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## The prospect of an international binding treaty on the right to development: A gateway to global justice

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**Summary:** *After four decades of international debate, the United Nations seems closer than ever to the adoption of a new covenant on the right to development. The final draft of the covenant has unique features in the form of a framework convention that allows more flexibility and regulation in subsequent protocols. The raison d'être of the covenant will be its unique role in ensuring global justice and addressing the major developmental challenges of developing countries and their ability to fulfil the realisation of the right to development. This article argues that the debate surrounding the right to development should now move from theoretical debates to discussions on the concrete framework of implementation within the framework of the draft covenant and its subsequent additional protocols. It focuses on the international dimension of the right to development and the critical thematic issues that need to be implemented if the very idea of the right to development is to be seriously considered within the framework of contemporary international human rights law. In particular, it discusses the international trade rules, intellectual property regimes, unilateral*

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*coercive measures, the burden of climate financing, the debt burden and the difficulties of financing for development, all of which have a significant bearing on the realisation of the right to development.*

**Key words:** *right to development; Draft International Covenant on the Right to Development; developing countries; global justice; human rights*

## 1 Introduction

The nature of things does not madden us, only ill will does.

Jean-Jacques Rousseau

Fifteen years ago, an article in the *African Human Rights Law Journal* was published which argued that the right to development should be recognised as a basic human right and integral part of international human rights law.<sup>1</sup> Its basic argument was based on moral and legal arguments emanating from international human rights law and the 1986 United Nations (UN) Declaration on the Right to Development (RTD Declaration).<sup>2</sup> While some scholars supported the legal recognition of the right to development and insisted on its international recognition and enforcement,<sup>3</sup> a few other authorities challenged the very idea of the right to development and its relevance to contemporary human rights discourse.<sup>4</sup>

The adoption of the African Charter on Human and Peoples' Rights (African Charter) in 1981 and the RTD Declaration in 1986, as well as subsequent legal developments, provided an impetus towards the legal recognition and the prospects of the implementation of the right to development. However, the concept of the right to development remains one of the most contested rights in international human rights law. The ideological underpinning of the right that seeks to create a cosmopolitan just and fair international economic order has created a rift and continuing debate and controversy between developed and developing countries. This disagreement and

1 MA Tadege 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 325.

2 Declaration on the Right to Development adopted by General Assembly Resolution 41/128 (4 December 1986).

3 S Marks 'Making space for new human rights: The case of the right to development' (1998) 1 *Harvard Human Rights Yearbook* 3; A Sengputa and others (eds) *Reflections on the right to development* (2005) 93; A Sengputa 'The human right to development' (2004) 32 *Oxford Development Studies* 179.

4 J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 475; YP Ghai & YK Pao 'Whose human right to development?' (1989) Study prepared by the Commonwealth Secretariat.

different understanding on the concept of the right and the nature of obligations of state parties made it difficult to create consensus among states to come up with a binding treaty on the right to development. More recently, for the first time the Human Rights Council Working Group on the Right to Development (WGRTD) came up with a complete Draft International Covenant on the Right to Development (DICRTD) in 2020.<sup>5</sup> So far, there have been three drafts of the Covenant on the right to development prepared by the Working Group: the first that was adopted on 20 January 2020; the second, adopted on 30 November 2022; and the latest version of the Covenant which was adopted on 18 July 2023.<sup>6</sup>

In the first two drafts of the DICRTD, the language used by the WGRTD was a 'convention', instead of a 'covenant'.<sup>7</sup> However, the 2023 final draft, which is the most recent draft, the Working Group has termed it a 'Draft Covenant on the Right to Development'.<sup>8</sup> While there does not seem to be any significant normative value attached to these terms, the term 'covenant' was chosen to equate it with the two international human rights covenants, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>9</sup> This seems to give some normative force to and recognition of the right to development as a basic human right on 'equal footing' and 'on a par with all other human rights and fundamental freedoms'.<sup>10</sup>

After four decades of the adoption of the RTD Declaration, the adoption of the DICRTD is a major step towards the full integration of the right to development as a basic human right within the framework of international human rights law. It is true that the substance and legal consequences of the DICRTD remain largely unfamiliar. This is also obscured by the fact that despite the attempts by the Draft Convention to articulate the specific normative content of the right to development, a number of areas remain unclear, in particular in

5 Draft Convention on the Right to Development adopted by the Human Rights Council Working Group on the Right to Development, A/HRC/WG.2/21/2/Add.1, adopted on 20 January 2020. See the Revised Convention on the Right to Development, Human Rights Council Working Group on the Right to Development, A/HRC/WG.2/24/2 adopted on 30 November 2022.

6 As verified by the Special Rapporteur on the Right to Development, Professor Surya Deva; no changes had been made to this last version at the time of publication of this article. I use the latest version in referring to the subsequent discussions.

7 Draft Convention (n 5).

8 Report by the Chair Rapporteur of the Working Group on the Right to Development, Zamir Akram, Draft Covenant on the Right to Development, Human Rights Council 54th session, 18 July 2023.

9 See the Introduction, Report by the Chair Rapporteur of the Working Group on the Right to Development (n 8).

10 As above.

terms of the implementation of the specific commitments of states. Moreover, the academic commentaries on the DICRTD have not focused on the major aspect of the right to development, which is its international dimension and its ability to attribute responsibility for development from individual states to the international community as a whole.<sup>11</sup> These academic commentaries have focused more on generic discussions about the prospects of the implementation of the Draft Covenant without giving enough weight to the international dimension of the right to development. Both seen from the historical foundations of the right as well as the *raison d'être* of its moral and legal ambitions, the failure to articulate and give enough weight to its international dimension is a travesty of contemporary human rights discourse. As Beall astutely observes, 'the diminishment of international responsibility in the [right to development] was a reluctant concession by the Global South, rather than an accurate reflection of the content of this right'.<sup>12</sup>

This article aims not only to underscore the key features of the DICRTD but, more importantly, to articulate its significant dimension – its international dimension and the modalities of its implementation. The second part of the article provides a brief outline of the evolution and current state of the debate on the right to development. The third part analyses the DICRTD and its key features. It will then proceed to examine why a distinct discussion on the international dimension of the right to development is important for any realistic implementation of the right to development. Finally, the article will provide a framework for the implementation of the international dimension of the right to development by identifying the key thematic issues that need to be realised if the prospect of an international covenant on the right to development will be practically realised.

## 2 The evolution and current state of the right to development

The profound statement in the Universal Declaration of Human Rights (Universal Declaration) that 'all human beings are born free and equal in dignity and rights' can only be realised when there is clear universal responsibility to ensure the right to development of every

11 In this article the term 'international dimension of the right to development' refers to the collective as well as individual responsibility of states to realise the right to development that go beyond the measures taken by states individually that affect people within their national boundaries.

