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THE RIGHT TO DEVELOPMENT: EXPLORING THE LEGAL BASIS OF A SUPERNORM

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I. INTRODUCTION

A. *Background*

It was during the successive decolonization in the 1960s when the right to development was first articulated by developing countries, particularly those in Africa, as a necessary companion of their newly

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acquired political emancipation from their colonial masters.[1] As originally envisioned, the right to development is not a human right which is claimable by individuals against their own state, but rather a people's right which is opposable *erga omnes*—that is, claimable vis-à-vis the international community as a whole. After the wave of decolonization in the 1960s, the right to development took the form of a demand by developing countries against developed ones to bring to an end the perpetuation of, whether perceived or real, colonialist policies of economic domination and exploitation.[2] The right became associated with two specific demands, namely, the establishment of a "new international economic order" which would be more conducive to the economic progress of developing countries, and the adherence to the notion that peoples must have full control over their natural wealth and resources.[3] Because of their economic dependency on developed countries, the newly independent developing countries were pushing for "a restructuring of the global economic system through a new international economic order."[4] Thus, in the 1960s, while the Western world was trumpeting individual human rights guaranteed in the Universal Declaration of Human Rights and the two international human rights covenants, a significant number of developing countries were testing the waters, so to speak, by crafting a collective right to development to bolster their demand for fundamental changes in their economic relationship with the developed world. During a 1967 meeting of the Group of 77 developing countries, the foreign minister of Senegal emphatically declared that

> Our task is to denounce the old colonial compact and to replace it with a new right. In the same way that developed countries proclaimed individual rights to education, health and work, we must claim here, loud and clear, that the nations of the Third World have the right to development.[5]

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1. Mohammed Bedjaoui, *The Right to Development, in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 1177 (Mohammed Bedjaoui ed., 1991). This is not to say, however, that the right to development is operative only in the immediate aftermath of decolonization. The right remains a continuing collective entitlement of peoples.

2. David Beetham, *The Right to Development and Its Corresponding Obligations, in* DEVELOPMENT AS A HUMAN RIGHT 79, 79-80 (Bard A. Andreassen & Stephen Marks eds., 2006).

3. *Id.* at 79.

4. Khurshid Iqbal, *The Declaration on the Right to Development and Implementation*, 1 Pol. Persp. Graduate J. 1, 4 (2007).

5. Laurent Meillan, *The Right to Development and the United Nations*, 34 DROIT EN QUART MONDE 14 (2003).

The concept of the right to development was first recognized by the U.N. Commission on Human Rights in 1977.[6] The then Commission acknowledged the right to development as a "human right" and recommended to the Economic and Social Council that it should invite the Secretary-General to undertake a study on the subject. With the creation of a Working Group of Government Experts on the Right to Development in 1981, the debate on the right was formally elevated in the U.N. agenda.[7] The Declaration on the Right to Development was subsequently adopted by the U.N. General Assembly in 1986 in an almost unanimous vote, with only the United States casting a negative vote.[8] The World Conference on Human Rights held in 1993 reaffirmed the right to development, as formulated in the 1986 Declaration, as a universal and inalienable right and an integral part of fundamental human rights.[9] During this conference, a consensus was reached among developed and developing countries that the right to development is indeed a human right.[10] In 2000, world leaders attending the U.N. Millennium Summit reached an agreement on a set of goals and targets for fighting extreme poverty, environmental degradation, disease, hunger and discrimination against women, which later became the Millennium Development Goals. The Summit Declaration included a pledge "to making the right to development a reality for everyone and to freeing the entire human race from want."[11]

B. *Criticisms Against the Right to Development*

However, the right to development is not without criticisms both with respect to its basis in international law and its susceptibility to

6. *Development—Right to Development*, Office of the U.N. High Commissioner for Human Rights, http://www2.ohchr.org/english/ issues/development/right/index.htm.

7. *Id.*

8. *The Declaration on the Right to Development*, G.A. Res. 41/128, U.N. GAOR, 41st Sess., 97th plen. mtg., U.N. Doc A/RES/41/128 (1986) [hereinafter G.A. Res. 41/128]. Eight other countries abstained.

9. *Vienna Declaration and Programme of Action*, adopted by the U.N. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, Part I, § 10, U.N. Doc. A/CONF.157/24.

10. Iqbal, *supra* note 4, at 6.

11. *The Millennium Declaration*, G.A. Res. 55/2, ¶ 11, U.N. GAOR, 55th sess., U.N. Doc. A/RES/55/2 (Sept. 18, 2000). While these high-level conferences have elevated the status of the right to development in the political sphere, they are not "sources" of international law *stricto jure*. But they may be taken as evidence of *opinio juris* which, if coupled with a general practice among a large number of states, may be creative of customary international law.

implementation in actual controversies.[12] Some burning questions remain to be answered and some apparent answers need to be questioned: Does the right to development have a firm basis in international law to begin with? Has it crystallized into something more than a "soft law"[13] to be of any practical use to international lawyers? What is the precise content of the right to development and against whom can it be claimed?

Some skeptics dismiss the validity of the right to development because it is allegedly a "right to everything," the "sum of all human rights" or an amalgamation of all the existing individual human rights.[14] They argue that the right does not add anything new and substantial to human rights law because all it does is to combine existing individual human rights. This misconception about the right to development is fuelled by at least two official U.N. reports that endorse the view that the right to development is less of a separate right than a synthesis of all other human rights.[15] The purported dual nature of the right also fans the fire of confusion surrounding it.

Another criticism commonly raised against the right to development is its alleged "non-justiciable" nature.[16] Indeed, the same criticism is also levelled against economic, social, and cultural rights in general. Hans Kelsen explains why this criticism is valid by arguing that "the essential element [of a right] is the legal power bestowed upon the [individual] by the legal order to bring about, by a law suit, the execution of a sanction as a reaction against the non-fulfilment of the

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12. *See, e.g.*, Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473 (1985); Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 20 (1988).

13. The term "soft law" is used to refer to certain norms whose underlying basis lies outside the traditional sources of international as stipulated in Article 38(1) of the International Court of Justice (ICJ) Statute and are, therefore, non-binding. Other terms are used to refer to soft law such *pré-droit, para-droit and péri-droit*, all of which connote the idea of a moral norm that may or may not evolve into a legal rule. *See* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. OF INT'L L. 413, 421 (1983); *see also* Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L COMP. L.Q. 850 (1989).

14. YASHI GAI, WHOSE HUMAN RIGHT TO DEVELOPMENT? 13-15 (Commonwealth Secretariat 1989).

15. *See* The Secretary-General, Report of the Secretary General: *The International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Cooperation, Including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and Fundamental Human Needs*, U.N. Doc, E/CN.4.1334 (Jan. 2, 1979); *see also* Report of the Working Group of Governmental Experts on the Right to Development, Commission on Human Rights, 38th Sess., Prov. Agenda Item 8, at 3, U.N. Doc E/CN.4/1489, (Feb. 11, 1982).

16. *See, e.g.*, Donnelly, *supra* note 12.

obligation."[17] Jack Donnelly is likewise of the view that human rights must entail clear legal obligations on the part of "duty-holders" if they are to qualify as rights in the real sense.[18]

Finally, the right to development has been criticized as a right of states to pursue a narrow model of economic development over the human rights of the people of the state invoking the right.[19] The economic development of Singapore and the relative curtailment of basic freedoms in that country is a usual example given to bolster this criticism.[20] With this right, the state is allegedly prone to sacrificing the human rights of its people in order to pursue its own version of economic development. In particular, the criticism is based on the fear that "[t]he right to development [will allow] states where necessary to put the interests of investors over the interests of other human beings."[21]

C. *Legal Positivism as a Methodology*

Using legal positivism as a distinct methodology for finding the "law," this Article will demonstrate that the right to development is a legally binding rule of international law. In the process, this Article aims to refute the criticisms levelled against the right to development. In order to do this, it is essential to establish the right's mandatory nature and debunk notions that the right belongs to the realm of "soft law."[22] The term "soft law" is used to refer to certain norms whose underlying basis lies outside the category of "sources" of international as stipulated in Article 38(1) of the International Court of Justice (ICJ) Statute and are, therefore, non-binding.[23] Other terms are used to refer to "soft law"

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17. Alston, *supra* note 12, at 34 (citing HANS KELSEN, PURE THEORY OF LAW 125-26 (M. Knight trans. 1967)).

18. *See, e.g.*, Donnelly, *supra* note 12, at 473.

19. Anne Orford, *Globalization and the Right to Development*, *in* PEOPLE'S RIGHTS 127, 135 (Philip Alston ed., 2001).

20. Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 745 (1996).

