

# THE UNITED NATIONS SYSTEM AND THE REALISATION OF THE RIGHT TO DEVELOPMENT: CHALLENGES AND OPPORTUNITIES

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## Abstract

*Given the controversy on the right to development (RTD), this article examines the extent to which this right can be realised within the current United Nations (UN) and regional human rights mechanisms. To this end, it explores the opportunities provided by an interdependence-based interpretation of global and regional treaties. It also looks at avenues provided by the UN Universal Periodic Review and its Special Procedure. It finds that indeed an interconnectedness-based reading of human rights, though not a substitute for a treaty on the RTD, could be used to foster the RTD while waiting for the adoption of a potential treaty on it.*

**Keywords:** right to development; UN system; regional system; Universal Periodic Review; Special Procedure

## 1 Introduction

The United Nations (UN) was established to ensure a better life for all. To this end, the international community set up the UN system, which can be described as a range of processes and mechanisms developed to ensure respect for human rights. The work of the UN system also aims to ensure the eradication of poverty and the achievement of human development, which has ascended into the realm of human rights through the adoption of the UN Declaration on the Right to Development (UNDRTD) in 1986.<sup>1</sup>

Despite this, millions of people continue to live in squalor, without freedom of movement, association, and access to adequate food, education, health, water, sanitation and other 'basic rights'.<sup>2</sup> Their civil, political, economic, social and cultural rights remain unprotected. In other words, freedoms from fear and want, which are significant

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<sup>1</sup> GA res 41/128, UN GAOR, 41st session, 97th plenary meeting, UN Doc A/RES/41/128, 4 December 1986.

<sup>2</sup> H Shue *Basic Rights* (1996).

for the realisation of the right to development (RTD),<sup>3</sup> remain illusory. Meanwhile, whereas binding in the African human rights system, the RTD is controversial at the global level where it remains non-binding and enjoys only a 'moral or political' force.<sup>4</sup> This situation raises the question on the role of the UN system in achieving a legally non-binding RTD or whether there is any prospect for such. In spite of the soft or non-binding feature of the RTD, the UN system can provide a bridge for its realisation while awaiting the advent of a treaty that could further ensure its monitoring. To this end, the article explores the extent to which the UN system, which comprises the treaty- and the charter-based systems, could be a bridge for monitoring the realisation of the non-binding RTD. As part of assessing whether the UN system can assist in the realisation of the RTD, the article examines the treaty-based system to explore whether it is accessible for the realisation of the RTD. It also unpacks the charter system to ascertain whether it provides avenues for the realisation of the RTD. Invariably, the article goes on to examine the challenges and opportunities for achieving the RTD through the UN system.

Two key factors are critical in informing the analytical framework of the article. Firstly, it relies on the interdependence and interconnectedness of human rights, in the jurisprudence of the UN Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), and regional bodies in charge of human rights that monitor the implementation of regional human rights treaties. Secondly, it also relies broadly on the UN's *modus operandi* with specific attention to *human rights thematic* in its exploration of avenues for the achievement of the RTD. Ultimately, the article does not shy away from advocating for the RTD, by concretely examining what could be done prior to the adoption of a global convention on the RTD. In this context, it argues that even though the RTD is non-binding at the global level, the UN system can be the appropriate bridge for its realisation.

The article is divided into five parts, including this introduction. The second part presents an overview of the RTD and the third part focuses on the controversy regarding its legal force. This triggers the need to

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<sup>3</sup> A Sen 'Human rights and development' in A Andreassen and SP Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 1-8.

<sup>4</sup> LH Piron 'The right to development: A review of the current state of the debate for the Department for International Development' (2002) 4 <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf> (accessed 11 January 2018). G Alfredsson 'The right to development: Perspective from human rights law' in LA Rehof and C Gulmann (eds) *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1989) 84.

proffer solutions through the UN system, which is at the centre of the fourth part. The fifth part of the article provides concluding remarks.

## 2 The RTD: A Brief Overview

In the 1970s, subsequent to their independence, developing countries gathered in the Group of 77 countries and called on the international community to establish a new international economic order (NIEO) which would be conducive to their development conceptualised as a right.<sup>5</sup> The idea of development as a human right was taken forward in the academic arena by Keba M'baye through his 1972 inaugural lecture in Strasbourg, France.<sup>6</sup> After numerous activities on the RTD, including the adoption (without vote) of Resolution 4 (XXXIII) in 1977 by the Committee on Human Rights,<sup>7</sup> it was finally recognised at the global level through the adoption of the 1986 UNDRTD.<sup>8</sup> The latter describes the RTD as:<sup>9</sup>

1. an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

This provision suggests that the RTD has five characteristics:

- It is inalienable, and consequently cannot be the subject of negotiations.
- It is a process safeguarding the right to participation of its beneficiaries.
- It is a process in which all human rights and fundamental freedoms should be realised.
- It is an individual and collective right.
- It secures the right of people to self-determination.

<sup>5</sup> The Joint Declaration of the seventy-seven developing countries made at the conclusion of the UN Conference on Trade and development 1964 (G77 Declaration 1964: paras 1 and 2); also The Charter of Algiers adopted at the 1st Ministerial Meeting of the Group of 77, in Algiers in 1967 (The Charter of Algiers, 1967, part 1).

<sup>6</sup> K M'baye 'Le droit au développement comme un droit de l'homme' (1972) 2-3 *Revue des Droits de l'Homme* 503-534.

<sup>7</sup> The Resolution called upon the UN Secretary-General to engage in research on the international aspects of the RTD.

<sup>8</sup> The UNDRTD adopted by GA res 41/128 of 4 December 1986.

<sup>9</sup> Article 1.

