

WORKING PAPER

Human Rights and Equitable Development: “ideals”, issues and implications

Klaus Decker, Siobhán McInerney-Lankford and Caroline Sage.

I. Introduction

The aim of the paper is to explore the relationship between human rights and development. While development theory and human rights discourse have, until recently, developed fairly independently of each other- and have often been viewed as in tension - there are persuasive reasons to argue that these two bodies of thought and practice are in fact two sides of the same coin.¹ On the one hand, human rights advocates have increasingly realized that human rights principles can only be meaningful in practice if other (supply and demand) capacities exist. On the other hand, understandings of development have expanded to encompass more holistic understandings of human well-being and human development. Further, the emergence of ‘Rights-Based Approaches to Development’ (RBA) over the past decade has led to a reshaping of development practices in a number of multilateral and bilateral agencies to accord with and reflect human rights principles. RBA have also served to reinforce critiques of more traditional approaches to development.

The definition of international development as a process of social and economic change is widely debated and contested. It is fair to say, however, that common understandings of development generally include the aim of enhancing well-being and capacity, and building a better quality of life for poor and marginalized groups.² One could argue further that among those overarching goals, development is also aimed at enhancing peoples' human rights. Thus, despite a fairly disconnected history, the mutual interdependence of human rights and development is now generally accepted. The codification of rights in international, regional or national regimes is meaningless if people do not have awareness the capacity to claim those rights. Improving individual circumstances through economic development may therefore be a precursor to making human rights meaningful in practice. Conversely, economic development without a concern for the equity of outcomes or the social arrangements and processes that determine allocations and power, can only serve to reinforce existing inequalities and deprivation. In this paper, we outline areas of human rights law relevant to development and introduce preliminary perspectives on the nature of the relationship between the two. This paper aims to set forth the foundation for future exploration of the evolving

¹ See Alston, Philip “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals” *Human Rights Quarterly* 27(2005): 755-829

² Amartya Sen has defined development as the “expansion of the real freedoms that people enjoy, see A. Sen *Development as Freedom* (New York: Anchor 2000), p 3.

connection between these two areas, and offer a broader base of reference for the discussion of human rights in the WDR 2006 on Equity and Development

II. What are Human Rights?

Today the notion of human rights has become synonymous with international human rights law³ and its core international human rights instruments— most prominently the Universal Declaration of Human Rights. However, an account of human rights that began with the Universal Declaration would be incomplete, and while the sources of human rights obligations are generally held to be human rights treaties and legislative frameworks –at the global, regional and national level– this tells us little about moral, philosophical and political underpinnings of these laws or the sources of their legitimacy.

In this section we explore ways in which human rights have been understood, their philosophical genesis, the antecedents to the modern human rights regime, and ultimately the ways in which these different elements have been embodied in contemporary human rights law.

Defining Rights

It is widely acknowledged that human rights defy precise definition. Rights themselves are a complex notion, which permit of a variety of interpretations and theories and are capable of embodying many different values and meanings. Theories of rights abound and have a long pedigree.⁴ Notwithstanding this, rights are distinct in taking the entitlements of individuals as the starting point for political morality.⁵ That stands in contrast to a view that rights be based on some prior theory of social and political morality, such as utilitarianism. Further, rights are also distinct in that they embody corresponding duties.⁶ This is ineluctable. There is much that can and has been debated about what those duties look like, which are primarily referable to the nature of rights under a particular theory or conceptualization. However, in terms of normative construct, rights can be understood as correlatives – where right implies duty. Rights are also generally logically related to law, entailing a body of rules and principles.⁷ Finally, the concept of rights connotes some special importance and high priority, as well as some degree of enforceability.

³ C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford, OUP) 2003, 7-9

⁴ They have origins as far back as Romans and Stoics – Seneca, Cicero..

⁵ R. Dworkin posited a tripart distinction under which political morality may be right- based, duty-based or goal based; *Taking Rights Seriously* (1978) 171

⁶ On the relationship between rights and duties and the relationship between duties and right-bearers, see “choice theory of rights – singling out the right-bearer in view of the power he has over the duty in question (e.g. HLA Hart) and benefit or interest theories of rights which focus on duty – e.g., X has a right if Y has a duty to perform some act or omission which is in X’s interest (e.g. Bentham, Raz, Lyons, McCormick). For a theoretic analysis of the “correlativity of rights and duties” B. Mayo, ‘What are Human Rights?’ in DD Raphael (ed), *Political Theory and the Rights of Man* Indiana UP (1967) 68,72.

⁷ J. Waldron, (ed) *Theories of Rights* (OUP 1984).

At the same time, the values and political and philosophical theories underpinning a particular understanding of rights will often be more determinative than a particular formulation of a right or even the name or type of right itself.⁸ Positivist theories of rights anchor conceptions of rights in what is provided for in particular legal systems- rights have meaning only as legal rights.⁹ Such theories are often subject to criticism that they are based on a “naturalistic fallacy”, purporting to derive certain norms from prescriptive premises about human nature. Positive law also leaves open to interpretation the normative commitment or content of rights, as well as the basis or theory upon which positive law provisions are based.

In contrast, theories of natural rights base conceptions of rights on a pre-existing moral order or natural law. The tradition of natural rights has roots with the Stoics and Romans, through St. Augustine and Aquinas, to more modern manifestations such as Roosevelt’s Four Freedoms- freedom of speech and worship, freedom from want and fear. But, as Margaret MacDonald has pointed out “That men are entitled to make certain claims by virtue simply of their common humanity has been equally passionately defended and vehemently denied.”¹⁰

Defining Human Rights

From this backdrop emerges the notion of *human* rights, defined as basic universal legal or moral guarantees, that belong to all human beings, and that protect individuals and / or groups, from actions and omissions of the state and some non-state actors that affect fundamental human dignity.¹¹ Human rights are based on a theory that takes for its starting point the human dignity of individuals and their entitlement to have basic autonomy and freedoms respected and basic needs satisfied.¹² While they are founded on moral principle and conceived of in terms of inherence, universality and indivisibility, they are, at core, (legal) guarantees against actions and omissions.¹³ As with all rights, human rights embody duties, providing a legal framework of entitlements and obligations; each right implies a claim holder and a duty bearer. “A right is logically related to duty and obligation and also to the concept of law-like rules and principles.”¹⁴

⁸ For example, rights are given explicit treatment in the work of John Locke and his ‘Two Treatises of Government’ (1689) and Thomas Paine’s ‘The Rights of Man’ (1792) and emerge implicitly in the political and moral philosophy of Kant Rousseau and Mill.⁸ The notion of human rights is viewed by many, to be a revival of the 18th century concept of the Rights of Man⁸.

⁹ One obvious proponent of this school of thought was Jeremy Bentham –J. Bentham (1782). *Of Laws in General*. (ed. H.L.A. Hart, 1970. London: Athlone Press); See also John Austin (1832). *The Province of Jurisprudence Determined*. (ed. W.E. Rumble, 1995. Cambridge: Cambridge University Press).

¹⁰ M. MacDonald ‘Natural Rights’ in J. Waldron *Theories of Rights*, p 21

¹¹ A *Human Rights Approach to Development: primer for development practitioners* (UNDP, August 2003) citing to the OHCHR.

¹² L. Henkin, ‘Introduction’ in *The International Bill of Rights* (L. Henkin ed. Columbia University Press 1981)

¹³ UNDP, *A Human Rights Approach to Development – Primer for Development Practitioners* (Amparo Tomas) August 2003 p 1

¹⁴ J. Waldron, *supra* n.. 7

In terms of moral justification, human rights can be understood as the set of basic minimum guarantees necessary for a minimum good life – minimum prerequisites for leading a ‘good life’. The normative framework of human rights can be described as a series of moral imperatives or entitlements based on the inherent dignity of people, which have been embodied in law – generally international law. They derive their authority from both legal and moral sources. As with all rights, human rights imply duties.¹⁵ In practical terms, human rights specify a series of actions that need to be taken or that a duty bearer (generally a state) must forbear from doing.

Human rights may be conceived of as individual rights or collective rights.¹⁶ Some commentators have resisted the notion of “collective human rights”, however, on the basis that the essential meaning of “human rights” would be diluted or made conceptually vague if one were to include collective entitlements.¹⁷ Others, focusing on human rights as standards for relationships within society, welcome the notion of collective human rights on the basis that human rights are inherently relational and are, at least in part, a response to a universal problem of unequal power relationships.¹⁸ Further, since the indispensable conditions for a dignified existence as a human being may include belonging to collectivities, certain collective rights may be essential for the fulfillment of these conditions.

Collective human rights are conceptualized in a number of ways. First, there are human rights that can only be exercised collectively, such as the right of freedom of association or assembly. Second, there are rights that can only be implemented in a collective manner, such as certain economic, social and cultural rights that obligate the authorities to take general measures, which affect subjects collectively. Third, there are rights that are held by collectivities, where the subject of the right is collective, such as the right of self-determination of indigenous people or the right of a national, ethnic, racial or religious group not to be destroyed– as protected by the Genocide Convention.¹⁹ This is perhaps the strongest sense of the term collective right, and perhaps the most accurate use

¹⁵ Similarly, according to Asbjørn Eide, “Rights require correlative duties.” A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in A. Eide, C. Krause, A. Rosas, *Economic, Social and Cultural Rights* (2001) 22

¹⁶ There is nothing axiomatic about the individualistic conception of rights, see R. Unger in *The Critical Legal Studies Movement* (1983) and R. Unger, *Law in Modern Society* (Free Press 1976). See also S. Lynd, “Communal Rights” (1984) 62 *Texas Law Review* 1417. Lynd criticizes the notion of rights as property which treats rights as scarce commodities to be fought for, thus preventing members of a society to care about each other’s needs. He does not support, however, the anti-rights talk and instead argues for communal rights, those rights that belong to the whole community and cannot be given up. These rights, which Lynd characterizes as unalienable, include the right to engage in concerted activity, the rights guaranteed by the first amendment and the rights associated with the power of eminent domain and favour the definition of long term society objectives as opposed to individualistic and adversarial conceived rights. For critiques of the individualistic orientation of liberal rights discourse, see P. Gabel, ‘Book review of Ronald Dworkin’s “Taking Rights Seriously”’ 91 *Harvard L. Review* 302 (1977); MA Glendon, *Rightstalk* (1991); D. Kennedy & P. Gabel, “Roll Over Beethoven” 36 *Stanford Law Review* 509; M. Tushnet, ‘An Essay on Rights’ 62 *Texas Law Review* 1363 (1984).

¹⁷ J. Donnelly, ‘Human Rights, Individual Rights and Collective Rights’ in J. Berting et al. (eds) *Human Rights in a Pluralist World* (1990).

¹⁸ J. Herman Burgers, ‘The Function of Human Rights as Individual and Collective Rights’ in J. Berting, et al. (eds) *Human Rights in a Pluralist World* (1990) 63

¹⁹ See Herman Burgers, *supra* n. 18. pp 70-71.

of the term. Most human rights advocates and commentators do not therefore prioritize individual rights at the expense of community rights, rather these rights are seen as ultimately compatible even if in some situations they need to be balanced against each other.

Jeremy Waldron notes “the traditional human rights (e.g. free speech, religious freedom, and the right to work etc) are not single or atomic claim rights but tangled clusters... each of them involving all sorts of privileges, powers, claim rights, immunities and so on.” Waldron goes on to argue that there had been tendencies to split clusters into their constituent element and insists that each be justified separately in making a claim for the overall right or freedom in question, but concludes that the “present approach” restores the integrity of the clusters by concentrating on a single interest which underlies and generates all of the detailed elements. “Thus the right to free speech, for example, is understood in terms of recognition that an individual’s interest in self expression is a sufficient ground for holding other individuals or agencies to be under duties of various sorts rather than in terms of the detail of the duties themselves.”²⁰

For the purposes of the present discussion, so far as it aims to elucidate aspects of the relationship of human rights to development, we are concerned mainly with a positivist conception of rights- that is, where rights are embodied in law, most particularly international law. That is not to discount the importance of a broader normative framework that informs the law; human rights law is clearly founded on a notion of natural law and natural rights because of its assumptions about the inherent and inalienable dignity of the human person. In the international law context, the legal obligations inherent in codified rights reflect the intrinsic rights-duties relationship.

In the international context, duties (generally reflected in state obligations) may be categorized in a variety of ways- duties to respect, protect and fulfill.²¹ The duty to respect is in many senses a negative duty – it implies forbearance rather than active engagement on the part of the duty holder. Put simply, it demands that the duty holder not violate rights. In contrast, the duty to protect requires a state to protect individuals and groups against infringement of their rights by others. This requires more affirmative conception of duty. The duty to fulfill is an affirmative duty requiring a state to take active measures towards the realization of particular rights. It demands that the state facilitate or, if necessary, provide for the realization of a particular right in positive terms. In addition to these, some human rights lawyers argue that the duty to promote places an onus on duty bearers to enhance rights awareness, seen as an essential foundation for the realization of all rights.

This discussion of the normative structure of rights and duties in human rights law leads to the concept of “generations” of rights, which, while not mapping exactly to the four-fold categorization above, is coherent with it.

²⁰ J. Waldron, *supra* n. 7, p 11.

²¹ A. Eide, ‘Economic, Social and Cultural Rights as Human Rights’ in *Economic, Social and Cultural Rights*, *supra* n 15, p 23.

Substantive Conceptions of Rights: Three Generations

First Generation Rights

For some theorists, a starting point for rights is a particular aspect of moral personality—the “active, practical, assertive side of human life as opposed to the passive, affective and even pathological side.” Rights are seen as the basis not for all human rights but for those specifically related to choice, self-determination, agency and independence. On this view the duties correlative to rights are mainly negative in character; they are duties to refrain from obstructive action or interference with choice rather than duties to provide positive assistance.²² First generation rights are rights predicated on this conception. These rights epitomize an understanding of rights that protect the individuals against arbitrary or misuse of public power and are the basis of protection for certain kinds of human interests related to choice, self-determination, agency and independence.²³ First generation rights are associated with the eighteenth century liberal enlightenment, and best understood in terms of the nature of the duty they impose.²⁴ That is, they require primarily forbearance or non-interference on the part of the state and enjoin rather than require certain kinds of state action. As conceptualized, first generation rights include rights such as freedom of religion, freedom of the press, and the right to free assembly.²⁵ The French Declaration is a classic example, embodying this negative conception of human rights and proclaiming the “freedom of man”.²⁶ In turn, the state has a duty to refrain from interfering with individual choice. As such, first general rights are often political philosophies advocating laissez-faire principles and minimalist theories of state.²⁷

Second Generation Rights

The philosophical underpinnings of first generation rights were subject to sustained attack throughout the twentieth century. These critiques were accompanied by the emergence of a new species of rights of a more affirmative and positive nature. Such rights embody entitlements to positive assistance and reflect a broader range of rights—social, economic and cultural—rather than being limited to civil liberties. These entitlements to more positive or affirmative action by duty bearers are sometimes called “second generation rights”. Substantively, these include rights to a decent standard of living, the rights to work, and rights to health, social protection, education and social security.

²² J. Waldron, n 7, p 11. This distinction in types of rights relates also to the distinction between Choice and Benefit theories of rights identified earlier with negative, first generation rights being associated with choice theory while second generation rights are associated with benefit theory. Under the former, the right-bearer is agent and chooser rather than merely a potential victim or potential recipient of assistance.

²³ J Waldron, *supra* n 7, p 5.

²⁴ E.g., Virginia Declaration of 1776

²⁵ See e.g., US Constitutional amendments 1-12

²⁶ M. Duverger, *Constitutions et documents politique*, (9th ed Paris Presses universitaires de France, 1981) 9.

²⁷ J. Waldron, *supra* n 7, p 5.

