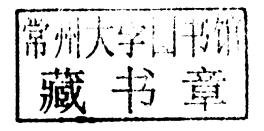


# The Right to Development and International Economic Law

### Legal and Moral Dimensions

Isabella D Bunn





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# THE RIGHT TO DEVELOPMENT AND INTERNATIONAL ECONOMIC LAW

The United Nations is commemorating the 25th anniversary of the 1986 Declaration on the Right to Development, which proclaimed the right to be: '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 realized'. The UN now aims to mainstream the right into its policies and operational activities, and is reviewing prospects for an internationally-binding legal instrument. The evolution of the right to development, however, has been dominated by debates about its conceptual validity and practical ramifications. It has been hailed as the cornerstone of the entire human rights system and criticized as a distracting ideological initiative. Questions also persist about the role of the right in reforming the international economic order.

This book examines the legal and moral foundations of the right to development, addressing the major issues. It then considers the right to development in the global economy, noting the challenges of globalization and identifying key principles such as differential treatment of developing countries, participation and accountability. It relates the right to broad objectives such as the Millennium Development Goals, the human rights-based approach to development, and environmental sustainability. Implications for international economic law and policy in the areas of trade, development finance and corporate responsibility are assessed. The conclusion looks to the legal and ethical contributions — and limitations — of the right to development in this new context. With an academic and professional background in international law, human rights and moral theology, the author brings a unique interdisciplinary focus to this timely project.

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Legal and Moral Dimensions

Isabella D Bunn

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### Introduction

## The Debate on the Right to Development

S THIS BOOK – The Right to Development and International Economic Law: Legal and Moral Dimensions – goes to press, the 25th anniversary of the United Nations Declaration on the Right to Development is being commemorated. In 1986, the UN proclaimed the right to development to be an inalienable human right, entitling everyone to 'participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realized'.¹ Political impetus came from the developing countries, seeking a fundamental restructuring of the global economic order. Political resistance came from some developed countries, wary about the scope of obligations for international assistance as well as the use of human rights concepts to advance such claims. The debate on these questions began years before the Declaration was adopted, and is likely to continue for years to come.² Notwithstanding such controversy, the right to development has become the focus of substantial implementation efforts at the international level.

Although some commentators have hailed the right to development as the cornerstone of the entire human rights system, serious misgivings about its validity and usefulness persist. While the very concept of a 'right to development' holds legal and moral gravitas, there is ambiguity about the exact content and implications of the right. Moreover, while pressure mounts for concrete results in terms of improved social and economic conditions, efforts to link the right to international economic reforms have often been thwarted.<sup>3</sup> As the title of this book suggests, it is time to move the debate in new directions.

Drawing on both legal reasoning and moral reflection, this book argues that engagement with international economic law is indispensable to any meaningful realization of the right to development. The topic lends itself to interdisciplinary analysis. While the right is evolving within the subject of international

<sup>&</sup>lt;sup>1</sup> Declaration on the Right to Development, G A Res 41/28, adopted 4 Dec 1986; 41 UN GAOR; Supp No 53 at 186 [hereinafter cited as 'UNDRD']. See the text of the UNDRD in App 1. The main UN website on the right to development is: www.ohchr.org/EN/Issues/Development/Pages/DevelopmentIndex.aspx.

<sup>&</sup>lt;sup>2</sup> See ch 2, I and II.

<sup>&</sup>lt;sup>3</sup> See, eg, Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 Harvard Human Rights Journal 139.

### 2 The Debate on the Right to Development

law, it is rooted in moral traditions – indeed, the very idea of a right to development was first raised in Catholic teaching. As will be seen, ethical analysis and action have influenced many dimensions of the right. But, this book argues, the right must build on its legal and moral foundations in addressing the challenges of the global economy.

#### THE DISCOURSE WITHIN THE UNITED NATIONS

The right to development finds its place in the discourse on the law of human rights, and has featured in the work of the United Nations since the 1970s.<sup>4</sup> In debates on the legal importance of the right, it is both praised as a major breakthrough in the history of human rights and denounced as a distracting, if not dangerous, ideological initiative.<sup>5</sup> Views of its potential moral, political and economic contributions are similarly divided. Early on, many commentators had high expectations.<sup>6</sup> The right to development would do no less than address the economic imbalance between the developed and the developing worlds, integrate human rights and economic development issues and enhance the ethical component in the analysis and conduct of international relations.