21. Orford, *supra* note 19.

22. *See generally* Gunther F. Handl, *A Hard Look at Soft Law: Remarks*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

23. Article 38(1) of the Statute of the International Court of Justice provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;

such as *pré-droit, para-droit, and péri-droit,* all of which connote the idea of a moral norm that may or may not evolve into a legal rule.[24]

The idea that international law is a product of state consent is encapsulated in Article 38(1) of the ICJ Statute which "is widely recognised as the most authoritative and complete statement as to the sources of international law."[25] Therefore, any effort in finding the "source" from which the right to development emanates must be consistent with Article 38(1). The task at hand is in keeping with Ian Brownlie's advice to international lawyers "not to stray from the confines of positive international law."[26] This positivism demands the "envisaging [of] international law as positive law, i.e., as *lex lata.*"[27] According to Prosper Weil, this approach requires lawyers to maintain the "distinction between *lex lata* and *lex ferenda* . . . with no abatement of either its scope or its rigor."[28] This Article will demonstrate that the concept of the right to development regroups and consolidates into a single rubric certain fundamental norms which are already in existence under international law. This being the case, the right draws its legal strength from the simultaneous and interlocking operation of these fundamental norms in the international system.

This Article will argue that separate legal norms which are already in existence in international law actually coalesce and reinforce one another to form a "super-norm" which is the right to development. It will propose a new view on how this clustering of individual norms takes place in order to form an encompassing legal rule. While this "clustering process" is something novel, it will be shown that it does not digress from the accepted sources of international law and hence from legal positivism.

In discussing the individual norms that comprise the right to development, this Article traces their sources in international treaty, international custom, or the general principles of international law. Whenever there is a need to shed light on the *precise* contents of these

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> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38(1), June 26, 1945, 589 Stat. 1031, 3 Bevans 1179.

24. Oscar Schachter, *The Evolving International Law of Development,* 15 COLUM. J. OF TRANSNAT'L L. 1, 4 (1976).

25. MALCOLM N. SHAW, INTERNATIONAL LAW 70 (6th ed. 2008).

26. Ian Brownlie, *The Rights of Peoples in Modern International Law, in* THE RIGHTS OF PEOPLES 1, 14-15 (James Crawford ed., 1988).

27. Prosper Weil, *Towards Relative Normativity in International Law,* 77 AM. J. INT'L L. 413, 421 (1983).

28. *Id.*

norms (i.e. entitlements of the obligee and duties of the obligor), this thesis relies primarily on the resolutions adopted by the U.N. General Assembly as interpretative aids. While these resolutions are not per se "sources" of international law, their usefulness lies in being authoritative elaborations or elucidations of existing legal norms *as understood by states*.[29] Resorting to these resolutions in order to arrive at clearer and more precise legal norms, therefore, does not digress from the theory and methodology of legal positivism. It bears stressing that General Assembly resolutions are also consented to by at least the majority of U.N. Member States, thus creating a legitimate expectation that they will act consistently with what the resolutions state.[30] After all, the presumption is that states mean what they say and say what they mean in international fora. Aside from being authoritative aids for treaty interpretation, General Assembly resolutions may be taken as evidence of the *opinio juris* of states—an indispensable component of customary international law.

II. THE PURPORTED 'DUAL NATURE' OF THE RIGHT TO DEVELOPMENT AND ITS DILUTING EFFECT ON NORM-CREATION

While the adoption of the Declaration on the Right to Development in 1986 has brought to the fore important issues concerning the right's normative content,[31] it must be pointed out that the legal basis of the right is not derived from the declaration itself which, true to its name, is merely declaratory of its existence.[32] What is noteworthy in the Declaration is its explicit departure from the original conception of the right to development in the 1960s when it was understood as a collective entitlement of peoples. The Declaration defines the right to development as

> an inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, and contribute to, and enjoy economic, social, cultural, and political

29. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 145-46 (4th ed. 2004).

30. *Id.*

31. Stephen Marks, The Obstacles to the Right to Development 6-7 (Harvard Univ. Fracois-Xavier Bagnoud Ctr. for Health & Human Rights, Working Paper No. 17, 2003).

32. However, some commentators argue that resolutions adopted by the U.N. General Assembly may have a legal force depending on a set of factors. *See, e.g.*, Bedjaoui, *supra* note 1, at 1194.

> development in which all human rights and fundamental freedoms can be fully realized.[33]

From this formulation, it is clear that the right to development as envisaged by the drafters of the Declaration is both an individual human right to be enjoyed by every person and a collective right guaranteed to entire peoples. However, adding an "individual" dimension to the right to development does not give it added clarity and focus, instead such addition only adversely affects its normative strength. Isabella Bunn argues that the dual nature of the right creates "difficulties in identifying the beneficiaries and duty-holders under the right."[34] In addition, considering it as a right of *every* individual within a state makes it vulnerable to a serious definitional challenge. A proponent of this dualist perspective, Amartya Sen defined the right to development as "a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious freedoms and civil rights for all."[35] The over expansiveness of his definition is readily apparent because it describes the right to development, not only as a collection of virtually all human rights claims, but it is also a conglomeration of such collections. Sen also offered a definition of the concept of development as the "expansion of substantive freedom or capabilities of persons to lead the kind of lives they value or have reason to value."[36] What is meant by "development" of an individual? If it is the amalgamation or "sum" of all human rights guaranteed in the covenants,[37] why collapse them into one mega-right and on what basis? While this definition is a good exercise in philosophical abstraction, it falls short as a source of concrete entitlements on the part of the "rights-holder" and identifiable obligations on the part of the "duty-bearers."[38] Arjun Sengupta formulated yet another expansive definition of the right to development thus:

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33. *See* G.A. Res. 41/128, *supra* note 8 (emphasis added).

34. Isabella Bunn, *The Right to Development: Implications for International Economic Law*, 15 AM. UNIV. INT'L L.R. 1425, 1435 (2000).

35. Amartya Sen, *Human Rights and Development*, *in* DEVELOPMENT AS A HUMAN RIGHT: LEGAL, POLITICAL AND ECONOMIC DIMENSIONS 1, 5 (Bard Andreassen & Stephen Marks eds., 2003).

36. AMARTYA SEN, DEVELOPMENT AS FREEDOM 16, 35 (Alfred A. Knopf, Inc. 1999).

37. The right to development is sometimes described as "distilled" from existing individual and collective rights or the "sum" of them all. Roland Y. Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287, 323-24 (1983) [Rich, *An Emerging Human Right*].

38. In human rights parlance, a particular right is said to confer entitlements in favor of an individual or a people who are referred to as the "rights-holder." Such entitlements may be demanded primarily from states or the international community who are referred to as the "duty-bearers." On the dichotomy between rights and duties, see HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 180-81 (2000).

> The right to development refers to a process of development which leads to the realization of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process.[39]

The definition is littered with tautologies: a rights-based process of development is precisely one that produces human rights realization; and human rights realization is necessarily based on international human rights standards. But being tautological is not its most serious flaw. If one looks closer, it is difficult to find any value an individual or a people holds dear and aspires that is not included in this definition. In other words, every possible individual or societal "good" is encompassed by it. This, in fact, led many critics and sceptics alike to condemn the right to development as a "right to everything."[40]

It is in this context that David Beetham laments how the existing literature on the right to development has unnecessarily expanded the right well beyond its core meaning, and thus sacrificing its "clarity of focus" and diluting its normative force.[41] He pushes for the narrowing down of the right to development's definitional scope to "a nation's or people's right to economic development."[42] He observes that

> The more the right to development is expanded to include all possible aspects of development, the more difficult it becomes to specify what would count as a violation or infringement of the right, since almost anything might count as such, and the responsibility for not fulfilling it becomes correspondingly diffuse and unidentifiable. . . . In sum, a wide definition of the right to development provides a convenient excuse for the evasion of responsibility.[43]

It is not the conception of the right to development as an individual human right but rather its collective nature and inter-state dimension that truly makes it a legal tool to address the real problems faced by debtor countries.

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39. Arjun K. Sengupta, *On the Theory and Practice on the Right to Development*, 24 HUM. RTS. Q. 846 (2002).

40. Felix Kirchmeier, The Right to Development—Where Do We Stand?, 4 Friedrich Ebert Stiftung, Occasional Papers, No. 23, July 2006.

41. Beetham, *supra* note 2, at 81.

42. *Id.* at 95.

43. *Id.* at 83-84.