12 KM Beall 'The Global South and global human rights: International responsibility for the right to development' (2022) 43 *Third World Quarterly* 2340.

human person.<sup>13</sup> Articles 22, 25 and 28 of the Universal Declaration that impose the responsibilities for the realisation of socio-economic development of all states are based on the international collective responsibility of states. The collective responsibility of states for development is also found in article 56 of the UN Charter, which imposes the duty of solidarity and international cooperation. This has been interpreted to include the responsibility to ensure the right to development for all and universal respect for human rights.<sup>14</sup> Similarly, article 2 of ICESCR outlines the collective responsibility of states to uphold socio-economic rights in situations where a state's resources are inadequate for the complete fulfilment of human rights.<sup>15</sup>

However, the modern conception of the right to development is attributed to Kéba Mbaye. In an inaugural lecture in Strasbourg, Mbaye, a renowned Senegalese jurist, argued for the recognition of the right to development.<sup>16</sup> Many also credit Doudou Thiam, former Foreign Minister of Senegal, who made an impassioned speech for the recognition of the right to development for the first time at the UN General Assembly meeting on 23 September 1966 in New York.<sup>17</sup> Since then, many other scholars have argued for the recognition of the right to development and its integration within the framework of international human rights law. In 1981, with the adoption of the African Charter, the right to development was for the first time recognised in a binding regional human rights treaty. Because of its historical association with Africa, the right to development has also often been considered a unique African contribution to international human rights law.<sup>18</sup>

The motivating factors underpinning the new international economic order, backed by numerous developing countries, persisted with the framework of the right to development debate and continue to shape much of the normative content found in the

13 Art 1 Universal Declaration of Human Rights adopted 10 December 1948, General Assembly Resolution A/RES/217(III).

14 Art 56 UN Charter adopted 26 June 1945.

15 Art 2 International Covenant on Economic, Social and Cultural Rights adopted by GA Resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976.

16 K M'Baye *Le droit au développement comme un droit de l'homme in Revue internationale des droits de l'homme* (1972), cited in RL Barsh 'The right to development as a human right: Results of the global consultation' (1991) 13 *Human Rights Quarterly* 322.

17 DJ Whelan "'Under the aegis of man": The right to development and the origins of the new international economic order' (2015) 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 93.

18 K Arts & A Tamo 'The right to development in international law' (2016) 63 *Netherlands International Law Review* 244.

Draft Covenant.<sup>19</sup> These movements culminated in the emergence of the right to development as a distinct right 'with international responsibility central to this right'.<sup>20</sup> The *travaux préparatoires* of ICESCR demonstrate that some of these underlying factors for the right to development were proposed for inclusion in the Covenant. For example, a proposal was put forward to include an obligation requiring former colonial powers to restore the property rights of colonised states and recognise their entitlement to reparations,<sup>21</sup> but this was later excluded from the Covenant. Thus, instead of focusing on its international dimension,

the right to development, and economic and social rights more broadly, were codified in a way that emphasised the obligations of poor states towards their own citizens, rather than drawing attention to extreme concentration of wealth in the West, economic rules that severely disadvantage poor states, and the historical wrongs that were implicated in their poverty.<sup>22</sup>

The RTD Declaration did include a number of provisions that focus on the international dimension of the right to development, encompassing the shared responsibility of states regarding the right to development.<sup>23</sup> However, these were generic obligations that do not provide specific obligations of states and the modality of the implementation.

After the adoption of the RTD Declaration in 1986, there were various attempts to push the agenda of the right to development under the auspices of the UN. In 1998, the then Commission on Human Rights established a WGRTD that studies the progressive development of the right and provides advice to the Council.<sup>24</sup> In the same year, an Indian economist, Professor Arjun Sengupta, was appointed Independent Expert on the Right to Development.<sup>25</sup> Subsequently, a High-Level Task Force on the Right to Development was appointed in 2004 which replaced the mandate of the Independent Expert on the Right to Development.<sup>26</sup> In 2016 the mandate of the Special Rapporteur on RTD was created under the

19 Moreover, the mandate of an Independent Expert on the Promotion of a Democratic and Equitable International Order was created on 29 September 2011 under Human Rights Council Resolution 18/6.

20 Beall (n 12) 2344.

21 Beall (n 12) 2338.

22 Beall (n 12) 2339.

23 See arts 3(2) & (3); arts 4, 5, & 7 RTD Declaration.

24 UN Human Rights Commission Resolution 1998/7, E/DEC/1998/269.

25 Economic and Social Council Decision 1998/269 of 30 July 1998 and Commission on Human Rights Resolution 1998/72.

26 Commission on Human Rights Resolution 2004/7 and Economic and Social Council Decision 2004/249.

resolution of the Human Rights Council.<sup>27</sup> More recently, in 2019, an Expert Mechanism on the Right to Development was created by the Human Rights Council to provide the Council with thematic expertise and technical support.<sup>28</sup>

These multiple mandates clearly indicate the weight given to the issues and the significance of fully integrating the right to development within the framework of international human rights law. However, the most significant development since the adoption of the RTD Declaration is the recent adoption of the first complete draft of the DICRTD. For the first time, after close to four decades of debate on the subject, a fully-fledged Draft Covenant has been adopted that captures all the elements of the right, including the meaning and scope of the right and the details of state obligations.

### 3 Key aspects of the Draft International Covenant

The DICRTD builds much of its content from the 1986 RTD Declaration as well as from existing international human rights treaty norms and principles.<sup>29</sup> However, one should note that the RTD Declaration contained only 10 articles that underline its normative aspirations and principles. As such, the RTD Declaration, while important in defining the meaning of the right and some basic ideals that underpin the right, did not contain elaborate provisions that articulate the rights and obligations of states. In this regard, the DICRTD is significant as it provides an extensive list of 39 provisions that articulate the definition and meaning of the right, its relation with the existing framework of international human rights law as well as the rights and obligations of state parties.<sup>30</sup> While a thorough review of each of the articles is not feasible, in this part the article will highlight the key aspects of these provisions.

The DICRTD contains preambular provisions and five parts dealing with its operative provisions. The Preamble to the DICRTD provides extensive reference to the RTD Declaration and the animating normative precepts that underlie the right to development as well as a reference to the various declarations and resolutions that affirmed the foundations of the right to development as a basic human

27 Human Rights Council Resolution 33/14 (2016).

28 Human Rights Council Resolution 42/23 (2019).

29 First para of the Preamble to DICRTD.

30 However, Schrijver argues that while the right to development has relevance to contemporary human rights debate, a new convention on the right to development adds no value to the right to development. See N Schrijver 'A new convention on the human right to development: Putting the cart before the horse?' (2020) 38 *Netherlands Quarterly of Human Rights* 84.

right.<sup>31</sup> In particular, it recognises the various regional human rights instruments that recognise the right to development, including the African Charter; the Inter-American Democratic Charter; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; the Arab Charter on Human Rights; the Human Rights Declaration of the Association of Southeast Asian Nations; and the American Declaration on the Rights of Indigenous Peoples.<sup>32</sup>