These are second-generation rights in a chronological sense, being a product of the twentieth century. Indeed it was not until the Constitutions of the late 1970s (Portugal and Spain) that second generation rights emerged as constitutionally enshrined.²⁸ Both first and second generation rights are embodied in the ICCPR and the ICESCR and are included in the, as yet unbinding, EU Charter of Fundamental Rights of the European Union adopted at the European Council in Nice 7 December 2000.²⁹ Their emergence reflects a growing understanding that non-interference alone will not suffice to protect people's rights and dignity, and that indeed negative rights themselves require some affirmative action on the part of states and may even depend, in part, on second generation rights to be fully meaningful.³⁰

Third Generation Rights

The end of the twentieth century saw the emergence of a third generation of rights. Rooted in Article 28 of the Universal Declaration of Human Rights, these have also been termed "development rights" or "solidarity rights".³¹ Article 28 proclaims "Everyone is entitled to a social and international order in which the rights set forth in this Declaration can be fully realized." Third generation rights are based on holistic community interests although each reflects both individual and collective interests. It follows from this, that they also have a broader range of corresponding duties, which may vest not only in a state party to a particular instrument, but more broadly, in the larger global community. Third generation rights arguably fall into two categories.

The first category of rights is seen to reflect a "revolution of expectation" in the developing world and its demand for a global redistribution of power, wealth and resources, and include the right to self determination (political, economic, social and cultural), the right to economic and social development, and the right to participate in and benefit from the "common heritage of mankind (scientific and information progress, cultural traditions and sites and monuments).

The second category relates more to areas in which the nation state falls short (and thus duties may fall on the wider international community). These rights include the right to peace, the right to a clean, healthy and sustainable environment, and the right to humanitarian disaster relief and the right of groups of people to cultural, political and economic development. While these rights may not have a long or established pedigree, their importance should not be underestimated. These rights are also sometimes referred

²⁸ The Irish constitution of 1936 for instance, provided for economic and social rights, although not in the text of the Constitution, but in the form of Directive Principles of Social Policy (Article 45 of Bunreacht na hEireann).

²⁹ OJ of the European Communities 18 December 2000 C 364/1.

³⁰ A number of important declarations confirm the principles of indivisibility and interdependence of all forms of human rights. The Tehran Declaration in 1969; Resolution 32/130 (December 16th 1977); Resolution 40/114 (December 13th 1985); Resolution 41/117 (December 4th 1986); and the Vienna Declaration and Program of Action (UNGA A/CONF.157/23) (July 12th 1993). See also J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (1996 Oxford, Clarendon) 1127-1132.

³¹ See generally, P. Alston, "A Third Generation of Human Rights: Progressive Development or Obfuscation of International Human Rights Law?" 29 *Netherlands International Law Review* 307 (1982) ; K. Vasak, "For the Third Generation of Human Rights: The Rights of Solidarity" Inaugural Lecture to the Tenth Study Session of the International Institute of Human Rights. 2-27 July 1979.

to as development-oriented rights. Proponents of third generation rights emphasize that this newer category of right will reinforce and strengthen the existing human rights, enhancing their effectiveness and making them more relevant to both governments and individuals.³²

III. The emergence of the International Human Rights Regime

Prior to the Universal Declaration of Human Rights the notion of human rights as such was not pervasive. The language used was that of natural rights, fundamental rights or the rights of man. According to some writers, the new nomenclature emerged to highlight the inclusiveness and universality of the rights proclaimed, and to extend the rights beyond those of “men” to include women, (and arguably other excluded groups).

Historical antecedents to what is sometimes termed “contemporary international human rights law”³³ do exist. Although termed rights of man or natural rights the concept emerges in political milestones such as the Magna Carta (1215), English Bill of Rights (1689), French Declaration of the Rights of Man and Citizen (1789) and the United States Constitution and Bill of Rights (1791). Precursors that bear an even closer resemblance to modern human rights law can be found in international legal doctrine and institutions, such as legal doctrines of state responsibility for injuries to aliens³⁴, the abolition of the slave trade in the 1815 Declaration on the Abolition of the Slave Trade adopted during the Peace Conference in Vienna,³⁵ and the Mandate system established under the Covenant of the League of Nations.³⁶ The emergence of protections for minority groups in the interwar period also set the stage for the emergence of international human rights obligations. During this time the League of Nations established a system of protection for minorities,³⁷ which allowed any member of the Council of the League of Nations to bring any violation or threat of violation to the attention of the Council. The Permanent Court of Justice was empowered to hear cases concerning disagreements related this³⁸ and international humanitarian law.³⁹

³² C. Flinterman, ‘Three Generations of Rights’ in *Human Rights in a Pluralist Society* 75, 77.

³³ T. Buergenthal The Normative and Institutional Evolution of International Human Rights 19 *Human Rights Quarterly* 703 (1997)

³⁴ I. Brownlie, *Principles of Public International Law* (5th edn. 1998) Chapter XXIV Injury to the Persons and Property of Aliens on State Territory esp. pp521-538

³⁵ 8 February 1815.

³⁶ See e.g., Arts. 22 of the Covenant of the League of Nations provided for “freedom of conscience and religion” in the mandated territories and prohibited “abuses such as the slave trade, the arms traffic and the liquor traffic”. Article 23 of the Covenant provided that the administering powers would endeavor to secure and maintain fair and humane conditions of laborer for men, women and children.”

³⁷ Bertrand Ramcharan refers to this as “the first building blocks for an international legal regime for the protection of human rights.” See Bertrand Ramcharan, *The United Nations High Commissioner for Human Rights – The Challenges of International Protection* (Martinus Nijhoff Publishers) 2002, at 1.

³⁸ E.g., *Rights of Minorities in Upper Silesia (Minority Schools)* 1928 PCIJ Series A. No.15, 26 April 1928.

³⁹ L. Henkin, *The Age of Rights* 13 (1990), from Thomas Buergenthal ed., *International Human Rights* (2002) (Buergenthal). See generally, M. Schmidt, L. Green (eds.) *The Law of Armed Conflict: Into*

Sources of international human rights law

The drafting of the “international bill of rights” – comprising the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights, began after World War II.⁴⁰ There had been some influential precursors including the Atlantic Declaration signed by President Franklin Roosevelt and Prime Minister Winston Churchill on 14 August 1941, which proclaimed respect of the right of all peoples to choose the form of government under which they live. In the context of this paper it is also interesting to note that the declaration espoused a desire to bring about “the fullest collaboration between all nations in the economic field with the object of securing for all improved labor standards, economic advancement and social security” as well as a wish to bring about a world in which “the men in all the lands may live our their lives in freedom from fear and want.”⁴¹ In addition to this, there are human rights bodies emanating directly from the Charter, which, in most cases, predate the Bill of Rights itself.

It is important to note that while the instruments that are discussed in the following sections frequently cast human rights norms in general and even abstract terms, the actions they require on the part of duty bearers (primarily states) are often specific and onerous. Monitoring bodies, discussed below, now fulfill an important role in interpreting and elaborating the meaning and content of norms, and in ensuring that the full realization of rights is made possible in current economic, social and political contexts.

United Nations Charter

The UN Charter was passed by the General Assembly and signed on June 26, 1945⁴² and laid the “legal and conceptual foundation for the development of contemporary international human rights law.”⁴³ The Charter is seen by many as “the turning point”⁴⁴ with its Preamble reaffirming the faith of the UN community “in fundamental human

the Next Millennium (Newport RI, Naval War College, 1998). *Passim* D. Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, OUP); A Robert and D Guelff, *Documents on the Law so War* (3rd ed. Oxford OUP, 2000);

⁴⁰ See Franklin D. Roosevelt’s famous ‘Four Freedoms’ speech in 1941 (freedom of speech and belief; freedom from fear and from want) quoted in L. Sohn & T. Buergenthal, *International Protection of Human Rights* (Indianapolis: Bobbs-Merills 1973) 506-507. See also, MA Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001)

⁴¹ Great Britain and the United States Join Declaration of the President and Prime Minister [Released to the press by the White House, August 14, 1941] 35(4) AJIL Supplement at 191

⁴² UKTS 1946 No. 67

⁴³ L. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States”, from Buergenthal, 29.

⁴⁴ A. Cassese, *International Law* (2nd edn. 2005) 377-379.

rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.⁴⁵

A number of Charter-based bodies have since been established by the Economic and Social Council (ECOSOC) after the Charter, the most notable of which is the Commission on Human Rights which was established in 1946⁴⁶

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was drafted by the Human Rights Commission⁴⁷ and adopted by the General Assembly of the United Nations on December 10, 1948.⁴⁸ The Commission had been charged to draft an instrument “articulating the nature and content of the human rights and freedoms that the UN had affirmed”⁴⁹ and the declaration was designed to be a standard of worldwide application.⁵⁰

The UDHR is widely viewed as the “source of inspiration and [...] the basis for the UN in making advances in standard setting as contained in the existing human rights instruments.”⁵¹ Its political standing and symbolic importance is incontestable. As Louis Henkin observed,

*If the jurisprudential character of the Declaration remains controversial, no one would doubt its significance as the principle articulation of the international human rights idea and the authoritative enumeration of universally recognized human right.[...] The UDHR has been the principal conduit for bringing the idea of human rights into the life of many nations: it is expressly referred to in states constitutions; its provisions are adopted or adapted in others.*⁵²

⁴⁵ Note also; Art. 1(3) – purposes of Charter – “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”; Art. 2(1) – “sovereign equality of all members” – indicates balance between principles of sovereignty and non-interference and of respect for human rights⁴⁵; Art. 55- “universal respect for, and observance of human rights”; Other references to human rights – Arts. 13(b)(1), 62(2), 68.

⁴⁶ Resolution 5(1), February 16, 1946 *Commission on Human Rights* was established in 1946 under ECOSOC. The Charter authorizes the ECOSOC under Articles 62 and 68 to “make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all” and to “set up commissions...for the promotion of human rights...” Steiner and Alston 611-34, 641-48. Three main procedures (i) ECOSOC Res. 1503: confidential consideration of a situation; (ii) ECOSOC Res. 1235: public debate focusing on consistent patterns of violations of human rights and gross violations of human rights; and (iii) Working Groups on various issues.

⁴⁷ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent (Pennsylvania Studies in Human Rights)* (University of Pennsylvania Press, 1999) *passim*.

⁴⁸ Res. 217A(iii), U.N. Doc. A/810 at 71 (1948). See, N. Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance and Interpretation* (1958) – c.f. T. Buergenthal, 35.

⁴⁹ A. Eide, ‘The Universal Declaration in Space and Time’ in *Human Rights in a Pluralist World* (1990) at 15, traces the vision embodied in the UDHR and the evolution of the international legal order with respect to human rights.

⁵⁰ C. Tomuschat, *Human Rights Between Idealism and Realism* (2004, Oxford, OUP) 63.

⁵¹ Vienna Declaration and Programme of Action Vienna Declaration (UNGA) (A/CONF. 157/23), July 12, 1993 – issued by the UN World Conference on Human Rights, Vienna, Austria, June 14-25, 1993.

⁵² L. Henkin, “the International Bill of Rights: the Universal Declaration and the Covenants in R Bernhardt and JA Jolowicz (eds.) *International Enforcement of Human Rights* (Berlin Springer Verlag 1987) 1,6.

The Preamble of the UDHR proclaims “recognition of the inherent dignity and the equal and inalienable rights of all persons” and sets out the principle that “human rights are both universal and international”.⁵³ The Declaration makes provision for the full set of political and civil rights and economic social and cultural rights, albeit at a considerable level of abstraction and generality. It provides also for “duties to the community”.⁵⁴

The jurisprudential status of the Declaration under international law remains contested. While only a declaration, and not intended to create contractual obligations between states,⁵⁵ it is now widely accepted that certain provisions of the UDHR generate international law obligations and are binding to that extent.⁵³ As Philip Alston notes, “What exactly those obligations are, and when they will apply, will depend on the legal basis on which the claim is grounded.”⁵⁶ In a more general sense, the UDHR has become a highly visible and widely recognized articulation of moral and political standards, and a measure by which respect for, and compliance with, international human rights principles can be judged.⁵⁷

Neither is the concept of universality at the heart of the UDHR unproblematic. Drafted, as it was, when the United Nations comprised only 56 states, and with virtually no involvement from Africa or Asia, it has not been without controversy in an era in which UN membership has grown to 191 members, many of which were not even in existence at the time of the drafting.⁵⁸ A second point of contention is the heavily individualistic orientation of the Declaration. Numerous commentators have argued, from an African or Asian perspective, the idea that people could possess a non-community-linked human

⁵³ Article 1 provides “All human beings are born free and equal in dignity and rights.”

⁵⁴ Article 29

⁵⁵ J.E.S. Fawcett, “The International Protection of Human Rights” in DD Raphael, *Political Theory and the Rights of Man* (Indiana University Press, Bloomington and London, 1967)

⁵³ See H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, 25 *Ga. J. Int’l & Comp. L.* 287 (1995-1996) esp.317-352. The Vienna Declaration emphasized that “the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing human rights instruments....” See preamble to the “Vienna Declaration and Programme of Action” (INGA) CONF.157/23), issued on 12 July 1993 by the United Nations World Conference on Human Rights, Vienna, 14-25 June 1993.

⁵⁶ P. Alston, ‘The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration’ in *Human Rights in a Pluralist World Individuals and Collectivities* (Meckler Westport, London 1990) 1, 4. Alston observes that two alternative approaches are generally put forward for this proposition: first the authoritative interpretation approach which states that the Declaration has come to be accepted as an authoritative interpretation of the UN Charter. The second, is that certain provisions of the UDHR have attained the status of customary international law and are binding to that extent. While the former appears to be the stronger of the two alternatives, it too is beset with challenges and the question of whether all of the UDHR rights (as well as newer, third generation rights) fall within the ambit of the Charter.

⁵⁷ L. Henkin, *The Age of Rights* 19 (1990); H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’, 25 *Ga. J. Int’l & Comp. L.* 287 (1995-1996) esp.317-352. On human rights law and custom more generally, see B. Simma and P. Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles’, 12 *Australian Yb. Int’l. L.* 82 (1992) *passim*.

⁵⁸ C. Tomuschat, *Human Rights Between Realism and Idealism*, 36.

identify (which is inculcated in the Declaration) or of the Western liberal democratic view of the individual as the ultimate repository of rights is inconceivable.⁵⁹ The Western influence on the UDHR is undeniable; there is no sense in which the emphasis on rights, rather than duties can be overlooked.

That being said, the UDHR cannot be seen as a Western product, and was heavily influenced by the strong Socialist presence on the Human Rights Commission at the time of its inception. Its drafting was also influenced by the writings and opinions of non-western scholars, philosophers and religious leaders. Despite these challenges, the UDHR has continued to be recalled and cited as a universal and highly visible human rights standard. Further, it has been reaffirmed by a number of UN declarations and statements. For example, the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in June 1993 underscored and reaffirmed the central importance of the UNDR as a common standard of achievement for all peoples and nations.⁶⁰ More recently, the Millennium Declaration⁶¹ reaffirmed the UDHR in solemnly resolving to respect fully and uphold the UDHR.

The international covenants: the ICCPR and the ICESCR⁶²

The *International Covenant on Civil and Political Rights* (ICCPR)⁶³ makes provision for the protection of key civil and political rights including due process rights⁶⁴, the prohibition on discrimination⁶⁵, freedom of thought, conscience and religion⁶⁶, and the rights of cultural minorities⁶⁷. The ICCPR imposes an immediate obligation to “respect and ensure” the rights it proclaims,⁶⁸ but also makes provision for derogation and limitations. The Human Rights Committee is the Treaty body charged with overseeing the respect and implementation of the ICCPR.

⁵⁹ K. Van der Wal, ‘Collective Human Rights: A Western View’, 83 at 83 in Berting, Baehr, Burgers, Flinterman, de Klerk, Kores, Van Minnen and Vander Wal (eds) *Human Rights in A Pluralist World Individuals and Collectivities* Meckler Westport and London (1990) citing Asmarom Legesse. T. van Boven, ‘The Relations Between Peoples’ Rights and Human Rights in the African Charter in 7 *HRLJ* (1986) 183-194 .

⁶⁰ Vienna Declaration and Programme of Action 1993 UNGA (A/CONF.157/23) issued on July 12, 1993 by the United Nations World Conference on Human Right.