III. FROM NORM TO SUPERNORM: THE BASIS OF THE RIGHT TO DEVELOPMENT UNDER INTERNATIONAL LAW

A. *The Right to Development is a People's Right*

In order that the right to development may acquire a more compelling relevance in theory and practice, it is essential to re-envisage it as a "collective right"—that is, a people's right to be invoked *on their behalf* by their own state vis-à-vis the international community.[44] Mohammed Bedjaoui, a former judge of the ICJ and one of the exponents of the right to development, opines that "placing the right to development among human rights whose enjoyment we are all too prone to regard as being restricted to the human being as an individual" only weakens the right and "dangerously obscure[s] the real international aspects of the basic problem."[45] He concludes that the right to development is "much more a right of the State or of the people, than a right of the individual."[46] Expanding the right to development by making it both an individual and a collective right only muddles its conceptual clarity and dilutes its strength as a rule of international law. Because the intended beneficiary of the right to development is "the people"—which is here taken to mean as the community of persons with a political organization comprising a state, certain questions relating to representation or agency comes to mind. Who represents the people in the international system? Who can legitimately invoke the right to development on their behalf? The prevailing view is that the people can act in the international system only through their state, except in certain situations.[47] Ian Brownlie observes that, in the international system, "the primary obligors and obligees of the right to development—that is, the subjects in the strict sense of those who can either claim entitlements or are potential respondents to such claims—are States."[48] Similarly Roland Rich argues that there is "no effective means of implementing the right to development other than through

44. Kirchmeier, *supra* note 40, at 10.

45. Bedjaoui, *supra* note 1, at 1180.

46. *Id.* at 1184.

47. Some notable examples are people who are subjugated by a colonialist state; who are under an occupying or invading power; and who are subjugated by a racist state. Under these situations, these peoples in the exercise of their right to self-determination may act in the international system on their own behalf (usually through national liberation movements) without the intercession of the colonialist, occupying or racist state. *See, e.g.*, ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 90-95 (1986).

48. IAN BROWNLIE, THE HUMAN RIGHT TO DEVELOPMENT, STUDY PREPARED FOR THE COMMONWEALTH SECRETARIAT (1989).

States and their governments."[49] Therefore, owing to its unique nature and historical origin, the right to development is only applicable in the external relations between the developed and developing states (horizontal dimension), and not in the relations between a state and its own people or an individual (vertical dimension).

Sticking to the original formulation of the right to development as a collective right of a people preserves its conceptual clarity and focus as a legally binding rule. The original formulation makes possible the identification of precise entitlements and obligations on the part of the "rights-holder" and the "duty-bearers," respectively. Georges Abi-Saab argues that, in order for the right to development to qualify as a legally binding rule, the "active and passive subjects of the right and its content" must be clearly identified.[50] This identification of the "rights-holder" and "duty-bearer," and what is legally due to and from each, is essential in locating the metes and bounds of a right (i.e., what the right *is*). Christine Chinkin essentially agrees with this analysis by arguing that a rule is, or becomes, a legal rule if and when "certain legal consequences follow from its performance and its breach" and adds that "it must be possible both to determine breach and the legal outcome of any claim of breach."[51]

B. *The Two Components of the Right to Development Make It a Legal Right*

There is an urgent need to resist, both at an intellectual and practical level, the temptation to regard the right to development as the amalgamation of all human rights because it effectively dilutes the right's normative character and renders it ineffectual. This Article proposes to return to the core of the right to development—to narrow it down to its essential components—if it is to remain a functional concept. These components, designed to benefit developing states, are:

(1) Right to an independent process of economic development; and
(2) Right to international conditions favorable to the realization of ESC rights within states.

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49. Roland Rich, *The Right to Development: A Right of Peoples* [hereinafter Rich, *A Right of Peoples*], *in* THE RIGHTS OF PEOPLES, *supra* note 26, at 39, 53.

50. Georges Abi-saab, *The Legal Formulation of a Right to Development*, *in* THE RIGHT TO DEVELOPMENT AT THE INTERNATIONAL LEVEL 163 (Hague Academy of International Law, 1980).

51. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L COMP L.Q. 850, 859 (1989).

Both components stand on a solid legal footing because each one is founded on legally binding norms already in existence in international law. Mindful of these components, this article offers the following definition of the right to development:

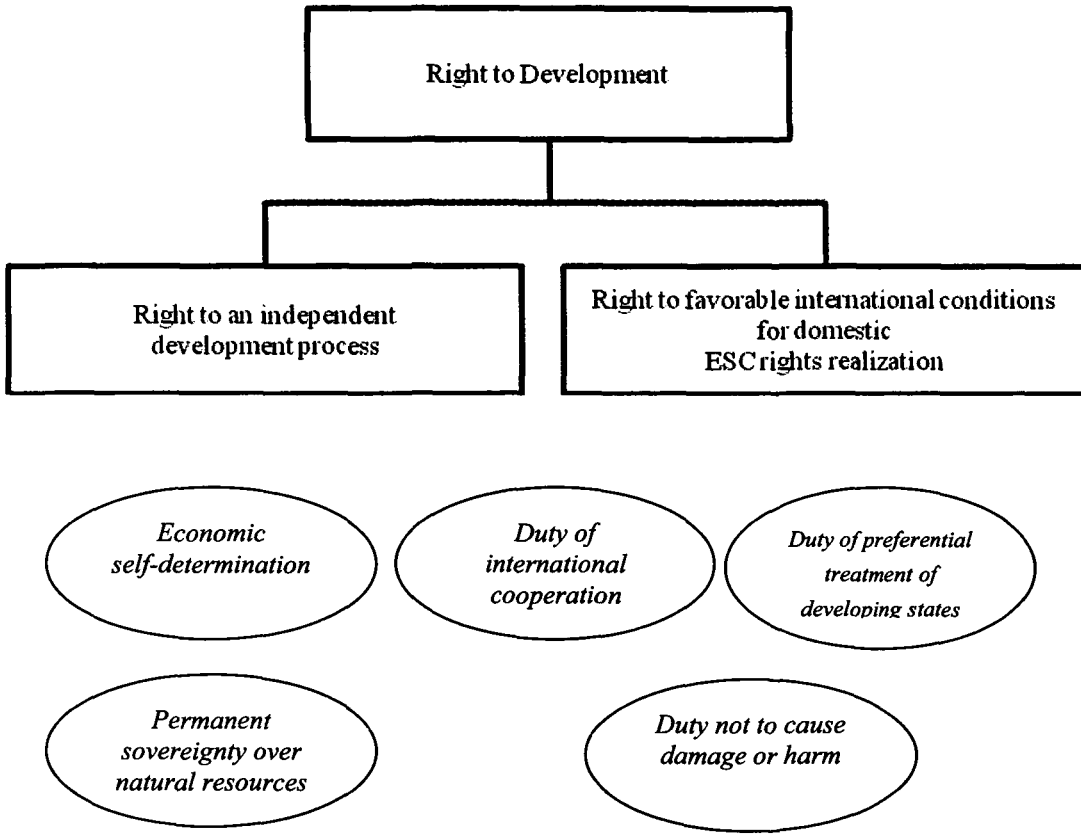
> The right to development is a right of the people of a state to pursue an independent process of economic development that takes place within the context of international conditions that are favorable to the progressive realization of economic, social and cultural rights within their state.

This definition keeps intact the "collective" nature of the right that makes it opposable against the international community and removes any embellishment that it is also an individual human right claimable by every person against his or her state. Explicit in this definition are the following entitlements in favor of the "people" of every state: first, they have a right to implement a process of economic development independently and free from interference from other states or international organizations (right to an independent development process); and second, they have a right to international conditions that are favorable, rather than harmful or damaging, to the progressive realization of economic, social, and cultural rights in their country (right to favorable global conditions for domestic realization of rights).

Correspondingly, the following obligations on the part of other states or international organizations as "duty-bearers" can be deduced from this definition: first, they have an obligation to respect every people's freedom to pursue their own development process; and second, they have an obligation to modify, alter or even discontinue certain activities, such as international economic or financial arrangements, that result in "unfavorable conditions" that damage or harm the progressive realization of human rights in the territory of other states. Milan Bulajic was referring to this second component when he argued that "the international community must assume the correlative obligation of *establishing the conditions that permit the attainment of national goals*."[52] Thus, from the perspective of the "rights-holder," the right to development has two interrelated components as depicted by *Figure 1* below:

52. MILAN BULAJIC, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW 16 (2d ed. 1993) (emphasis added).

Figure 1: Components and supporting norms of the right to development



It is submitted here that both components of the right to development spring from certain fundamental norms whose underlying bases are firmly established in the recognized "sources" of international law. This gives the right to development its composite nature. This Article will discuss these norms *ad seriatim* and will demonstrate how they are intimately sewn up into a consolidated concept—a *supernorm—of* the right to development. Prosper Weil describes the norms in international law as having relative normativity whereby the legal force of each norm is a matter of "more or less" on a gradated scale.[53] He theorizes of the possibility of "an ordinary norm becom[ing] a supernorm" or "it even appears that any *sub*norm of general international law might be coaxed upward, in a stealthy rise from nonlaw to superlaw."[54] The force that lifts an ordinary norm in its rise to become a supernorm remains to be

53. *See* Weil, *supra* note 27, at 421.
54. *Id.* at 427.

the consent of states to be bound by rules, as encapsulated in Article 38(1) of the ICJ Statute.