The operative clauses of the Draft Covenant cover an extensive list of issues. Part 1 sets out the objective of the Covenant, which is to ensure the full realisation of the right to development of all individuals and peoples and guarantee the full operationalisation and implementation of the right.<sup>33</sup> It provides the definition of terms and institutional structures established under the Draft Covenant and the general principles that guide the Covenant. Article 3 sets the general principles and provides the meaning and definition of the right to development. It emphasises that individuals and peoples are the central subjects of the right to development and, as such, should be the active participants and beneficiaries of development. This definition is a restatement of the RTD Declaration which provides similar language.<sup>34</sup> The general principles also integrate the principles of a human rights-based approach to development that are common to all human rights, such as the principles of equality, non-discrimination, empowerment, participation, transparency, accountability, equity, subsidiarity, universality, inalienability, interdependence and indivisibility.<sup>35</sup> Furthermore, the general principles outline the importance of the international dimension of the right to development noting the critical significance of international solidarity for the realisation of the right to development and the duty of states to create an enabling national and international environment.<sup>36</sup>

Part 2 of the DICRTD articulates the link that exists between the right to development and other international human rights norms. In particular, it notes that the right to development encompasses civil, cultural, economic, environmental, political and social development and that it is both indivisible and mutually dependent with other human rights.<sup>37</sup> The relation between the right to development and

31 See para 9 DICRTD.

32 Preamble, para 10 DICRTD.

33 Art 1 DICRTD.

34 See art 2 Declaration on the Right to Development.

35 Arts 3(b) & (c) DICRTD.

36 Art 3(i) DICRTD.

37 Art 4(1) DICRTD.

the right to self-determination has also been provided by recognising the rights of states, in particular developing countries to determine their political status and dispose of their natural resources.<sup>38</sup> The fact that the right to development is informed by the decolonisation process and historical injustices of developing countries is evident from the fact that it also calls upon states to prevent and eliminate massive and flagrant violations of the rights of individuals and peoples in situations of apartheid, all forms of racism and discrimination, colonialism, domination and occupation, aggression, interference and threats against national sovereignty, national unity and territorial integrity, threats of war and the refusal to recognise the right to self-determination.<sup>39</sup>

Although the DICRTD emphasises on creating an enabling international environment and a just and equitable international system for the realisation of the right to development, it lacks clarity on how such an enabling environment can be created. As will be shown below, it is true that the DICRTD identifies some of the key thematic issues that should be the focus of the international dimension of the right to development, but falls short of articulating the specific mechanism of how this should be articulated. This may have been because of the nature of the Covenant as a framework convention that leaves certain issues to be addressed under subsequent protocols. In this regard, the discussion in the subsequent parts will be critical both in articulating how these thematic issues should be addressed and the modalities of their implementation within the framework of the DICRTD and its additional protocols.

The most extensive part of the DICRTD is Part 3. It provides a number of provisions, first setting out the general obligations of state parties and then providing the details of the specific obligations of states.<sup>40</sup> It starts by linking the obligations of states on the right to development with the tripartite obligations of states to respect, protect and fulfil the right to development for all, as well as their duty of cooperation to eliminate obstacles to development.<sup>41</sup> Article 13, which is the most detailed provision of Part 3 of the DICRTD, provides a number of state obligations. It provides the collective obligation of state parties on the right to development by taking joint and separate action to eliminate obstacles to the realisation of the

38 Arts 5(1) & (2) DICRTD.

39 Art 5(5) DICRTD.

40 Part III of DICRTD covers a significant number of provisions from arts 8 to 25.

41 Art 8(1) and arts 10, 11 & 12 DICRTD.

right to development by reviewing international legal instruments, policies and practices and by adopting new ones.<sup>42</sup>

Article 13 provides specific reference to developing and least developed countries that provide for specific obligations of state parties. These include promoting a universal, rules-based, open, non-discriminatory, equitable, transparent and inclusive multilateral trading system; implementing the principle of special and differential treatment for developing countries; and improving the regulation and monitoring of global financial markets and institutions. It also calls upon states to ensure enhanced representation and a voice for developing countries in decision making in all international economic and financial institutions, encouraging official development assistance, financial flows and foreign investment. It provides obligations on states for enhancing the adaptive capacity and strengthening resilience to climate change vulnerabilities as well as climate financing, the transfer of technology, the elimination of illicit financial flows, debt relief and restructuring, and facilitating the safe and orderly migration and mobility of people.<sup>43</sup> Moreover, the DICRTD prohibits states from using unilateral political or economic measures to force a state into subordinating its sovereignty, which also has significant implications for developing countries.<sup>44</sup> The article will highlight some of these key thematic issues and the modalities of their implementation within the framework of implementing the international dimension of the right to development.

In terms of the enforcement mechanism of the DICRTD, it envisages a conference of state parties as an implementation mechanism that serves as voluntary mechanisms for state reporting, ensuring compliance of state parties with the commitments they made under the Covenant.<sup>45</sup> As the structure of the DICRTD seems modelled on a framework convention, the expectation is that other subsequent protocols will be adopted to operationalise the specific commitments of state parties.<sup>46</sup> The subsequent parts of the article will expand on some of the key issues on which the additional protocols of the DICRTD needs to focus and how the overall spirit of the right to development can be operationalised within the framework of the Draft Covenant.

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42 Art 13(1) DICRTD.

43 Art 13(4) DICRTD.

44 Arts 14 DICRTD.

45 Art 26 DICRTD.

46 K de Feyter 'Towards a framework convention on the right to development' Dialogue on Globalisation: International Policy Analysis, Friedrich-Ebert-Stiftung, Berlin/Geneva (2013).

## 4 The international dimension of the right to development

Before looking at the specific thematic issues that the DICRTD should address, it is crucial to discuss the unique significance of the external or international dimension of the right to development and why it should be the focus of its normative content. Despite the various components of the right to development, there is no doubt that a critical element of the right to development is its international dimension and the importance of addressing structural economic governance regimes that continue to constrain the full realisation of the right to development of developing countries.<sup>47</sup> In other words, 'the right to development has a distinctly international character'.<sup>48</sup>

Many scholars argue that the *raison d'être* and the normative core of the right to development relate to its international dimension.<sup>49</sup> In this regard, the 2002 report of the WGRD notes that the 'distinguishing element of the right to development, therefore, is an enabling international environment and a just and equitable international system that is favourable to development. Greater attention needs to be given to this element of the right to development.'<sup>50</sup> Similarly, Ibhawoh argues that the unique feature of the right to development is its collectivist, communitarian or group-centred normative foundation and its cosmopolitan ambition. This aspect of the right to development 'marks a departure from the individual-centred orientation of other international human rights instruments'.<sup>51</sup> More importantly, he argues that a unique aspect of the right to development is the fact that the obligation to fulfil the right not only relates to individual states but also, crucially, to the international community and states acting collectively. He notes:<sup>52</sup>

In this context, human rights go beyond the traditional definition of being entitlements that individuals hold against the state. They are also construed as entitlements that states hold in relation to other states and the international community at large. The notion that states and 'peoples' can also claim development as human rights entitlement against other states or the international community is a major paradigm shift in human rights orthodoxy. It represented a

47 ID Bunn *The right to development and international economic law* (2012).

48 B Ibhawoh 'The right to development: The politics and polemics of power and resistance' (2011) 33 *Human Rights Law Quarterly* 79.

