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"Legal dimensions of the right to development as a human right:"

Some conceptual aspects

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**LEGAL DIMENSIONS OF THE RIGHT TO DEVELOPMENT**  
**AS A HUMAN RIGHT:**  
**SOME CONCEPTUAL ASPECTS**

By

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I. The 1986 U.N. Declaration.

In 1977 the U.N. Commission on Human Rights recommended to ECOSOC a request to the U.N. Secretary-General to undertake a study, in connection with debates initiated in UNESCO, of the international dimensions of the right to development as a human right. On the basis of the Secretary-General's study of 1979, the Commission on Human Rights adopted a resolution in that year stating that the right to development was a human right and "as much a prerogative of nations as of individuals within nations". Two years later, in 1981, ECOSOC approved the Commission's decision to establish a Working Group of 15 governmental experts to dwell upon the matter; from 1982 to 1985, the Working Group embarked on the elaboration of a draft Declaration on the Right to Development, considering its "individual" and "collective" aspects. In 1985 the matter was referred to the U.N. General Assembly, where for two years it was the object of dense negotiations. In 1986, the III Committee of the General Assembly adopted the Declaration by 133 votes in favour, one against, and 9 abstentions; the U.N. Declaration on the Right to

Development, considering its "individual" and "collective" aspects. In 1985 the matter was referred to the U.N. General Assembly, where for two years it was the object of dense negotiations. In 1986, the III Committee of the General Assembly adopted the Declaration by 133 votes in favour, one against, and 9 abstentions; the U.N. Declaration on the Right to Development was at last adopted in plenary session by the General Assembly (resolution 41/128, of 04 December 1986), with 146 votes in favour, one against, and 8 abstentions, containing a preamble with 17 paragraphs and 10 Articles and its operative part.

The U.N. Declaration on the Right to Development states quite clearly that "the human person is the central subject of development and should be the active participant and beneficiary of the right to development" (Article 2 (1), and preamble). It qualifies the right to development as "an inalienable human right" of "every human person and all peoples" (Article 1), by virtue of which they are "entitled to participate in, and contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized" (Article 1 (1)).

The Declaration addresses itself repeatedly to States, urging them to take all necessary measures for the realization of the right to development (Articles 3 (3), 4, 5, 6, 7 and 8). Responsibility for the realization of the right to development is placed primarily on States (Article 3(1)), "individually and collectively" (Article 4(0)), but also on all human beings, "individually and collectively" (Article 2 (2)), i.e., individuals and communities. The Declaration envisages measures and activities at both national and international levels (Articles 3 (0), 4, 8 and 10) for the realization of the right to development. The Declaration thus encompasses a wide and complex range of relationships meant to

<sup>1</sup> For an account of the drafting of the Declaration, cf. e.g., inter alia, M. Bulajic, Principles of International Development Law, Dordrecht, M. Nijhoff, 1986, pp. 332-345; J. Alvarez Vite, Derecho al Desarrollo, Lima, Cult. Cuzco Ed., 1988, pp. 8-108; M. fi. Kenig-WHkowska, The U.N. Declaration on the Right to Development in the Light of its Travaux Préparatoires " , International Law and Development (ed. P. De Waart, P. Peters and E. Denters), Dordrecht, M. Nijhoff, 1988, pp. 381-388.

contribute to the realization of the right to development.

## II. Subjects, Legal Basis and Contents of the Right.

The 1986 Declaration clarified to some extent the key questions of the subjects, legal basis and contents of the right to development, much discussed in the preparatory work of the Declaration and in expert writing in the years which preceded it<sup>2</sup>. As to the subjects, it is noteworthy that the Declaration, as pointed out, proclaims the right to development as an inalienable human right, by virtue of which every human person and all peoples are entitled to enjoy economic, social, cultural and political development. The active subjects or beneficiaries of the right to development are thus the human beings and peoples. In addition, like what happens in contemporary formulation of other rights pertaining to human collectivities, or to the human person in society, or "l'homme ou peuple situé", distinct sets of obligations<sup>3</sup> may be distinguished: in the present context, the responsibilities ascribed by the Declaration to States, individually and collectively, and, as counterpart of the human right to development, the responsibilities incumbent also upon human beings, individually and collectively (communities, associations, groups). The passive subjects of the right to development are thus those who bear such responsibilities, with emphasis on the obligations attributed by the Charter to States, individually and collectively (the collectivity of States).