The emergence of the right to development is occasioned by a similar norm-creating process, albeit one that is incremental in nature. The process can be conceived of as a gradual formation of, for lack of a better term, a cluster of norms whose cohesion relies on the normative strength of each norm comprising the whole. It has become a kneejerk reaction among lawyers, especially positivists, to gauge a single norm's relative normativity on the basis of the widely accepted sources of international law, and easily lose sight of the fact that any norm does not operate in a legal vacuum. It always co-exists with other norms that operate simultaneously in a particular legal regime (e.g., law of armed conflict or law of the sea) and in the broader international legal system. What drives the behavior of states is the combination of the norms that they adhere to. What emerges from this simultaneous observance of norms is a cluster of norms interlocking and overlapping at each other, and mutually reinforcing each other's legal strength. Lawyers are so used to imagining the formation of law in the international system as an upward linear progression from non-law (moral norms), to soft law, to hard law, and finally to *jus cogens* at the top. This Article proposes to add something novel—but not revolutionary as to digress from the accepted "sources" of international law—to this view: norms as they move upwards along the graduated scale tend to cluster together as they reach the top—overlapping and interrelating with each other with the aim of securing and even reinforcing their coveted place and status as a legal rule.

An example is in order to illustrate this *clustering process*. Take, for instance, the "principle of distinction" which is well-settled in international humanitarian law.[55] A myriad of norms actually comprise this principle that include, *inter alia,* differentiating between combatants and non-combatants; differentiating between civilian objects and legitimate military targets; protection of combatants *hors de combat*; and protection of religious and cultural places.[56] These norms, all

55. *See, e.g.*, Marco Sassoli, *Targeting: The Scope and Utility of the Concept of 'Military Objectives' for the Protection of Civilians in Contemporary Armed Conflicts*, *in* NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 181, 182-84 (David Wippman & Matthew Evangelista eds., 2005).

56. The rationale of the principle of distinction is to attack only those that are legitimate military targets and to prohibit indiscriminate attacks against persons or properties. Article 48 of Additional Protocol I to the Geneva Conventions provides: "In order to ensure respect for and protection of the civilian population and civilian object, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." *See* Additional Protocol I to the Geneva Conventions, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, art. 48, *entered into force* Dec. 7, 1979.

operating simultaneously and reinforcing one another, contribute to the legal validity and strength of the principle of distinction. Another example is the fairly advanced principle of the "common heritage of mankind" which first appeared in the treaty governing Antarctica and later in the law governing outer space and the seabed.[57] Jennifer Frakes has identified five norms actually comprising the common heritage of mankind principle.[58] First, there can be no private or public appropriation of the common heritage spaces (non-appropriation norm).[59] Second, resources contained in common heritage areas should be managed on behalf of all nations (norm of shared management).[60] Third, all nations must actively share with each other the benefits acquired from exploitation of the resources from the common heritage areas.[61] Fourth, these areas should not be used for military purposes.[62] Fifth, these areas should be "preserved for the benefit of future generations."[63] The validity and strength of the common heritage of mankind principle depend on the commitment of states to comply with (state practice) and adhere to (*opinio juris*) the individual norms that comprise it.

In the case of the right to development, the clustering of norms first appeared in the particular regime of international economic law after the wave of decolonization in the 1960s, and it later acquired more urgency (as well as legitimacy) courtesy of the regime of human rights law. This Article demonstrates that the right to development is borne out of this incremental process happening gradually in two separate but interfacing international law regimes. The right to development regroups and consolidates into a single rubric certain fundamental norms which are already existing for quite some time under the regimes of international economic law and human rights law. This being the case, the right to development—similar to the principles of distinction and common heritage of mankind—draws its legal strength from the simultaneous and interlocking operation of these fundamental norms in the international system. These norms are the following:

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57. Antarctic Treaty pmbl. art. VI., Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 72; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205; U.N. Convention on the Law of the Sea (UNCLOS) art. 136, Dec. 10, 1982, 1833 U.N.T.S. 397.

58. Jennifer Frakes, *The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space, and Antarctica: Will Developed and Developing Nations Reach a Compromise?*, 21 WIS. INT'L L.J. 409, 411 (2003).

59. *Id.*

60. *Id.* at 412.

61. *Id.* at 413.

62. *Id.*

63. *Id.*

(1) The principle of economic self-determination of peoples;
(2) The people's permanent sovereignty over their natural wealth and resources;
(3) The duty of international cooperation among states;
(4) The duty of preferential treatment of developing states; and
(5) The duty of preventing damage or harm against the rights of another state.

It is submitted that the first two norms—mutually reinforcing one another—are the underlying rationale of the first component of the right to development (i.e., the right to an independent development process); while the last three norms, also interrelated and overlapping, are the pillars of the second component (i.e., the right to favorable international conditions for domestic realization of economic, social, and cultural rights). It bears stressing that the right to development draws its legal strength from all its constituent norms. It is only when these norms are taken together that a more complete structure of the right to development—and one that stands on a solid legal footing—begins to take shape.

1. Right to an Independent Development Process

a. The Principle of Economic Self-determination of Peoples

Article 1(2) of the U.N. Charter provides that one of the organization's purposes is the development of friendly relations among states based upon the "principle of equal rights and self-determination of peoples."[64] That the right to self-determination is recognized in the U.N. Charter itself, which some regard as the constitutional document of present-day international system,[65] shows the right's high priority in the hierarchy of international law norms. The ICJ in fact characterized the right to self-determination as a "norm of the nature of *jus cogens*, derogation from which is not permissible under any circumstances."[66] The 1970 Declaration on Principles of International Law Concerning Friendly Relations may be regarded as an "authoritative interpretation" of U.N. Charter provisions dealing with the right to self-determination.[67] The Declaration states, among others, that "all peoples

64. U.N. Charter art. 1, para. 2.

65. *See, e.g.*, BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 16 (Bruno Simma ed., 2d ed. 2002).

66. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Counsel Resolution 276 (1970), Advisory Opinion, 1981, I.C.J. 16 (June 21) (Ammoun, concurring).

67. SHAW, *supra* note 25, at 253.

have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"[68] and that all states have the duty to respect this right. Aside from the U.N. Charter, other major treaties recognize the existence of the right to self-determination. Common Article 1(1) of the ICESCR and the ICCPR provides that

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[69]

It is clear therefore that the right to self-determination has two incidences: a people can choose whatever type of government they wish and they can freely undertake their economic, social, and cultural development. It is the right's "economic aspect" that needs to be emphasized here—that which guarantees the freedom of peoples in their pursuit of "economic development." The self-determination of peoples necessarily entails an independent control of a country's economy in general and an effective involvement in economic planning in particular.

Without these, self-determination is never complete. This is only logical because, for a people who have liberated themselves from a colonial, occupying or racist state and have declared political independence, their newly found freedom will be meaningless if this is not coupled with the freedom to choose an economic system that is viable for the country and the freedom to determine its own model of economic development. This is not to say, however, that the right to self-determination is applicable only for peoples escaping the clutches of colonialism, occupation, or racism as argued by some commentators.[70]

The right's inclusion in the ICESCR and ICCPR ensures its continuing applicability well beyond the context of colonialism, occupation, or racism. James Crawford observes that the right's inclusion in the two covenants has a "tone of universality."[71] Consistent

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68. *Declaration on Principles of International Law Concerning Friendly Relations*, G.A. Res. 2625 (XXV), Annex, 25 U.N. GAOR, Supp. (No. 28), U.N. Doc. A/8018 at 123 (Oct. 24, 1970).

69. International Covenant on Civil and Political Rights, Part I, art. 1, Dec. 16, 1966, 993 U.N.T.S. 171, *available at* http://www2.ohchr/org/english/law/ccpr.htm.

70. Antonio Cassese, for example, argues that present-day international law limits the application of the right to self-determination to three situations: "(1) an anti-colonial postulate; (2) a criterion for condemning those forms of oppression of a people involving the 'occupation' of territory; (3) an anti-racist postulate." CASSESE, *supra* note 47, at 135.