Yet a number of critics maintained that the right to development would at best make no difference to the people in the poorer parts of the world, and was more likely to be detrimental to them. One claimed:

If it achieves any significance, the right of development will divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights, and provide increasing resources and support for the state manipulation (not to say repression) of civil society and social groups. It will keep the international and diplomatic community engaged for many years in useless and feigned combat on the urgency and parameters of the right.<sup>7</sup>

<sup>&</sup>lt;sup>4</sup> See UN Doc E/CN.4/S.R.1389 (1977). While more extensive citations will be presented in the subsequent chapters of this book, several important early contributions to the UN and legal debate may be mentioned here: Keba M'Baye, 'Le Droit au Développement comme un Droit de l'Homme' (1972) 5 Revue des Droits de l'Homme 503; Philip Alston, 'The Right to Development at the International Level' in René-Jean Dupuy (ed), Hague Academy of International Law Colloquium on the Right to Development at the International Level (1980) [hereinafter cited as The Hague Academy Colloquium]; Nanni Rojas-Albonico, Le Droit au Développement comme Droit de l'Homme (1984); 'Symposium: Economic Development as an Emerging Human Right' (1985) 15 California Western Law Journal; Philip Alston, 'Making Space for New Human Rights' The Case of the Right to Development' (1998) 1 Harvard Human Rights Year Book 3; UK Commonwealth Secretariat, 'Occasional Papers on the Right to Development' (Series, 1989); Subrata Roy Chowdhury, Erik MG Denters, and Paul JIM de Waart (eds), The Right to Development in International Law (1992) [hereinafter cited as The Right to Development in International Law].

<sup>&</sup>lt;sup>5</sup> See generally, *The Right to Development in International Law*, ibid, which provides several critical essays with divergent viewpoints.

<sup>&</sup>lt;sup>6</sup> The Hague Academy Colloquium, above n 4 at 110-11.

<sup>&</sup>lt;sup>7</sup> Yash Ghai, 'Whose Human Right to Development?' Human Rights Unit Occasional Paper, Commonwealth Secretariat (1989) 5-6.

Indeed, since the Declaration on the Right to Development (UNDRD) was adopted by the UN General Assembly in 1986, the international and diplomatic community has been engaged in a debate on the urgency and parameters of the right. This study may shed light on whether such efforts amount to more than useless and feigned combat.

Over the last 25 years, substantial UN resources have been devoted to elevating the significance of the right to development and promoting its implementation. In 1993, the right to development was formally recognized as 'a universal and inalienable right and an integral part of fundamental human rights'. It is considered to be a vital link between civil and political rights and economic, social and cultural rights. Indeed, proposals have been broached to reformulate the right to development in terms of a binding convention. Under the UN Commission on Human Rights – later re-established as the UN Council on Human Rights – a series of reports on the right to development has been issued by various working groups, intergovernmental groups of experts, independent experts and a High-Level Task Force. In general, such efforts have sought to evaluate progress towards the realization of the right and make further recommendations on the specific commitments in the UNDRD.

The Secretary-General and the High Commissioner for Human Rights have made the right to development a priority in the work of the UN. In recent years, they have aimed to mainstream the right by strengthening the global partnership for development between member states, development agencies and the international development, financial and trade institutions. As the UN High Commissioner for Human Rights expressed it, '[t]he real purpose to the right to development is to secure the harmonization of the aspirations toward the material improvement of the human condition with the aspirations of freedom and dignity'. <sup>13</sup> But notwithstanding support for such grand aims, it is widely acknowledged that the right has failed to have a serious impact on national policy-making, resource allocation or practical action. <sup>14</sup> Thus, one of the ongoing challenges in UN discourse lies in bridging the gap between aspiration and realization.

