood within the programmes of various agencies and pursue it from there in a much more coordinated manner. If there was an emerging common understanding on a rights based approach to development, the difference is still not clear between a rights based approach to development and the RTD.

A shared workable vision also requires empirical evidence. The Working Group therefore recognised *"the need to identify, develop and build a consensus on suitable objective tools to support an adequate approach and methodology in undertaking human rights impact assessments for the right to development."* It also

agreed "that there is an urgent need to build national capacity, especially statistical capacities, through technical cooperation programmes to encourage the use of human rights impact assessments and other tools in guiding public policy at the national and international levels for the implementation of the right to development"<sup>22</sup> The corresponding recommendations by the Working Group were to recommend "that States be encouraged to undertake independent impact assessments of trade agreements on the right to development, as a potentially useful instrument at the national and international levels, bearing in mind that the analysis and methods in this respect are still evolving. The Working Group encourages States to consider using these assessments in the context of all the relevant international trade forums, including the Trade Policy Review Mechanism and future trade negotiations".<sup>23</sup>

The RTD framework does not intend to reinvent the wheel, but just to conciliate trade and development norms and policies with human rights requirement. The RTD addresses precisely the "no man's land" of interaction or the "demarcation zone" that artificially separates those two sets of norms. The main obstacle in this respect is both conceptual and practical. Practitioners on "both sides of the fence" hesitate to claim any "disputed territory" which might belong to the other. It was therefore a fundamental step forward that the Working Group on the RTD adopted the recommendation of its Task Force and agreed that "it is necessary to consider introducing and strengthening human rights standards and principles in undertaking impact assessments of trade and development rules and policies at both national and international levels. Such an approach is critical for the implementation of the right to development. It is also necessary in identifying those complementary measures that may be required to address adverse consequences of both national and international trade and development policies."<sup>24</sup>

The lack of reference to the RTD in relevant UN fora and beyond also indicates that the human rights community, including at the individual States level has not yet been sufficiently associated, if at all associated, to the preparatory stages of policy-making and standard-setting exercises in the areas related to the RTD. A fundamental reason explains this situation: the negotiations on the realisation of the RTD should achieve a sustainable level of a maturation and productivity providing States with concrete credible results to rely on, individually and collectively, to mainstream the RTD into their policies, norms and decision making process in all related fields. The same reason explains the relative lack of visibility of the tireless efforts by the OHCHR in relation to the RTD. In fact as stated by the chairman of

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<sup>22</sup> E/CN.4/2005/25, paragraph 53

<sup>23</sup> Ibid, paragraph 54/e

<sup>24</sup> Ibid, paragraph 52

the Working Group during the 61st session of the CHR, *"the efficiency of the role of the OHCHR and its effectiveness directly depend, and largely rely on the extent and clarity of the areas of agreement among member States. There should be sufficiently large areas of agreement with specific requests and clear direction to the OHCHR. Otherwise all what the OHCHR can do is to organise seminars during which scholars can elaborate on the general principles embodied in Declaration on the Right to Development."*

The added value of such analysis of the nature of the obstacles to the realisation of the RTD is essentially to determine the priorities and methods of the Working Group on the RTD. The new approach adopted during the 5th and 6th sessions of the Working Group is precisely the beginning of a structured transparent and inclusive process which needs the support of all governments and a more active involvement of the civil society and academic circles in order to set up a realistic road map for the future of the RTD.

Ultimately, the objective of any new approach to the RTD should be to move it from generalities to specifics, from rhetoric to action and from Geneva to the field. The success of the new approach to the RTD, even with the highest possible degree of both conceptual clarity and political commitment is unachievable without empirical evidence, impact assessment, public awareness and involvement of development practitioners at all levels on the ground. The added value of the RTD as a concept to clarify the development process can only be established through structured and continued dialogue among all stakeholders, so as to bridge the various perspectives and propose operational models for furthering the implementation of the RTD.