According to the UNDRTD, whereas nation states have the primary responsibility for the realisation of the RTD of their citizens,<sup>10</sup> the international community has the responsibility for the realisation of the right through international cooperation.<sup>11</sup> In other words, the RTD is a holistic human-centred concept underpinned by the establishment of a national and international environment in which every individual and all peoples or groups freely enjoy a sustainable improvement of their economic, social, cultural and political well-being. This means it is an individual and collective right that should be realised by both nation states and the international community. In other words, while at the national level, states should adopt appropriate policies for the achievement of the RTD, at the global level, member states of the international community are obliged to establish a conducive environment through the adoption of development-friendly policies, for example on trade. In addition, international financial institutions such as the World Bank and the International Monetary Fund should ensure that their lending and other policies are development-friendly, if the RTD is to become a reality. Kamga and Fombad argue that for the realisation of the RTD:

[N]ational action should be complemented by international actions revolving around the adoption of fair trade policies on the global market, solving the debt burden of developing countries, ensuring that wealthy countries respect their development assistance pledges and ensuring real global partnership for development in general.<sup>12</sup>

In order to further define and achieve the RTD, the UN allocated a lot of time and resources to the RTD. In this respect, subsequent to the adoption of the UNDRTD<sup>13</sup> mentioned earlier, an Open Ended Working Group on the RTD and the appointment of an Independent Expert on the RTD took place,<sup>14</sup> and the UN High-Level Task Force (HLTF) on implementing the RTD was set up.<sup>15</sup> Furthermore, the unanimous adoption of the Vienna Declaration on Human Rights in 1993 was another formal recognition of the RTD,<sup>16</sup> which had been binding in the African Charter on Human and

<sup>10</sup> UNDRTD art 3(1).

<sup>11</sup> UNDRTD art 3(2), art 4(1).

<sup>12</sup> SD Kamga and C Fombad 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) 57 *Journal of African Law* 196, 203.

<sup>13</sup> The UNDRTD adopted by General Assembly resolution 41/128 of 4 December 1986 (n 8 above).

<sup>14</sup> Commission on Human Rights (CHR) Res 1998/72.

<sup>15</sup> CHR, Res 2004/7.

<sup>16</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993 in Vienna.

Peoples' Rights since 1986.<sup>17</sup> According to Baxi,<sup>18</sup> the high intensity of activities on the RTD has made it the most repeated declaration besides the Universal Declaration on Human Rights (UDHR) in the UN system. Indeed, the recognition of the RTD was reiterated in numerous other international instruments,<sup>19</sup> and this has led it to be viewed as *a fait accompli* to use Alston's words.<sup>20</sup> This arguably seems to suggest that there is an agreement on this right; however, the contrary is true: the RTD remains the most contentious human right of our time.

### 3 Some Insight on the Controversy on the Right to Development

While scholars such as M'baye,<sup>21</sup> Bedjaoui,<sup>22</sup> Marks,<sup>23</sup> Sengupta<sup>24</sup> and Solomon,<sup>25</sup> to name but a few, present the RTD as the most important human right or the right without which other human rights are

<sup>17</sup> The African Charter was adopted in 1981 in Nairobi, Kenya and came into force in 1986. Art 22 of this instrument expressly provides for the RTD.

<sup>18</sup> U Baxi 'Normative content of a treaty as opposed to the Declaration on the Right to Development: Marginal Observations' in SP Marks (ed) *Implementing the Right to Development – The role of International Law* (2008) 47–51.

<sup>19</sup> Other pronouncements of the RTD include: The right to development has been continuously and consistently reaffirmed by the international community, including in the Rio Declaration on Environment and Development, the Vienna Declaration and Programme of Action, the United Nations Millennium Declaration, the 2002 Monterrey Consensus on Financing for Development, the 2005 World Summit Outcome, the 2007 United Nations Declaration on the Rights of Indigenous Peoples, the 2010 outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals,<sup>47</sup> the 2011 Istanbul Programme of Action for the Least Developed Countries for the Decade 2011–2020, the 2012 outcome documents of the 13th session of the United Nations Conference on Trade and Development (UNCTAD XIII), and the United Nations Conference on Sustainable Development.

<sup>20</sup> P Alston 'Development and the rule of law: Prevention versus cure as a human rights strategy', in International Commission of Jurists (ed) *Development, Human Rights and the Rule of Law* (1981) 3.

<sup>21</sup> M'baye (n 6 above).

<sup>22</sup> M Bedjaoui 'The difficult advance of human rights towards universality in a pluralistic world' Proceedings at the colloquium organised by the Council of Europe in cooperation with the International Institute of Human Rights, Strasbourg (1989) 32–47 (on file with the author). Also M Bedjaoui 'The right to development', as quoted by HJ Steiner, P Alston and R Goodman *International Human Rights in Context: Law, Politics, Morals – Text and Materials* (2008) 1447.

<sup>23</sup> SP Marks (ed) *Implementing the Right to Development: The Role of International Law* (2008).

<sup>24</sup> A Sengupta 'Right to development as a human right' (2001) 36(27) *Economic and Political Weekly* 2527–2536.

<sup>25</sup> ME Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in Marks (n 23 above) 17. Other proponents of the RTD are S Fukuda-Parr '25 years of the right to development: Achievements and challenges' (statement at the Global Partnerships for Development Conference, Friedrich Ebert Foundation,

meaningless, Donnelly,<sup>26</sup> Whyte,<sup>27</sup> Bello<sup>28</sup> and Vandenberg,<sup>29</sup> on the other hand, believe that the RTD is a fallacy and should be discarded. In this debate, proponents of the RTD argue that the right has developed into a *jus cogens* norm and as such is binding on the international community at large. They argue that intense activities on the RTD led to its ascension in the realm of customary law<sup>30</sup> and obligations *erga omnes*, which engage the legal interest of the world broadly, are *jus cogens*.<sup>31</sup> The latter represents a norm of general international law considered as 'hierarchically superior, the literal meaning of which is compelling' and does not need states' consent.<sup>32</sup> Locating the RTD in the sphere of *jus cogens*, Murray-Bruce writes:

[W]ith the DRD's [Declaration on the right to development] purposes and objectives enshrined in the UN Charter – a peremptory norm of international law, a *jus cogens* from which there is no derogation – the Right to Development automatically espouses normative value and imposes legal and non-derogable obligations on its duty holders.<sup>33</sup>

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Berlin, 24–25 February 2011); Kamga and Fombad (n 12 above) 204; T Karimova *Human Rights and Development in International Law* (2016); S Fukuda-Parr 'The right to development: Reframing a new discourse for the twenty-first century' (2012) 79(4) *Social Research: An International Quarterly* 839–864.

<sup>26</sup> J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 473; also J Donnelly 'The right to development: How not to link human rights and development' in C Welch (ed) *Human Rights and Development in Africa* (1984) 260, 261.

<sup>27</sup> J Whyte 'Review of development as a human right' in A Andreassen and SP Marks (2007) 1(1) *Electronic Journal of Sustainable Development* [http://www.ejsd.co/docs/REVIEW\\_OF\\_DEVELOPMENT\\_AS\\_A\\_HUMAN\\_RIGHT.pdf](http://www.ejsd.co/docs/REVIEW_OF_DEVELOPMENT_AS_A_HUMAN_RIGHT.pdf) (accessed 11 January 2018).