<sup>&</sup>lt;sup>8</sup> One study observes that '[t]here are few questions in the field of international human rights where unclarity and even confusion reign to the extent they do with regard to the right to development'. Notwithstanding years of UN effort and debate, there is no consensus on the content and meaning of the right. On the contrary 'the controversies surrounding the adoption of the Declaration in 1986 and the vagueness and inconsistency of the texts of the Declarations leave most questions open'; Anja Lindroos, *The Right to Development* (1999).

See ch 2, III, on implementation of the right and ch 4, I, on legal theories underlying the right. Vienna Declaration on Human Rights, UN World Conference on Human Rights, UN Doc A/CONF.157/24, 25 June 1993, pt I, Art I (10); reprinted in (1993) 14 Human Rights Law Journal 352.

G A Res 53/155, 1998; see also ch 7, VII, on efforts towards legal enhancement of the right.

<sup>12</sup> The findings of such reports are noted throughout this book. See App 3 for a table with relevant report citations.

<sup>&</sup>lt;sup>13</sup> Foreword by Louise Arbour, UN High Commissioner for Human Rights, in Bård A Andreassen and Stephen P Marks, *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) iii.

<sup>&</sup>lt;sup>14</sup> Such an assessment is found, eg, in many of the contributions to the volume on development as a human right, ibid.

#### THE INTERNATIONAL LEGAL DIMENSIONS

The right to development also invites attention in light of debates in the field of international law. In the area of human rights law, the right to development poses several major questions.<sup>15</sup> For example, how can new types of rights be accommodated within the existing body of human rights law? How are civil and political rights to be integrated with economic, social and cultural rights? How can the concept of individual human rights be reconciled with the concept of collective rights or the rights of peoples? How can human rights norms be implemented and enforced? What are the human rights obligations of non-state actors such as business corporations? This book provides some insight on these questions.

In the field of development law, the right to development straddles the divide between the so-called North and South, or First and Third Worlds, or developed and developing countries, or rich and poor. Over the decades, certain UN legal prescriptions have reflected the underlying tensions in economic development theory. In the 1970s, developing countries sought to redress economic inequalities through the creation of a 'New International Economic Order' (NIEO). This was strongly resisted by developed countries, and later overtaken by the apparent success of free-market ideology. The death-knell for the NIEO was sounded many years ago. However, as will be seen, elements of the NIEO survive in the intention and interpretation of the UNDRD. The continued influence of these elements is one of the main political issues surrounding the right to development.

- <sup>15</sup> See ch 5 on the substance of the right to development for commentary on some of these questions. 20 years ago, Philip Alston observed that the UN Commission on Human Rights 'has expended an enormous amount of time and energy on matters of marginal importance, while the core concerns that provided impetus for the emergence of the concept of the right to development in the first place have remained largely unaddressed'; 'Revitalising United Nations Work on Human Rights and Development' (1991) 18 Melbourne University Law Review 216, 217. Alston is the leading scholar on the subject, and this article remains helpful in situating the right to development in the human rights debate.
- <sup>16</sup> These differences in economic development theories are discussed in Geir Lundestad, East, West, North, South: Major Developments in International Politics 1945-1996 (1997) 296–328. On one side is the liberalist or traditional view that upholds the growth capacity of market economies, and concedes only moderate government intervention both nationally and internationally. On the other side is the structuralist or dependency school. Put simply, it holds that the South has become underdeveloped and has remained so due to the development of the North.
- (S-VI) (1974), was intended to 'eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations'. See discussion of the NIEO and the surrounding controversy in ch 2, I. Also note that the right to development has been held out as the single most important element of a *structural* approach to human rights at the international level. Philip Alston, 'Prevention Versus Cure as a Human Rights Strategy' in International Commission of Jurists (eds), Development, Human Rights and the Rule of Law (1981) 31–108, at 99.
- <sup>18</sup> See discussion of the legacy of the NIEO in ch 2, III. C. iii; law review articles have referred to its 'requiem' and 'post-mortem'.

In recent years, the subject of development has become linked to another concept – that of environmental sustainability. This book notes how the right to development relates to the law of sustainable development. <sup>19</sup> Indeed, some commentators refer to 'the right of sustainable development'.