### **Changing dynamics of the RTD**

Contrary to a general perception we believe there is a growing "objective complicity" between globalisation and the RTD. By definition, this right is about an environment and a process; the same applies to globalisation. The more topics compete on the international agenda, the more multilateral concerns become cross-cutting. The more intensive interaction is created between various actors and sets of norms and policies, the more we need global vision, coherent policies and concerted action among all stakeholders. The right to a development framework is among the most useful tools to conduct such an important exercise. This should be done in an inclusive, collective, transparent and cooperative manner.

There is obviously a striking contrast between the normative process of

trade law and that of the RTD. While the multilateral trade system is progressing at a high speed as a properly normative system, the RTD has to prove its credentials and convince those who find it nearer to empty promises and wishful thinking. There is no doubt that the work of UNCTAD, numerous G.A. declarations from the Charter of economic rights and duties of States to the Millennium Development Goals in addition to numerous UN Summit meetings all contributed to upgrade the level of attention and the primacy of development cooperation within and outside the UN system. However, notes Prof. G. Abi-Saab, *"this impressive normative structure has remained very fragile because the basis of obligation of the industrialised countries to act according to these principles was very controversial. While agreeing to participate in certain schemes and programmes, the industrialised countries, particularly the Western ones, have always insisted on the purely voluntary character of this participation and have denied any sense of obligation, as they have always dissociated themselves from declaratory resolutions of principles. Consequently, the greater part of this legal structure has remained in the form of soft law, if not lex ferenda."*<sup>125</sup>

While this conclusion remains genuinely true, the realities of today's world, namely the growing interdependence among different nations in many fields should temper the classical North-South divide and reduce the traditionally categorical conflict of interest in areas related to the RTD in its different applications. The consequences of lacking the national environments conducive to the realisation of the RTD can affect international relations in variable forms such as illegal immigration, organised crime, terrorism and can even constitute threats to international peace and security. Hence the growing joint interest of North and South to genuinely cooperate to achieve sustainable development all over the world. Failures of development can become threats to peace. Globalisation accelerated the interaction between all those factors and actors, including non-State actors. This makes the RTD a much more complex ground in an increasingly multi-actor world, not only internationally but even within States. The positive side of this rather challenging reality for the future of the RTD is simply that securing globalisation objectively requires the realisation of the RTD, or whatever we call the RTD. It is in fact very significant to contemplate the increasing importance of the "social dimension of globalisation" and the increasing calls for a globalisation "with a human face", including from numerous western sources, particularly within the civil society and the academic circles. The definition of that social dimension of globalisation is strikingly similar to that of the RTD. According to the ILO Expert Group report on globalisation, *"the Social dimension of globalisation is about jobs, health and education, but it goes far beyond these. It is the dimension of*

<sup>125</sup> G. Abi-Saab, *Whither the International Community*, Op-cit p. 263

*globalisation which people experience in their daily life and work: the totality of their aspiration for democratic participation and material prosperity. A better globalisation is the key to a better and secure life for people everywhere in the 21st century. We also propose a process by which such a perspective can be realised at all levels, beginning with empowered local communities and improved and more accountable national governance; fair global rules applied fairly; and global institutions that are more pro people.*<sup>26</sup>

At the national level we can also identify many policies and programmes which do not deviate much, if at all, from a right to development framework with the sole exception of that title, and with it all the moral weight of the concept of human rights. In fact many applications of the right to development emerged out of necessity and progressively took place at both national and international levels, such as the NEPAD initiative and the Cotonou agreement between the EU and ACP, without "labeling" them as RTD applications. An interesting and innovative example is the Swedish recent "policy for global development" based on the simple and clear fact that achieving the Millennium Development Goals in a shrinking interdependent world requires a new vision for the interest of all. The government Bill 2002/03:122 presented to that effect does not pronounce the "magic words": right to development. But it relates to what we consider to be a genuine RTD framework, another functional model to be added to previously mentioned examples. A model named "*equitable and sustainable global development.*" According to this model "*the concept of development must be broadened and a new framework must be created for a more coherent policy*" and "*responsibility must be shared. Each and every country is responsible for creating favourable conditions for development within its boundaries..... At the same time, the rich countries for their part, must assume responsibility for supporting and complementing national efforts in poor countries by pursuing a coherent development-promoting policy and by international development cooperation. "With or without the label", this in our view is about the right to development.*<sup>27</sup>