<sup>28</sup> E Bello 'Article 22 of the African Charter on Human and Peoples' Rights' in E Bello and B Adjibola (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992) 447, 462.

<sup>29</sup> A Vandenberg 'The right to development in international human rights law: A call for its dissolution' (2013) 31(1) *Netherlands Quarterly of Human Rights* 187–209.

<sup>30</sup> RA Touz Mohammadoov 'What does "defending the right to development" mean nowadays?' Human Rights Commission 2002; Statement of the Working Group on the right to development, joint written statement submitted by Centre Europe-Tiers Monde (CETIM) and AAJ. E/CN.4/2001/WG.18/CRP.15 <https://www.cetim.ch/what-does-%C2%ABdefending-the-right-to-development%C2%BB-mean-nowadays/> (accessed 11 January 2018).

<sup>31</sup> F Murray-Bruce 'Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to Development' (2005) *Beppress Legal Series' Working Paper No 725* (On file with author) 16.

<sup>32</sup> K Hossain 'The concept of *jus cogens* in international law' *The Daily Star* No 74 <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 11 January 2018).

<sup>33</sup> Murray-Bruce (n 31 above).

However, this argument is rejected by opponents of the right who advise 'not to link development and the [RTD]',<sup>34</sup> as this could be a 'risky form of legal gymnastics' especially because linking development and human rights would amount to using political preferences as law.<sup>35</sup> Shedding more light on this view, Bello is of the opinion that the RTD is

[t]oo woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and 'directionless'; it strikes a chord of the advent of the good Samaritan.<sup>36</sup>

The disagreement on the RTD goes beyond the academic arena to reach the UN. In this forum, diplomats, mostly from the developed world under the leadership of the USA, oppose those from the global South under the leadership of China.<sup>37</sup> The trends on votes on the RTD illustrated this disagreement at the UN where most Western countries voted against or abstained, and the global South voted massively for the right.

In this debate, the global North views the RTD as a matter of national sovereignty, meaning that every country has the obligation to secure the RTD of its citizens if there is such a right. They rely on the promote, protect and fulfil-trilogy, with the state nation as the duty bearer. This implies that development assistance cannot be an obligation, but a matter of charity informed by the donors' (wealthy countries) interest or their self-interest. Against this view, the global South believe that development assistance should be an entitlement, especially in a context where global policies that are developed or sponsored by the wealthy countries affect people's lives in the developing world. This view espouses Wenar's theory that the World Order makers should be responsible for their actions.<sup>38</sup> In fact, at

<sup>34</sup> J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 473; also J Donnelly 'The right to development: How not to link human rights and development' in Welch (n 26 above) 260, 261.

<sup>35</sup> Alfredsson (n 4 above) 84.

<sup>36</sup> Bello (n 28 above) 462.

<sup>37</sup> It is a well-known fact that the USA is the main opponent of the RTD and that China joining the G77 in the push for the adoption of the UNDRD was instrumental for its adoption. SD Kamga 'The G77 and the transformation of global relations for a just world: Challenges and opportunities' 46(1) *Africa Insight* (2016) 71–88.

<sup>38</sup> L Wenar 'Responsibility and severe poverty' in T Pogge (ed) *Freedom from Poverty as a Human Right* (2007) 255.

the UN, the RTD has been submitted to a political game,<sup>39</sup> which did not ease its operationalisation. It is in this context that the next section of the article taps into the UN system to explore ways and avenues to give effect to the RTD which after all seeks to protect human dignity.

## 4 The UN Human Rights System and the Realisation of the Right to Development

The UN human rights system is a set of procedures established by the UN to ensure respect for human rights. This system consists of two-track measures:<sup>40</sup> on the one hand, the treaty-based system is crafted around treaties that bind only state parties. On the other hand, the Charter-based system is crafted around the UDHR (article 28) and articles 55 and 56 of the UN Charter, which call upon the international community to cooperate to ensure a better standard of living for all. These elements of the UN human rights system provide comprehensive avenues for assessing the prospects for the realisation of the RTD.

### 4.1 *The Treaty-based System and the Realisation of the RTD*

As alluded to earlier, the UNDRTD is non-binding, but an integrated reading of human rights in treaties would lead to a binding RTD. In other words, mainstreaming the RTD into human rights treaties and monitoring mechanisms would enhance prospects for its realisation. While the focus is on the UN system at the global level, the section will also tap into the African, Inter-American and European human rights systems to demonstrate how an interdependent reading of human rights can lead to the realisation of the RTD. The interdependent interpretation of the human rights approach for the RTD will raise questions on its added value; and will also be dealt with in this section.

<sup>39</sup> In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the CHR without a vote whereas at the General Assembly, 125 votes in favour, one vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without a vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at the General Assembly. At the CHR in 2001, the EU (except the UK) was for the RTD, three abstentions (UK, Canada and the Republic of Korea) were recorded and Japan and the USA voted against. In 2001, at the 56th session of the General Assembly (September to December) 123 votes in favour and four against (Denmark, Israel, Japan and the USA), with 44 abstentions were recorded.

<sup>40</sup> F Viljoen *International Human Rights Law in Africa* 2 ed (2012) 46.



#### 4.1.1 At the Global Level

The RTD echoes the universality, indivisibility and interdependence of human rights. These features of the RTD are also elements of the common article 1 of the International Covenant on Economic and Social and Cultural Rights (ICESCR)<sup>41</sup> and the International Covenant with Civil and Political Rights (ICCPR).<sup>42</sup> Common article 1 of these instruments reads as follows:<sup>43</sup>

1. All people have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their *economic, social and cultural development*.
2. All people may, for their ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may people be deprived of its own means of subsistence.
3. The State Parties to the present Covenant ... shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The right to natural wealth and resources is also reiterated by the ICCPR<sup>44</sup> and the ICESCR,<sup>45</sup> which explicitly provide that '[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.

Various elements of the RTD<sup>46</sup> such as economic, social and cultural development, sovereignty over resources and cooperation based on mutual benefits and preservation of self-determination are all found in common article 1 and other provisions of the two covenants as highlighted above. It is therefore contended that the RTD could be mainstreamed in the two covenants and their monitoring mechanisms. In this respect, while Scheinin contends that common article 1 is the 'home' of the RTD,<sup>47</sup> Mathews is of the view that the common article 1 'is in effect,

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<sup>41</sup> GA res 2200A.