Moreover, the right to development has underscored the value of an integrated approach to the problems of both human rights and development. This book addresses the 'human rights approach to development', which has transformed both development theory and practice.<sup>20</sup>

As indicated by the title, a primary focus of this project is international economic law.<sup>21</sup> To what extent should the right to development be linked to the reform of international economic institutions and policies? Within the draft texts of the declaration on the right to development considered by UN delegates in the 1980s, provisions that would have sharpened this approach were expressly rejected.<sup>22</sup> One American diplomat later warned that the failure to 'quarantine' the right to development within human rights fora would allow the right to 'provide legal sanction to a myriad of ideas harmful to true long-term world security'.<sup>23</sup> Nonetheless, other legal experts have maintained that 'problems of international economic law need to be highlighted because of their inextricable relevance to any respectable implementation of a right to development'.<sup>24</sup> This book argues in favour of leveraging the right to development to promote global legal reform.

19 See discussion of sustainability in ch 3, II. E and in ch 7, VI.

<sup>20</sup> A helpful summary of the human rights approach to development is found at www.ohchr.org/Documents/Publications/FAQen.pdf. See also Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (2005).

- I presented initial elements of this argument in 1999, at a conference sponsored by the American Society of International Law; Isabella D Bunn, 'The Right to Development: Implications for International Economic Law' (2000) 15 American University International Law Review 1425. Research included Henry Steiner and Philip Alston, International Human Rights in Context, 2nd edn (2000) ch 16 on 'Globalization, Development and Human Rights' 1306–61; Friedl Weiss, Erik Denters and Paul de Waart, International Economic Law with a Human Face (1999); Michael K Addo, 'An Underlying International Economic Law Problem of the Right to Development' Human Rights Unit Occasional Paper, Commonwealth Secretariat (1989), which deals largely with bilateral economic assistance; Pieter van Dijk et al (eds), Restructuring the International Economic Order: The Role of Lawyers (1986).
- <sup>22</sup> A proposed amendment offered by Pakistan during the deliberations of the Third Committee prior to consideration of the draft Declaration on the Right to Development by the General Assembly included a call for 'action to increase concessional assistance to developing countries, build world food security, resolve the debt burden, eliminate trade barriers, promote monetary stability and enhance scientific and technical co-operation'; A/C.3/41/L.5, 2 Oct 1986. A Report of the Working Group of Governmental Experts on the Right to Development, E/CN.4/1985/11, 24 Jan 1985, presents an earlier series of draft proposals, many of which also focus on international economic policy.
- <sup>23</sup> Morris B Abram, 'Human Rights and the United Nations: Past as Prologue' (1991) 4 Harvard Human Rights Journal 69, 78. Such harmful ideas were said to include debt rescheduling for the least-developed countries. Abram served in a number of capacities for the US government's mission to the UN in Geneva, and objected to development being construed as a right rather than as a goal or aspiration. As will be noted, the US was the only nation to vote against the UNDRD in 1986.
- <sup>24</sup> Addo, above n 21 at 8. Danilo Turk also indicates that reforms in international economic policy, especially with respect to new forms of cooperation and reinterpretation and revision of certain international instruments, are a vital means to the realization of the right to development; 'The Human Right to Development' in van Dijk et al, above n 21 at 93–95.

Since the adoption of the UNDRD in 1986, the implications of the right to development for international economic law and policy have expanded exponentially. While the text of the UNDRD itself is rather ambiguous, subsequent UN resolutions and actions squarely link the right to development to subjects such as development assistance, the debt burden and adjustment policies, foreign investment, the activities of transnational corporations, the international trading regime, unilateral coercive measures and many others.<sup>25</sup> The resulting pressure for changes in international economic law cannot be ignored.

Moreover, over the past 25 years, the international environment in which policies on human rights and development take shape has been transformed. The demise of Communism marked an ideological shift towards both democratization and a market-driven world economy. This spurred the process of globalization and the myriad interconnections of trade, investment and finance.26 However, public concern over the social impact of globalization also led to a major rethinking of both the goals and the functioning of the international economic system.<sup>27</sup> At the turn of the millennium, the global community made important commitments to address inequalities and alleviate poverty. The shock of the attacks of September 11, 2001 – which ushered in an 'age of terror' – also led to a re-examination of issues related to human rights and development. 28 As this book goes to press, the global economy is still mired in the financial and debt crisis that took hold in 2008. World leaders are scrambling to find solutions to restore growth, employment and stability. Surely the realization of the right to development must respond to this new international environment, and to the legal and policy tools deployed to meet unprecedented challenges.