71. James Crawford, *The Rights of Peoples: Peoples or Governments?*, *in* THE RIGHTS OF PEOPLES, *supra* note 26, at 55, 58.

with this view, the International Law Commission expressed its opinion that the right to self-determination is of "universal" application.[72]

In the two articles of the U.N. Charter where the right is mentioned (i.e., Articles 1(2) and 55), the contexts are different from issues of colonialism, occupation, or racism which suggests the right's applicability in other situations.[73] Thus, the people of a state that is not colonialist, occupying nor racist have *inter alia* the inherent freedom to choose their economic system and to determine their own model of economic development. Self-determination, including its economic dimension, is a continuing right of the people that does not end with political emancipation.

Even after political emancipation, the right continuously guarantees that the people can genuinely manage or lead their economic future. Mohammed Bedjaoui seems to equate the concept of economic self-determination with the "right to development" when he stated that

> The "right to development" flows from this right to self-determination and has the same nature. There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize at the same time a "right to development" for the peoples that have achieved self-determination. This right to development can only be an "inherent" and "built-in" right forming an inseparable part of the right to self-determination.74

One obvious violation of the right to economic self-determination is "economic coercion." S. Azadon Tiewul describes "economic coercion" as "an attempt to constrain state conduct through the use of withholding of economic resources."[75] Clearly, economic coercion can take on many forms and degrees ranging, for example, from discreet impositions in an onerous trade agreement to outright trade embargoes. The term "economic coercion" does not include economic sanctions that may be lawfully imposed by the Security Council under the U.N. Charter.[76]

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72. *Report of the International Law Commission on the Work of its Fortieth Session*, G.A. Res. 42/156 at 64, U.N. Doc. A/43/10 (1988), *reprinted in* [1990] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/SER.A/1988/Add.1.

73. Crawford, *The Rights of Peoples: Peoples or Governments?*, *in* THE RIGHTS OF THE PEOPLES, *supra* note 26, at 55, 58.

74. Bedjaoui, *supra* note 1, at 1184 (emphasis in original).

75. S. Azadon Tiewul, *The UN Charter of Economic Right and Duties of States*, 10 J. INT'L L. & ECON. 645, 670 (1975).

76. The Security Council may act whenever it is satisfied of "the existence of any threat to the peace, breach of the peace, or act of aggression." U.N. Charter art. 39. In any of these three situations, the Security Council may call on Member States of the United Nations to apply economic, political, diplomatic or other sanctions against the culprit state or, if these measures

What the term encompasses are interventions in the internal and external affairs of another state using economic measures. This makes "economic coercion" violative of another fundamental principle of international law—the principle of non-intervention.[77] Citing several declarations of the U.N. General Assembly, Oscar Schachter argues that "economic coercion directed against the sovereign rights and independence of any state has been declared to be in violation of international law."[78] The 1974 Resolution on Permanent Sovereignty over Natural Resources specifically deplores "acts of states which use force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes."[79] It also provides that states have a "duty to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State."[80]

b. The People's Permanent Sovereignty Over Natural Resources

The "sovereign equality of states" is a cornerstone of present-day international law.[81] In fact, it is securely enshrined in the U.N. Charter which provides that the "Organisation is based on the principle of the sovereign equality of all its Members."[82] Ian Brownlie explains the centrality of "state sovereignty" in present day international law, thus

> sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law.[83]

There is a specific aspect of state sovereignty that is inextricably connected to the right to development—this is the principle of

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are unsuccessful, to take such military action "as may be necessary to maintain or restore international peace and security." *Id.* arts. 41-42.

77. Detlev C. Dicke, *The Concept of Coercion: A Wrong in Itself, in* INTERNATIONAL LAW AND DEVELOPMENT 187, 190 (Paul de Waart et al. eds., 1988).

78. Schachter, *supra* note 24, at 14 n.30.

79. 1974 Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, ¶ 4, 28 U.N. GAOR, 28th Sess., Supp. No. 30, Doc A/9030 (1974).

80. *Id.* ¶ 6.

81. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 157 (3d ed. 1999).

82. U.N. Charter art. 2, para 1.

83. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287 (4th ed. 1990).

"permanent sovereignty over natural resources."[84] The principle of permanent sovereignty over natural resources has gained wide acceptance among states.[85] It is recognized in both the ICESCR and the ICCPR in their common Article 1(2) and another common article (Articles 25 and 47, respectively) which state that

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
>
> . . .
>
> Nothing 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.[86]

The principle of "permanent sovereignty over natural resources" is also recognized in other multilateral treaties like the African Charter on Human and People's Rights (1981), the two Vienna Conventions on Succession of States (1978 and 1983) and the U.N. Convention on the Law of the Sea (1982).[87] The principle of "permanent sovereignty over natural resources" was further elaborated by the U.N. General Assembly through the Charter of Economic Rights and Duties of States.[88] Whereas the principle originally covered physical resources such as minerals, flora and fauna, the General Assembly explained its coverage to include all of a country's "wealth, natural resources and *economic activities*."[89] The inclusion of economic activities in the principle assures the people's sovereign right to regulate or oversee all economic activities within their country for their own ends. Nico J. Schrijver summarizes the most important implications of the principle of permanent sovereignty over natural resources, particularly for the peoples of

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84. Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), ¶ 15, 17 U.N. GAOR, 17th Sess., Supp. No.17, U.N. Doc. A/5217 (1962).

85. Crawford, *The Rights of Peoples: Peoples or Governments?*, *in* THE RIGHTS OF PEOPLES, *supra* note 26, at 63.

86. International Convention on Economic, Social and Cultural Rights, arts. 1(2) and 25, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316(1966), *entered into force* Jan. 3, 1976.

87. Nico J. Schrijver, *Permanent Sovereignty Over Natural Resources Versus the Common Heritage of Mankind: Complementary or Contradictory Principles of International Economic Law?* [hereinafter Schrijver, *Permanent Sovereignty*], *in* INTERNATIONAL LAW AND DEVELOPMENT, *supra* note 77, at 87, 91.

88. *Charter of Economic Rights and Duties of States*, G.A. Res. 3281(xxix), art. 2, ¶ 1, U.N. GAOR, 29th Sess., Supp. No. 31 (Dec. 12, 1974) (emphasis added).

89. *Id.*

developing countries.[90] Aside from the principal right to possess, use, and dispose of their natural resources, this principle supports *inter alia* the right of a people "to withdraw from unequal investment treaties and to renounce contractual relations when one party unjustly enriches itself thereby" and the right "to revise the terms of an arrangement in the exercise of [their] legislative competence."[91] Subrata Roy Chowdhury extols the principle of permanent sovereignty over natural resources as "a seminal source for rules from which a State can derive a wide range of powers to exercise control over production and distribution arrangements in aid of its right to development."[92]

Moreover, the principle of permanent sovereignty over natural resources further implies that, if foreign control or influence inhibits a people from possessing, using or disposing of their natural wealth and resources as they deem proper, then their right to development is violated. Another clear implication is that a people cannot involuntarily renounce their right to possess, use and dispose of their natural resources without compromising their right to development. Of course, a people can voluntarily allow multinational corporations or other states to economically exploit their natural resources (for example, in an oil exploration agreement) but that action is not violative of their permanent sovereignty over natural resources; it is in fact consistent with it because they had the freedom to choose to allow or prevent foreign economic exploitation.[93]

2. Right to International Conditions Favorable to Domestic Realization of ESC Rights

a. The Duty of International Cooperation Among States

The right to development also includes, but is not identical with, the "duty of international cooperation" among states.[94] This duty is an important element of the right that contributes to its normative force.

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90. Schrijver, *Permanent* Sovereignty, *supra* note 77, at 90.

91. *Id.*

92. Subrata Roy Chowdhury, *Permanent Sovereignty Over Natural Resources: Substratum of the Seoul Declaration*, *in* INTERNATIONAL LAW AND DEVELOPMENT, *supra* note 77, at 59, 80.

93. An analogy may be made here with the application of the principle of non-intervention in the domestic affairs of a state. In the exercise of its sovereignty, a country may invite another country to intervene in the former's internal affairs without derogating that sovereignty. *See, e.g.*, ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 53 (2006).

94. *See, e.g.*, Daniel O'Donnell, *The Right to Development, Human Rights and the New International Economic Order*, ILANUD, Año 5, No. 15 y Año 6, No. 16, *available at* www.ilanud.or.cr/AO52.pdf.