<sup>42</sup> GA res 2200A (XXI).

<sup>43</sup> My emphasis.

<sup>44</sup> ICCPR art 47.

<sup>45</sup> Article 25.

<sup>46</sup> UNDRTD art 1(2).

<sup>47</sup> M Scheinin 'Advocating the right to development through complaint procedures under human rights treaties' in Andreassen and Marks (n 3 above) 275.

the miniature “right to development” provision in the Covenants’.<sup>48</sup> Indeed, common article 1 applies to some substantive provisions of the two covenants. For instance, common article 1 would apply to article 27 of the ICCPR, which addresses minority rights, and to article 11 of the ICESCR, which deals with ‘the right of everyone to an adequate standard of living for himself and his family’.

Emphasising the need to use an interconnectedness approach to human rights interpretation, Scheinin observes that the interdependence-based interpretation of the ICCPR’s provisions reveals that article 1 and article 27<sup>49</sup> are linked.<sup>50</sup> He aptly demonstrates how the UN Human Rights Committee in examining state parties’ compliance with the ICCPR relies on article 1 of the Covenant.<sup>51</sup> For example, with special attention to the right to natural wealth and resources of indigenous peoples, back in 1999, in its Concluding Observation on Canada, the Human Rights Committee recognised that:

[t]he right to self-determination requires, *inter alia* that all people must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee recommends that decisive and urgent action be taken towards the full implementation of the recommendations on land and resource allocation. [Recommendations made by the Royal Commission on aboriginal Peoples in view to protect indigenous peoples’ rights in Canada].<sup>52</sup>

Similarly, the Committee on Human Rights used common article 1 on self-determination to protect indigenous peoples’ rights in countries such as Mexico,<sup>53</sup> Norway,<sup>54</sup> and Australia,<sup>55</sup> amongst others.

The interconnectedness between article 27 of the ICCPR and article 1 was further articulated in *Makuika et al v New Zealand*,<sup>56</sup> which dealt with a national fisheries settlement in New Zealand and the share of the indigenous peoples known as the Maori. In this communication, the

<sup>48</sup> S Mathews ‘Presentation on the link between the right to development and the work of the UN human rights mechanisms’ (on file with author).

<sup>49</sup> Article 27 of the ICCPR reads: ‘In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their groups, to enjoy their own culture, to profess and practise their own religion, or to use their own language.’

<sup>50</sup> Scheinin (n 47 above) 276.

<sup>51</sup> *Ibid.*

<sup>52</sup> Concluding Observation on Canada, UN Doc CCPR/C/79/Add.105 (1999) para 8.

<sup>53</sup> Concluding Observations on Mexico, UN Doc CCPR/C/79/Add.109 (1999).

<sup>54</sup> Concluding Observations on Norway, UN Doc CCPR/C/79/Add.112 (1999).

<sup>55</sup> Concluding Observations on Australia, UN Doc CCPR/CO/69/AUS (2000).

<sup>56</sup> Communication No 547/1993 *Makuika et al v New Zealand* (27 October 2000). See 2000 Report of the Human Rights Committee, vol II, UN Doc A/56/40 (vol II) 11–29.

Human Rights Committee was of the view that minority rights included in article 27 comprise various elements of self-determination as provided for by article 1 of the Covenant.

Further, the interdependence of human rights was also tested through *Chief Bernard v Canada*.<sup>57</sup> In this case, the Chief of the Lubicon Band, Bernard Ominayack, brought a communication to the Human Rights Committee claiming that Canada had violated the band's human rights including their right to self-determination, to pursue their development, to their natural resources and not to have their means of subsistence taken away. The Human Rights Committee used the Lubicon Lake Band case to underline that:<sup>58</sup>

[p]rojects aimed at the economic development of a state must be assessed with consideration to its obligations under Article 27 [of the ICCPR] which, according to the committee protects *inter alia*, the cultural rights of person belonging to minorities.

In addition, in another communication dealing with the protection of indigenous people's right to participation, the Human Rights Committee declared through its General Comment 23(50)<sup>59</sup> on article 27:

Culture manifests itself in many forms including a particular way of life associated with the use of land resources, especially in the case of indigenous people ... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minorities communities in decision which affect them.<sup>60</sup>

The other significant element of the RTD found in treaties is the international community's obligation to cooperate for the realisation of human rights.<sup>61</sup> For instance, this obligation is reiterated by the ICESCR in articles 2(1) and 11(1) and (2), which compel members of the international community to work together for human well-being. The UN Committee on Economic, Social and Cultural Rights highlights

<sup>57</sup> *Chief Bernard v Canada*, Communication No 167/1984, views adopted 26 March 1990, Report of the Human Rights Committee, vol II, UN doc A/45/40, 1-30.

<sup>58</sup> See K Mynnti 'The right of indigenous peoples to participate in development projects' in M Scheinen & M Suksi (eds) *Human Rights in Development Yearbook 2002* (2005) 238.

<sup>59</sup> Report of the Human Rights Committee, vol I, UN doc A/49/40, 107-110.

<sup>60</sup> Mynnti (n 58 above) 239.

<sup>61</sup> UNDRTD art 6(1).

this obligation in General Comment 3<sup>62</sup> on the nature of state parties' obligations. In this General Comment, the Committee is unequivocal in underlining the importance of the UNDRTD and urges state parties to the ICESCR to comply with all 'the principles recognized therein'.<sup>63</sup>

#### 4.1.2 The African Human Rights System

At the African regional level, without even relying on article 22 of the African Charter, which expressly provides for the RTD, an interdependent reading of human rights provided for in the Charter enabled the African Commission on Human and Peoples' Rights (the African Commission) to infer the right to food in the Charter and rely on it to find the violation of RTD. In *SERAC & Another v Nigeria*,<sup>64</sup> two non-governmental organisations brought before the African Commission a communication on behalf of the Ogoni people against Nigeria, concerning contracts for oil exploitation on their land by the Shell Company. They claimed, inter alia, the violation of the right not to be discriminated against,<sup>65</sup> the violation of the rights to life,<sup>66</sup> family,<sup>67</sup> property,<sup>68</sup> health,<sup>69</sup> environment,<sup>70</sup> and the right of all people to freely dispose of their wealth and natural resources in their own interest.<sup>71</sup>

The African Commission found the violation of the rights to health, environment, and of people to freely dispose of their wealth and natural resources. More importantly, some of these rights were interpreted to have included the right to food, which is not provided for by the Charter. Furthermore, the RTD was also inferred by the right to food. The African Commission held:

The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22).