49 See Bunn (n 47); Ibhawoh (n 48).

50 See Report of the Working Group on the Right to Development, 11 April 2002, E/CN.4/2002/28/Rev.1 para 52(e).

51 Ibhawoh (n 48) 85.

52 As above.

challenge to and in some sense a repudiation of the dominant Western liberal rights system.

Similarly, the commentary on the DICRTD notes that, unlike other treaties that make individuals rights holders and states duty bearers, the Draft Covenant focuses on inter-state reciprocal obligations.<sup>53</sup> The right to development challenges the traditional understanding that individual states should bear the primary obligation to fulfil socio-economic rights. It is this cosmopolitan ambition of the right to development that forms its significant normative dimension. As Salmon argues, the right to development has internal and external dimensions. On the one hand, the internal dimension imposes on individual states the duty to fulfil the right to development by adopting appropriate policies.<sup>54</sup> On the other hand, the external aspect of the right to development attributes responsibility internationally to states acting individually and collectively.<sup>55</sup> In this sense, the international duty to fulfil socio-economic rights and the right to development is not of a secondary nature. Salmon emphasizes the fact that, because the core normative component of the right to development is its international dimension, all states ought to bear a collective responsibility. She argues that the normative significance of the right to development is its cosmopolitan ethos and its effect in humanising the global economic order 'with the most salient element of this right found in its potential challenge to existing political and economic global arrangements'.<sup>56</sup>

It should also be emphasised that without the collective responsibility of all states to ensure the right to development of developing countries by making structural changes to the international economic order, the realisation of the right to development could indeed be a 'search for unicorn'.<sup>57</sup> As De Schutter rightly notes, 'the right to development can only be fully realised if we take into account the interdependency of states, and if we take seriously the duty to reshape the global environment in which they operate'.<sup>58</sup> It should be clear that 'economic development and charity cannot replace multilateral action to establish a just and democratic

53 Draft Convention on the Right to Development with Commentaries, 20 January 2022 para 4, A/HRC/WG.2/21/2/Add.1.

54 ME Salmon 'Legal cosmopolitanism and the normative contribution of the right to development' (2008) 16 *London School of Economic, Society and Economy Working Papers* 2.

55 As above.

56 As above.

57 Donnelly (n 4).

58 O de Schutter 'The international dimension of the right to development: Enabling poverty reduction in domestic legal orders by a reformed international legal order' in M Andenas, J Perelman & C Scharling (eds) *The fight against poverty and the right to development* (2021) 317.

international order. Creating an international enabling environment for development requires greater attention.’<sup>59</sup> De Schutter’s astute observation articulates the unique importance of focusing on the structural causes of underdevelopment in the Global South rather than treating the symptoms of poverty, which will not make any significant changes to the realisation of the right to development.

The DICRTD has articulated the key thematic issues around the international dimension of the right to development and the key obstacles to the realisation of this right. However, the collective obligations of states and the specific mechanisms on how these issues can be operationalised have not been adequately articulated. Consistent with the arguments of Salmon, De Schutter and Bunn, the recent report of the Special Rapporteur on RTD has highlighted some of these thematic issues.<sup>60</sup> A comprehensive and detailed discussion on all issues pertaining to the DICRTD may not be feasible. However, an attempt has been made to highlight the key thematic issues, in particular those relating to international economic law that should be the focus of the operationalisation of the international dimension of the right to development. As Bunn rightly notes, ‘engagement with international economic law is indispensable to any meaningful realisation of the right to development’.<sup>61</sup>

## 5 Key areas for reform

The following part of the article outlines some of the basic and key areas for reform required if the right to development of individuals in the developing countries is to be realistically realised within the framework of an international covenant on the right to development. These include the challenges of the terms of international trade; the monopolisation of intellectual property rights and access to technology; the problem of unilateral coercive measures; the need to confront the burden of climate change and climate financing; and addressing development financing and the debt burden of developing countries. These issues should also be the focus of subsequent protocols of the DICRTD to ensure the realisation of the right to development for all individuals and peoples.

59 D Aguirre *The human right to development in a globalised world* (2021) 354; see also Report of the Open-Ended Working Group on the Right to Development on its 3rd session, Geneva, 25 February-8 March 2002 E/CN.4/2002/28/Rev.1 (11 April 2002).

60 Report of the Special Rapporteur on the Right to Development, Surya Deva: Reinvigorating the Right to Development: A Vision for the Future (4 August 2023).

61 Bunn (n 47) 1.

## 5.1 Restructuring the terms of international trade

Stiglitz observes that in recent times, free trade has become 'the mantra of political leadership' in many states.<sup>62</sup> While the general idea that free trade can promote development is widely held, a number of studies have also revealed that it could have the opposite effect and undermine the development of poor countries, if not properly approached. In an influential article on the effects of international trade, Pavcnik argues that without a proper analysis of its effects and the establishment of the required safety measures, trade liberalisation could entail significant human rights implications, such as the rise in commodity prices, an increase in inequality, poor labour conditions and a number of other areas.<sup>63</sup> Similarly, Stiglitz notes that trade can indeed be a positive force for development, but only if the correct conditions and terms of trade can be articulated in order to sustain the economic growth of developing countries.<sup>64</sup>

As discussed in the preceding parts of this article, a number of scholars, including Bunn, De Schutter, De Fetter and Salmon, have argued that international economic law, in particular international trade law, must be reformed if the right to development of individuals and all peoples is to be realised. One of the key attempts by the World Trade Organisation (WTO) in respect of developing countries was the adoption of the principle of special and differential treatments (SDTs), which allows these countries to have lower levels of obligation, more flexible implementation timeline, and other more favourable treatments without providing reciprocal benefits to other states as required by the WTO. The assumption was that with these SDTs, developing countries can take advantage of the framework for better competitiveness in market access, technology, services, eventually providing these countries with better growth potential.

Initially, when the General Agreement on Tariffs and Trade (GATT) was adopted in 1947, many developing countries, particularly those in Africa, were under colonial rule. Because of this, GATT did not include any provision dealing with the SDTs of developing countries.<sup>65</sup> It was only later, in 1954-1955, that article 18 of GATT was included as the first provision that provided some exceptions to

62 JE Stiglitz & A Charlton *Fair trade for all: How trade can promote development* (2005) ix.

63 N Pavcnik 'The impact of trade on inequality in developing countries' (2017) *National Bureau of Economic Research* 3878.