### **The way forward**

In light of the preceding analysis of the particularities of the RTD the question then becomes: can this right survive its institutional weaknesses and those of the international community as it stands today? We answer in the affirmative. The RTD starts in our view to gain credibility through a cumulative process of

<sup>26</sup> Report of the World Commission on the Social Dimension of Globalisation: A fair globalisation: creating opportunities for all.

<sup>27</sup> Shared responsibility, Sweden's policy for global development, Government Bill 2002/03:122, publication of the Swedish Ministry of Foreign Affairs.



various sporadic applications. Depoliticisation of the RTD is an ongoing process thanks to the ramifications of globalisation which increasingly require collective management through better global governance and more effective, efficient and coherent policies at both national and international levels.

The RTD is a holistic human right of a particular nature, added value and increasing relevance. It is the only "box" in human rights that one can hardly "think outside". Almost every development in policies, programmes strategies and norms at both national and international levels has an impact, positively or negatively, on the RTD. It is certainly intellectually challenging to define operational RTD frameworks valid in different situations. But it is certainly not an impossible task to perform. The principles that have been identified as being critical to this process include accountability, transparency, non-discrimination, equity and participation as well as the rule of law and good governance at all levels. In addition, there are at least two other aspects that are central in both the conceptualisation and the operationalisation of the right to development and the policy framework that it supports. The first is the emphasis on the notion of indivisibility of human rights - civil and political, as well as the economic, social and cultural rights - and the second is the importance of international cooperation in the implementation of the right to development.

The 5th and 6th sessions of the Working Group on the RTD adopted a new approach to the RTD. This approach made the RTD more technically challenging and relatively less divisive politically. At least the spirit of the debates and the voting patterns during the last two years suggest a net amelioration. Yet, this positive development is fragile. Its sustainability depends on the behaviour of all relevant actors. It requires hard work, creative thinking, good faith and political commitment. It requires in particular a more active role by academic and non-governmental circles to shape a viable and constructive road-map for the RTD.

The "operational theatre" of the RTD is much more multi-actor than that of all other human rights. The degree of sophistication of the required "institutional engineering" is therefore much higher than any other cross-cutting issue on the multilateral agenda. In recognition of this fundamental particularity the Working Group on the RTD stated in its 6th session that *"development partnerships should go beyond relationships between governments and multilateral institutions to include civil society organisations."*<sup>28</sup>

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<sup>28</sup>E/CN.4/2005/25. paragraph 45

The objective, and yet neither visible nor recognised, alliance between globalisation and the RTD is the only alternative to a possible *return to the wild liberalism of the nineteenth century, trusting entirely in the 'invisible hand' and the supreme law of the market (new dogma which we could call markettheism), (which) leaves it in reality to naked power relations in society, in the pure tradition of social Darwinism, to reach their natural equilibria through the process of natural selection.*<sup>29</sup>

A traditional human rights setting only involves a State and its nationals. But this was before we all become willingly or involuntarily plugged into new global networks that diminish the management capacities of the nation State which is supposed to be the only duty holder in relation to its nationals from a traditional human rights perspective. With the new realities of globalisation we certainly need to rethink some of our basic human rights classical assumptions. With economic and cultural globalisation, and the resulting instability and turmoil, an increasing number of global concerns can only be addressed in a global manner. This requires fair rules and solid institutions. No collective action can be effective if equity is side-stepped or if institutions of global governance reflect balances and thoughts that are outdated by more than half a century. The increased relevance and need for an RTD framework in a globalised world is best expressed by paragraphs 336 and 337 of the report of the independent expert group within the ILO on Globalisation: *"A Fair Globalisation creating opportunities for all: "Increasing globalisation has generated a need for better global governance. The growth of interdependence among nation States has meant that a broader range of issues now affects more countries more strongly than ever before. The growing nexus of links between countries through trade, FDI and capital flows means that changes in economic conditions or policies in major economies have strong spillover effects on the rest of the world. Similarly, new global rules also have a strong impact on the policy options and economic performance of countries.... More specifically, increasing globalisation has given rise to a broadening range of issues that cannot be effectively dealt with except through collaborative global action. Examples of these include the problem of financial contagion, communicable diseases, cross-border crime, security concerns, tax havens and tax competition. More generally, there is a growing need to develop institutional arrangements to support and supervise global markets in the interests of all participants. This includes the need to ensure their smooth and equitable functioning, eliminate uncompetitive practices and abuses, and correct market failures."*