<sup>62</sup> General Comment No 3, The nature of States parties' obligations (Fifth session, 1990), UN Doc. E/1991/23, annex III at 86 (1990), reprinted in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 14 (2003).

<sup>63</sup> General Comment No 3 para 14.

<sup>64</sup> *SERAC & Another v Nigeria*, ACHPR, 2001, 15th Annual Activity of the African Commission 2001, 2002. Banjul, the Gambia.

<sup>65</sup> Article 2.

<sup>66</sup> Id art 4.

<sup>67</sup> Id art 18.

<sup>68</sup> Article 14.

<sup>69</sup> Article 16 of the ACHPR.

<sup>70</sup> Id art 24.

<sup>71</sup> Id art 21.

By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.<sup>72</sup>

This interconnectedness reading of human rights led Kamga and Fombad to claim that in *SERAC*, ‘the rights alleged to have been violated are all building blocks of the RTD’.<sup>73</sup>

Furthermore, in the *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*,<sup>74</sup> the DRC took Burundi, Rwanda and Uganda in front of the African Commission. The DRC alleged that it was under attack by the defendants’ military, which had invaded its border provinces in the eastern part of the Congo and encroached upon articles 2 (freedom from discrimination), 4 (right to life), 6 (personal liberty and protection from arbitrary arrest), 12 (freedom of movement), 16 (right to health), 17 (right to education), 19 (right to equality and rights), 20 (right to self-determination), 21 (free disposal of wealth and resources), 22 (RTD) and 23 (right to national and international security and peace) of the African Charter. The African Commission found in favour of the DRC. It held that

[the] deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.<sup>75</sup>

This is another interdependent reading of rights that are constitutive elements of the RTD. In this case, for the achievement of the RTD, the right to wealth and natural resources is combined.

A similar trend was followed by the Commission in the *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*.<sup>76</sup> In this case, after having been dispossessed of their land and natural resources by Kenya, the Endorois Community took the matter to the Commission for violation of articles 8,<sup>77</sup> 14,<sup>78</sup> 17,<sup>79</sup> 21<sup>80</sup> and 22<sup>81</sup> of

<sup>72</sup> *Endorois case* para 150.

<sup>73</sup> Kamga & Fombad (n 12 above) 213.

<sup>74</sup> Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

<sup>75</sup> *DRC case* para 95.

<sup>76</sup> Communication 276/2003.

<sup>77</sup> Freedom of conscience and religion.

<sup>78</sup> Right to property.

<sup>79</sup> Right to culture.

<sup>80</sup> Rights to free disposition of natural resources.

<sup>81</sup> RTD.

the ACHPR by the Republic of Kenya.<sup>82</sup> The Commission found for the applicants. It used the opportunity to clarify the all-inclusive nature of the RTD, which include non-discrimination, participation, accountability and transparency, equity and choices.<sup>83</sup> The Commission went further and explained that:

[D]evelopment is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states ‘... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available’. Freedom of choice must be present as a part of the right to development.<sup>84</sup>

This was indeed another consideration of ‘the interconnectedness and seamlessness of the rights contained in the African Charter’<sup>85</sup> in defining the RTD. This approach was reiterated by the African Court on Human Rights in its handling of the *Ogiek* case.<sup>86</sup> In this case, failure by the government of Kenya to put a hold on the eviction of the *Ogiek* community from their land as requested by the African Commission, which was seized of the matter by the *Ogiek* people, and led to the Commission taking the matter to the African Court on Human Rights as empowered by article 5(1a) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples. It alleged that Kenya violated articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter. The court found in favour of the *Ogiek* community and with special attention to the RTD, it relied on the interconnectedness reading of elements of the right. In doing so, it relied strongly on article 23 of the UN Declaration on the Rights of Indigenous People, which reads as follows:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the *right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them* and, as far as possible, to administer such programmes through their own institutions.<sup>87</sup>

<sup>82</sup> See Communication 276/2003 para 22.

<sup>83</sup> Communication 276/2003 para 277.

<sup>84</sup> *Endorois* case paras 227–228.

<sup>85</sup> OC Okafor “Righting” the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples’ Rights’ in Marks (ed) (n 23 above) 55.

<sup>86</sup> *African Commission on Human and Peoples’ Right v Republic of Kenya*, judgment in Application 006/2012.

<sup>87</sup> See *Ogiek* case, para 209. For a thorough analysis of the *Ogiek* case, see SD Kamga, *The Right to Development in the African Human Rights System* (2018).

While the right to participation is emphasised, it should apply when the right to health, housing and other economic and social programmes are concerned. This is another clarification of the composite future of the RTD that should be understood with consideration of the interconnectedness of its elements.

#### 4.1.3 The Inter-American Human Rights System

In the Inter-American human rights system, the interdependence-based interpretation of human rights is likely to lead to the realisation of the RTD, which is not provided for in the American Convention on Human Rights. This was demonstrated through the *Awas Tingni community v Nicaragua*<sup>88</sup> dealing with indigenous people's communal lands rights in the Inter-American Court of Human Rights.<sup>89</sup> As a result of the failure by the state to demarcate the communal land of the indigenous Awas Tingni community – to guarantee the community's right to property over its ancestral lands and natural resources, and the trespassing by the state, which had approved a logging concession on community lands – the Inter-American Commission, empowered by article 62 of the Inter-American Convention on Human Rights, took the case to the Inter-American Court<sup>90</sup> on Human Rights. In its initiative, the Inter-American Commission relied on article 27 of the ICCPR, which enabled the UN Human Rights Committee to provide an interdependent reading of human rights for the protection of indigenous people's rights to land and resources. Nevertheless, the court found the violation of the right to property and the right to judicial protection provided by articles 21 and 25 of the Inter-American Convention on Human Rights respectively. Interestingly, in finding the violation of the right to property, the court adopted an interdependence approach to human rights that could be used for the protection of the RTD, where it is not provided for.<sup>91</sup> The court held as follows:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own *territory*: the close ties of indigenous people with

<sup>88</sup> Inter-American Court of Human Rights, *The case of the Mayagna (sumo) Awas Tingni Community v Nicaragua*, judgment of August 31, 2001.

<sup>89</sup> For a further analysis of this case, see Scheinin (n 47 above) 279.