64 As above.

65 A Keck & P Low 'Special and differential treatment in the WTO: Why, when and how?' (2004) *Staff Working Paper ERSD* 3.

developing countries.<sup>66</sup> Subsequently, through the Kennedy round of trade negotiations, a more extensive section, Part IV of GATT on 'Trade and Development' (articles 36-38) was added in 1965, which provided more concessions including exemptions on tariff and non-tariff barriers to developing countries.<sup>67</sup> The Generalised System of Preferences (GSPs) were further introduced in 1971 to allow developed countries to impose lower tariff and non-tariff barriers for products imported from developing countries.<sup>68</sup>

Nevertheless, all these measures failed to deliver the long-awaited improved access to trade for developing countries. Moreover, some of the key products from developing countries, such as agricultural products, textile and clothing, footwear and other similar products, were excluded from these SDT schemes.<sup>69</sup> The subsequent Uruguay round of trade negotiations also attempted to include some commitments to provide for SDTs of developing countries. However, Stiglitz argues that the prospects of the outcome of the Uruguay round of negotiations ultimately failed to deliver the crucial reforms required by developing countries.<sup>70</sup> It is clear that from the outcome of the eight years of the trade negotiations under the Uruguay round of trade negotiations, developed countries enjoyed most of the benefits of the outcomes, while most developing countries were left worse off.<sup>71</sup>

In a similar vein, the Doha Development Agenda, launched in 2001, has made the issue of SDTs for developing countries a central focus of its reform efforts. There are ongoing discussions on how to make SDTs of developing countries binding and mandatory as well as to articulate the respective rights and obligations of states more precisely. Observers point out that the impetus for a comprehensive and concrete framework for SDT has also dwindled in the post-Doha round of trade negotiations. The prospect for a robust STD scheme for developing countries is clearly lacking.

Research also indicates that developing countries are vulnerable to preferential erosion, where they are subject to a persistent decline in their competitive advantage that they enjoy as a result

66 Y Ismail & Y Bhagat *Differential treatment of developing countries in trade and climate change regimes* (2023) 3.

67 As above.

68 As above.

69 Stiglitz & Charlton (n 62) 2.

70 E Ornelas 'Special and differential treatment for developing countries' (2016) 3 CESifo Working Paper Series 5823, <https://ssrn.com/abstract=2766933> (accessed 1 March 2025).

71 Stiglitz & Charlton (n 62) 2.

of preferential trade treatment.<sup>72</sup> Preferential erosion can occur when export partners eliminate preferences, expand the number of preference beneficiaries, or lower their most-favoured-nation (MFN) tariff without lowering preferential tariffs proportionately, which in effect will not have a net positive outcome.

After the Uruguay round of trade negotiations, the application of SDTs has been confined to addressing adjustment difficulties of developing countries and focusing on their full integration, which obligated both developing and developed countries to adhere to the same trade rules under WTO.<sup>73</sup> Scholars argue that the empirical evidence on the effect of SDT treatment of developing countries and its effect on their development is scant and inconclusive.<sup>74</sup> Clearly, a binding agreement on SDTs and addressing the above key issues that impede market access of developing countries must be addressed for these countries to fully benefit from the global trading system and ensure the right to development of individuals and peoples. The restructuring of current trade rules is so profound that a small marginal improvement of 5 per cent of the export of developing countries can generate seven times more than what they currently receive in aid.<sup>75</sup> On the whole, if the overall terms of trade are improved, developing countries can generate revenues through exports more than 30 times what they can get through aid.<sup>76</sup>

While these issues have to some extent been provided in the DICRTD, more details of the reforms required in international trade law should be the focus of the subsequent protocols of the DICRTD, because as a framework convention, the DICRTD cannot address all the thematic issues that are indispensable for the realisation of the right to development. Subsequent protocols of the DICRTD should be able to articulate in detail the modalities and implementation mechanisms of the reforms needed in international trade law as they relate to the realisation of the right to development.

72 P Clean & S Page 'Special and differential treatment of developing countries in the World Trade Organisation' (2021) 2 *Global Development Studies* 10.

73 K Fukasaku 'Special and differential treatment for developing countries: Does It help who help themselves' (2000) 197 *World Institute for Development Economics Research Working Papers* 1.

74 Keck & Low (n 65) 29.

75 Oxfam International *Rigged rules and double standards: Trade, liberalisation and the fight against poverty* (2002).

76 As above.

## 5.2 Monopolisation of intellectual property rights and access to technology

International rules on trade in services under the auspices of the Trade Related Aspects of Intellectual Property Rights (TRIPS) has also created complex problems for developing countries. Due to its significant implications for developing countries, the TRIPS Agreement has been the most controversial agreement in the WTO.<sup>77</sup> The low capacity of and investments in research and development in developing countries mean that these countries have limited capacity to create intellectual property protection through copy rights and patents. The bulk of intellectual property is also owned by companies in developed countries. As a result, developing countries are 'net importers of technical knowledge',<sup>78</sup> but this does not mean that developing countries lack the technical know-how and the knowledge base for creativity and innovation. On the contrary, many developing countries have creative traditions in many respects and have contributed to the innovative potential of many of the developed countries through the migration of skilled professionals to these countries.<sup>79</sup>

However, the fact that intellectual property rights are owned by developed countries means that developing countries will be confronted with higher prices for protected technologies and products, restricting their ability to use these locally.<sup>80</sup> In particular, the impact of the TRIPS Agreement on key issues, such as healthcare and access to medicine, has been critical. Despite the pressure by developing countries that the framework of the TRIPS agreement should not prevent them from access to medicine, no clear framework was provided to facilitate access to essential medicines, such as those that assist in the treatment of HIV, tuberculosis, malaria and pandemics such as COVID-19.<sup>81</sup> The pressure from developing countries forced the WTO to adopt a separate declaration, the Declaration on the TRIPS Agreement and Public Health, which was aimed at ensuring access to medicine for developing countries.<sup>82</sup> Nevertheless, many argue that these are only tentative attempts at addressing the inherent flaws of the TRIPS Agreement as it does not comprehensively address issues that have significant implications

77 CM Correa 'TRIPS Agreement and access to drugs in developing countries' (2005) 17 *Sure Journal of International Human Rights* 1.

78 UNCTAD 'The TRIPS Agreement and developing countries (1996) UNCTAD/ITE/1, 15.

79 G Hugo 'Best practice in temporary labour migration for development: A perspective from Asia and the Pacific' (2009) 47 *International Migration* 23.

80 UNCTAD (n 78) 1.

81 As above.

82 Declaration on the TRIPS Agreement and Public Health (14 November 2001).

for developing countries. Moreover, these commitments need to be included in a binding instrument that can create specific legal obligations on developed countries.<sup>83</sup>

The lack of any adequate governance framework for the recognition and protection of traditional knowledge as well as plant varieties that are unique to some developing countries continues to erode the resource sovereignty of these countries. Although the TRIPS Agreement allows for a *sui generis* regime under national law to protect plant varieties, the lack of capacity in most developing countries has left these countries without any kind of protection for their plant varieties.<sup>84</sup> For example, despite the fact that *teff*, an indigenous grain in Ethiopia, is unique to the country, multinational companies have produced the product without any form of compensatory framework or reasonable benefit from the product for the country of origin. Similarly, questions have been raised on the patentability of the production of *basmati* rice, which has been produced in Pakistan and India for hundreds of years. However, a United States (US) company was able to obtain a patent for a *basmati* rice without any recognition of the country of origin. Another example is where a US company managed to obtain a patent for turmeric healing, while this has actually for generations been used in India.<sup>85</sup>

All these factors demonstrate the way in which the TRIPS Agreement and the monopolisation of knowledge and access to technology by developed countries continue to have serious implications for developing countries and their ability to realise the right to development of their citizens and peoples. The TRIPS Agreement as well other similar agreements should have adequate space and framework for recognising traditional knowledge and working methods as well as plant varieties that are *sui generis* to specific developing countries.<sup>86</sup> Future SDT arrangements should provide for binding rules for developing countries that guarantee better access to the transfer of technology, access to medicine, the recognition of *sui generis* plant varieties and traditional knowledge in order to ensure that they benefit adequately from the TRIPS Agreement and other similar multilateral arrangements. Without a fair and sustainable framework of the TRIPs Agreement, the creative potential and the right to development of individuals and peoples in developing countries will be seriously hampered.