Possibly the major significance of the Declaration on the Right

<sup>2</sup> Cf. the papers by R. Ago, R. Zacklin, G. Abi-Saab and A. El de, in U Droit international au développement au plan International - Colloque (1979), Hague Academy of International Law (hereinafter quoted Hague Colloquy), The Hague, Sijthoff/Nijhoff, 1980, pp. 7-8 (Ago), 117-118 (Zacklin), 162-164 and 168-170 (Abi-Saab), and 402-403 and 415 (Eide).

<sup>3</sup> I. J. Koppen and K.-H. Ladeur, Environmental Rights, Florence, European University Institute, (1989), p. 33 (2nd draft, Internal circulation).

to Development lies in its recognition or assertion of the right to development as an "inalienable human right". The emerged formulation and acknowledgement of this right of the human person and of peoples was intuitively forecasted or anticipated by a few authors some years ago<sup>4</sup>. But even nowadays, in the first years following the Declaration, some precision is required as to the legal basis and contents of the right to development. The Declaration contains elements which are already embodied, mutatis mutandis, both in human rights instruments proper (such as, e.g., the 1948 Universal Declaration, the two U.N. Covenants on Human Rights, and U.N. resolutions of various kinds on the subject) and in sources of the international development law (such as the 1974 Charter of Economic Rights and Duties of States, the 1974 Declaration - and Programme of Action - on the Establishment of a New International Economic Order, and relevant U.N. General Assembly resolutions)<sup>5</sup>.

It is important to keep in mind the distinction between the "international law of development" ("droit international de développement"), and the "right to development" ("droit au développement") as a human right as proclaimed in the 1986 Declaration. The former, with its various components (right to economic self-determination, permanent sovereignty over natural wealth and resources, principles of non-

<sup>4</sup> Kéba M'Baye, "Le droit au développement comme un droit de l'homme", 5 Revue des droits de l'homme/Human Rights Journal (1972) pp. 505-534; J. A. Canillo Salcedo, "El Derecho al Desarrollo como Derecho de la Persona Humana", 25 Revista Española de Derecho Internacional (1972) pp. 119-125.

<sup>5</sup> Cf., e.g., Jorge Castañeda, "La Charte des droits et des devoirs économiques des États", 20 Annuaire français de droit international (1974) pp. 31-77; P.M. Martin, "Le nouvel ordre économique international", 80 Revue générale de droit international public (1976) pp. 502-535; P.J.I.M. de Waart, "Permanent Sovereignty over Natural Resources as a Cornerstone for International Economic Rights and Duties", 24 Netherlands International Law Review (1977) pp. 304-322; A. A. Cançado Trindade, "As Nações Unidas e a Nova Ordem Económica Internacional", 81 Revista de InformapSo Legislativa - Brasilia (1984) pp. 213-232; H. Hohmann, "Justice sociale et développement pour le nouvel ordre économique international", 58-59 Revue de droit international de sciences diplomatiques et politiques (1980-1981) pp. 217-231 and 82-88, respectively.

reciprocal and preferential treatment for developing countries and of participatory equality of developing countries in international economic relations and in the benefits from science and technology), emerges as an objective international normative system regulating the relations among juridically equal but economically unequal States and aiming at the transformation of those relations, on the basis of international cooperation (U.N. Charter, Articles 55-56) and considerations of equity, so as to redress the economic imbalances among States and to give all States - particularly the developing countries - equal opportunities to attain development <sup>6</sup>. The latter, as propounded by the 1986 Declaration, and inspired in such human rights provisions as Article 28 of the 1948 Universal Declaration and Article 1 of both U.N. Covenants on Human Rights, appears as a subjective human right, embodying demands of the human person and of peoples which ought to be respected.