(1) Articles 55 and 56 of the U.N. Charter

There exists a norm in international law that directs states "to cooperate" with one another in order to achieve certain desired outcomes set forth in the U.N. Charter.[95] This duty of international cooperation is not merely deduced or implied from some general or abstract duties of states (for example, the duty of friendly relations). It is a concrete duty whose mandatory character is supported by treaty law—that is, Article 56 of the U.N. Charter, in reference to Article 55 thereof—which provides that

> Article 56. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.
>
> . . .
>
> Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> *(a)* higher standards of living, full employment, and conditions of economic and social progress and development;
> *(b)* solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> *(c)* universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[96]

One of the arguments for the legal basis of the right to development is the duty of international cooperation among states on the strength of the above-quoted provisions.[97] Khurshid Iqbal, for example, argues that "the main principle" that gives legal force to the right to development is the well-established duty to cooperate.[98] Rich also argues that the duty to cooperate is "the fundamental source of the right to development."[99]

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95. *Id.*

96. U.N. Charter arts. 55, 56.

97. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1442 (3d ed. 2008).

98. Iqbal, *supra* note 4, at 1.

99. Rich, *An Emerging Human Right*, *supra* note 37, at 291.

The U.N. Independent Expert on the Right to Development, Arjun Sengupta, also shares the view that "the case of international cooperation could be further strengthened by referring . . . to Article 55 and 56 of the Charter."[100] He adds that owing to the "special status" of the U.N. Charter as the foundation of the present-day international system, states must commit to heart and seriously fulfill their duty of international cooperation.[101]

However, the duty of international cooperation has its share of skeptics, who are of the view that the duty to cooperate as formulated in Articles 55 and 56 of the U.N. Charter "remains rather abstract and permits a relatively wide margin of discretion regarding its practical interpretation and application."[102] It is submitted that this criticism is misguided, rather overly harsh, in its insistence for "specifics" in a constitutional document that the U.N. Charter is. Edward Kwakwa responds to the same criticism by arguing that

> Article 56 of the Charter clearly obligates a state to do something towards the achievement of the purposes [of the United Nations] set forth in article 55. This implies a right to do nothing does not exist. . . . [W]hile the provisions are general, nevertheless they have the force of positive international law and create basic duties. Political and juridical organs of the UN have also interpreted the provisions of articles 55 and 56 as constituting legal obligations. The preferable view, therefore, is that these Charter provisions establish firm commitments in the form of a binding treaty obligation.[103]

First, it is clear who bears the duty to cooperate—all members of the United Nations.[104] Second, it is also clear what conduct is required of the members—to take joint and separate action in co-operation with the United Nations for the solution of international problems.[105] Actual examples of "joint and separate action" contemplated by the U.N. Charter are scientific and technological cooperation, transfer of

100. Arjun Sengupta, The Right to Development as a Human Right, 4 (2000) (working paper on file with the Harvard University Francois-Xavier Bagnoud Center for Health and Human Rights).

101. *Id.*

102. Danilo Turk, *Participation of Developing Countries in Decision-making Processes*, *in* INTERNATIONAL LAW AND DEVELOPMENT, *supra* note 77, at 342.

103. Edward Kwakwa, *Emerging International Development Law and Traditional International Law—Congruence or Cleavage?*, 17 GA. J. INT'L & COMP. L. 431, 442 (1987).

104. U.N. Charter art. 56.

105. U.N. Charter art. 55.

technology, as well as cultural and educational cooperation.[106] Because the types of cooperation are as numerous as the number of international problems they are meant to solve, it is unrealistic to enumerate them all in the U.N. Charter. But that does not mean that the duty to cooperate is abstract and vague. Lastly, it is clear to what purpose cooperation among states is aimed for—the achievement of the three objectives enumerated in Article 55 of the U.N. Charter.[107]

Moreover, when one considers certain resolutions adopted by the U.N. General Assembly that reiterate the duty to cooperate and "provide a considerable degree of guidance as to its specifics,"[108] the superficiality of the above criticism is immediately exposed. The more prominent of these resolutions are the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States,[109] the 1974 Declaration and Programme of Action on the Establishment of a New International Economic Order,[110] the 1975 Charter of Economic Rights and Duties of States,[111] and the 1986 Declaration on the Right to Development.[112] While admittedly these resolutions are not *per se* "sources" of international law, they are meant to interpret general provisions of the U.N. Charter (among which is the duty to cooperate) and must therefore be regarded as authoritative elucidations by the General Assembly on those general provisions. Among these resolutions, it is the Charter on the Economic Rights and Duties of States, Article 17 that most clearly explains the duty to cooperate as follows:

> International co-operation for development in the shared goal and common duty of all States. Every State should co-operate with the efforts of developing countries to accelerate their economic

106. Art. 56, Repertory, Supp. 3, vol. II (1959-1966), *available at* http://untreaty.un.org/cod/repertory/art56/english/rep_supp3_vol2-art56_e.pdf; *see, e.g.*, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations 3, *available at* http://www.un.org/UN50/dec.htm.

107. U.N. Charter art. 55.

108. Stephen P. Marks, *Obligations to Implement the Right to Development: Philosophical, Political, and Legal Rationales*, *in* DEVELOPMENT AS A HUMAN RIGHT 57, 74 (Bard A. Andreassen & Stephen Marks eds., 2006).

109. *See generally* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., 1883d plen. mtg., U.N. Doc. A/85 (Oct. 24, 1970).

110. *See generally* Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. GAOR, 6th Special Sess., U.N. Doc. A/7 (May 1, 1974).

111. *See generally* Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 2315th plen. mtg., U.N. Doc. A/48 (Dec. 12, 1974).

112. *See generally* Declaration on the Right to Development, G.A. Res. 41/128, 41st Sess., 97th plen. mtg., U.N. Doc. A/RES/41/128 (Dec. 4, 1986).

> and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty.[113]

(2) Articles 2(1) and 11 of the ICESCR

Philip Alston and Gerard Quinn argue that certain provisions of the ICESCR are susceptible to an interpretation that developed states have an obligation "to provide assistance to poorer states parties in situations in which the latter are prevented by a lack of resources from fulfilling their obligations under the Covenant."[114] First among these is the clause "to take steps, individually and *through international assistance and co-operation*, especially economic and technical" found in Article 2(1) of the ICESCR.[115] The full import of this clause leads some commentators to argue that, even standing alone, it provides the legal basis for the right to development. The second provision is Article 11(1) which mandates states parties to fulfill the "right . . . to an adequate standard of living" of their people while recognizing "the essential importance of international co-operation based on free consent" to achieve this goal.[116] The third provision is Article 11(2) which, although concerning the specific "right . . . to be free from hunger," directs states parties to take steps "individually and through international co-operation" to achieve this right.

Stephen Marks assigns a heavy significance on the duty "to take steps, individually and through international assistance and cooperation" found in Article 2(1) as providing "a legal basis for the *reciprocal* obligations between and among states parties to the ICESCR.[117] According to his view, this duty provides the ICESCR a sort of "horizontal" dimension, meaning the existence of an obligation among the states parties *inter se,* as opposed to a "vertical" dimension that involves obligations owed by a state party to its own population.[118] He argues that the full realization of ICESCR rights cannot be attained in a piecemeal fashion,

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113. Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., 1325th plen. mtg., U.N. Doc. A/48 (Dec. 12, 1974).

114. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 186 (1987).

115. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2(1), U.N. GAOR (Dec. 16, 1966) (emphasis added) [hereinafter ICESC].

116. *Id.* art. 11(1).

117. Marks, *supra* note 108, at 72 (emphasis added).

118. *Id.*

> but only through a policy that is deliberately designed to achieve all the rights, progressively and in accordance with available resources. . . . These are the legal obligations of each of the states parties . . . not only to alter its internal policy but also to act through international cooperation toward the same end.[119]

However, the duty of international cooperation may be given a restrictive interpretation which, if proven to be valid, weakens the legal force of the right to development. According to this interpretation, the obligation of developed states extends only as far as participating in international agencies concerned with development issues such as, for example, the U.N. Development Program or the Organisation for Economic Co-operation and Development.[120] In other words, developed states fully comply with the duty to cooperate even when they engage only in nominal participation or involvement in these agencies. The flaw in this restrictive interpretation can easily be exposed when the intent of the framers of ICESCR is taken into account.[121] This intent is also expressed in the 1986 Declaration on the Right to Development when it provides that the duty requires "*effective*" international cooperation—which means one that produces concrete results and not just perfunctory or general involvement in the activities of international agencies.[122] Criticizing this restrictive interpretation, Stephen Marks stated that it ignores "the politically significant pronouncements of high-level conferences and legally significant interpretations of expert bodies"[123] all of which "provide a considerable degree of guidance as to the specifics of the general legal obligation of international cooperation."[124]

b. The Duty of Preferential Treatment of Developing Countries

Before a group is said to enjoy preferential treatment compared to other groups, it is first necessary to identify that "group" as distinct or unique from the rest. Have developing countries become distinct or unique subjects of international law? Rich believes so as evidenced by the fact that "developing countries" have been regarded as a separate group in various international instruments adopted over many decades, ranging from human rights treaties to the U.N. Convention on the Law

119. *Id.*

120. *Id.* at 72-73.