83 Correa (n 77).

84 UNCTAD (n 78) 35; see also art 27(3) (b) of TRIPS.

85 Stiglitz & Charlton (n 62).

86 UNCTAD (n 78) 21.

It is true that the DICRTD does provide some provisions that deal with the reform areas needed in the area of intellectual property rights and the transfer of technology. These provisions include the duty to cooperate in the transfer of technology, enhancing north-south, south-south, triangular and other forms of regional and international cooperation in all spheres, science, technology and innovation, and also enhancing knowledge sharing on mutually agreed terms, and the diffusion of environmentally friendly technologies.<sup>87</sup> However, the specific mechanisms of how these commitments will be realised have not been clearly provided in the DICRTD. The prospect of a realistic realisation of the right to development will call for future protocols to the DICRTD to clearly address how these commitments should be realized, by focusing on the international dimension of the right to development.

### 5.3 Preventing unilateral coercive measures

Unilateral coercive measures by states create complex moral and legal questions that have direct and clear implications for the realisation of the right to development in developing countries. The use of sanctions as a way of attributing state responsibility and modifying state behaviour to achieve certain human rights, as well as humanitarian and political ends, is widely well known.<sup>88</sup> In international law, the basis on which these measures can be imposed are guided by the UN Charter under chapter 7, which provides for a collective security and sanctions regime. However, unilateral sanctions by states acting alone or collectively with other states are inconsistent with international law and the underlying principles of the right to development.<sup>89</sup> As will be shown below, the impact of unilateral coercive measures had a devastating socio-economic impact on developing countries.

The earliest effort at attempting to address the problem of unilateral coercive measures was the Charter of Economic Rights and Duties of States, which provides that 'no state may use or encourage the use of economic, political or any type of measures to coerce another

<sup>87</sup> See art 13 DICRTD.

<sup>88</sup> See in this regard M Alina & T Antonios 'Unilateral coercive measures and international law' 1 June 2021 The Left in the European Parliament 2022, SSRN: <https://ssrn.com/abstract=4235572> (accessed 1 March 2025); AF Douhan Unilateral coercive measures, effects and legality (2023), <https://yjil.yale.edu/posts/2023-06-20-unilateral-coercive-measures-effects-and-legality-issues> (accessed 1 March 2025).

<sup>89</sup> Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, Alena F Douhan, Negative Impact of Unilateral Coercive Measures: Priorities and Roadmap, A/HRC/45/7 (2020).

state in order to obtain from it the subordination of the exercise of its sovereign right'.<sup>90</sup> The language used by the DICRTD clearly is inspired by the Charter and its language is more or less identical to it.<sup>91</sup> Similarly, the Vienna Declaration and Programme of Action, adopted in 1993, emphasised the colossal effect of unilateral coercive measures on the socio-economic conditions of states, and called on states to

refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among states and impedes the full realisation of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments.<sup>92</sup>

A number of studies were done by the UN on the impact of sanctions on human rights and development of states. These studies have demonstrated the negative impact of unilateral sanctions on specific countries. The studies clearly demonstrate that they are not desirable forms of ensuring state accountability and attributing state responsibility.<sup>93</sup>

Nevertheless, the use of unilateral sanctions by states continues to be made without any serious consideration on the negative impact that these measures have on the realisation of the right to development in developing countries. In recent times, for example, the United States has suspended Ethiopia, Eritrea, Mauritania, South Sudan, Guinea, Mali and Burkina Faso from the Africa Growth and Opportunity Act (AGOA) and other economic benefits.<sup>94</sup> These removals from preferential trade benefits have been imposed allegedly to improve the human rights or humanitarian situation and the democratic practice in these states. However, the overall impact that these sanctions have on the economic development of developing countries is significant.<sup>95</sup> Critics also raise the need to explore other sanction regimes that do not curtail the right to development of

90 Charter of Economic Rights and Duties of States (1974) General Assembly Resolution 3281(xxix), UN GAOR, 29th session, Supp 31.

91 See art 32 of the Charter of Economic Rights and Duties of States and art 14 of DICRTD.

92 Vienna Declaration and Programme of Action A/CONF 157/23 (12 July 1993) para 31.

93 See the Reports of the UN Special Rapporteur on Unilateral Coercive Measures, <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures> (accessed 10 February 2025).

94 O Omiunu 'US suspends four countries from AGOA: Reassessing the human rights-trade nexus' (2023) Afronomics Law, <https://www.afronomicslaw.org/category/analysis/us-suspends-four-countries-agoa-reassessing-human-rights-trade-nexus> (accessed 20 January 2025).

95 See AGOA Country Eligibility, <https://agoa.info/about-agoa/country-eligibility.html#:~:text=On%2031%20October%202023%2C%20the,announcement%20on%2029%20December%202023> (accessed 20 January 2025).

states. While it is true that the scope of attributing state responsibility in international law is limited, many observers argue that other possible alternatives, such as the imposition of individual sanctions on political, military or economic elites of a particular regime that violate international norms, may be preferable.<sup>96</sup> Targeted sanctions, such as arms embargoes and the restriction of any aid or financial support to the security sector of these regimes, may also be another avenue for pressuring these regimes and ensuring accountability.<sup>97</sup>

The Committee on Economic, Social and Cultural Rights (ESCR Committee) has underlined the serious impact of unilateral sanctions on the enjoyment of socio-economic rights. In its General Comment 8, based on the number of reports it had received from state parties, the Committee stated that unilateral coercive measures have a devastating and 'dramatic impact' on the enjoyment of socio-economic rights in state parties.<sup>98</sup> It called on state parties to take mitigating measures or consider the use of alternative measures. The Committee identified a number of ways in which sanctions have impacted on the enjoyment of socio-economic rights, including on the distribution of food, pharmaceuticals and sanitation supplies. It also noted that sanctions jeopardised the quality of food and the availability of safe drinking water and severely interfered with the functioning of basic healthcare and education systems, and undermined the right to work.<sup>99</sup> The Committee also made it clear that state parties to ICESCR as well as 'external entities' such as international financial institutions have the obligation to ensure that the effects of sanctions do not undermine the enjoyment of socio-economic rights.<sup>100</sup> It also highlighted the need for constant monitoring of the effects of sanctions and making broad humanitarian exceptions and investments needed to facilitate basic infrastructure.<sup>101</sup>

The serious implications of unilateral coercive measures on human rights prompted the UN to establish a mandate of the Special Rapporteur on Unilateral Coercive Measures in 2014, which mandate was renewed in 2023. The report published by the Special Rapporteur demonstrated that unilateral coercive measures violated

96 Bunn (n 47) 113.

97 A Hofer 'The developed/developing divide on unilateral coercive measures: Legitimate enforcement or illegitimate intervention?' (2017) 16 *Chinese Journal of International Law* 175.