<sup>90</sup> If the state in question has accepted the jurisdiction of the Inter-American Court in accordance with art 62 of the American Convention, and the Commission considers that the state has not complied with the recommendations of the report approved in accordance with art 50 of the American Convention, it shall refer the case to the court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary. See also art 45 (Referral of the Case to the Court) Rules of Procedure of the Inter-American Commission on Human Rights.

<sup>91</sup> Scheinin (n 47 above) 279.

the land must be recognised and understood as the *fundamental basis of their culture, their spiritual life, their integrity and economic survival*. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve *their cultural legacy and transmit it to future generation*.<sup>92</sup>

In this case, the right to property was not reduced to the possession and production, but taken to include the right to a territory, culture, spiritual life, integrity, economic survival and sustainable development; as it also includes the need to ensure that future generations benefit from cultural legacy. This is indeed a reading of the right to property, which is likely to protect the RTD in an environment disposed to protecting civil and political rights.

#### 4.1.4 The European Human Rights System

In the European human rights system notorious for its reluctance to protect collective rights comprising elements of the RTD, an interconnectedness reading of human rights is also likely to achieve the right under discussion. This was observed in the case of *G and E v Norway*,<sup>93</sup> where in a case of land claimed by some indigenous Sami people, the European Commission on Human Rights unequivocally acknowledged that under article 8, which provides for the right to private life, family, and home in the European Convention on Human Rights, ‘a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as “private life”, family life or “home”’.<sup>94</sup> Even though in this case the factual elements of the case did not benefit the claimants, the principle was recognised and applied in *Lopez Ostra v Spain*.<sup>95</sup>

In *Lopez Ostra*, an interconnectedness-based interpretation led the European Court of Human Rights to find that the environmental damage caused by a plant set up to manage waste from leather tanneries constituted a violation of the right to private life, family and home (article 8 of the European Convention). According to the court, in permitting the building of the plant in a residential area, ‘the state had failed to strike the appropriate balance between the economic well-being of the broader

<sup>92</sup> Inter-American Court of Human Rights, *The case of The Mayagna (sumo) Awas Tingni Community v Nicaragua*, Judgment of August 31 2001 para 149. (My emphasis).

<sup>93</sup> *G and E V Norway* European Commission of Human Rights, *Decisions and Reports*, vol 35 (1984) 30–45.

<sup>94</sup> As per art 8 of the European Convention on Human Rights.

<sup>95</sup> *Lopez Ostra v Spain*, European Court of Human Rights, Judgment of December 9, 1994.



community and the respect for individual right under Article 8'.<sup>96</sup> In all these cases, whether in Africa, the Americas or Europe, the avenues provided by treaties for the achievement of the RTD led Scheinin to argue as follows:

Irrespective of whether a specific human right treaty includes an explicit provision of the RTD (the African Charter), or not most if not all other treaties provide at least some potential for claims related to the RTD. Due to the composite nature of the RTD, this should not come as a surprise.<sup>97</sup>

Put differently, an interconnectedness reading of human rights is conducive to achievement of the RTD. However, this reading of the RTD may cast doubt on the need to have it as a specific human right or on its added value, especially if its elements are already incorporated into existing treaties. The following subsection will ascertain the value of the RTD as it relates to other human rights.

#### 4.1.5 The Interdependent Interpretation of Human Rights and the Added Value of the RTD

The fact that elements of the RTD are already incorporated into core international and regional treaties may raise questions on the need to have a RTD. Nevertheless, as explained by Mathews, the RTD 'is less about establishing a new substantive right, and more about framing a system of duties that might give better effect to existing rights'.<sup>98</sup> Firstly, it is a system in which not only governments are bearers of human rights, but in which international cooperation (including with non-state actors) is significant for the realisation of these rights. Secondly, it is a system that compels states to, while mainstreaming human rights into economics, ensure that development policies and programmes resulting from international relations and cooperation are equitable and not detrimental to the achievement of human rights in other states. Thirdly, it is a framework containing normative processes to examine the human rights impacts of international institutions' activities in other states, especially the less developed ones.<sup>99</sup> Salama observes: 'the right to development necessarily echoes the core principles of all human rights including, first and foremost, its constitutive elements of equity, non-

<sup>96</sup> For more similar reasoning, see *Hatton and Others v the United Kingdom*, European Court of Human Rights, Chamber Judgment of October 2, 2001, with special attention to paras 97 and 106; for more analysis of these cases, see Scheinin (n 47 above) 281. Id 283.

<sup>97</sup> Id 283.

<sup>98</sup> Mathews (n 48 above).

<sup>99</sup> S.Randolph and H.Green 'Theory in practice: A new framework and proposed assessment criteria' UN *Realising the Right to Development – Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013) 404.

discrimination, active and meaningful participation, accountability and transparency.<sup>100</sup>

From this perspective, UN treaties, including the Convention on the Elimination of All Forms of Discrimination against Women,<sup>101</sup> Convention on the Rights of the Child<sup>102</sup> and Convention on the Rights of Persons with Disabilities,<sup>103</sup> that prohibit discrimination, call for an inclusive society and emphasise social and economic development that can also be tapped into for the realisation of the RTD.

In this context, while submitting their reports to the various UN Committees in charge of monitoring treaties, as well as to overseeing bodies at regional levels, state parties can also report on the steps taken to give effect to the RTD by tapping into the interconnectedness of human rights included therein. Scheinin argues that 'existing human rights bodies are quite capable of taking the interdependence of human rights duly on board when interpreting the provision of one treaty'.<sup>104</sup> From this perspective, realising the RTD does not depend on being a proponent or opponent of the right, but rather relies on 'the interconnectedness and seamlessness of the rights contained [in international treaties]'.<sup>105</sup> In other words, it is important to pay attention to the organic nexus between human rights in seeking solutions for the achievement of the RTD.<sup>106</sup> This seems to be an expansive interpretation of human rights, which is risky for their implementation. It is risky because the implementation may be repetitive in a context of limited resources and consequently not produce the expected outcome. Nevertheless, the expansive interpretation is likely to be valuable as human rights are known to be universal, indivisible and interdependent.<sup>107</sup> Villaroman observes:

International law is a legal system. Its rules and principles (i.e. its norms) act in relation to, and should be interpreted against the background of, other rules and principles. As a legal system, international law is not a random collection of such norms. *There are meaningful relationships between them* ... In applying international law, it is often necessary to

<sup>100</sup> I Salama 'The right to development at 25: renewal and achievement of its potential' UN Realising the right to development – Essays in Commemoration of 25 Years of the United Nations Declaration on the right to development (UN Geneva 2013) 486.