Three years after the adoption of the U.N. Declaration on the Right to Development, its significance has been acknowledged by some countries, in their comments and views on the implementation and further enhancement of the Declaration, forwarded to the U.N. Secretary-General and considered by the U.N. Commission on Human Rights in its 1989 session. According to some of those comments and views, the primary significance of the Declaration is reflected in the fact of its giving the right to development the status of an "inalienable human right" (Jamaica), its stressing the "all-embracing global" nature of the problem of development in our days linked to the observance of human rights (USSR), its awareness of the need of a "comprehensive realization" of all human rights (Yugoslavia), and its recognition of the interdependence of all human rights (Brazil and India) <sup>7</sup>. Furthermore, the right to

<sup>6</sup> M. Virally, "Vers un droit international du développement", 11 Annuaire français de droit international (1965) pp. 3-12; H. Gros Espieli, Derecho Internacional del Desarrollo, Valladolid, Univ. de Valladolid, 1975, pp. 11-47; P. Buirette-Maurau, La participation du tiers-monde à l'élaboration du droit international, Paris, LGDJ, 1983, pp. 131-137, 160-167 and 185-202.

<sup>f</sup> U.N. doc E/CN.4/AC.39/1989/1, of 21.12.1988, Analytical Compilation of Comments and Views on the Implementation and Further Enhancement of the Declaration of the Right to Development Prepared by the Secretary-General, pp. 4-9.

development focusses on the interaction between human rights and development issues<sup>8</sup>, at last brought together.

### III. Obstacles.

The U.N. Declaration on the Right to Development itself was attentive to the obstacles to be overcome in order to provide equality of opportunity for development. The Declaration refers to the elimination of those obstacles in Articles 5 and 6 (3) and two consideranda of the preamble, and identifies them as being: massive and flagrant violations of rights of human beings and peoples (ensuing from situations such as those resulting from apartheid, all forms of racism and racial discrimination; foreign domination and occupation, aggression, foreign interference and threats against national unity and sovereignty and territorial integrity), threats of war and refusal to recognize the fundamental right of peoples to self-determination.

In addition, the [U.N.] open-ended Working Group of Governmental Experts on the Right to Development, originally established in 1981 by the U.N. Commission on Human Rights, recently considered (1989) as further obstacles to be surmounted for the realization of the right to development the following: the arms race and the threat of nuclear holocaust, poverty and destitution, illiteracy, economic imbalances in international relations, the deterioration of the environment and the ecological balance. Ideological and religious intolerance, different forms of violence, and natural disasters. On the other hand, it also considered, as factors which may foster the harmonious development of mankind, the progress in science and technology and the dissemination of knowledge and cultural values through information and communications media (so as to facilitate

<sup>9</sup> Ph. Alston, "The Right to Development at the International Level", Hague Colloquy, cit. supra n. 2, p. 111. - And cf. J.-B. Marie and Questiau, "Article 55 alinéa c", La Charte des Nations Unies - commentaire article par article (éd. J.-P. Cot and A. Pellet), Paris-Bruyelles, Economica/Bruylant, 1985, pp. 863-883.

exchanges among men and cultures) <sup>9</sup>.

#### IV. Implementation.

The formulation and assertion of the right to development lead then to the next question, that of its implementation or vindication. The issue can be properly considered within the universe of International human rights law. By and large, human rights which have found expression in multiple Instruments at global and regional levels form the object of groups of provisions that have functions which may appear different but are often complementary to each other, namely: to protect the life and physical integrity of human beings and to secure the exercise of other fundamental rights and freedoms; to prevent and eliminate all forms of discrimination; to secure minimum conditions of living <sup>10</sup>.

Human rights range substantively from those which impose limits to State intervention (e.g., right to life, right not to be ill-treated, liberty and security of person, freedoms of thought, conscience, religion and opinion, freedom of movement) to those which require State action (e.g., right to work and to an adequate standard of living, including food, housing and clothing; right to health and to social security; right to organize trade unions; right to education) <sup>11</sup>. Human rights range procedurally from those which can be vindicated by the victims

<sup>9</sup> U.N. doc. E/CN.4/1989/10, of 13.02.1989, Problems Related to the Right to Enjoy an Adequate Standard of Living - The Right to Development, pp. 3-13. On the "Individual" and "collective" dimensions of the right to development and the related theme of the external debt (of Latin American countries), cf., e.g., L. Diaz Müller, "El Derecho al Desarrollo y los Derechos Humanos", 4 Revista del Instituto Interamericano de Derechos Humanos (1986).

<sup>10</sup> A. Kiss, "Définition et nature juridique d'un droit de l'homme à l'environnement, Environnement et Droits de l'homme (éd. P. Kromareck), Paris, UNESCO, 1987, p. 14.