98 UN Committee on Economic, Social and Cultural Rights (ESCR Committee) General Comment 8: The relationship between economic sanctions and respect for economic, social and cultural rights, E/C.12/1997/8, 12 December 1997 para 3.

99 General Comment 8 (n 98) para 5.

100 General Comment 8 (n 98) paras 13 & 14.

101 General Comment 8 (n 98) para 9.

international law, international humanitarian law, the UN Charter and the norms and principles governing peaceful relations among states.<sup>102</sup> Despite the serious impact of unilateral coercive measures on human rights and the right to development, there is no clear remedy for violations that result from such actions.<sup>103</sup>

Despite this, the use of unilateral coercive measures has become ‘increasingly a regular practice of states’,<sup>104</sup> which questions their compatibility with the principles of the right to development. In particular, the serious impact of unilateral coercive measures on the right to development has been acknowledged by many of the special procedures of the UN, as a result of which they issued a joint statement and called on states to ‘withdraw or at least to minimise them’.<sup>105</sup> The report emphasised that unilateral coercive measures continue to have a negative impact on the right to development and the fulfilment of the Sustainable Development Goals (SDGs). Given the lack of a treaty-based mechanism that follows up the impact of unilateral coercive measures, the Conference of State Parties under the DICRTD may be better placed to analyse its impact and provide comprehensive recommendations for state parties. Moreover, the broadly framed commitments that have a great bearing on the realisation of the international dimension of the right to development of states provided in the DICRTD in article 14 should be expanded and better articulated. This includes critical elements of the international dimension of the right to development, including the sovereign equality of all states and the obligation of states to refrain from employing unilateral coercive measures aimed at undermining the sovereign rights of developing countries.

#### 5.4 Controlling illicit financial flows

The Global Financial Integrity shows that a significant amount of capital worth billions of dollars goes out of developing countries.<sup>106</sup> The United Nations Conference on Trade and Development (UNCTAD) states that the total financial flows from developing countries, particularly in Africa, are much higher than the external debt of these countries, demonstrating that ‘Africa is a net creditor to

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102 Report of the Special Rapporteur (n 89).

103 As above.

104 As above.

105 OHCHR ‘Unilateral sanctions impinge on the right to development – UN experts’, <https://www.ohchr.org/en/press-releases/2021/08/unilateral-sanctions-impinge-right-development-un-experts> (accessed 10 February 2025).

106 See Global Financial Integrity, <https://gfiintegrity.org/issue/illicit-financial-flows/> (accessed 10 August 2025).

the world'.<sup>107</sup> Another major report of UNCTAD reveals that African states lose an estimated \$88,6 billion annually which could have filled half of their financing gap for the SDGs, which is estimated at \$200 billion.<sup>108</sup> The implications of controlling illicit financial flows cannot be overemphasised. Illicit financial flows undermine the realisation of the right to development in developing countries by diverting the much-needed resources to fight poverty. The inability to control such a significant amount of capital undermines the efforts to mobilise resources for the fight against poverty in developing countries and their capacity to realise the right to development.

Controlling illicit financial flows from developing countries through a variety of mechanisms should be explored to ensure the realisation of the right to development in these countries. Studies indicate that there are a number of mechanisms by which illicit financial flows can be controlled. The first is to ensure that tax systems have anti-abuse clauses that mitigate the effects of using tax treaties to avoid tax payment that involves governments and companies. The second is ensuring more openness and transparency of financial transactions so that regulatory authorities are better equipped with the available information. Third, there needs to be a framework for better taxation of companies that operate in a particular country where the economic activity is carried out (host country) and some value is created instead of merely using it for extracting capital and labour. Lastly, many African countries are also victims of illegal capital flight in the form of corruption where corrupt officials continue to use the financial and banking systems to steal a large sum of money and assets from Africa.<sup>109</sup> There has to be a mechanism that allows for recovering stolen capital and assets. Because of this, it is important to enhance existing multilateral and national initiatives on anti-money laundering, anti-terror financing, and the controlling of corruption and bribery. Legal avenues for the prosecution of offenders and the return of assets should be explored and enhanced more among states. All these measures can and should be addressed in the additional protocols of the DICRTD. The articulation of clear normative commitments and the implementation mechanism is an important element of the international dimension of the right to development that can facilitate the realisation of the right to development in developing countries.

107 UNCTAD 'Africa could gain \$89 billion annually by curbing illicit financial flows', <https://unctad.org/es/isar/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows> (accessed 22 September 2024).

108 UNCTAD *A world of debt: A growing burden to global prosperity report* (2024).

109 See De Schutter (n 58).

## 5.5 Tackling the burden of climate change and climate financing

Climate change and global warming have emerged as some of the most pressing issues in the context of international development. The overwhelming scientific evidence shows that human activity that results in carbon emission and greenhouse gases is largely responsible for the increase in global warming and the climate crisis.<sup>110</sup> In this context, it is true that all states have the collective responsibility to tackle climate change and take appropriate measures to mitigate the effects of climate change, and that a failure to do so could result in catastrophic environmental disasters worldwide. However, the obligations of developing countries in this regard should be carefully articulated. First, climate change commitments of developing countries should not compromise their ability to ensure the right to development of individuals and peoples living in these countries. As much as it is morally compelling to respond to the climate crisis, the urgent developmental needs of developing countries should also be addressed with the same moral urgency and response. Second, the contribution of developing countries to the climate crisis is minimal. Most industrialised developed countries bear the greatest responsibility for the current climate crisis.<sup>111</sup>

Recognising the differentiated responsibility of states on climate change, the current climate change commitment of states in the UN Framework Convention on Climate Change (UNFCCC) as well as in other climate commitments is guided by the principle of common but differentiated responsibilities.<sup>112</sup> The principle of common but differentiated responsibilities is similar to the STD, an emerging pattern in global politics and international law, which places the emphasis on 'equity-based differentiation'.<sup>113</sup> In principle, this means that there should be a consideration of the contribution of each state to the climate crisis as well as the particular challenges faced by developing countries to ensure their compelling developmental demands. Thus, the burden of climate financing and the realisation of the right to development should be shared.

<sup>110</sup> European Union 'Causes of climate change', [https://climate.ec.europa.eu/climate-change/causes-climate-change\\_en#:~:text=Burning%20fossil%20fuels%2C%20cutting%20down,greenhouse%20effect%20and%20global%20warming](https://climate.ec.europa.eu/climate-change/causes-climate-change_en#:~:text=Burning%20fossil%20fuels%2C%20cutting%20down,greenhouse%20effect%20and%20global%20warming) (accessed 28 September 2024).

<sup>111</sup> United Nations Framework Convention on Climate Change (UNFCCC) (1992) Preamble para 3, art 3(1), art 4(2)(a).

<sup>112</sup> UNFCCC Preamble para 6; art 3(1); art 4(1).

<sup>113</sup> C Weinhardt & T Schöfer 'Differential treatment for developing countries in the WTO: The unmaking of the north-south distinction in a multipolar world' (2022) 23 *Third World Quarterly* 78.