⁶¹ General Assembly resolution 55/2 of 8 September 2000

⁶² “For political and ideological reasons, and because of the procedural considerations pertaining to the enforcement and realization of the rights, it was decided that two separate covenants should be drawn up, each devoted to a different “aspect” of human rights.” – S. Salman & S. McInerney-Lankford *The Human Right to Water: Legal and Policy Implications* World Bank (2004) 21.

⁶³ Adopted through GA Res. 2200A(XXI), December 16, 1966, entered into force on March 23, 1976.

⁶⁴ Articles 9, 10 and 11

⁶⁵ Article 2(1) also relevant to 2, 3, 14(1), 23(4), 24(1), 25 and 26

⁶⁶ Article 18

⁶⁷ Article 27

⁶⁸ Buergethal, 49 – citing Schachter, “The Obligation to Implement the Covenant in Domestic Law”, in L. Henkin (ed.) *the International Bill of Human Rights: The Covenant on Civil and Political Rights* (1981) at 311. General Comment Nos. 2(13) and 3(13), Doc. A/36/40 at 108-109 (1981).

The *International Covenant on Economic, Social and Cultural Rights (ICESCR)*⁶⁹ provides for second generation rights, and includes provisions on the right to work and to form trade unions; the right to an adequate standard of living, the right to be free from hunger, and the rights to health and education. Adopted on Dec. 16, 1966 and entered into force on Jan. 3, 1976, the ICESCR currently has 155 signatories, 148 of which have ratified. Article 2 of the ICESCR obligates a State that has ratified the Covenant to "take steps" "to the maximum of its available resources" to achieve "progressively the full realization of these rights." The Covenant does, however impose certain obligations that are of immediate effect, including the undertaking in Art. 2(1) to "take steps" and the provision that rights under the Covenant will be exercised without discrimination.⁷⁰

The rights in both international human rights covenants are indivisible, interdependent and interrelated. The separation of these two 'species' of rights and the adoption of a 'bifurcated model' of two Covenants arguably reflects the divergent ideological and political orientation of different countries within the United Nations after World War II.

Other Sources of International Human Rights Obligations⁷¹

Beyond these key instruments, numerous other treaties establishing specific human rights obligations have been developed and brought into force. For example, *the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)*⁷²– declares that genocide, in peace or war, is a crime under international law and makes individual perpetrators punishable.⁷³ Similarly, *the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*⁷⁴ prohibits torture committed "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."⁷⁵

The *International Convention on the Elimination of All forms of Racial Discrimination (ICERD)*⁷⁶– prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin" and *the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*⁷⁷– prohibits discrimination against

⁶⁹ Adopted through GA Res. 2200A (XXI), Dec. 16, 1966 and entered into force on Jan. 3, 1976. Currently 155 signatories, 148 of which have ratified.

⁷⁰ Committee on Economic Social and Cultural rights, General Comment No. 3, 1990⁷⁰

⁷¹ See Office of the UN High Commissioner for Human Rights, *Human Rights: A compilation of International Instruments*, Vol. 1 (2002), p 651. (UN Compilation)

⁷² Adopted by G.A. Res. 260(III) A, Dec. 9, 1948 and entered into force on Jan. 12, 1951.

⁷³ Art. II defines genocide. The Statutes of the ad hoc Tribunals for the former Yugoslavia and Rwanda adopt this definition as the basis for conferring jurisdiction over genocide on the tribunals. Same is true for the ICC considered below- see Buergenthal, 73.

⁷⁴ Adopted b GA Res.39/46, 10 Dec. 1984, entered into force, 26 June 1987- UN Compilation 315.

⁷⁵ Art. 1(1)

⁷⁶ Adopted by General Assembly in 1965, entered into force in 1969- GA Res. 2106 A (XX), 21 Dec. 1965. 5 ILM 352 (1966); UN Compilation p. 118.

⁷⁷ Adopted by UN GA on Dec. 18, 1979, entered into force on Sept. 3, 1981-GA Res. 34/180 of 18 December 1979 - 19 ILM 33 (1908); UN Compilation p 155.

women, defined as “any distinction, exclusion, or restriction made on the basis of sex” that impairs the enjoyment by women of “human rights and fundamental freedoms”⁷⁸. CEDAW states that State Parties should undertake to embody the principle of equality in national constitutions and legislation.⁷⁹ Further, they are required to take a wide range of measures to ensure the equal rights of women in all spheres of life.⁸⁰ *The Convention on the Rights of the Child*⁸¹ obliges state parties to accord children within their jurisdiction a number of civil, political, economic and socio-cultural rights, without discrimination.⁸²

In addition to the numerous international human rights treaties that now exist, certain human rights obligations emanate from customary international law,⁸³ general principles of law⁸⁴ including peremptory norms (principles of *jus cogens*) and obligations *erga omnes*.⁸⁵:

⁷⁸ Art. 1

⁷⁹ Art. 2

⁸⁰ For example, Art. 5 – to modify social and cultural patterns of conduct to eliminate prejudices and stereotypes

⁸¹ Adopted through GA Res. 44/25, 20 Nov. 1989 entered into force 2 Sept. 1990- UN Compilation 181.

⁸² Art. 2(1). Art. 3(1)

⁸³ I. Brownlie, *Principles of Public International Law* (2005) 6th edn., 6-12

⁸⁴ Article 38 (1) of the Statute of the International Court refers to the general principles of law recognized by civilized nations as a source of public international law (but which is not relegated to being a ‘subsidiary means’), see Brownlie, *Principles of Public International Law* (2005) 6th ed..

⁸⁵ ICJ in *Barcelona Traction* case, stating: an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the *basic rights of the human person, including protection from slavery and racial discrimination*. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi universal character. As noted here by the Court, examples of *erga omnes* obligations may be found both in general international law and in treaty law. There are arguably many areas of concern to the international community, such as protection of human rights, peace-keeping, disarmament and arms control, and protection of the environment. One of the features of this type of obligation is their ‘indivisibility’, their ‘non-bilateralizable structure’, their non-reciprocal character: their violation affects all other states (in case of obligations under general international law) or all other states that are party to the treaty that imposes these obligations. While both are considered peremptory norms, there are important differences between *jus cogens* and obligations *erga omnes*. It is also said that the concept of *erga omnes* obligation is not characterized by the importance of the interest protected by the norm – this aspect being typical of *jus cogens* – but rather by the legal indivisibility of the content of the obligation, i.e. that the rule in question provides for obligations which bind simultaneously each and every addressee State with respect to all the others. Thus, while this is true of peremptory norms, it is also true of other norms of general international law and of certain multilateral treaty rules. See M. Ragazzi, *The Concept of Obligations Erga Omnes* (1997, OUP)

Regional Systems of human rights protection

Alongside the numerous norms and laws that have emanated from the United Nations, several regional bodies have developed their own regional laws and systems of enforcement.⁸⁶

The *European Convention on Human Rights and Fundamental Freedoms* (1953) (ECHR) embodies primarily civil and political rights such as: the right to life; the right to be free from cruel or inhuman or degrading treatment or punishment; due process of law; freedom of thought, conscience and religion; freedom of assembly.⁸⁷ While the range of substantive rights covered by the ECHR remains confined primarily to civil and political rights, the formal reach of the Convention's provisions has been extensive, including extraterritorial applicability and coverage in the private domain.⁸⁸ There are now eleven protocols to the ECHR. Forceful compliance mechanisms are in place.⁸⁹

The *American Declaration on the Rights and Duties of Man* proclaimed in 1948⁹⁰ set out a series of foundational rights⁹¹ and civic duties⁹² applicable for its inter-American Members. *Inter-American Convention on Human Rights* was adopted in 1969 but did not enter into force until 1978. The Convention established both the Inter-American Commission on Human Rights and Inter-American Court of Human Rights.⁹³

The African Charter on Human and Peoples Rights 1986 operates under aegis of the Organization of African Unity (OAU). African Commission, established under the Charter, has three dominant rights based functions: (i) promotion (ii) ensuring protection and (iii) interpretation of Human Rights⁹⁴.

⁸⁶ Of note in this connection is GA Resolution 32/127 calling for the establishment of regional arrangements for HR protection.

⁸⁷ See generally, MacDonald, Mather and Petzold, *The European System for the Protection of Human Rights* (1994); Janis, Kay and Bradley, *European Human Rights Law Text and Materials* (2nd ed. OUP 2000)

⁸⁸ On acts and omission and the applicability of human rights in the private domain, see A. Clapham, *Human Rights in the Private Sphere* (1993) Oxford Clarendon; S. McInerney, 'The European Convention on Human Rights and Fundamental Freedoms and the Evolution of Fundamental Rights in the 'Private Domain'. In C. Harding and C Lim (eds.) *Essays and Commentary on the European and Conceptual Foundations of Modern International Law* 277 (1999).

⁸⁹ See Section V.

⁹⁰ May 2, 1948 by the Ninth International Conference of American States

⁹¹ The Declaration set out 27 human rights including civil and political as well as eco/soc/cultural rights.

⁹² The Declaration set out ten duties of the citizen.

⁹³ For details see Section V on compliance mechanisms.

⁹⁴ For further information on compliance mechanisms see Section V.

IV. Human Rights and Development

Traditional visions

Despite their common roots as international discourses established out of a concern for the plight of people across the world,⁹⁵ human rights and development theory and practice have evolved separately, and their discourses have, until relatively recently, been seen to occupy different spheres.⁹⁶ In fact, up until the early 1980s most analysts saw a fundamental conflict between development and human rights. Even today, the discourses of rights and development remain distinct, and continue to be viewed by some as necessarily separate; indeed in some circles attempts to bring human rights concerns onto the development agenda are strongly opposed.

This rather outdated view that presumptively separates human rights and development continues to permeate both discourses, with proponents of each agenda often failing to meaningfully engage with the approaches or visions provided by the other. Philip Alston highlights the separate evolution of the human rights agenda and the development agenda by analyzing the Millennium Development Goals and examining the way this agenda is linked to the international human rights agenda.⁹⁷ Alston looks at both the perceived relevance of the MDG discourse for human rights proponents as well as the perceived relevance of the international human rights agenda for development specialists. He concludes that despite obvious theoretical and potentially practical interlinkages, the daily practice on both sides is not particularly encouraging.⁹⁸ He appeals to both the development practitioners and human rights lawyers: the former should mainstream human rights into development efforts. The latter should engage more effectively with the development agenda.

The fraught nature of the relationship between human rights and development discourses is at least partially attributable to the different modalities employed by each—development policy has tended to focus on projects and programs, while the world of human rights is premised on norms, standards and duties.⁹⁹ These different starting

⁹⁵ “At first sight the marriage of development and human rights seems like the most auspicious possible union: two beneficent ideas and practices dedicated to making the world a better place coming together and strengthening each other in the process. On closer inspection however, a more nuanced assessment is called for which takes into account the limitations on both sides and in their combination.” S. Marks & A. Clapham, *International Human Rights Lexicon* (OUP 2005) 91.

⁹⁶ Some identify the change in approach as having occurred in adoption of the 1986 Declaration on the Right to Development – See M. Conley and D. Livermore., “Human Rights, Development and Democracy; The Linkage between Theory and Practice” Special Issue, *Canadian Journal of Development Studies/Revue Canadienne D’etudes du Development*: 20-35.

⁹⁷ P. Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals” *Human Rights Quarterly* 27(2005): 755-829

⁹⁸ P. Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals” *Human Rights Quarterly* 27(2005): 755-829

⁹⁹ E. Stather (State Secretary, Federal Ministry for Economic Cooperation and Development BMZ, Germany), Keynote address International Policy Dialogue on Human Rights in Developing Countries, How can Development cooperation contribute to furthering their advancement Cologne 29-30 September 2003 Summary Report (InWent Capacity Building International, Germany)

points also mean that the way progress is judged in each field different- with development policies of assessed in terms of obstacles and indicators, while human rights records are understood in terms of compliance and derogation. Some of this dissonance may be attributable to their basis in divergent academic disciplines— development thinking with its foundations in economics and human rights with their basis in law. Indeed, a development policy that exclusively focuses on the free market and economic growth alone is likely to be problematic for human rights, which in turn find no place in pure economic models. While human rights are based on a set of agreed values, ‘perfect’ markets are inherently valueless- without regard for differences in opportunities, treatment or circumstance. Growth is measured in the aggregate, rather than in terms of its distribution across different socio-economic groups.

This is not to say that development practitioners that espouse a purely economic vision of development are not concerned with the plight of the world’s poor or marginalized. For those concerned with helping the world’s poor, economic growth has proved itself to be the most effective way of alleviating poverty. The questions then become, what about those left behind? What about the losers of economic reforms? Human rights advocates have increasingly challenged the purely economic understanding of human welfare, the focus on needs rather than rights, and the detrimental effects that mainstream development practice has had on groups that are excluded or marginalized by the process. Donnelly argues,

(M)arkets distribute the benefits of growth without regard to short-term deprivation. Those who suffer “adjustment costs” such as lost jobs, higher food prices or inferior health care or education acquire no special claim to a share of the collective benefits that efficient markets produce. One’s “fair share” is a function solely of efficiency, of monetary value added. The human value of suffering, the human costs of deprivation and the claims they justify are excluded from the accounting of markets¹⁰⁰.

Donnelly identifies two types of trade-offs that result from the traditional development formula- the equity trade-off (sacrifice of distributional equity in favor of rapid capital accumulation and thus growth) and the liberty trade-off (sacrifice of civil and political rights in the name of efficiency of a concerted national war on underdevelopment).¹⁰¹ Within dominant development discourse, improvements in poor people’s lives are often measured purely in terms of aggregate poverty reduction (itself measured in purely economic terms); such poverty reduction is generally seen to be achieved through aggregate growth. Thus a number of highly repressive regimes have experienced sustainable economic growth (S. Korea, Taiwan, Singapore in the 1970s and China in the 1990s) are seen as evidence that the protection of civil and political rights is not important for development. The immediate or short-term affects are not measured. The negative affects on some groups are not measured. The affects on other important aspects of human well-being are not measured. The fact that most dictatorships have not only been abusive in human rights terms, but been dismal failures in economic terms as

¹⁰⁰ J. Donnelly, ‘Human Rights, Democracy and Development’ (1999) HRQ 629.

¹⁰¹ J. Donnelly, Human Rights and Development: Complementary or Competing Concerns 36 (2)World Pol.. 255 (1984).

well is not considered.¹⁰² Most importantly for this discussion, the effects on people's rights are not measured. Donnelly argues that 'free markets' "are an economic analog to a political system of majority rule without minority rights"¹⁰³ - a system of power without the checks and balances that have come to define democratic systems.

Alston also argues that current approaches to development are seriously flawed.¹⁰⁴ He argues that the preoccupation with- and the selectivity of- the MDG's means that certain rights are missing from the development agenda. He also sees the MDG agenda as a 'top-down' technocratic approach to human problems, rather than a participatory approach that encourages grass roots efforts; the MDGs seem to settle for half-measures instead of seeking for comprehensive solutions. More importantly, Alston argues that the MDG process is used by governments and donors to detract attention and resources from real human rights issues and the existing mechanisms and initiatives charged with enhancing the fulfillment and protection of these rights.

Traditional development paradigms are also criticized as portraying people in underdeveloped regions as having no agency or worth- only problems and needs. "From this perspective development is problematic because it fosters an image [...] of deficiency. Instead of focusing only on what is lacking and destroying what is there, we should be paying more attention to the possibilities, energies, processes and ideals within communities."¹⁰⁵

From the perspective of many development economists, however, human rights advocates ignore some of the key lessons of economic development, relying on simplistic ideals that fail to produce realistic solutions to development problems. For some, the notion has often seemed "implausible in the face of the wide variety of what we would call oppressive and inhumane practices that are taken for granted, and even expected in different parts of the world."¹⁰⁶ Further, government's in developing countries can't possibility ensure even basic rights for many of their citizens- such as those to education or health care- in their current circumstances; even if they could, the legal systems in these countries are generally so weak that enforcement of such rights would be difficult. This underpins one of the most fundamental criticisms of human rights based approaches to development- that they provide no clear framework for priorities and 'trade-offs'.