<sup>101</sup> GA res 34/180 of 18 December 1979.

<sup>102</sup> GA res 44/25 of 20 November 1989.

<sup>103</sup> GA res 61/106 of 13 December 2006.

<sup>104</sup> Scheinin (n 47 above) 275.

<sup>105</sup> Okafor (n 85 above) 55.

<sup>106</sup> U Baxi 'The New International Economic Order, basic needs and rights: Note towards development of the right to development' (1983) 23 *India Law Journal* 235.

<sup>107</sup> 1993 Vienna Declaration (n 16 above).

determine the precise relationship between two or more rules and principles that are both valid and applicable in respect of a situation.<sup>108</sup>

Indeed, there are significant correlations between human rights, and their implementation, and the interconnectedness of these rights are instrumental for their effectiveness. The reading of human rights from indivisibility and interdependency perspectives is well in line with the Vienna Convention on the Law of Treaties<sup>109</sup> according to which 'treaties [and other human rights instruments] are interpreted in the light of their context and their object and purpose'.<sup>110</sup>

However, for Vandenbogaerde, the fact that essential components of the RTD are already included in various treaties and conventions or rather 'strongly rooted in international and regional human rights law',<sup>111</sup> should justify its dissolution, as the right does not add any value. It could be argued that an interconnectedness reading of human rights for the sake of the RTD would be cumbersome for state reporting on the implementation of human rights.

On the contrary, the abundance of tools or human rights instruments will generally enhance prospects for a better implementation of the rights at hand. Neuman is of the view that 'overlapping and interrelated restatements of human rights are characteristic of the historical and political contexts within which the negotiation of human rights instruments takes place'.<sup>112</sup> This assertion suggests that the higher the number of instruments, the higher the prospect of a better protection of human rights. Sharing this view and in contrast with Vandenbogaerde's opinion, Mathews observes: 'the bigger the toolbox the better as you will always need it at some point, as long as it is not a spanner in the works'.<sup>113</sup>

There are however some challenges in applying the RTD in treaty mechanisms. For instance, although wealthy countries have committed to allocate 0.7% of their GDP to development assistance<sup>114</sup> for developing countries, it is not easy to quantify the development assistance needed for the right to become a reality. Furthermore, the RTD goes beyond states that are party to treaties. It encompasses non-state actors such

<sup>108</sup> N Villaroman 'Rescuing a troubled concept: An alternative view of the right to development' (2011) 29(1) *Netherlands Quarterly of Human Rights* 26.

<sup>109</sup> 1969 Vienna Convention on the Law of Treaties, art 31 para 1.

<sup>110</sup> K De Feyter 'Towards a multi-stakeholder agreement on the right to development' in Marks (ed) (n 23 above) 97, 98.

<sup>111</sup> Vandenbogaerde (n 29 above) 195.

<sup>112</sup> G Neuman 'Human rights and constitutional rights: Harmony and dissonance' 2003 (55) *Stanford Law Review* 1863.

<sup>113</sup> Mathews (n 48 above).

<sup>114</sup> See Resolution 26/26 of 24 October 1970 at the International Conference on Financing Development, reaffirmed in 2002 in Monterrey, Mexico.

as international financial and trade institutions (including the World Bank, International Monetary Fund and the World Trade Organization), transnational companies and intergovernmental organisations that play significant roles in the realisation of the RTD. This scenario raises the question of how to hold non-state actors accountable. Nevertheless, these challenges can be addressed through fruitful dialogues with non-state actors. This approach was implemented by the Committee on Economic, Social and Cultural Rights that held consultative meetings with organisations on ‘how to mainstream trade-related concerns in their work and on extraterritorial obligations’.<sup>115</sup>

In sum, the UN treaty system, as well as regional human rights systems, provides opportunities to turn the RTD ‘from rhetoric to reality’.<sup>116</sup> Scheinin correctly argues that there is<sup>117</sup>

a viable option to strive for the realization of the right to development also under existing human rights treaties and through their monitoring mechanisms, provided that an interdependence-based and development-informed reading can be given to the treaties in question.

## **4.2 The Charter-based System: Tapping into the Work of the UN Human Rights Council**

As mentioned earlier, the Charter-based system is built around the UDHR and the UN Charter. In order to promote and protect human rights, the following UN organs were established: The General Assembly, the Security Council, the Secretary-General, the UN High Commission for Human Rights and the UN Commission on Human Rights (now the Human Rights Council).<sup>118</sup> The latter’s work is informed by an interdependent reading of human rights. In fact, the establishment of the Human Rights Council was based on the recognition that ‘development and human rights are the pillars of the United Nations system, and ... that development, peace and security and human rights are interlinked and mutually reinforcing’.<sup>119</sup> As a result of their flexibility, the Council’s mechanisms that are likely to be conducive to the realisation of the RTD are the Universal Periodic Review (UPR) and the Special Mechanisms or Procedures.

### **4.2.1 The Universal Periodic Review**

<sup>115</sup> Mathews (n 48 above); also UN Doc E/2001/22, paras 636–653 of 2000.

<sup>116</sup> Marks ‘The human right to development: Between rhetoric and reality’ 2004 (17) *Harvard Human Rights Journal* 139–168.

<sup>117</sup> Scheinin (n 47 above) 274.

<sup>118</sup> GA res 60/251 (2006).

<sup>119</sup> UN 2006, Human Rights Council, UN Doc A/RES/60/251.

The UPR is a process in which states examine their human rights records on an equal footing within the UN Human Rights Council, established in 2006<sup>120</sup> as a replacement of the UN Commission on Human Rights, which was criticised for being politicised and shielding developed countries from criticism.<sup>121</sup> Unlike the UN treaty mechanism where the monitoring of human rights is handled by a Committee of experts, the UN Council is made up of 47 member States, (one third of which are elected into the council every year by an absolute majority of the UN General Assembly). The governments are mandated to monitor human rights records in a spirit of interchange and cooperation. States have at most two consecutive mandates of three-year terms. In this forum, the principles of universality, indivisibility and interconnectedness of all human rights apply across the board. According to the UN Council Resolution's Preamble, 'all human rights are mutually reinforcing and must be treated in a fair and equal manner, on the same footing and with the same emphasis'. This is an entry point in which to mainstream the RTD in human rights in order for it to be assessed by the UN Human Rights Council through the UPR. In fact, the inclusion of the RTD in the work of the UN Human Rights Council is unambiguous. The Resolution establishing the UN Council reads:<sup>122</sup>

The work of the Council shall be guided by the Principle of Universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political rights, economic, social and cultural rights, including *the right to development*.