### THE MORAL DIMENSIONS

This book asserts that an appreciation of the moral foundations of the right to development is essential to both the normative elaboration and the practical realization of the right. The right to development has received some attention in

<sup>&</sup>lt;sup>25</sup> See part two on specific areas of international economic law and policy as they relate to the right to development. See App 3 for a table with citations to relevant resolutions. For a general overview, see Wolfgang Benedek, Koen de Feyter and Fabrizio Marrella (eds), *Economic Globalisation and Human Rights* (2007).

<sup>&</sup>lt;sup>26</sup> See ch 8, I, on the challenges of globalization.

<sup>&</sup>lt;sup>27</sup> See ch 8, II, on the anti-globalization movement. In 1999–2001, public demonstrations directly targeted institutions such as the World Bank, the International Monetary Fund, the World Trade Organization and companies symbolic of global capitalism.

Lecture by Prof Harold Hongju Koh, former US Assistant Secretary of State for Democracy and Human Rights, on 'Why Nations Obey International Law', Oxford University, 15 Oct 2001. The subsequent 'war on terror' raised a further series of human rights issues. See *Protecting human rights and fundamental freedoms while countering terrorism*, Report of the Secretary General, A/60/374, 22 Sept 2005. The report observes that as terrorism feeds on alienation and despair, people everywhere must be offered real hope of self-respect and a decent life by peaceful methods: 'Greater respect for human rights, along with democracy and social justice, will, in the long term, be the most effective prophylactic against terrorism'; at para 76.

the field of theology, given its link to elements of Catholic doctrine.<sup>29</sup> But it can also be set against some of the larger debates in Christian social ethics, and indeed against the ambiguities of church history with respect to both human rights and development. Support for human rights only emerged after centuries of religious oppression and intolerance.<sup>30</sup> Commitment to the poor has often been entangled with imperialism and exploitation of local populations. As one theologian observes, 'Western religious and philosophical ethics helped justify every aspect of colonialism'.<sup>31</sup> Additionally, questions are posed about the proper role of the Church – if any – in social and political action altogether.<sup>32</sup> These issues sharpen some of the ethical critiques of the right to development brought out in this book.

More generally, the challenges of globalization have renewed the scrutiny of the values pursued – and values undermined – by the international economic system. For example, public concern has motivated ethically-grounded initiatives such as the Jubilee 2000 campaign to alleviate third world debt. <sup>33</sup> These efforts have garnered worldwide support and influence, bringing the demands of human rights and social justice into the debate on global economic policies.

Some of these interdisciplinary strands are brought together in an analysis of 'Ethics, Human Rights and Globalisation'.<sup>34</sup> Questions raised by the UN High Commissioner for Human Rights echo some of the impetus behind this project:

What is the relationship between ethics and human rights and how do they both link to values, morality and to law? It is not only an interesting intellectual exercise to analyze these concepts, it is directly relevant to the world of action and to the policy choices we face as individuals, as citizens of different countries and as world citizens ... [We must] also address the challenges of globalisation. What role can ethics and human rights play in a world of greater inequality within as well as between nations?