Human rights are often characterized as absolutist and incapable of accommodating resource constraints, given their indivisible and interdependent nature. In contrast, development economics has devised a range of models of approaches to deal with resource distribution- based on indices such as consumer preferences, or an objective social welfare function. This characterization, however, is somewhat simplistic. First

¹⁰² Indeed, as Donnelly points out, even where these regimes were not dismal failures, but moderate successes in economic terms, their being dictatorships was not a necessary condition for their economic success. Donnelly *supra* n100, p 628.

¹⁰³ J. Donnelly, *supra* n 100, p 630.

¹⁰⁴ P. Alston, "Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals" *Human Rights Quarterly* 27(2005): 755-829, p765-766.

¹⁰⁵ S. Marks and A. Clapham, *International Human Rights Lexicon* 95.

¹⁰⁶ J. Waldron, *supra* n 7, p, 3.

human rights do provide mechanisms for dealing with certain limitations and derogations of rights, and rights based approaches to development have certainly begun to develop certain systems for prioritization. These approaches, however, should not be confused with encompassing 'trade-offs' or a focus on 'basic needs', given their continued presumption of the compatibility, indivisibility and interdependence of rights and the fact that certain rights that cannot be derogated from. Further rights are seen as having intrinsic as well as instrumental value- rights are not prioritized based on their instrumental affects on growth or poverty reduction (even if these affects are substantial). A rights based approach sees the furthering of human rights as both the means and the ends of development processes, thus they focus as much on the process of development as on the outcomes.

The relationship between human rights and development has also been challenged on a number of other grounds. Amartya Sen has identified three core concerns with the legal edifice of human rights in the development context.¹⁰⁷ First, what he terms the legitimacy critique: that rights have no real status or import without being entitlements sanctioned by the state. From a legalistic perspective, rights require legislation to exist, thus one is left with the dilemma of having no rights without laws. As many developing countries have failing, embryonic or corrupt legal systems, does this mean that their citizens have no legitimate claim to human rights? Second, the coherence critique related to form- without identifying correlative duties and duty bearers, rights have no meaning. Third, the cultural critique which is that rights cannot claim to be universal because of cultural diversity and resistance to the idea of rights (e.g. Asian values debate). Similarly, some argue that attempts to refocus development on individuals, rather than aggregate measures, may in fact undermine group rights and community social capital. Another criticism is that, in contrast with development strategies, human rights is often seen as retrospective in outlook, focusing on wrongs that have occurred in the past, rather than orienting itself forward-looking programmatic outlook and perspective.

Yet many of the criticisms are not insurmountable. While many developing countries do not have the means, or an effective legal system, to adequately protect people's rights, this does not mean that the fulfillment of such rights should not be a high priority policy reform goal- for both the governments themselves and international donors who assist them. As Gauri suggests,

...if understood not as binding constraints but as high priority goals, rights to health care and education can be useful and meaningful. In this view, rights are not legal instruments for individuals (though they can be, if governments codify them in domestic law), but duties for governments, international agencies, and other actors to take concrete measures in pursuit of ideals on behalf of individuals. ...Calling health care and education rights means, on this understanding, that everyone bears some responsibility for their fulfillment. If individuals in developing (of for that matter, developed) countries receive miserably inadequate health care and education, their rights impose duties on their local governments, national

¹⁰⁷ A. Sen, *Development As Freedom* Anchor Books New York (1999) 227-228.

*governments, foundations, neighbors, international agencies, and citizens of rich countries- on all people who might be in a position to help.*¹⁰⁸

The Convergence of Human Rights and Development

As even this brief above illustrates, the relationship between development and human rights is certainly complex. However, despite an early vision of the two operating in and occupying distinct realms, there is evidence of a move on both sides for greater coherence and a growing commitment to identifying synergies and complementarity, adducing evidence of greater compatibility. As a result, an emerging consensus around the correlation between rights and development is becoming evident. This has arguably come about due to developments within both development and human rights circles.¹⁰⁹ On the one hand the growing popularity of alternatives to narrow growth-based understandings of development emphasize equity or social justice rather than narrowly economic processes and has given ways to a more holistic and comprehensive conception of economic processes and development itself¹¹⁰ At the same time human rights advocates have begun focusing on more substantive and practical ways of making human rights principles more meaningful in practice. There has been increasing awareness within human rights communities of the need to address practical challenges that emerge in development programming and sequencing, and the constraints that are inevitably confronted where attempts are made to implement human rights in poor countries.

Shifts in Development thinking

Traditional development thinking, which has predominantly focused on economic growth as the primary means of reducing poverty and increasing social welfare, has been increasingly criticized both inside and outside of development circles. Commentators have argued that the heavy focus on economic growth has tended to situate it as an end in itself, rather than as a means to achieving less tangible gains in human welfare and well-being. More importantly, after over sixty years of development practice, economic growth as both a means and an ends has arguably failed to achieve promised results. First, it has been argued that the level of economic growth itself is not being met, often attributed to the ‘crisis of governance’ in many developing countries. Second, in countries where economic growth has occurred, it has often not yielded the corresponding reduction in poverty hoped for, and in some cases has arguably had a detrimental effect on other aspects of human welfare, including human rights. Third, numerous commentators have argued that even when economic growth does occur, such growth is often unsustainable in the face of other factors such as inequity, oppression, weak institutions, conflict, elite capture and lack of competition.

¹⁰⁸ V. Gauri, “Social Rights and Economics: Claims to Health Care and Education in Developing Countries”, *World Bank Policy Research Working Paper* 3006, March 2003.

¹⁰⁹ Alston pleads for merging both agendas (p. 766, 808). The main issue of his article is how human rights relate to the MDG agenda. Section VI A (pp. 798 etc.) is entitled ‘linking human rights and development’ - P. Alston, *supra* n 104.

¹¹⁰ J. Donnelly, *supra* n 100. See also UNDP’s concept of sustainable human development which has five aspects: empowerment, cooperation, equity, sustainability and security (UNDP, Governance for Sustainable Development: A UNDP Policy Document 2 (1997) <http://magnet.undp.org/policy/default.htm>

Within development circles, these concerns have led to an increased focus on areas such as governance, participation, accountability and rule of law. They have also led to a shift from seeing people as merely recipients of aid- traditional welfare model- to active participants (or rights bearers) in their own development. These concerns have been reinforced by an increased focus on the importance of equity for sustained pro-poor development, which in turn demands an understanding of people as potentially productive members of a given society.

In this context it is argued that ‘Rights Based Approaches’ (RBA) to development have evolved in response to the limitations of previous approaches,¹¹¹ and supplement, rather than replace those approaches.¹¹²

Why human rights and development?

For many human rights advocates, the relationship between human rights and development is obvious- with the fulfilments of all people’s rights being of intrinsic importance and thus an ultimate and natural goal of development. Further, human rights are seen as providing a framework for equality and non-discrimination in the context of development and a basis for the design of programs that respond to growing national and global inequalities. Human rights frameworks provide a systematic way of dealing with development as expanding choices, opportunities, and freedoms— “To promote development, you must also strengthen human rights”¹¹³. A number of more specific interrelated arguments have been put forward to support this, which offer justifications for why development practice should incorporate human rights principles or why human rights agreements and obligations might be of direct relevance to development.

The first set of arguments centre on the fact that human rights provide an internationally agreed upon set of principles and obligations, in contrast to other approaches that are arguably more *ad hoc* or culturally specific. As many countries already have obligations to work towards these standards, the international human rights regime potentially provides a consistent, coherent and unified framework for development policies and practices -both internally, by providing an overarching framework for currently relatively dispersed areas of development practice, such as gender, disability, indigenous peoples, workers rights, participation etc, and between different organizations and agencies, as a means of effectively harmonizing international activities.¹¹⁴ It is clear that greater coherence and harmonization could lead to better development practice and outcomes. Further human rights provide a comprehensive set of benchmarks and indicators for measuring progress beyond legal and institutional frameworks and constructs. With the increased focus on equity in development theory and practice, human rights standards provide the normative basis on which to understand, disaggregate and compare different levels and types of inequality and discrimination.

¹¹¹ E.g., basic needs approach

¹¹² UNDP, *A Human Rights Approach to Development – Primer for Development Practitioners* (Amparo Tomas) August 2003. Page 1.

¹¹³ E. Stather, *supra* n 99. In the address he also emphasized that human rights and development are interdependent.

¹¹⁴ Alston reminds us of the relevance of HR compliance mechanisms for the MDG agenda, see P. Alston, *supra* n 104.

A second, related argument focuses on a ‘no harm’ principle. Even if one was to accept that there are trade-offs inherent in economic development, development practice should not support ‘trade-offs’ that cause harm to a given population or contravene people’s rights. In this regard, nonderogable rights could provide a set of minimum standards for development outcomes, providing a basis of accountability and the ‘no harm’ principle. Given the increased overlap of development activities and areas covered by the human rights instruments it is important for international organizations to explicitly examine the connections between the two, such that international aid is not in fact supporting state activities that are in contravention of the states obligations under human rights treaties and instruments.

Third, it is contended that human rights, being predicated towards, and founded on, a primordial conception of human dignity, are of general relevance to development- both philosophically and substantively.¹¹⁵ Philosophically, human rights make the values implicit in development policy and practice— despite the scientific sheen of development economics— explicit. All development policies prioritize and advance certain values. A human rights based approach to development, itself self-consciously value-driven, requires that those values be made explicit. Making the values driving development practice explicit could arguably increase the transparency and accountability of the development process by highlighting the centrality of accountability to those held to be the objects of development- the poor, suffering and marginalized. Further, as a set of internationally espoused, valued and agreed on principles, human rights discourse is arguably a powerful vehicle for promotion of normative and cultural change.

Substantively, there is increasing overlap between areas covered by development activities and human rights treaties and practices respectively¹¹⁶. For example, it is possible to match the MDG indicators with specific provisions of the ICESCR. Human rights potentially provide a basis for tackling some of the more difficult development quandaries steaming from the pervasive problems of inequality, discrimination and ‘elite capture’ that come with a more expansive understanding of development. Human rights highlight and provide framework for distributive economic, social and political justice required if we are to take equitable development seriously.

Problems such as elite capture, corruption, discrimination and inequality, are arguably particularly difficult to deal with given that development agencies generally have to work through or with incumbent governments and/or institutions or organizations that have the necessary mandate and capacity manage development programs. Thus assistance is rarely given directly to those in need and the obligations of equitable distribution by aid recipients are at best unclear. Human rights highlight and articulate the dual nature of ‘rights’- that inherent in every right is a corresponding duty, and thus a duty bearer- providing a basis for identifying the duties and obligations of government institutions. A human rights based approach to development is based also on a clear understanding of the difference between right and need. A right is something that one is entitled to solely

¹¹⁵ See generally, UNDP Integrating human rights with sustainable development A UNDP policy document (New York, UNDP 1998) 7.

¹¹⁶ See an overview by P. P. Alston, *supra* n 104, pp 784, 785 , 791.

by virtue of being a person. A right can be enforced and entails an obligation on the part of the government. A need, on the other hand, is an aspiration that can be quite legitimate but is not necessarily associated with an obligation on the part of the government to cater to it.¹¹⁷

Finally, it is argued that existing human rights monitoring and enforcement mechanisms could be effectively used to inform and complement established development approaches. These mechanisms and their uses are discussed below.

V. Human Rights in Action

While there is still no consensus within the international community on the relationship between human rights and development, human rights instruments and mechanisms are increasingly being used to enhance people's welfare, while at the same time development organizations are beginning to acknowledge the importance of human rights for their work. This section outlines a variety of mechanisms and initiatives that can be seen as illustrating the practical significance of human rights and their relevance for development.

The International human rights regime: Mechanisms for Compliance and Enforcement

The impressive normative framework established under International Law to protect human rights covers a huge variety of global and regional instruments that have already been described.¹¹⁸ According to the Vienna declaration of 1993, all human rights are universal, indivisible and interdependent and interrelated¹¹⁹, however, when it comes to the procedures ensuring their implementation there is quite some diversity. In the absence of adequate compliance mechanisms, these standards may be considered as mere norm facades or Potemkin villages.¹²⁰

There are currently two complementary sets of mechanisms to ensure compliance with international human rights obligations.¹²¹ The first consists of activities of intergovernmental organs of international organizations such as the United Nations' General Assembly, the Economic and Social Council (ECOSOC), and in particular the Human Rights Commission and its subsidiary organs. Although their activities are oftentimes seen as mere politics, these bodies are recognized as important to ongoing human rights monitoring and compliance. The second are mechanisms established by specific global and regional human rights agreements such as the Human Rights

¹¹⁷ UNDP *Poverty Reduction and Human Rights: A Practice Note* (June 2003), 1.

¹¹⁸ See sections II and III.

¹¹⁹ The Vienna Declaration is available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

¹²⁰ Riedel, Art. 55, MN 97 in B. Simma (ed.), *The Charter of the United Nations* (Oxford: University Press, 2nd edition, 2002)

¹²¹ For more details see L. Henkin, *International Law: Politics, Values and Functions* in 216 *Collected Courses of the Hague Academy of International Law* 13 (vol. IV, 1989), 251.

Committee under the Covenant on Civil and Political Rights and the commissions and courts under the regional human rights conventions.¹²² By ensuring the progressive realization of human rights in member countries, these mechanisms can be seen as furthering some of the key goals of development.

Intergovernmental Compliance Mechanisms

As we have seen, the global human rights regime has most prominently, but not exclusively, been developed within the United Nations system. Similarly both sets of compliance mechanisms have been established under the UN Charter, specific UN treaties or one of the organs specifically mandated to deal with human rights.

The intergovernmental human rights compliance mechanisms can be found with the organs directly or indirectly based on the UN Charter. Their mandate is broad and enables them among other things to promote the respect for human rights and respond to human rights violations. Among them, there are the International courts and tribunals – such as the International Court of Justice, the International Criminal Tribunals for ex-Yugoslavia and Rwanda, and the International Criminal Court- charged with respond to human rights violations, and intergovernmental organs such as the Security Council and the Commission on Human Rights.

International Courts

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations, established in 1945 by chapter 14 of the UN Charter.¹²³ Its mandate, as set out in the ICJ Statute, is to settle disputes between States according to public international law.¹²⁴ Individuals cannot bring cases to the ICJ. Nevertheless, the growing caseload of the ICJ also includes disputes and requests for advisory opinions with important human rights implications.¹²⁵ Although its judgments are binding to the parties, the ICJ does not have any specific mechanisms to ensure enforcement, relying on the willingness of parties and international pressure for compliance. It relies on the willingness of the parties to comply with the judgment. However, analysis of compliance by states with ICJ judgments shows that noncompliance is rare.¹²⁶ Between 1946 and 1987, the overall percentage of full compliance was 80 percent, with this figure arguably rising since this time.¹²⁷ This is in fact quite impressive when compared to compliance records of national

¹²² L.Henkin, *supra* 121.

¹²³ See the ICJ's website at <<http://www.icj-cij.org/>>. The ICJ supersedes the Permanent Court of International Justice pursuant to Article 14 of the Covenant of the League of Nations. The protocol establishing it was adopted by the Assembly of the League in 1920 and ratified by the requisite number of states in 1921.

¹²⁴ Article 38 Statute of the International Court of Justice.

¹²⁵ H. Steiner, & P. Alston *International Human Rights in Context* (Oxford: University Press, 2000), p. 597. F. Newman and D. Weissbrodt, *International Human Rights* (1990) 681-731.

¹²⁶ J. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance* in *The International Court of Justice at a Crossroads* (Lori Fisler Damrosch ed., 1987), p. 288; C. Paulson, "Compliance with Final Judgments of the International Court of Justice since 1987" *The American Journal of International Law* 98/3: 434-461 (2004), p. 434.