121. *Id.* pmbl.

122. The Macquarie Dictionary defines the word "effective" as "producing the intended or expected result." The Macquarie Dictionary Online, http://www.macquariedictionary.com.au.

123. Marks, *supra* note 108, at 73.

124. *Id.* at 74.

of the Sea.[125] He argues that some treaties "show an awareness of developing countries as a special, protected category of States."[126] Isabella Bunn agrees that "developing countries are, in some respects, treated as special subjects of international law" as evidenced by various resolutions adopted by the U.N. General Assembly dealing with them as a distinct grouping of states.[127]

But have developing countries been treated "preferentially"? Again, both authors believe so because developing countries "are beneficiaries *as such* of special rights in international law" not conferred to other subjects of international law.[128] Isabella Bunn argues that the phenomenon of preferential treatment of developing countries "is grounded in a duty to cooperate for development, and has emerged over several decades of state practice."[129] Evidence of state practice in this regard can be found in different areas of international law, among which are: in some human rights treaties;[130] in agreements that give trade concessions;[131] in the provisions of the Law of the Sea Convention giving certain benefits to developing countries;[132] and in the practice of providing development assistance.[133] Although with respect to the last one, most developed states still consider it as a matter of discretion and benevolence rather than as a matter of legal obligation. Other areas where preference is accorded to developing countries include international agreements relating to investment, natural resources, relocation of industry, the oceans, international liquidity, and other related areas.[134]

Oscar Schachter analyzes the common rationale that underlies the preferential treatment of developing countries in these areas and finds that it is "the idea of need as a basis for entitlement."[135] What he found

125. Rich, *A Right of Peoples*, *in* THE RIGHTS OF PEOPLES, *supra* note 26, at 48.

126. Rich, *An Emerging Human* Right, *supra* note 37, at 302.

127. Bunn, *supra* note 34, at 1448.

128. Rich, *A Right of Peoples*, *in* THE RIGHTS OF PEOPLES, *supra* note 26 (emphasis added).

129. Bunn, *supra* note 34, at 1448.

130. The ICESCR, for example, recognizes the special circumstance of developing countries and takes into account their "available resources" in gauging compliance with the treaty. ICESC, *supra* note 115.

131. *See, e.g.*, Bernard Hoekman et al., *Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún*, *in* TRADE PREFERENCES AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES, ch. 29 (Bernard Hoekman ed., 2006).

132. The UNCLOS contain provisions that give preferences to developing countries in the areas of *inter alia* access to fishing zones (Article 62) and access to seabed mining technology (Annex III, article 5.3.e). U.N. Convention on the Law of the Sea, http://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm (last visited Mar. 25, 2010).

133. *See* SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES' HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION 83-98 (2006).

134. Schachter, *supra* note 24, at 9.

135. *Id.* at 10.

remarkable about this idea is not its espousal by its beneficiaries (i.e., developing countries) which is to be expected but rather its general acceptance by the developed countries against whom the idea will be invoked against. Schachter argues that the "scale and duration" of the practice of giving preferential treatment to developing countries "have been substantial enough to demonstrate the practical acceptance of a responsibility [on the part of developed states] based on the entitlement of those in need."[136] In other words, the practice of giving preferential treatment to developing countries has crystallized into a customary norm of international law. However, Schachter is quick to point out that the idea of need as a basis for entitlement is different from the Marxist ideal of "to each according to his needs, from each according to his ability"; rather the idea is confined with the "provi[sion] for the minimal human needs of the most disadvantaged segments of society."[137] Emphasizing what the norm of preferential treatment of developing countries adds to present-day international law, Milan Bulajic argues that

> The problems of development cannot be resolved on the basis of the principles of peaceful co-existence among States with different political and economic systems. Coexistence as a minimum standard for preserving world peace, should be further developed and it should be the duty of all States to cooperate for development, *on the basis of preferential and non-reciprocal treatment of developing countries.*[138]

c. The Duty of Preventing Damage or Harm Against the Rights of Another

The last norm that supports the existence of the right to development is the principle that a person, in the exercise of his or her right, must not cause damage or harm to the rights of another. This is the principle of abuse of rights. *Sic utere tuo ut alienum non laedas.*[139] This principle can be found in "the majority of the legal systems of the world."[140] It is a widely held principle that certainly qualifies as a "general principle of law among civilised nations"—another sanctified "source" of

136. *Id.*

137. *Id.*

138. BULAJIC, *supra* note 52, at 50 (emphasis added).

139. "One should use his own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (Centennial ed. 1991).

140. Enrique Gomez-Pinzon, *State Responsibility for External Consequences of Domestic Economic-Related Acts*, 16 CAL. W. INT'L L.J. 52, 79 (1986).

international law according to Article 38(1) of the ICJ Statute.[141] This principle has been applied by the court in *Trail Smelter* (United States v. Canada) where it ruled that

> Under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[142]

Almost two decades later, the same principle was reiterated by the arbitral tribunal in *Lake Lanoux* (France v. Spain). The tribunal applied the principle of abuse of rights when it stated that the upstream state (France), in the exercise of its lawful activities involving the lake within its territory, is obliged to consider the interests of the downstream state (Spain) and to strive to "give them all satisfactions compatible with the pursuit of its [France] own interests."[143]

David Beetham opines that "it would be difficult to contest the principle that the first duty of governments, as of citizens also, is not to cause damage or harm" to the rights of another.[144] This translates into a practical rule of conduct in the international system, according to him, that states have the duty "not to initiate or support policies or institutional arrangements, whether domestic or international, which systematically damage any country's economic development."[145] James Crawford considers this as the negative duty of every state not to impede the development of another state.[146]

Enrique Gomez-Pinzon explains that the criteria used in determining whether there has been an abuse of rights differ from one national

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141. Oscar Schachter classifies five groups of general principles of international law that have been applied in international cases: (1) principles of municipal law "recognized by civilized nations"; (2) general principles of law "derived from the specific nature of the international community"; (3) principles "intrinsic to the idea of law and basic to all legal systems"; (4) principles "valid through all kinds of societies in relationships of hierarchy and co-ordination"; and (5) principles of justice founded on "the very nature of man as a rational and social being." *See, e.g.*, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (London, Stevens 1953); Cherif Bassiouni, *A Functional Approach to General Principles of Law,* 11 MICH. J. INT'L L. 786 (1989-1990); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 50-55 (1991).

142. Trail Smelter Case (United States v. Canada), 3 R.I.A.A. 1905 (1941).

143. Lake Lanoux Arbitration (France v. Spain), Arbitral Tribunal Nov. 16, 1957, 24 INT'L L. REPS. 101, 139 (1957).

144. Beetham, *supra* note 2, at 84.

145. *Id.*

146. Crawford, *The Rights of Peoples: Peoples or Governments?*, *in* THE RIGHTS OF PEOPLES, *supra* note 26, at 66.

jurisdiction to another.[147] Two of these criteria are relevant to the acts or omissions of states on the international plane: the "harmful alternative" criterion and the "flagrant disproportion between damage and profit" test.[148] According to the "harmful alternative" rule, "[w]henever a State can obtain, through alternative means, the goals it is pursuing, it must choose the one which would avoid causing injuries to other States."[149] If State A choses a course of action that is harmful to State B, when State A could have chosen an alternative that is harmless to State B, then State A has abused its rights. On the other hand, according to the "flagrant disproportion between damage and profit" test, "if the exercise of a right tends to satisfy an interest of minimal importance in comparison to the harm caused [to others], then the right has been abused."[150] Stated differently, if the exercise of a right will both result in a minimal advantage to its holder and a great disadvantage to another, then the holder of such right is not justified in exercising it.