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<sup>29</sup>G. Abi-Saab, *Whither the International Community?* European Journal of International Law 9 (1998), 265

If market failures cannot be addressed unilaterally, if no country can fully achieve development on its own, and neither can the global marketplace, then we must focus our efforts on the missing link of the equation: the right to development. This requires creative institutional thinking and a collaborative approach between relevant actors and organisations. In fact the numerous rapid evolutions accompanying the transition to a globally integrated market exposed a fundamental if not existential institutional deficiency. On the one hand, globalisation eroded the capacity of national policy instruments, while international institutions, conceived in a totally different era, are obviously unprepared to respond to the new challenges of our time. We agree with Professor Mohan Rao that *"the implication is self-evident: not only does the world need a big push towards greater cooperation for establishing adequate rules and institutions for the emerging global economy, but the creation of these global public goods must pay special attention to the criteria of equity, legitimacy and democracy. World-wide stability, security, democracy and peace cannot be founded on a system of rules that leaves too much of value for real people and communities to the whims of the market. In particular, equity, legitimacy and democracy are not only important means to effect cooperation, but valuable ends."*<sup>60</sup>

To stimulate such new thinking we need to overcome the "historical legacy" of deliberately and artificially fragmented human rights notions. We need to rediscover the RTD as a guarantor of the indivisibility of all human rights and a tool of reconciliation between artificially dislocated sets of norms, within and even beyond the human rights arena. Such historical reconciliation should establish coherence of States policies and obligations and enhance the universality of human rights. The very essence of the right to development is simple, comprehensive and clear: it is the right to a national and international environment that enables or at least does not hinder the enjoyment by individuals and peoples of their basic human rights and fundamental freedoms, an environment that is free from structural and unfair obstacles to development.

With such a fundamental idea of "a right to the rights" none of the constitutive elements of the RTD needs to be highly perspective, rather the need is to accept the basic premises of that right in full conceptual clarity and accordingly conduct specific subsequent negotiations in good faith on technically sound basis and within credible empowered and coordinated institutions. Within those parameters we believe that even the deepest among the legitimate doubts and concerns of the opponents of the right to development can be accommodated.

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<sup>60</sup>J. Mohan Rao, Equity in Global Public Goods Framework, in Global public goods, International Cooperation in the 21st century, UNDP, 1999, p. 85.

Although we agree that proving such an optimistic conclusion requires at least a separate article. A second separate article needs be dedicated to how the preceding analysis of the right to development should be associated to the current debates on the reform of the United Nations which in our view do not sufficiently integrate the right to development despite its great potential as a catalyst for policy coherence, international cooperation, inter-agency coordination and, indeed, world peace and security. As rightfully emphasised by the UN Secretary General in his report "In larger freedom: Towards development, security and human rights for all"<sup>31</sup>: *"We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights."* Our humble addition is that we will not ensure respect for human rights without an environment *"in which all human rights and fundamental freedoms can be fully realised"*<sup>32</sup> through "the creation of national and international conditions favourable to the realisation of the right to development."<sup>33</sup>

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<sup>31</sup> In larger freedom: Towards development, security and human rights for all, A/59/2005.

<sup>32</sup> Article 1 of the RTD declaration of 1986.

<sup>33</sup> Ibid, article 3/1