Therefore, the advent of the UN Human Rights Council provides an opportunity to mainstream the RTD into the UN human rights system and advance its realisation. Although the main challenge of the RTD within this forum could be the enforcement of the UN Human Rights Council resolutions, the lack of enforcement will not be directly linked to the nature of the RTD, but to challenges related to the enforcement of international law in general.<sup>123</sup> Nevertheless, in terms of standard setting,

<sup>120</sup> GA res 60/251 (2006).

<sup>121</sup> H Steiner, P Alston and R Goodman *International Human Rights in Context: Law, Politics, Morals – Text and Materials* (2008) 791–792.

<sup>122</sup> Paragraph 4 (my emphasis).

<sup>123</sup> For more on challenges related to the enforcement of international law, see O Bradford and A Ben-Shahar 'Efficient Enforcement in International Law' 2012 (12)2 *Chicago Journal of International Law*; H Koh 'How is international human rights law enforced?' 1998 (74)3 *Indiana Law Journal* 1397–1417; Michael (ed) *The Role of Law in International Politics* (2000); G Downs and M Jones 'Reputation, compliance and international law' 2002 (31) *Journal of Legal Studies* S95 – S114; J Goldsmith and E Posner *The Limits of International Law* (2005).

the RTD is well established in areas of concern at the UN Human Rights Council and should simply be mainstreamed in the Council's activities, especially through the UPR.

#### 4.2.2 The UN Special Procedures

The UN Special Procedures or Mechanisms are specific processes aiming to secure respect for human rights. The UN Human Rights Council is empowered to adopt special mechanisms for the promotion and protection of human rights. These mechanisms often focus on specific human rights thematic or are country-specific. They are often in the forms of a 'working group', 'Special Rapporteur' or an 'Independent Expert', to list but a few. The importance of these mechanisms cannot be overstated. The former UN Secretary-General Kofi Annan portrayed the special mechanisms as 'the crown jewel of the [UN human rights] system'.<sup>124</sup>

There are 44 thematics,<sup>125</sup> including the Special Rapporteur on the RTD (focusing directly on the RTD) and the mandates on extreme poverty,<sup>126</sup> international solidarity,<sup>127</sup> foreign debt<sup>128</sup> as well as an Independent Expert on the promotion of a democratic and equitable international order,<sup>129</sup> among others that are linked with the RTD.

In their mandates, Special Rapporteurs, especially those who have thematics that are linked with the RTD, can make the necessary connections between the issues at hand and the achievement of the RTD. For instance, while attending to issues of poverty, foreign debt, international solidarity, democracy and an equitable international order; respective Special Rapporteurs can show that a deficit in these thematics hinders the realisation of the RTD. Subsequently, their recommendations should address the main thematic as well as the RTD. In reality, it is all about mainstreaming the RTD into the work of the Special Rapporteurs. From this perspective, the Special Procedure would play a significant role in shaping the normative content of the RTD while at the same time monitoring how states comply with the right in practice and would then in turn recommend tangible measures to ensure compliance.

However, the Special Procedures face financial and other resource challenges, which may hinder their ability to tackle various issues

<sup>124</sup> Steiner *et al* (n 121 above) 765.

<sup>125</sup> Thematic mandates [http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=) (accessed 11 January 2018).

<sup>126</sup> 1998 CHR1998/25.

<sup>127</sup> 2005 CHR 2005/55.

<sup>128</sup> 2000 CHR, 2000/10.

<sup>129</sup> 2011 Human Rights Council Resolution, 18/6.

simultaneously. Nonetheless, it remains possible if one looks at human rights in a broader way and assesses all human rights as they interconnect to one another. According to Villaroman '[human rights] norms, all operating simultaneously and reinforcing one another, contribute to the legal validity and strength of the broader human rights discourse and standards'<sup>130</sup> which ultimately address human dignity at the centre of RTD discourse. Therefore, instead of doing a 'disservice'<sup>131</sup> to other human rights, the amount of work on the RTD has fortified other human rights, leading to its ascension into the sphere of customary law<sup>132</sup> and is building momentum for its ascent into treaty law.

## 5 Concluding Remarks

The aim of this article was to explore challenges and opportunities for the realisation of the controversial RTD through the UN system. The article began with a brief overview of the RTD, which is inalienable, securing the right to participation and self-determination of beneficiaries. It also encompasses all fundamental freedoms, both collective and individual, and underlines the significant place of international cooperation for its achievement. Subsequently, the article found that the controversy on the legal value of the RTD is due to the politisation of the debate on the right. The article showed that this disagreement is the main hindrance to the achievement of the RTD and attempted to find solutions within the UN human rights system made of the treaty- and the Charter-based systems.

The article found that in spite of the non-binding character of the RTD, the treaty-based system is conducive to its achievement, especially if 'an interdependence-based and development-informed reading [is applied to the UN] treaties'.<sup>133</sup> It also relied on the interconnectedness-based interpretation of human rights in regional human rights systems to show how this can be done at a global level. Furthermore, it found that the Charter-based system, with special attention to the work of the UN Human Rights Council, crafted around the notion of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to promoting all human rights, including the RTD, is conducive to the realisation of the right under discussion.

In addition, the article found that in the Charter-based system, the thematics allocated to Special Rapporteurs would be conducive to the realisation of the RTD if the Rapporteurs establish the linkages between the thematics and the RTD principles such as, for example, eradicating

<sup>130</sup> Villaroman (n 108 above) 27.

<sup>131</sup> Vandenbogaerde (n 29 above) 209.

<sup>132</sup> Baxi (n 18 above).

<sup>133</sup> Scheinen (n 47 above) 134.

poverty and improving living standards. In short, the thematics would lead to the achievement of the RTD if Special Rapporteurs consider human rights in a more comprehensive manner and evaluate all human rights as they interconnect to one another. Ultimately, the article urged all stakeholders to move beyond theoretical discussions and controversies and look at how the already operational UN system can be accessed to improve living standards and protect human dignity in general. Whereas this approach cannot be a substitute to a treaty on the RTD, it helps in seeking better protection of human dignity while waiting for a potential convention on the topic.