Two scenarios are possible here: intentional and unintentional damage or harm to a developing state. With respect to the first, the aforesaid duty clearly applies as it is precisely meant to prohibit a state from damaging or harming another through ill-will, malice or *dolo.* For example, when a coastal state knowingly and unjustifiably prohibits the transport of international food aid on its territory en route to the starving population of a landlocked state, then the former causes damage or harm to the latter through *dolo.* The latter's population is denied their right to food. Meanwhile, the proscription equally applies when the damage or harm is done to a state as a result of negligence, lack of foresight or skill, or other species of *culpa* on the part of the guilty state. For example, when an importer state suddenly halts the importation of an agricultural product from an exporter state whose population relies on it as their only source of livelihood, then the former causes damage or harm to the latter through *culpa.* The latter's population is denied their right to work. In other words, the duty not to cause damage or harm is still breached even though the guilty state's action is ostensibly within its prerogative (i.e., the importer state can choose to get the product from another exporter state) and short of malice or ill-will but nonetheless failed to take into consideration the human rights violation in the other state. In this example, the importer state's lack of foresight as to the dire effects of its action upon the population of the exporter state led to the breach of the duty. Therefore, a guilty state incurs state responsibility if it causes damage or harm to another state as a result of

147. Gomez-Pinzon, *supra* note 140, at 80.
148. *Id.* at 81.
149. *Id.*
150. *Id.*

either a malicious conduct or an unintentional act but with reckless disregard to the wellbeing of other peoples.

However, it may be argued that the developed states, in pursuing their legitimate national interests, in fact usually cause "incidental damage" (i.e., non-intentional) to developing countries, and such contrary state practice therefore proves that the duty of preventing damage or harm (as a result of *culpa,* at least) is non-existent in international law. The argument is specious because, as Rosalyn Higgins commented, the widespread examples of non-compliance of a norm do not negate its existence in international law.[151] Adam McBeth similarly argues that "[a]n obligation that is not effectively enforced . . . is not necessarily stripped of its legal character as an obligation."[152] For example, even if most states actually engage in the practice of torturing political dissidents, that in itself does not mean that the obligation prohibiting torture is non-existent or has ceased to exist.

The Charter of Economic Rights and Duties of States includes a strong normative language that lends support to the duty of states "not to cause damage or do harm" to the lawful interests of other states, particularly in the economic realm. Although already a general principle of law, this negative duty finds expression in the following provision of the Charter:

> All States have the duty to conduct their mutual economic relations in a manner which takes into account the interest of other countries. In particular, all States should avoid *prejudicing* the interests of developing countries.[153]

This duty "not to cause damage or do harm" is required of states not only in their bilateral or multilateral dealings with each other but also in their actions or activities within the international organizations they belong to. The Maastricht Guidelines, another interpretative document, provides that "[i]t is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members."[154] Thus,

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151. ROSALYN HIGGINS, INTERNATIONAL LAW AND HOW WE USE IT: PROBLEMS AND PROCESS 20 (1998).

152. Adam McBeth, *Every Organ of Society: The Responsibility of Non-state Actors for the Realization of Human Rights* 30 HAMLINE J. PUB. L. & POL'Y 33, 66 (2008).

153. *Charter of Economic Right and Duties of States,* GA Res. 3281 (XXIX) of 12 Dec. 1974, art. 24 (emphasis added).

154. Guideline 19, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan. 22-26, 1997. The guidelines were formulated by a group of more than thirty experts who met in Maastricht, The Netherlands in January 1997. The objective of the

for example, if an international organization implements a program or policy that damages or does harm to a particular state, responsibility therefore is attributable not only to the organization itself but also to its Member States that voted in favor of such program or policy.

What then is the relationship of the "duty not to cause damage or harm" to the right to development? David Beetham argues that, if states initiate or maintain an international arrangement or policy in breach of their obligation "not to cause damage or do harm" to another state, then the latter's right to development is violated. Mohammed Bedjaoui proposes that "the best means of ensuring the citizens right to development would be to liberate the State from certain international arrangements which unjustly siphon off its wealth abroad."[155] Similarly, Andreassen and Marks argue that, by virtue of the right to development, developed countries—"acting through their development cooperation programs or through the international institutions to which they belong—have a duty [of] relaxing constraints on productive resources' of developing states."[156] Pursued to their logical conclusion, these views call for the modification or even the complete abrogation of those features of the international system (whether it be political, economic or financial) that damage or harm the development of poor countries, including their capacity to progressively realize the rights of their people.

But what if modifying or abrogating those features of the international system would lead to damage or harm to the nationals of developed states? When are developed states duty-bound to prioritize the nationals of other states over their own nationals or interest? Although discussing the "morality" of giving international aid, Thomas Pogge was confronted with the same questions and postulated that states have a "hierarchy of obligations" which includes the "negative duties not to wrong (unduly harm) others" occupying the top spot.[157] According to him, when it comes to the positive duties to give aid or assistance, it is perfectly legitimate if states will prioritize their own nationals or interests. But when it comes to the negative duty not to cause damage or harm, the priority accorded to a state's nationals or its interest becomes arbitrary. The conclusion, Pogge argues, is that a state's duty not to cause damage or do harm must always prevail over positive duties to assist or protect that state's own nationals or

group was to expound on the Limburg Principles as regards the nature and scope of violations of rights in the ICESCR and to adopt appropriate responses and remedies.

155. Bedjaoui, *supra* note 1, at 1180-81.

156. Bard A. Andreassen & Stephen Marks, *Conclusion, in* DEVELOPMENT AS A HUMAN RIGHT 308 (Bard A. Andreassen & Stephen Marks eds., 2006).

157. THOMAS W. POGGE, WORLD POVERTY AND HUMAN RIGHTS 132-33 (1999); also cited in Beetham, *supra* note 2, at 91.

interest.[158] In the ultimate analysis, it is in the interest of developed states to assist the people of developing countries (either through a positive duty to give aid or through a negative duty not to harm, or both). Lester Pearson explains the reason why this is so:

> If the rich countries . . . concentrate on the elimination of poverty and backwardness at home and ignore them abroad, what would happen to the principles by which they seek to live? Could the moral and social foundations of their own societies remain firm and steady if they washed their hands of the plight of others?[159]

IV. CONCLUSION

The right to development is a legal right guaranteed to peoples (and not to individual persons) and is demandable against the international community. It is a composite of fundamental norms that rest on a firm foundation under positive international law. For quite some time, it has been, and it still is, part of *de lege lata*. But the tendency of its proponents to expand its reach, in their eager desire to solve all the problems of this world, makes it prone to the accusation that it is still a "soft law" or part of *de lege ferenda*. Having demonstrated the legal basis of the right to development, the next question is—what does it entail to developing states? How will they benefit from the right in concrete terms? This Article has answered these questions by showing the correlative duties of developed states or international organizations: first, there is an obligation to respect and observe a developing state's freedom to manage its own economy in general and its right to an independent economic planning in particular; and second, there is an obligation to modify or remove those features of the international system that cause damage or harm to developing countries.

But what if a state violates any or all of the norms comprising the right to development? What is the consequence of this violation? This is where the law of state responsibility may be especially invoked by the aggrieved state. It provides "that a State could be held responsible by other subjects of international law for any injuries it caused to them."[160] The International Law Commission's 2001 U.N. Articles on the

158. *Id.*

159. LESTER PEARSON, PARTNERS IN DEVELOPMENT: REPORT OF THE COMMISSION ON INTERNATIONAL DEVELOPMENT 7 (1969).

160. August Reinisch, *Debt Restructuring and State Responsibility Issues*, *in* LA DETTE EXTERIEURE 557 (Dominique Carreau & Malcolm N. Shaw eds., 1995).

Responsibility of States for Internationally Wrongful Acts of States provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State."[161] An "internationally wrongful act" is defined as an act or omission "constitut[ing] a breach of an international obligation of the State"[162] regardless of the origin or character of that obligation whether customary, conventional or other.[163] However, actual remedial measures to address breaches of the right to development are outside the scope of this Article whose only objective is confined to proving the legal basis of such a right.

The criticism that the right to development merely combines existing individual human rights and does not add anything new to human rights law is occasioned by a lack of understanding about the true meaning and import of the right. It does not really involve any serious challenge against the right's normative strength. The right to development, as shown in this Article, is a people's right that is distinct and separate from individual human rights. By virtue of the right, entitlements and duties on the part of a people (as the "rights-holder") and states or their organizations in the international system (as the "duty-bearers"), respectively, are created *ipso facto*. Having demonstrated the composite nature of the right to development, comprising as it does of several legally binding norms, this Article is a direct refutation of the charge of non-justiciability. It is shown that the core essentials that make up the right to development are firmly anchored on positive international law and, therefore, violation of any or all of them results in state responsibility on the part of the violator state. Having said that, there is no reason why a violation of the right to development, like any other internationally wrongful act, cannot lend itself to remedial actions in order to seek redress for the damage or harm done to an aggrieved state or its people.

161. International Law Commission (ILC), 2001 U.N. Articles on the Responsibility of States for Internationally Wrongful Acts of States, art. 1.

162. *Id.* art. 2(b).

163. *Id.* art. 12.