¹²⁷ C. Paulson, *supra* n 126, p 460.

courts in developed countries.¹²⁸ Partial noncompliance, as well as difficulties in actually monitoring compliance, is, however, a growing concern in some quarters.¹²⁹

The International Criminal Tribunals for ex-Yugoslavia and Rwanda can also be seen as playing an important role in ensuring compliance with human rights standards. Both Tribunals were established in the aftermath of massive human rights violations and atrocities by UN Security Council Resolutions as “a measure to maintain or restore international peace and security, following the requisite determination of the existence of a threat to the peace, breach of the peace or act of aggression.... putting an end to such crimes and of taking effective measures to bring to justice the persons responsible for them, and would contribute to the restoration and maintenance of peace”¹³⁰

The mandate of both Tribunals is to prosecute persons responsible for serious violations of international humanitarian law in accordance with the provisions of their respective statutes.¹³¹ Both tribunals are charged with hearing serious violations of human rights—genocide, grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity.¹³² While established by international law, both tribunals rely on national enforcement bodies. For example, for those convicted by International Tribunal for the Former Yugoslavia “imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.”¹³³

As early as 1948 attempts have been made to establish a permanent international criminal court.¹³⁴ In 1992, at the request of General Assembly, the International Law Commission drafted a statute to establish a permanent court; the statute was adopted in 1998 at the United Nations Diplomatic “Conference of Plenipotentiaries on the Establishment of an International Criminal Court” in 1998 in Rome, by a vote of 120 to 7, with 21 abstentions. The Statute sets out the Court’s jurisdiction, structure and functions and provides for its entry into force 60 days after 60 States have ratified or acceded to it. The 60th instrument of ratification was deposited with the Secretary General on 11 April

¹²⁸ In the Netherlands, for example, a study conducted in 1989 on the basis of judgments issued in 1986 found that, on average, only little more than half the award is collected after three years despite a favorable judgment. For more details see P. J. Van Koppen & M. Malsch “Defendants and One-Shooters Win After All: Compliance with Court Decisions in Civil Cases” *Law and Society Review* 25/4: 803-820 (1991).

¹²⁹ C. Paulson, *supra* n 126, p 456, 460.

¹³⁰ Report of the Secretary General under Security Council Resolution 808, Doc. S/2504, 3 May 1993, reprinted in *Human Rights Law Journal* 14: 198 (1993). The basis for UN Security Council establishing such enforcement mechanisms is Chapter VII of the UN Charter.

¹³¹ Article 1 Statute of the International Tribunal for the Former Yugoslavia; Article 1 Statute of the International Tribunal for Rwanda.

¹³² Articles 2 through 5 Statute of the International Tribunal for the Former Yugoslavia; articles 2 through 4 Statute of the International Tribunal for Rwanda.

¹³³ Article 27 of the Statute of the International Tribunal for the Former Yugoslavia

¹³⁴ In 1948 the General Assembly instructed the International Law Commission to study the possibility of establishing a permanent international criminal court.

2002, when 10 countries simultaneously deposited their instruments of ratification. Accordingly, the Statute entered into force on 1 July 2002. Since this date, serious human rights violations in the form of genocide, crimes against humanity, and war crimes are prosecutable by the court.¹³⁵ Official capacity as a Head of State, an elected representative or a government official, or as a commander in the armed forces does not exempt a person from criminal responsibility.¹³⁶ Again, the court relies on national enforcement by a state designated from a list of States which have indicated their willingness to accept sentenced persons.¹³⁷ This enforcement takes place under the supervision of the ICC.¹³⁸

The Security Council

Since the 1990s, the United Nations Security Council¹³⁹ has become an important player in terms of state compliance with international human rights.¹⁴⁰ The Security Council has primary responsibility, under the UN Charter, for the maintenance of international peace and security.¹⁴¹ Although highly controversial for a long time, large-scale human rights violations may nowadays be considered as threats to peace and international security, providing scope for active enforcement measures by the Security Council, such in the case of the Former Yugoslavia discussed above.¹⁴² The Security Council uses a variety of procedures and mechanisms to help reduce international tensions and conflicts, such as undertaking investigation and mediation, issue directives for cease-fires or settlements of disputes, deploying peace-keeping forces, economic sanctions (including trade embargoes) or collective military action.¹⁴³ In case of military action, the United Nations can rely on armed forces provided by member states¹⁴⁴ or utilize regional arrangements or agencies for enforcement action under its authority.¹⁴⁵

If the Security Council undertakes preventive or enforcement action against a Member State, this State may be suspended from the exercise of the rights and privileges of membership by the General Assembly on the recommendation of the Security Council. A Member State which has persistently violated the principles of the Charter may be expelled from the United Nations by the Assembly on the Council's recommendation.¹⁴⁶

¹³⁵ Articles 5, 6, 7, and 8 Rome Statute of the International Criminal Court.

¹³⁶ Articles 27, 28 Rome Statute of the International Criminal Court.

¹³⁷ Article 103 Rome Statute of the International Criminal Court.

¹³⁸ Articles 103-106 Rome Statute of the International Criminal Court.

¹³⁹ See the Security Council's webpage at <http://www.un.org/Docs/sc/>.

¹⁴⁰ H. Steiner, & P. Alston, *supra* n. 125, p 598.

¹⁴¹ H. Steiner, & P. Alston, *supra* n. 125, p 651.

¹⁴² H. Steiner, & P. Alston, *supra* n. 125, p 652; Riedel, Art. 55, MN 23, *supra* n. 120.

¹⁴³ Chapter 7 UN Charter.

¹⁴⁴ See Article 43 UN Charter.

¹⁴⁵ Article 53 UN Charter.

¹⁴⁶ Article 6 UN Charter.

The Commission on Human Rights

Established in 1946, the United Nations Commission on Human Rights (UNCHR)¹⁴⁷ today consists of 53 member governments elected by the Economic and Social Council (ECOSOC). During the first two decades of its existence, it focused mainly on establishing agreed on standards set the first draft of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural rights.¹⁴⁸ Over time, it has developed into the world's foremost human rights forum with a mandate that ranges from participation in standard-setting, monitoring, and shaping the implementation of human rights through technical cooperation and assistance.¹⁴⁹ Moreover, the UNCHR serves as a forum where countries as well as non-governmental groups and human rights defenders from around the globe can voice their concerns.

Despite a statement adopted by the UNCHR in 1947 that it had no power to take any action in regard to any complaints concerning human rights,¹⁵⁰ it revised its opinion in 1967 and acknowledged its competence to establish certain human rights compliance mechanisms called 'special procedures'. These procedures deal with either selected substantive human rights problems ('thematic procedures') or with the human rights situation in a given country ('country-specific procedures' or the '1503 procedure', named after ECOSOC Resolution 1503 from 1970 and the '1235 procedure', named after ECOSOC Resolution 1235 from 1967).¹⁵¹ Today, these procedures are considered to be one of the main pillars of the United Nations human rights machinery.¹⁵²

The main goal of the thematic procedures is to collect information about the worldwide implementation of a given human right.¹⁵³ The first thematic procedure, the Working Group on Involuntary Disappearances was established in 1980. One of the reasons for the choice of a thematic procedure was the reluctance of many governments to name specific countries concerned.¹⁵⁴ Subsequently, numerous thematic procedures were established for civil and political rights; the establishment of thematic procedures on economic, social and cultural rights is more recent.¹⁵⁵

The 1503 communications procedure allows for confidential consideration by the UNCHR of "situations that appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration". 1503 procedures are

¹⁴⁷ See the Commission's website at <http://www.unhchr.ch/html/menu2/2/chr.htm>.

¹⁴⁸ H. Steiner, & P. Alston, *supra* n. 125, p 611.

¹⁴⁹ Z. Kedzia, *UN Mechanisms to Promote and Protect Human Rights*, p. 10 in Symonides, Janusz *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 3-90.

¹⁵⁰ H. Steiner, & P. Alston, *supra* n. 125, p 611.

¹⁵¹ Z. Kedzia, *supra* n 149, p 49; N. Jayawickrama *The Judicial Application of Human Rights Law* (Cambridge: University Press, 2002), pp. 145-150.

¹⁵² Z. Kedzia, *supra* n 149, p. 49.

¹⁵³ Z. Kedzia, *supra* n 149, p. 51.

¹⁵⁴ H. Steiner, & P. Alston, *supra* n. 125, p 641.

¹⁵⁵ Z. Kedzia, *supra* n 149, p. 51.

managed by a Working Group on Communications, designated on a yearly basis by the Sub-Commission on the Promotion and Protection of Human Rights from among its members. It meets annually to examine complaints received from individuals and groups alleging human rights violations and any government responses.¹⁵⁶ The fact that a communication is transmitted to a State and acknowledged to a complainant does not imply any judgment on the admissibility or merits of the communication. Where the Working Group identifies reasonable evidence of a consistent pattern of gross violations of human rights, the matter is referred to the Working Group on Situations, which decides which situations are serious or important enough to bring to the attention of the UNCHR, who in turn can refer matters to the Economic and Social Council. Originally, the process remained confidential until the matter was referred to the ECOSOC. From 1978, however, the Chairperson of the UNCHR has announced the names of countries that have been under examination.

In 1967, the ECOSOC Resolution 1235 created a procedure enabling the UNCHR to undertake two additional types of activity. The first consists of an annual public debate where governments and NGO's are given the opportunity to identify publicly the country-situations that they consider to merit the UNCHR's attention.¹⁵⁷ Second, the resolution allows for the investigation and study of individual cases or particular situations. Only a small number of the situations identified are authorized for further investigation. However, the public debate does provide a forum for naming and shaming in order to generate media coverage, public debate and pressure for change.¹⁵⁸

If the UNCHR decides to study and investigate a situation in a given country, it is empowered with a range of approaches to the situation, including requesting all available information to be communicated, asking the government to respond in detail, appointing an individual or a group to examine and report on the situation, providing advisory

¹⁵⁶ To decide what communications may be accepted for examination, the Sub-Commission on the Promotion and Protection of Human Rights has drawn up rules of procedure (Sub-Commission resolution 1 (XXIV) of 13 August 1971). In general terms, these rules may be summarized as follows:

No communication will be admitted if it runs counter to the principles of the Charter of the United Nations or appears to be politically motivated.

A communication will only be admitted if, on consideration, there are reasonable grounds to believe - also taking into account any replies sent by the Government concerned - that a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms exists.

Communications may be submitted by individuals or groups who claim to be victims of human rights violations or who have direct, reliable knowledge of violations. Anonymous communications are inadmissible as are those based only on reports in the mass media.

Each communication must describe the facts, the purpose of the petition and the rights that have been violated. As a rule, communications containing abusive language or insulting remarks about the State against which the complaint is directed will not be considered.

Domestic remedies must have been exhausted before a communication is considered - unless it can be shown convincingly that solutions at the national level would be ineffective or that they would extend over an unreasonable length of time.

¹⁵⁷ H. Steiner, & P. Alston, *supra* n. 125, p 620.

¹⁵⁸ H. Steiner, & P. Alston, *supra* n. 125, p 620.

services, or voicing its concern or publicly criticizing the government.¹⁵⁹ The impact of any of these measures depends on a variety of political factors. Ultimately, governments take into account the relative costs of cooperation versus non-cooperation. Although the costs for the second option have steadily increased, they are not yet prohibitive in all cases.¹⁶⁰

Unlike the broad mandate of intergovernmental UN Charter-based human rights organs, the compliance mechanisms based on specific human rights treaties only deal with issues related to these treaties and the states party to them.

The Secretary General's 2005 Report on Reform, *In Larger Freedom*,¹⁶¹ makes a number of important recommendations for reform that would involve a wholesale restructuring of the United Nations human rights mechanisms. Prominent in the reform proposal is the proposal to replace the beleaguered Commission on Human Rights with a smaller, permanent Human Rights Council¹⁶². The reform would also involve heightened prominence and importance for the role of the Office of the High Commissioner for Human Rights (OHCHR).¹⁶³

Treaty Implementation Bodies and Compliance Mechanisms

As presented in a previous section, the international legal framework on human rights is to a large extent based on special human rights treaties.¹⁶⁴ Each of these treaties provides for specific human rights compliance mechanisms that go beyond the UN Charter-based mechanisms.¹⁶⁵ The establishment of these treaty monitoring bodies, composed of independent experts elected by State Parties and not acting as government agents, was a major breakthrough in the approach to the control mechanisms in the field of human rights at the international level.¹⁶⁶

¹⁵⁹ H. Steiner, & P. Alston, *supra* n. 125, p 621.

¹⁶⁰ H. Steiner, & P. Alston, *supra* n. 125, p 623.

¹⁶¹ <http://www.un.org/largerfreedom/contents.htm>

¹⁶² "183. If the United Nations is to meet the expectations of men and women everywhere — and indeed, if the Organization is to take the cause of human rights as seriously as those of security and development — then Member States should agree to replace the Commission on Human Rights with a smaller standing Human Rights Council." See also Addendum 1.

¹⁶³ See also Addendum 3, Annex - Plan of action submitted by the United Nations High Commissioner for Human Rights

¹⁶⁴ Reference to previous section.

¹⁶⁵ Human Rights Committee (HRC) for the 1966 International Covenant on Civil and Political Rights (ICCPR), the Committee on Economic, Social and Cultural Rights (CESCR) for the 1966 International Covenant on Economic, Social and Cultural Rights (ECESCR), the Committee on the Elimination of All Forms of Racial Discrimination (CERD) for the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) for the 1979 International Convention on the Elimination of All Forms of Discrimination Against Women (ICEDAW), the Committee against Torture (CAT) for the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, and the Committee on the Rights of the Child (CRC) for the 1989 International Convention on the Rights of the Child (ICRC).

¹⁶⁶ Z. Kedzia, *supra* n 149, p. 31.

Despite technical differences and variations as to the scope of protection under these compliance mechanisms, they can generally be reduced to three distinct features: reporting mechanisms, state complaints and individual complaints.

First, State parties are generally required to submit reports on measures taken to give effect to their commitments under the treaty and on the progress made.¹⁶⁷ These reports are then examined by the monitoring body. This mechanism, which least infringes State sovereignty, is the only procedure common to all six ‘core’ human rights treaties mentioned previously.¹⁶⁸ Due to the lack of effective sanctions and relative weakness of this compliance mechanism, the treaty bodies as well as the UN Commission on Human Rights, the Sub-Commission as well as other institutions have begun to introduce follow-up measures designed to render their working methods more effective.¹⁶⁹

Second, State communications procedures enable states to bring violations of and/or other forms of states’ non-compliance with their human rights obligations to the attention of the competent bodies.¹⁷⁰ This procedure is applicable exclusively when both states have recognized the competence of the compliance body to consider such communications.¹⁷¹

Third, individual communications procedures allow for direct access of those who claim to be victims of human rights violations to the compliance bodies. Although the term of ‘communication’ is carefully chosen in order to show that, technically, such a motion does not initiate a judicial proceeding but opens an examination of a case with a view to stating facts as to whether the violation or another form of non-compliance has taken place,¹⁷² the individual communication procedures are of quasi-judicial nature.¹⁷³ The ‘views’ issued by the compliance bodies are formulated like judgments, contain exact descriptions of the procedure and the facts of the case, followed by extensive legal reasoning, and culminate in precise declarations, which state in clear terms the manner in which treaty obligations have been violated.¹⁷⁴ They invariably contain concrete recommendations to the State violating its obligations, and how such violations should be redressed.¹⁷⁵ Altogether, the individual communications procedure as a situation where the subject of human rights and the state are put on equal footing before an independent international organ is considered by many to be the most significant change in international law since 1945.¹⁷⁶

¹⁶⁷ See Article 40 ICCPR. For the weaknesses in the reporting system see N. Jayawickrama *The Judicial Application of Human Rights Law* (Cambridge: University Press, 2002), pp. 133-134.

¹⁶⁸ Riedel, *supra* n. 120.

¹⁶⁹ Riedel *supra* n 120.

¹⁷⁰ Z. Kedzia, *supra* n 149, p. 68.

¹⁷¹ Z. Kedzia, *supra* n 149, p. 72.

¹⁷² Z. Kedzia, *supra* n 149, p. 68.

¹⁷³ Riedel, Art. 55, MN 90, *supra* n. 120.

¹⁷⁴ Riedel, Art. 55, MN 89, *supra* n. 120.

¹⁷⁵ Riedel, Art. 55, MN 89, *supra* n. 120.

¹⁷⁶ Z. Kedzia, *supra* n 149, p. 73.