- <sup>29</sup> In the field of theology, two works of note are Giorgio Filibeck (ed), *The Right to Development:* Conciliar and Pontifical Texts (1960-1990) (1991) and MT Szmitkowski, 'Reconnaissance du Droit au Développement et Doctrine Chrétienne' (1972) René Cassin Amicorum Discipulorumque Liber IV, 119–36.
- <sup>30</sup> See, eg, Alexander Boldizar and Outi Korhonen, 'Ethics, Morals and International Law' (1999) 10 European Journal of International Law 279, discussing an interdisciplinary conference on the 'Turn to Ethics' at Harvard University. Also, Mark Janis and Carolyn Evans (eds), Religion and International Law (1999).
- Malcolm D Evans observes that 'human rights and religion do not mix very easily and attempts to make them do so are fraught with difficulties and dangers'. 'Religion, Law and Human Rights: Locating the Debate' in Peter W Edge and Graham Harvey (eds), Law and Religion in Contemporary Society (2000) 177–97 at 177.
- <sup>31</sup> Preston Williams, 'Colonialism,' in John Macquarrie and James Childress (eds), A New Dictionary of Christian Ethics (1986) 100-01.
- <sup>32</sup> A range of views is presented in John Atherton (ed), *Social Christianity: A Reader* (1994). On the application of Jesus' teachings and ministry to social ethics, see John Howard Yoder, *The Politics of Jesus* (1972).
  - 33 See ch 11, II, for discussion of the Jubilee 2000 campaign.
- <sup>14</sup> Second Global Ethic Lecture at the University of Tubingen, Global Ethic Foundation, *Ethics, Human Rights and Globalisation*, Mary Robinson, 21 Jan 2002; available at www.global-ethic-now.de/pdf/0a-weltethos/ENG/lectures/Lecture\_Robinson\_eng.pdf.

Some answers may be found in the moral basis of the right to development – the themes of human dignity, equality, care for the poor, promotion of the common good, pursuit of justice, solidarity. These must be rallied in the creation of a social and international order in which all human rights and freedoms can be realized.

#### ORGANIZATION OF THE BOOK

The Introduction to this book on The Right to Development and International Economic Law: Legal and Moral Dimensions has provided a sense of the debates surrounding the right. This anticipates some of the tensions that arise in analyzing legal and moral aspects of the right to development, and indicates the relevance of international economic law to the realization of the right.

The book is divided into two main parts.

PART ONE of the book focuses on Foundations of the Right to Development. Chapter one reviews the global political and ethical context in which the right emerged, providing general background. Chapter two traces the legal formulation of the right, highlighting key international documents, the adoption of the UN Declaration on the Right to Development in 1986 and the substantial UN efforts towards its implementation. Chapter three discusses the moral basis for the right to development. The following three chapters offer an evaluation and critique of the right to development. This includes questions about the theoretical basis of the right, the meaning of development and the substance of the right to development in terms of its beneficiaries, duty-holders, key characteristics and enforcement. Chapter seven assesses the status of the right to development under international law, including normative issues surrounding UN resolutions, customary law, soft law and the concept of sustainable development. It concludes by considering the legal enhancement of the right, with particular attention to the potential elaboration of a UN treaty.

PART TWO of the book focuses on *The Right to Development in a Global Economy*, exploring some of the ramifications for international economic law and policy.<sup>35</sup> Chapter eight addresses the challenges and critiques of globalization, including responses such as the Millennium Development Goals. Chapter nine identifies six principles relevant to the realization of the right, including respect for human rights, differential treatment of developing countries, equality of opportunity, participation, accountability and the expansion of social responsibility. The following three chapters take up three key areas of global economic policy, noting implications for the right to development: the international trading system, financing for development and corporate responsibility.

<sup>&</sup>lt;sup>35</sup> The subject of international economic law is gaining in importance throughout the world, with the discipline expanding in areas of research and publications, teaching, practice, and public service. See, eg, Colin B Picker, Isabella D Bunn and Douglas W Arner (eds), *International Economic Law: The State and Future of the Discipline* (2008).

This underscores the main thesis of the book, that reform of international economic law is indispensable to the realization of the right to development.

The Conclusion reflects on some of the legal and moral contributions of the right to development in a new global context. This includes the UN's own assessment of the value-added of the right. In particular, a quarter of a century after the adoption of the UNDRD, the conclusion looks to prospects for the progressive realization of the right to development. A stronger moral grounding in the discourse may enhance the status of the right as a legal norm and build political support. An express connection to international economic law may help institute further changes in the system of world trade, investment and finance to promote human welfare and dignity. As efforts to advance the right both legally and programmatically intensify, such consideration is both relevant and timely. The right to development may be positioned to play an important role in the ongoing quest for ethical globalization.