However, recent figures indicate that developing countries continue to face a significant financial gap for climate financing, further derailing their ability to implement the right to development. The recent analysis of the UNFCCC shows that developing countries need at least \$6 trillion by 2030 to meet less than half of their nationally determined contributions.<sup>114</sup> Moreover, the 2009 climate finance commitment, which was supposed to mobilise \$100 billion annually for climate financing of developing countries, has not been met.<sup>115</sup> Developing countries were only able to receive a fraction of that, amounting to between \$21 billion and \$ 83,3 billion annually. What is more concerning is the fact that a significant degree of the climate financing is done through non-concessional loans, adding to the debt burden of developing countries and their ability to realise their right to development.<sup>116</sup>

The 2024 report of UNCTAD on climate financing indicates that achieving the climate and developmental goals of developing countries will require \$2,5 trillion of financing annually. It is less likely that these figures will be met as official developmental assistance and climate financing have over time decreased in real terms.<sup>117</sup> As the Special Rapporteur on RTD notes, requiring developing countries to have a double burden of investing in both developmental and climate financing is questionable on both moral and legal grounds.<sup>118</sup> The realisation of the right to development should take centre stage. This has to be seen in light of the more than 685 million people that live in extreme poverty and the 900 million people worldwide that do not have access to electricity, and the more than 4 billion people that do not have a social safety net.<sup>119</sup> Thus, while developing countries should work on climate mitigation and adaptation measures, overburdening them with significant financial and technical requirements will be a flagrant violation of the underlying principles of the right to development.

## 5.6 Addressing developmental financing and the debt burden

Developmental assistance and addressing the debt burden of developing countries should be another focus area for the

114 UNCTAD 'A climate finance that works for developing countries', Richard Kozul-Wright, Director of the Globalisation and Development Strategies Division, UNCTAD, <https://unctad.org/news/climate-finance-goal-works-developing-countries> (accessed 15 August 2024).

115 As above.

116 As above.

117 As above.

118 Report of the Special Rapporteur on the Right to Development (2024).

119 UNCTAD (n 114).

operationalisation of the underlying principles of the right to development under the framework of the DICRTD. There is no doubt that, if used effectively, developmental assistance can help developing countries to invest in infrastructure and basic socio-economic services. The debt burden of developing countries continues to create major challenges for developing countries as resources are diverted to debt repayment, further straining their already limited resources needed to finance development.

It is true that a number of initiatives have been undertaken to provide development financing for developing countries. However, the most concrete specific social and economic development targets for developing countries were set out in the new millennium in 2000. In the UN Millennium Summit in September 2000, for the first time world leaders adopted the Millennium Development Goals (MDGs), a set of eight specific achievable social and economic goals that were supposed to be achieved in 2015.<sup>120</sup> The anticipated success of the MDGs also did not deliver the expected social and economic goals. As Cheru observes, African countries in particular were only able to meet three of the eight goals.<sup>121</sup>

In recent times, development financing has faced several challenges, with only a few countries willing to provide the much-needed support to developing nations. As the recent report of the Secretary-General indicates, there is a significant financial gap in development financing of the SDGs, with over a \$4 trillion gap that is needed to finance the SDGs.<sup>122</sup> Moreover, a significant number of states have failed to meet their commitments in the 2022 Monterrey International Conference on Financing for Development in which developed countries agreed to contribute 0,7 per cent of their gross domestic product (GDP) to development financing.<sup>123</sup> The much-anticipated Addis Ababa conference for development financing also failed to deliver the expected outcome, which still results in a \$4 trillion development financing gap for the SDGs.<sup>124</sup>

120 The Millennium Declaration, adopted by General Assembly Resolution 55/2 (8 September 2000).

121 F Cheru 'The right to development and developing countries: A retrospective and prospective African view' (2016) 37 *Third World Quarterly* 1276.

122 UN Secretary General 'World cannot afford to continue throwing developing countries' plans futures onto raging bonfire of debt, Secretary-General tells General Assembly debate' SG/SM/22191 (15 April 2024), <https://press.un.org/en/2024/sgsm22191.doc.htm#:~:text=The%20world%20cannot%20afford%20to,empathy%20and%20above%20all%2C%20justice> (accessed 2 October 2024).

123 As above.

124 As above.

Another significant challenge to the realisation of the right to development in developing countries is the serious debt burden of developing countries. Described as the 'debt disaster' for developing countries, over the past few years, the significant amount of debt burden of developing countries continues to constrain their ability to realise the right to development.<sup>125</sup> The recent report of the Special Rapporteur on RTD shows that the public debt of developing countries has risen to 60 per cent of their GDP.<sup>126</sup> Moreover, according to the UNCTAD 2024 report, the debt service of developing countries has reached \$365 billion.<sup>127</sup>

Developing countries continue to face high interest rates compared to developed countries, and current estimates indicate that borrowing costs for developing countries are two to four times higher than those of the US and six to 12 times higher than those of Germany.<sup>128</sup> In 2022 alone, developing countries paid \$49 billion more in debt service than what they received, indicating a net negative transfer of resources for development financing.<sup>129</sup> In 2023, the total net interest payment of developing countries reached \$847 billion.<sup>130</sup> These debt burdens add significant pressure on developing countries for financing their developmental needs. The UNCTAD report indicates that many developing countries allocated not less than 10 per cent of their revenue to interest payments. These colossal debt burdens of developing countries must be urgently confronted if the principles underlying the DICRTD are to be addressed in any meaningful sense.<sup>131</sup>

## 6 Conclusion

The adoption of the DICRTD promises to offer a major step in the full recognition and implementation of the right to development. The would-be adopted International Covenant on the Right to Development will create legally binding obligations on state parties and improve the prospects of its implementation. However, this can only be achieved by remaining true to the fundamental moral and normative cosmopolitan principles of the right to development, as well as the collective responsibility of all states for its realisation. Since the normative foundations of the right to development in

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125 As above.

126 UNCTAD (n 108).

127 As above.

128 As above.

129 UN Secretary-General (n 122).

130 UNCTAD (n 108).

131 As above.

the late 1970s and the formal adoption of the RTD Declaration in 1986, adequate attention has not been given to the effective implementation of the right to development. The prospects of the DICRTD and its monitoring and supervision under the Conference of State Parties as well as the adoption of additional protocols that can enhance the implementation of the right to development need to consider its vital aspect – its international dimension and the specific thematic issues that underlie its normative ambitions.

A careful assessment of the principles and norms governing international trade, intellectual property, sanctions, climate financing, international financing and development demonstrate that they continue to significantly constrain the full realisation of the right to development in developing countries. Some of the attempts made to realise the integration of these norms and principles of the right to development within the global economic and financial architecture are tentative and rudimentary. In this regard, the discussion on the international dimension of the right to development can fill this significant normative gap and serve as an important point of reference and framework to create a just and equitable international economic order. The adoption of an international covenant on the right to development that adequately captures its international dimension will be a major milestone to address these issues and serve as an implementation framework for the right to development for all, including people living in dire and desperate social and economic conditions in developing countries.