The most prominent of the global human rights treaties are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). 27 years passed between the start of the drafting phase in 1949 and their entering into force in 1976.¹⁷⁷ The tensions between East and West and other political factors made it difficult to achieve a compromise, especially regarding a controversial system of implementation.¹⁷⁸

The Compliance Mechanisms under the ICESCR

Relative to the ICCPR provisions, the ICESCR is weak with respect to human rights compliance mechanisms.¹⁷⁹ It does not allow for State or individual communications.¹⁸⁰ Identifying effective approaches to implementation remains an issue of discussion.¹⁸¹ In this context, the justiciability of economic, social and cultural rights is often debated.¹⁸² In addition, the Committee on Economic, Social and Cultural Rights (CESCR), the body monitoring the implementation of the human rights obligations under the ICESCR, is the only treaty-monitoring body that was not established by the treaty itself.¹⁸³ Although it is similar in character to the treaty-based bodies, it is only based on an ECOSOC resolution. Nonetheless, the CESCR has the mandate to adopt general comments concerning the implementation of the ICESCR and to monitor the implementation of the ICESCR by States Parties through the consideration of their periodic reports and advising them on the means needed to ensure full compliance with the standards laid down in the Covenant.¹⁸⁴

The reporting procedure is initiated by a State party's initial report followed by regular subsequent reports once every five years.¹⁸⁵ In practice, this procedure is not fully implemented, since some States have failed to provide any initial reports, whereas many others are in arrears with their subsequent reports. In 2001, as many as 180 reports were overdue.¹⁸⁶ The CESCR has reacted by examining non-reporting countries after three consecutive non-appearances by relying on information provided by other sources of information such as NGO's which are generally more critical of the State party's position.¹⁸⁷

The State reports submitted are passed on to a 'pre-sessional working group' which elaborates the so-called 'list of issues' to be discussed with the government at the oral

¹⁷⁷ Riedel, Art. 55, MN 35, *supra* n. 120.

¹⁷⁸ Riedel, Art. 55, MN 36, *supra* n. 120.

¹⁷⁹ H. Steiner, & P. Alston, *supra* n. 125, p 275.

¹⁸⁰ Z. Kedzia, *supra* n 149, p. 68.

¹⁸¹ H. Steiner, & P. Alston, *supra* n. 125, p 248.

¹⁸² H. Steiner, & P. Alston, *supra* n. 125, p 275-278;

¹⁸³ Z. Kedzia, *supra* n 149, p. 38.

¹⁸⁴ Z. Kedzia, *supra* n 149, p. 38.

¹⁸⁵ Riedel, Art. 55, MN 78, *supra* n. 120.

¹⁸⁶ Z. Kedzia, *supra* n 149, pp 61-62.

¹⁸⁷ Riedel, Art. 55, MN 82, *supra* n. 120.

presentation of the report at the CESCR session.¹⁸⁸ This list is drafted on the basis of additional information provided by NGO's, members of civil society, and others.¹⁸⁹ After the private CESCR session, the Committee elaborates so-called 'concluding observations' evaluating the written and oral presentations.¹⁹⁰

The ICESCR does not provide any procedures for State communications or individual complaints despite the submission by the CESCR to the Commission on Human Rights of a draft Optional Protocol to the ICESCR in 1997.¹⁹¹

The Compliance Mechanisms under the ICCPR

For the ICCPR, the compromise reached during the drafting process with the protagonists of state sovereignty has led to a monitoring system that goes beyond the one of the ICESCR.¹⁹² It comprises the obligation of all States party to the Covenant to report periodically on the human rights situation in their countries.¹⁹³ However, State complaints were only admitted between those States which recognized this procedure by means of a special declaration.¹⁹⁴ Moreover, individual complaints are not provided for in the ICCPR itself, but require the ratification of a separate Optional Protocol.¹⁹⁵

In order to monitor the compliance of States Party to the Covenant, the ICCPR established a Human Rights Committee.¹⁹⁶ The reporting mechanism under the ICCPR is similar to the one under the ICESCR discussed above.¹⁹⁷

Similarly to other international and regional human rights compliance mechanisms, State communications do not play a significant role and have never been used in the context of the ICCPR.¹⁹⁸ For victims of human rights violations, this mechanism is not very meaningful, because an individual is rarely able to persuade any foreign country to take up the complaint against his state.¹⁹⁹ Still, the drafting process of the ICCPR has revealed that States are reluctant to accept this mechanism that potentially infringes their sovereignty.²⁰⁰ As a consequence, this procedure was made optional and is only admitted

¹⁸⁸ Riedel, Art. 55, MN 78, *supra* n. 120.

¹⁸⁹ Riedel, Art. 55, MN 78, *supra* n. 120.

¹⁹⁰ Riedel, Art. 55, MN 78, *supra* n. 120.

¹⁹¹ Riedel, Art. 55, MN 85, *supra* n. 120.

¹⁹² Riedel, Art. 55, MN 41, *supra* n. 120.

¹⁹³ Article 40 ICCPR.

¹⁹⁴ Riedel, Art. 55, MN 41, *supra* n. 120.

¹⁹⁵ Riedel, Art. 55, MN 41, *supra* n. 120.

¹⁹⁶ Article 28 ICCPR.

¹⁹⁷ See Article 40 ICCPR.

¹⁹⁸ Riedel, Art. 55, MN 84, *supra* n. 120.

¹⁹⁹ N. Jayawickrama *The Judicial Application of Human Rights Law* (Cambridge: University Press, 2002), p. 135.

²⁰⁰ Riedel, Art. 55, MN 41, *supra* n. 120.

between those States which recognized it by means of a special declaration (Article 41 ICCPR).²⁰¹

Individual Complaints

The individual complaints mechanism established under the ICCPR and its First Optional Protocol is arguably the most developed among the global human rights treaties and the competent organs receive around 1000 complaints per year.²⁰² The communications must be from individuals who claim to be victims of a violation by a state party to the Protocol of any of the rights set forth in the Covenant (Articles 1 and 2 of the Optional Protocol). The conditions for the admissibility of communications are largely identical to the ones for claims before a court of law.²⁰³

In the beginning, the admissibility is examined by a working group, which can request additional information from either side. Then, the Human Rights Committee decides on the admissibility. An opportunity is given to the State concerned to provide relevant information and comments. It is also in this phase that the Human Rights Committee informs the State concerned of its views whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation.²⁰⁴

However, there are no provisions for confrontation between the parties or even oral hearings.²⁰⁵ Only written information made available by the State party and the individual is taken into consideration according to the Optional Protocol, which leads to difficulties with independent fact finding such as the use of independent experts and on-site visits by the Human Rights Committee.²⁰⁶

The complaints procedure ends with the adoption of quasi-judicial ‘views’ by the Human Rights Committee, which are structured and formulated like judgments indicating the violation of obligations and ways to redress them.²⁰⁷ These ‘views’ are communicated to the State party and to the complainant. They are also appended to the Human Rights Committee’s annual report to the General Assembly. Arguably, this mobilization of shame can be seen as a painful means of political sanction that has occasionally accelerated the break-up of dictatorial regimes, such as the former military dictatorships of Uruguay and Argentina.²⁰⁸

Despite the obvious shortcomings of these global human rights compliance mechanisms, the achievements made in this area over the last decades are substantive and significant.

²⁰¹ Riedel, Art. 55, MN 41, *supra* n. 120.

²⁰² Riedel, Art. 55, MN 85, *supra* n. 120.

²⁰³ Riedel, Art. 55, MN 86, *supra* n. 120.

²⁰⁴ Rule 86 of the Rules of Procedure, CCPR/C/3/Rev.5).

²⁰⁵ H. Steiner, & P. Alston, *supra* n. 125, p 738.

²⁰⁶ H. Steiner, & P. Alston, *supra* n. 125, p 738.

²⁰⁷ Riedel, Art. 55, MN 89, *supra* n. 120.

²⁰⁸ Riedel, Art. 55, MN 91, *supra* n. 120.

Their role for the international compliance with global human rights standards should not be belittled.

Compliance Mechanisms within other Global Institutions and Specialized Agencies

In addition to the UN system, specialized agencies and other global international organizations have set-up human rights compliance mechanisms. As an example, we will briefly present those of the International Labour Organization (ILO).

The International Labour Organization (ILO) has a system that is based on the adoption of a wide range of international conventions and includes the regular examination of reports, input from non-governmental organizations and both technical and political review.²⁰⁹ A characteristic of the ILO that its organization is tripartite, which is also reflected in the human rights compliance mechanisms.²¹⁰ The legal basis of the supervisory system is Article 22 of the ILO Constitution. States have an obligation to report on the implementation and compliance with ILO standards.²¹¹ States send their reports to ILO and copies to workers' and employers' organizations, which have their own right to comment.

The reports are examined by the Committee of Experts on the Application of Conventions and Recommendations meeting annually to deal with around 2000 government reports per year.²¹² The Committee can indicate that the national law and practice are not in compliance with ILO standards and it can request changes. These requests can either be direct and not published for minor points or they can be observations which are published comments appearing in the annual reports and are submitted to the International Labour Conference for possible discussion.²¹³

This Conference meets every June and has a Committee on the Application of Standards composed of representatives of governments, employers and workers. The Committee usually discusses around 30 cases in public and invites the representatives of the governments concerned to appear before it and explain the reasons for the problem in question. In the dialogue between the government representative and the employers' and workers' own representatives on the Committee, the government representative is asked to explain statements and to indicate a timetable for the implementation of measures requested by the committee of Experts, or to commit the government to inviting the International Labour Office to carry out 'direct contacts' or technical assistance to resolve the problems.²¹⁴

²⁰⁹ L. Swepston, *The International Labour Organization's System of Human Rights Protection* in in Symonides, Janusz *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp.91-109.

²¹⁰ L. Swepston, *supra* n 209, p 92.

²¹¹ L. Swepston, *supra* n 209, p 96.

²¹² L. Swepston, *supra* n 209, p 96.

²¹³ L. Swepston, *supra* n 209, p 96.

²¹⁴ L. Swepston, *supra* n 209, p 96.

The ILO's compliance mechanisms also comprise two main complaints procedures. Any government which has ratified the same convention, any delegate to the International Labour conference or the governing body of the ILO can file a complaint alleging the violation of a convention by a country which has ratified it (Article 26 of the Constitution).²¹⁵ This leads to the establishment of a Commission of Inquiry which holds hearings, visits the country concerned and makes findings as to whether the convention is being violated or not.

Moreover, a representation may be filed by any workers' or employers' organization (Article 24 of the Constitution). A tripartite Governing Body Committee then decides the case on the basis of an exchange of correspondence.²¹⁶

Finally, the Committee on Freedom of Association is another complaints body within the ILO, receiving complaints of violations of freedom of association filed by organizations of employers and workers. This Committee is tripartite and its decisions and recommendations have led over time to improvements in numerous cases, from freeing trade unionists from prison or returning them from exile to reforms in labor law.²¹⁷

Regional Human Rights Compliance Mechanisms

While UN human rights mechanisms derive prominence and strength from their global status and their large number of signatories, the current complaints, monitoring and enforcement procedures arguably remain relatively weak.²¹⁸ In contrast, a number of regional systems have developed more advanced and effective systems for the implementation of human rights obligations.²¹⁹

The Inter-American System

In the Inter-American System for the protection of Human Rights, two different legal regimes coexist. The first is the original regime based on the *Charter of the Organization of American States* (OAS) with the *American Declaration on the Rights and Duties of Man* proclaimed in 1948. The second was established in 1969 by the *Inter-American Convention on Human Rights*, which establish both the Inter-American Commission on Human Rights and Inter-American Court of Human Rights.

Despite these different sources of law, the Inter-American Commission on Human Rights is now, in both cases, the organ entrusted with the function of promoting respect for, and

²¹⁵ L. Swepston, *supra* n 209, p 97.

²¹⁶ L. Swepston, *supra* n 209, p 97.

²¹⁷ L. Swepston, *supra* n 209, p 97.

²¹⁸ Riedel, Art. 55, MN 61, *supra* n. 120.

²¹⁹ It is important to note that currently there are no established regional human rights agreements between Asian or Arabic countries. On Asia see C. Raj Kumar "Institutionalization of Human Rights in Asia: Developmentalizing Rights to Promote Good Governance" *Asia Pacific Law Review* 12/2: 143-159 (2004); M. Tardu "The European Systems for the Protection of Human Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), p. 137. On the Arab states see B. El Din Hassan *Regional Protection of Human Rights in the Arab States in Statu Nascendi* in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 239-253.

defense of, human rights. In relation to non-parties to the American Convention, human rights are understood to be the rights proclaimed in the 1948 Declaration. In relation to states that are parties to the Convention, human rights are understood to be the rights set forth in it.²²⁰ In this case, the Convention provides for both private and interstate petitions to the Commission.

Both the Commission and individual states can submit cases to the Inter-American Court of Human Rights under the 1969 Convention. The Court has contentious and advisory jurisdiction over the signatory states to the Convention, and has the power to award compensation in the case of violations being found.²²¹ The Court supervises compliance with the reparations judgment and maintains the case on its docket until full reparations are made,²²² and at the end of 2002, the Court was monitoring compliance with its judgments in twenty-seven contentious cases.²²³

The African System

In Africa, the *African Charter on Human and Peoples' Rights* (ACHPR), effective since 1986, operates under aegis of the Organization of African Unity (OAU). The implementation mechanisms of the ADHPR are rather weak.²²⁴

The African Commission established under the Charter has three dominant rights-based functions: promotion, ensuring protection and the interpretation of human rights. The Commission can receive complaints and communications, while also operating as a reporting mechanism. The Council of Ministers is entrusted with the monitoring of the Commission's judgments.²²⁵

Despite its broad mandate, the African Commission has been criticized as operating under the political influence of member states.²²⁶ It is seen to lack independence and impartiality, while lacking sufficient resources or capacity to enable it to implement the provisions of the ACHPR in any event.²²⁷

²²⁰ See H. Caminos "The Inter-American System for the Protection of Human Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 165-211.

²²¹ Jo M. Pasqualucci *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge: University Press, 2003), p. 239.

²²² Jo M. Pasqualucci *supra* n 221, p. 288.

²²³ Jo M. Pasqualucci *supra* n.221, p. 288.

²²⁴ For further information see D. D. C. Don Nanjira "The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 213-237.

²²⁵ Fatsah Ouguergouz "The Establishment of an African court of Human And Peoples' Rights: A Judicial Premire for the African Union" in: Abdulqawi A. Yusuf (ed.) *African Yearbook of International Law* 11:79-141 (2003).

²²⁶ D. D. C. Don Nanjira "The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 213-237.

²²⁷ D. D. C. Don Nanjira "The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 213-237.

The European Systems

The Council of Europe

Arguably the most developed human rights compliance mechanisms exist within the council of Europe. The Council of Europe was founded in 1949. All of its 46 member states have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) with the most far-reaching regional human right agreement. The Convention established a state and individual complaints procedure. Over time, the normative framework- and the corresponding compliance mechanisms- have been improved by a number of additional protocols to the Convention.

Since 1998 complaints under the convention are received by the European Court of Human Rights (ECHR), which issues binding judgments and awards compensation. The caseload of the European Court of Human Rights is considerable: Between 1999 and 2003, it issued 2,572 judgments finding a violation of the European Human Rights Convention. Almost all cases complaints were initiated by individuals. The impact of these judgments on the legal and judicial systems of the Council of Europe's member states is measurable; in numerous cases formal criminal, civil and administrative procedures and institutional frameworks and practices have been adjusted in order that they comply with human rights standards articulated by the court.

The success of the European Court of Human Rights and its popularity among European citizens has led to a huge workload. In order to reduce the heavy workload of the ECHR by improving the functioning of the justice systems in the member states, the Council of Europe has established the European Commission for the Efficiency of Justice (CEPEJ),²²⁸ which not only benchmarks and evaluates the functioning of these justice systems,²²⁹ but is also intended to assist member states directly to improve the compliance of their justice systems with human rights standards, for example by fighting court delay.²³⁰

The member states of the Council of Europe have also signed the European Social Charter, which guarantees social and economic rights- in addition to the civil and political human rights under the European Human Rights Convention. The Charter provides a mechanism for collective complaints and requires states to submit national reports on their progress in this area.²³¹

²²⁸ For more information on current activities see the website of the European Commission for the Efficiency of Justice (CEPEJ) at <http://www.coe.int/cepej>.

²²⁹ See the report on the CEPEJ's pilot benchmarking and evaluation exercise European Commission for the Efficiency of Justice *European Judicial Systems: Facts and Figures* (Strasbourg: Council of Europe Publishing, 2005), 137 pages. This report is also available online at http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/systeme%20judiciaire%20A.pdf.

²³⁰ For more information on the CEPEJ's task force on court delay see http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Mandat%20TF%20DEL%20E.asp#TopOfPage.

²³¹ More detailed information is available at http://www.coe.int/T/E/Human_Rights/Esc/.

A key element for the strength of the Council of Europe's human rights compliance mechanisms is the fact that the Council of Europe's Committee of Ministers is entrusted to ensure enforcement of judgments of the ECHR.²³²

This control comprises different aspects.²³³ First, the Committee of Ministers ensures that payment of any just satisfaction decided by the Court is made as ordered. Second, it makes sure that individual measures are taken so that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention. These measures may consist, for example, of re-opening of proceedings at national level, granting of a resident permit, striking-out of criminal records, etc.

Third, the Committee of Ministers ensures that general measures be adopted in order to avoid new similar violations of the Convention.²³⁴ As a matter of fact, these measures may consist in constitutional, legislative or regulatory amendments, a change in administrative practice or in case-law, publication and dissemination of the Court's judgment, to name only a few of them.²³⁵

After the transmission of the Court's final judgment to the Committee of Ministers,²³⁶ the latter invites the respondent state to inform it of the steps taken to pay the amounts awarded by the Court in respect of just satisfaction and, where appropriate, of the individual and general measures taken to abide by the judgment. The information received is then closely examined. After establishing that the state concerned has taken all the necessary measures to abide by the judgment, the Committee adopts a resolution concluding that its supervisory functions have been exercised.²³⁷

Until the state in question has adopted measures deemed to be satisfactory, the Committee of Ministers does not adopt a final resolution striking the judgment off its list of cases, and the state continues to be required to provide explanations and to take the necessary action. The Committee can and does adopt interim resolutions, which usually contain information concerning the interim measures already taken and set a provisional calendar for the reforms to be undertaken or encourage the respondent state to pursue certain reforms or insist that it take the measures needed to comply with the judgment.

²³² See Article 46 (2) of the European Human Rights Convention. For more details see M. Tardu "The European Systems for the Protection of Human Rights" in J. Symonides *Human Rights: International Protection, Monitoring, Enforcement* (Berlington, VT: Ashgate, 2003), pp. 135-164.

²³³ For more detailed information see Elisabeth Lambert-Abdelgawad *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2002), 55 pages; Also see the Council of Europe's webpage on execution of judgments at http://www.coe.int/T/E/Human_Rights/execution/.

²³⁴ A detailed list of these general measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the Convention is H/Conf (2000)7 from 3-4 November 2004 available at http://www.coe.int/T/E/Human_Rights/Execution/02_Documents/H_Conf7.pdf.

²³⁵ E. Lambert-Abdelgawad *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2002), pp. 20-24.

²³⁶ Article 46 (2) of the Convention.

²³⁷ More details are available at http://www.coe.int/T/E/Human_Rights/execution/01_Introduction/01_Introduction.asp#TopOfPage.

These interim measures go as far as to threaten with the exclusion from the Council of Europe, which happened for the first time in a case involving Turkey in 2001.²³⁸

The supervision of the implementation of judgments of the European Court of Human Rights and the interaction with reluctant member states is a challenging task, as reminds the huge number of court judgments pending before the Committee of Ministers for control of execution for more than five years or otherwise raising important implementation issues.²³⁹

In addition to the supervision of the implementation of judgments, the Committee of Ministers is entrusted with the monitoring of the member states' general compliance with European human rights standards.²⁴⁰ Several procedures exist in this respect.²⁴¹

First, the Committee of Ministers can be seized by any member state, the Secretary General or on the basis of a recommendation from the Parliamentary Assembly for questions of implementation of commitments concerning the situation of democracy, human rights and the rule of law in any Member State.²⁴² On this basis, the Committee of Ministers was seized by the Secretary General in 2000 and the Parliamentary Assembly in 2003 concerning the situation in the Chechen Republic in the Russian Federation.²⁴³

Second, there is a confidential thematic monitoring procedure, which does not focus on particular countries, but on thematic areas such as 'effectiveness of judicial remedies', 'functioning of the judicial system', and 'non-discrimination'.²⁴⁴

Third, there is a post-accession procedure to monitor the compliance with the commitments of member states after their accession.²⁴⁵ At present, this procedure concerns Armenia, Azerbaijan, Bosnia-Herzegovina and Serbia and Montenegro.

The compliance mechanisms developed within the Council of Europe show that the often decried weakness of human rights enforcement mechanisms is not a fatality, but generally the result of a lack of commitment by member states. The European

²³⁸ Case of *Loizidou v. Turkey*. See E. Lambert-Abdelgawad *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2002), p. 38.

²³⁹ See the working paper produced by Erik Jurgens in 2005 for the Council of Europe's Parliamentary Assembly *Implementation of Judgments of the European Court of Human Rights* available at http://www.coe.int/T/E/Human_Rights/execution/01_Introduction/PA_Report_Ejdoc32%5B1%5D.pdf.

²⁴⁰ For a detailed description see A. Drzemczewski "Monitoring by the Committee of Ministers of the Council of Europe: A Useful 'Human Rights' Mechanism?" *Baltic Yearbook of International Law* 2: 83-103 (2002) and A. Drzemczewski "The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe" in: L. A. Sicilianos (ed.) *The Prevention of Human Rights Violations* (Athens: Ant. N. Sakkoulas Publishers, 2001), pp. 139-177.

²⁴¹ Details are available at <http://dsp.coe.int/monitoring/>.

²⁴² See A. Drzemczewski "Monitoring by the Committee of Ministers of the Council of Europe: A Useful 'Human Rights' Mechanism?" *Baltic Yearbook of International Law* 2: 83-103 (2002), p. 89.

²⁴³ See the response in SG/Inf(2004)3 *Russian Federation: Council of Europe's Response to the Situation in the Chechen Republic* available at [http://dsp.coe.int/monitoring/docs/SG-inf\(2004\)3_E.pdf](http://dsp.coe.int/monitoring/docs/SG-inf(2004)3_E.pdf).

²⁴⁴ For a complete list see [http://dsp.coe.int/monitoring/docs/Monitor-inf\(2004\)3_E.pdf](http://dsp.coe.int/monitoring/docs/Monitor-inf(2004)3_E.pdf).

²⁴⁵ For details see [http://dsp.coe.int/monitoring/docs/monitor-inf\(2005\)1_E.pdf](http://dsp.coe.int/monitoring/docs/monitor-inf(2005)1_E.pdf).

mechanisms show that where this commitment exists, forceful mechanisms can operate and are effective.

The European Union

“Human rights, democracy and the rule of law are core values of the European Union. Embedded in its founding treaty, they have been reinforced by the adoption of a Charter of Fundamental Rights. Respect for human rights is a prerequisite for countries seeking to join the Union and a precondition for countries who have concluded trade and other agreements with it.”²⁴⁶

Human rights were not explicitly provided for in the 1957 Treaty of Rome, the constituent instrument of the EU (then EEC), although its Preamble affirms the Member States’ willingness to “preserve and strengthen peace and liberty”(Preamble), to improve living and working conditions and to abolish discrimination on the grounds of nationality among citizens of the Member States It also created freedom of movement and establishment for EEC citizens.

The jurisprudence of the ECJ provided the first, prodigious source of substantive protection to fundamental right in EU law and continues to play a crucial role development of human rights in EU law. Through interpretation of various provisions of the Treaties²⁴⁷ the ECJ has combined the furthering of European integration and the protection of fundamental rights through doctrines such as supremacy and direct effect. In *Stauder*,²⁴⁸ the Court alluded for the first time to “the fundamental human rights enshrined in the general principles of Community law and protected by the Court.” In *Internationale Handelsgesellschaft*²⁴⁹, the Court held that respect for human rights forms an integral part of the general principles of Community law *Nold*²⁵⁰ confirmed the place of human rights in Community law, but for the first time referred specifically to

²⁴⁶ Overview of the Human Rights Activities of the European Union, at http://europa.eu.int/pol/rights/overview_en.htm. Examples of the voluminous literature on human rights and the EU include A. Clapham Human Rights and the European Community: A Critical Overview (1991); Cassese, Clapham, Weiler (eds) European Union - The Human Rights Challenge Vol. I II III (1991); Coppel & O'Neill, The European Court of Justice: Taking Rights Seriously? 29 CML Rev 669 (1992); Weiler, Thou Shalt Not Oppress a Stranger, 3 European Journal of International Law 65 (1992); Weiler & Lockhart, 'Taking Rights Seriously' Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence, Parts I&II 32 CML Rev (1995); N. A. Neuwahl, A. Rosas *The European Union and Human Rights* (1995) Kluwer; P. Alston (ed), *The EU and Human Rights* Oxford University Press (1999); A. Von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union. (2000) Common Market Law Review.

²⁴⁷ Primarily provisions related to the single market and equal treatment on the basis of nationality, Often the provisions relied upon bore little or no relation to human rights in a classical sense, for discussion of this in the context of equality law, see G. More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P. Craig and G. de Búrca, *The Evolution of EU Law* (1999) 516-553; S. McInerney, 'Bases for action against race discrimination in EU law' (2002) 27 *ELRev* 72.

²⁴⁸ Case 29/69, *Stauder v. Ulm* [1969] ECR 419, at 425.

²⁴⁹ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

²⁵⁰ Case 4/73, *Nold v. Commission* [1974] ECR 491..

international treaties and the case of *Rutili*²⁵¹ contained an explicit reference to the ECHR.

The 1992 Treaty of Maastricht included the first explicit mention of human rights in the text of the Treaty, and this was followed in 1999 with Treaty of Amsterdam which contained stronger human rights language, a broad enabling provision non-discrimination²⁵² and a more explicit commitment to the ECHR²⁵³. The Treaty of Nice was accompanied by the proclamation of the Charter on Fundamental Rights of the European Union on 7 December 2000.²⁵⁴ The Charter includes both first and second generation rights²⁵⁵ and codifies a number of declarations and sources of inspiration and guidance for the EU in the area of fundamental rights. Its preamble proclaims that "it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter." The Charter however remains unenforceable and non-justiciable, and in this way, while it will likely be incorporated through ECJ jurisprudence, it will not advance enforcement in as direct way as the ECHR, discussed above.²⁵⁶

The substantive enforcement of human rights can also be identified in Treaty provisions which have direct effect, such as Articles 12 EC which outlaws discrimination on the basis of nationality,²⁵⁷ or through various human rights related Regulations and Directives. A prominent example of the latter is the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which was adopted in 2000.²⁵⁸

As will be discussed below, the European Union's approach to development cooperation is strongly underpinned by an explicit commitment to human rights. In this respect, the evolving internal commitment to human rights within and between EU Member States, as well as between the EU and accession countries, is also reflected in its external relationship with third countries in the context of development.

²⁵¹ Case 36/75, *Rutili* [1975] ECR 1219.

²⁵² See S. McInerney, 'Equal Treatment of persons irrespective of racial or ethnic origin: a comment.' (2000) 25 *ELRev* 317.

²⁵³ On this connection, see H. Krüger and J. Polakiewicz, 'Proposals for a Coherent Human Rights System in Europe / The European Convention on Human Rights and the EU Charter of Fundamental Rights' (2001) 22 *Human Rights Law Journal* 1

²⁵⁴ Charte 4422/00 [2000] O.J. C/364/01 18/12/2000. G. de Búrca, 'The drafting of the European Union Charter of Fundamental Rights' (2000) 26 *ELRev*. 126

²⁵⁵ Charte 4422/00 [2000] O.J. C/364/01 18/12/2000.

²⁵⁶ The proposed EU Constitution (2004) included a provision making the Charter legally binding and justiciable.

²⁵⁷ There is also an argument to be made that this particular provision in fact reinforces indirect discrimination because of the *de facto* impact of *de jure* distinctions related to nationality, particularly when viewed in the light of Charter provisions, see S. McInerney, 'The Charter of Fundamental Rights of the European Union and the case of race discrimination' (2002) 27 *ELRev* 483.

²⁵⁸ Council Directive 2000/43/EC 29 June 2000 OJ L 180/22. See also S. McInerney, 'Equal treatment between persons irrespective of racial or ethnic origin: a comment' (2000) 25 *ELRev* 317.

National Human Rights Systems: Litigation as a tool for development outcomes

Many national governments are now bound by obligations emanating from both international and regional human rights agreements, either because these agreements automatically become part of national law or because they have been incorporated into national law by statute. In addition, many constitutions and national laws have enshrined human rights obligations at the domestic level. In an increasing number of countries individuals, groups and civil society organizations are using these, now national, obligations as a basis for demanding the fulfillment or enforcement of particular human rights. As an example, we will briefly present a summary of recent rights-based claims made in South Africa.

Right to Health Cases in South Africa

In 1996 the Constitutional Court of South Africa ruled that socio-economic rights provided for in the constitution are subject to judicial enforcement. Since this time a series of rights based legal challenges have produced some dramatic results in terms of enforcing government obligations to uphold certain rights. One clear area of impact has been on access to HIV/AIDS medicines as part of a right to health campaign. Civil society groups- lead by the Treatment Action Campaign (TAC) -, which begun by challenging drug pricing by multi-nationals, turned to intervening in large scale litigation in an attempt to secure anti-viral medicines for poor and disadvantaged HIV/AIDS sufferers.²⁵⁹

In response to continued pressure by civil society groups and to the rising AIDS crisis, the Government of South Africa introduced an amendment to the Medicines and Related substances Control Act 1965 in an attempt to reduce the price of publicly available drugs. The amendment encouraged pharmacists to provide cheaper generic drugs, allowed for the importation of cheaper drugs and introduced a compulsory licensing system allowing competitors to produce patented drugs.

The Pharmaceutical Manufacturers Association (PMA) and 39 drug companies challenged the government's legislation on the basis that it violated the WTO's intellectual property rights agreements. In response to the challenge, TAC intervened in the case²⁶⁰, asserting that the legislation was valid in that it constituted the government's positive duty to fulfill the right to health. Arguably as a result of public pressure and attention, in part brought about by the intervention of TAC, the PMA and the drug companies involved withdrew there case. One indirect result of the case was that the

²⁵⁹ Another significant example is the *Grootboom* case (The Government of Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC)), which held that the constitutional right to housing resulted in a burden on the South African government to establish a reasonable and coherent public housing program.

²⁶⁰ TAC intervened in the case as *amicus curae*. See M. Heywood, 'Debunking "Conglomo-Talk" A Case Study of the Amicus Curae as and Instrument from Advocacy, Investigation and Mobilisation', Johannesburg, TCA 3 Dec 2001, available at www.tac.org.za/Documents/MedicinesActCourtCase/Debunking_Conglomo.rtf

price of anti-retroviral medicine came down significantly- from approx 4000 rand per month to 1000 rand per month.²⁶¹

TAC then moved on to trying to compel the national and provincial governments to provide anti-retroviral drugs to all pregnant women to prevent the transmission of HIV from mothers to their children. The government appealed to the Constitutional Court, after TAC secured a successful decision. While the Constitutional Court found that while it was impossible to provide anti-retroviral to all HIV suffering immediately, the government must make reasonable steps to provide constitutional socio-economic rights on a 'progressive basis'. The Court found that the policy of not making anti-retroviral available at hospitals and clinics was unreasonable. The court ordered that the government take reasonable step to rectify the situation and to provide testing and counseling services at the hospital and clinics in question.

It is important to note that besides having the direct impact outlined, the campaign by TAC arguably had a number of more indirect impacts such as: setting ground breaking precedents, increasing judicial awareness of Human Rights obligations, and increasing public awareness of their rights. It is also interesting to note that in 1999 the same group was involved in a successful constitutional challenge relating to discrimination on the basis of HIV/AIDS, concerning a number of South African Airways cabin attendants with HIV. The judgment reinforced the right to equality for people with HIV.

The Emergence of 'Rights Based' Approaches to Development (RBA)

As previously outlined, rights-based approaches to development (RBA) have arguably emerged in response to both the apparent failure of traditional approaches to development and wider acceptance of human rights discourse generally. RBA are seen by some as stemming from the 'Right to Development' (RTD), which emerged in the 1960s and 1970s in connection with the efforts of newly independent states to establish fairer economic and trade relations between the North and South. In terms of institutional or formal endorsement, the RTD was first recognized by the Commission on Human Rights in 1977.²⁶² It is also recognized in Article 22 of the African Charter on Human and Peoples' Rights. The UN Declaration on the Right to Development was adopted by the General Assembly in 1986.²⁶³ Others trace the evolution back further to the report of Manouchehr Ganji on economic, social and cultural rights, the thrust of which was endorsed by the first World Conference on Human Rights held in Teheran in 1968.²⁶⁴ Whatever their origin, these approaches challenge the 'how' of development practice—that is, how the goals of development are best achieved—as well as the aims of development themselves. They also represent a fundamental change in the position and

²⁶¹ See Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, www.cohre.org/library

²⁶² Res. 4 (XXXIII) of 21 February 1977.

²⁶³ UN General Assembly Res. 41/128 of 4 December 1986.

²⁶⁴ See P. Alston, *supra* n 104p. 798

role of human rights in development, from a secondary and complementary one to a constitutive one.²⁶⁵

Rights-based approaches (RBA) to development are based on the fundamental principles of equality and non-discrimination that underpin the international human rights regime; nearly all human rights declarations, laws, conventions, treaties and agreements explicitly refer to equality and non-discrimination. Further, they attempt to incorporate norms, standards and principles of the international human rights system into the plans, policies and process of development. Different development organizations have approached this aim in a number of differing ways. Rights based approaches can strengthen human rights in development cooperation through specific positive and negative measures (such as the impositions of conditions (*ex ante*) or sanctions (*ex post*) to promote human rights (vertical approach) and may become the central frame of reference for development cooperation, and thereby constitute a higher aim and cross-cutting theme of development cooperation (horizontal approach).

A number of bi-lateral²⁶⁶, multi-lateral²⁶⁷ and non-governmental organizations²⁶⁸ have integrated human rights and democratization objectives into their overall policy objectives and into all aspects of their operational policies and practices- at both the programmatic and project levels.²⁶⁹ While other donors have not necessarily adopted a focus on human rights into their policy frameworks, many have begun to include rights based concerns into aspects of their programs or projects.²⁷⁰ While there are now a number of different manifestations of the incorporation of rights into development practice, the key elements of current RBA include:

- Express Linkage to Rights
- Accountability and transparency
- Empowerment
- Participation and Partnership
- Non-discrimination and Equality

²⁶⁵ P. Uvin, *Human Rights and Development* (2004) 122.

²⁶⁶ Bi-lateral organizations that have incorporated this approach into their development practices include DIFID, SIDA, NORAD, CIDA. A number of other bi-laterals have begun developing similar approaches.

²⁶⁷ Multi-lateral organizations include the numerous agencies that make up the UN system, the European Union and the World Health Organization- see <http://www.who.int/hhr/en/>

²⁶⁸ NGO organizations include Action Aid, CARE, Oxfam, Catholic Relief Services, Save the Children, and Interaction.

²⁶⁹ A process that is termed 'mainstreaming'.

²⁷⁰ For example, AUSAID explicitly states that they do not support a rights based approach to development in their overall policy objectives; however, they support a range of human rights activities through their global human rights program, supported by the Human Rights Fund and the Centre for Democratic Institutions- see www.usaid.gov/partner/global/humanrights.cfm. Similarly, multi-lateral organisations such as the WHO have increasingly incorporated a rights based approach into its strategies and programs. [WHO is also cited above; should be in one place only]

- Attention to Vulnerable Groups

RBA posit development as something that should further human rights, as they are defined in international standards. They also assume an understanding of the indivisibility of rights. It is important to note that while responses to the indivisible nature of rights from those outside the Human Rights community is often fairly negative and essentialist this principle aims to recognize the ‘interdependence’ of rights and it arguably similar to recognizing the multi-faceted nature of poverty or conversely well-being. It is not, as some commentators portray it, a naïve notion that development practitioners must address all issues at once or else are unable to do anything. Attempts to operationalize international human rights principles have also incorporated the principles and mechanisms for dealing with limitations and derogations of rights in certain contexts, and for the ‘progressive realization’ of rights in the development context more generally. Ultimately, the indivisibility of human rights does not mean that no distinction can be made between contextually identified priorities and fixed hierarchies. The former are necessary for development work and should not be perceived as violating the indivisibility of human rights.²⁷¹

It is also important to note that RBA demand attention to and monitoring of not only outcomes but also process. This is a key and distinctive insight offered by RBA- an understanding that the development process is a dynamic one and is not only an integral part of development per se but it key in the achievement of good outcomes. Thus understanding and monitoring process is as important as measuring outcomes. Another key insight offered by RBA is the necessary focus on duty bearers, as well as rights holders; thus articulating the fact that development requires more than a focus purely on the poor and marginalized. In this way, RBA arguably coincide with Sen’s conception of development in his focus on the capacities of people to claim their rights and the duty-bearers capacities to meet their obligations.

Arguably, one of the most comprehensive frameworks for a RBA has been articulated by 2003 UN Common Understanding. The UN-wide Plan of Action on strengthening human rights-related United Nations Action at Country Level: National Human Rights Promotion and Protection Systems²⁷² commits the UN to building strong human rights institutions at the country level, confirming that “All the UN agencies are collectively responsible for the implementation of this Plan [...]”²⁷³ Thus, the Common Understanding emphasizes the purpose of development cooperation, the use of human rights principles to guide development programming and the methodology to be followed in national capacity development.²⁷⁴

²⁷¹ P. Alston, *supra* n 104 p. 807

²⁷² See Report of the Secretary-General entitled *Strengthening of the United Nations: an agenda for further change* (A/57/387 of 9 September 2002). In that report, the Secretary General states that “The promotion and protection of human rights is a bedrock requirement for the realization of the Charter’s vision of a just and peaceful world”. Since that report, the strengthening and mainstreaming of human rights in the UN has come to be known as “Action 2”. “Action 2” related to Strengthening UN Support for the Promotion and Protection of Human Rights Worldwide.

²⁷³ UNDP, *Human Rights in UNDP Practice Note* (April 2005)

²⁷⁴ See also ML Silva, (on behalf of the Acting High Commissioner for Human Rights OHCHR) *The Human Rights Based Approach to Development Cooperation: Towards A Common Understanding Among UN Agencies Developing*

The key tenets of the Common Understanding are as follows:

- (1) All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments
- (2) Human rights standards contained in, and derived from the UDHR and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process;
- (3) Development cooperation contributes to the development of the capacities of duty-bearers to meet their obligations and or the rights to holders to claim their rights.²⁷⁵

UNDP has also developed a set of guidelines on human rights reviews of country programmes, which seek to assess programmes and projects results in terms of (i) impact on empowerment (disaggregated analysis); (ii) impact of capacities to respect protect and fulfill human rights; (iii) human rights outcomes , especially for the poor and disadvantaged groups and individuals (iv) unintentional results on human rights (positive or negative); (v) ownership of process and result by claim-holders and duty bearers involved (vii) sustainability – risk of set backs and efficiency of mechanisms for monitoring and redress.

In practical terms, the UNDP have outlined four positive ways in which RBA should- and have begun to - influence development programming

- (i) First, it forces programme staff and policy makers to reflect upon the why and the how of their actions not only on the questions of what should be done
- (ii) Second, the global legitimacy of human rights provides an objective starting point for dialogue and discussion with government, the people and external partners
- (iii) Third, it helps policy-makers and citizens to recognize the power dynamics of the development process
- (iv) Fourth, the accountability structure pursued through a human rights-based approach facilitates the development of quantitative and qualitative benchmarks and indicators for measuring.²⁷⁶

It is in many cases too early to assess how increasingly adopting human rights standards has impacted on the work of the organizations. Approaches by each of the organizations have also differed making generalizations fairly difficult at this stage. Despite the effort to further develop the RBA, some argue that its ‘continued credibility ... demands a higher degree of conceptual rigor and clarity than has prevailed in the past, along with a

Countries, How can Development cooperation contribute to furthering their advancement Cologne 29-30 September 2003 Summary Report (InWent Capacity Building International, Germany) at 19.

²⁷⁵ UNDP *Poverty Reduction and Human Rights: A Practice Note* (April 2005) 16.

²⁷⁶ UNDP, *Human Rights in UNDP – Practice Note* (April 2005) 15.

frank appraisal of their relative strengths and limitations.²⁷⁷ RBA have also been criticized for lacking clear defining criteria or being defined at level or abstraction and generality as to be relatively meaningless. Critics emphasize that some of the formulations do little more than restate the fundamental dilemma and do not provide real guidance as to how to resolve it.²⁷⁸

The EU has in its development cooperation developed a strong human rights foundation for its policies and interventions. This is consistent with the evolution of human rights protection in the jurisprudence of the ECJ, the growing prevalence of human rights language in the Treaties and the emergence of a panoply of human rights-related legislation in the EU.²⁷⁹ In 1991, the Luxembourg European Council²⁸⁰ adopted the Declaration on Human Rights which set forth a number of guiding principles for the EU's work in international relations.²⁸¹ The 1991 Declaration proclaims that:

“[R]espect for human rights, the rule of law and the existence of political institutions which are effective, accountable and enjoy democratic legitimacy are the basis for equitable development.”

The process of integration of human rights in EU policy and practice was advanced significantly in the Treaty on European Union (“TEU”, Maastricht)²⁸². The TEU establishes the development and consolidation of “democracy and the rule of law, and respect for human rights and fundamental freedoms”²⁸³ as objectives of the Common Foreign and Security Policy of the EU. The Treaty of Amsterdam²⁸⁴ saw a further, more concrete consolidation of the centrality of human rights to the EU's approach to development cooperation.²⁸⁵ It is also worth noting that the EU Commission's actions in the field of external relations must be guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights.²⁸⁶

²⁷⁷ Darrow, Mac & Amparo Tomas “Power, Capture and conflict: A Call for Human Rights Accountability in Development Cooperation” 27 *Human Rights Quarterly* 471 (2005)].

²⁷⁸ P. Alston, *supra* n 104 p. 803- 804 Alston believes that there is a good deal of optimism implicit in the suggestion made by the ‘Statement of Common Understanding’ that decision on complicated matters of development programming should be “informed by the recommendations of international human rights bodies and mechanisms” In addition, he points out that the advice given in the second list of the ‘Statement of common Understanding’ does not seem to follow inexorably from human rights principles per se, but rather to be a reflection of what the authors consider to be sound policy on the basis of their own expertise .

²⁷⁹ See discussion above at pages 40-42.

²⁸⁰ The Luxembourg European Council took place on 28-29 June 1991 in Luxembourg.

²⁸¹ Declaration on Human rights 28 and 29 June 1991. The European Council adopted the declaration in Annex V, which should guide the future work of the Community and its Member States.

²⁸² Also referred to as the Treaty of Maastricht, which came into force on November 1, 1993.

²⁸³ TEU, Article J.I, 2.

²⁸⁴ The Treaty of Amsterdam came into force on May 1, 1999,

²⁸⁵ Article 6 (ex Article F) provides: “1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

²⁸⁶ See discussion above at pages 40-42

Dialogue, conditionality and monitoring

While not formally characterized as a rights-based approach to development, the EU has, since the early 1990's made the human rights content of its development cooperation policies increasingly explicit, to the point that human rights are now a central, foundational tenet of their overall approach in this area. In its 1991 resolution, the Council reaffirmed the nature of the approach to be adopted by the Union in development cooperation as a *positive and constructive* one.²⁸⁷ At the same time, the EU has adopted "a distinct policy"²⁸⁸ in its external relations with a "human rights clause"²⁸⁹ being introduced into all trade and development agreements with third countries or non-Members since 1995.²⁹⁰ Such clauses state that the protection of human rights is an essential element of the agreement.²⁹¹ Since 1995, a human rights clause has been included in all negotiated bilateral agreements of a general nature. To date, more than 20 such agreements have been signed. In addition to these, more than 30 agreements negotiated *before* May 1995 contained human rights clauses. The content of essential elements clauses can vary from one agreement to the next, but most refer to the standard international human rights instruments such as the Universal Declaration, ICCPR, the ICESCR, as well as regional international law standards.

In contrast to its conditionality approach, the EU has placed human rights dialogue as "an essential part of the European Union's overall strategy aimed at promoting sustainable development, peace and stability."²⁹² The objectives of human rights dialogues vary but

²⁸⁷ Art 6 states "While, in general, a positive and constructive approach should receive priority, in the event of grave and persistent human rights violations or the serious interruption of democratic processes, the Community and its Member States will consider appropriate responses in the light of the circumstances, guided by objective and equitable criteria. Such measures, which will be graduated according to the gravity of each case, could include confidential or public démarches [processes] as well as changes in the content or channels of cooperation programmes and the deferment of necessary signatures or decisions in the cooperation process or, when necessary, the suspension of cooperation with the States concerned."

²⁸⁸ M. Cremona, "Variable Geometry and Setting Membership Conditionalities: A Viable Strategy?" in Mills (ed.) *A Review of Regional Integration in Southern Africa: Comparative International Experiences* South African Institute of International Affairs 2000 at 197.

²⁸⁹ Also known as the "essential element" of an agreement, or 'human rights essential element clause.'

²⁹⁰ The nature of the human rights clause was confirmed in a Council Decision entitled "Human Rights Clauses in Community Agreements with non-Members" promulgated on May 24 1995. For an analysis of the evolution of these clauses, see M. Cremona, 'Human Rights and Democracy Clauses in the EC's Trade Agreements' in N. Emiliou & D O'Keefe (eds.) *The European Union and World Trade Law after the GATT Uruguay Round* London, Wiley 1996. See also E Reidel & M Will, 'Human Rights Clauses in External Agreements of the EC' in P. Alston (ed.) *The EU and Human Rights Oxford*. OUP 1999.

²⁹¹ See M. Cremona, *supra*. note 11. Also see the Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries for a discussion of the evolution of the practice of including human rights clauses in agreements with third countries- COM (95) 216 of 23 May 1995.

²⁹² European Union guidelines on Human rights dialogues

they share certain objectives: first, discussing questions of mutual interest and enhancing cooperation on human rights inter alia; second, registering the concern felt by the EU at the human rights situation in the country concerned, information gathering and endeavouring to improve the human rights situation in that country; third, identifying at an early stage, problems likely to lead to conflict in the future.

VI. Conclusion

While it is clear that some progress has been made towards integrating human rights and development, it is also clear that for many the two discourses remain- and should remain distinct, and that approaches that attempt to find commonalities and convergence cross the divide face numerous issues in practice. In practice, many of the formal legal frameworks that underpin human rights obligations lack adequate enforcement mechanisms to make them meaningful. Further, their legalistic nature often means that they remain inaccessible to those in the greatest need of their protection. On the other hand, principle based RBA that attempt to target those in the greatest need, arguably may take away from obligatory nature of legally enshrined rights and thus may serve to weaken the basis on which they have been developed. This has led to a concern that human rights standards may co-opted and corrupted in the process. The multiplicity of RBA may also be seen to add to the already numerous rules of engagement within development practice, the complexity of which is compounded by the apparent failure to advance alignment and foster coherence of values between actors.

A key question for both human rights advocates and development practitioners therefore turns on how human rights standards can be maintained in the context of development practices. While the transformative potential of human rights discourse must be recognized, and its implications for development theory and practices understood, it is equally important to recall the genesis of human rights themselves. Human rights gain their [rhetorical] power from the internationally agreed and legally enshrined - *obligations* and *duties* they impose. It is essential therefore, that efforts to integrate human rights in development practice, not compromise those key characteristics in the process, and risk the impoverishment of rights discourse and the undermining of core values and objectives that human rights were conceived to realize.