<sup>11</sup> A. Elde, "redevelopment and 'the Right do Development': a Critical Note with a Constructive Intent", Hague Colloquy, op. cit. supra n. 2, p. 400.



themselves (or their representatives) to those which involve a complex web of actors, namely, the victims themselves, interest groups, judges, legislators and the administration. The normative-judicial model, suitable to the implementation of individual rights, appears inadequate to the implementation of, e.g., rights pertaining to human collectivities, the protection of which may require the mobilization of public funds and resources. The basic shortcoming of the judicial control model is that it treats all rights in a rather undifferentiated way, starting from the assumption that they are all susceptible of being vindicated by the same method<sup>12</sup>.

In practice it does not happen so; rights pertaining to human collectivities seem to call for a distinct approach to the means and the institutional arrangements for their implementation or vindication. As it has pertinently been pointed out, sometimes legislative measures may prove sufficient, but other times one may have to make "a concerted effort to cross cultural, socio-economic and other barriers in order to inform potential victims of their rights"<sup>13</sup>. Violations of those rights may affect so many individuals that individual litigation may prove unsuitable or unjustified, and it may happen that national rules of locus standi end up by denying standing<sup>14</sup>. In this broader dimension, it is clearer that the "justiciability" of a right cannot be erected as a conditio sine qua non of its existence and recognition as such: there are rights which cannot properly be vindicated today before a tribunal by their active subjects ("titulaires")<sup>15</sup>. This point needs further reflection and considerable rethinking of international human rights law, given the emergence of rights pertaining to human collectivities.

In any way, it can also be argued that, having been brought to the realm of international human rights law, the right to development, when raised in concrete cases, may well count on the operation of the means of

<sup>12</sup> A. Cassese, A. Clapham and J. Weiler, 1992 - What Are Our Rights ?, Florence, European University Institute, 1989, pp. 25 and 53-54.

<sup>13</sup> *ibid* pp. 55-56.

<sup>14</sup> *Ibid*, p. 68.

<sup>15</sup> A. Klöppel, *supra* cit. 10, p. 24.

Implementation proper to the International protection of human rights (basically, the petitioning, the reporting and the fact-finding systems). To this effect a range of possible courses of action may be contemplated in the future. These might be pursued, first, at the Initiative of the human beings concerned, Individually and collectively (communities, associations, groups), as active subjects of the right to development. Secondly, the possibility is not to be discarded of the Initiative of States acting on behalf of peoples, to protect them: clear indications to this effect can be found in, e.g., two applications instituting proceedings before the International Court of Justice, namely, that of New Zealand (against France) in the Nuclear Tests case (1973-1974), and that of Nauru (against Australia) in the pending Phosphate Lands case (1989 onwards).

However, having raised this possibility, it seems that it is in particular on the methods of human rights protection proper that the right to development is more likely to count on for its implementation as a human right. The 1986 Declaration, in this respect, actually refers, in its preamble, to relevant Instruments of the United Nations and its special agencies in the present domain. Anyway, the implementation of the right to development as a human right, given the "individual" and "collective" dimensions of the right at issue and its comprehensive nature, may prove to be a complex and multi-faceted one.

#### V. Relation to Other Human Rights.

Moreover, we need be guarded against the pitfalls of an inadequate compartmentalization of human rights, first because it hardly reflects the reality of their actual implementation, and secondly because it may pave the way to invocation of undue restrictions to the exercise of certain rights. Let us concentrate on these two points. As to the first one, it may be recalled that the proposed dichotomy between individual and social rights, which found expression in the "legislative" phase of elaboration of the two U.N. Covenants on Human Rights bearing in mind their respective means of implementation, did not resist the onslaught of

time, as the U.N. Covenant on Civil and Political Rights also foresaw the possibility of a "progressive realization" of certain rights and the U.N. Covenant on Economic, Social and Cultural Rights contained provisions susceptible of application in the short run. Contrary to the old assumptions, it was soon realized that there were civil and political rights that required "positive action" on the part of the State (e.g., the droit civil to judicial assistance integrating the guarantees of due process), just as there were economic, social and cultural rights linked to the guarantee of a measure of freedom (e.g., right to strike and trade union freedom) <sup>16</sup>.

In this respect, already from the early sixties onwards the ILO drew attention to the fact that certain rights, of an economic and social character (e.g., right not to be subjected to forced labour, freedom of association for trade union purposes, freedom from discrimination in relation to employment and occupation) were most closely related to civil liberties and even more akin to these latter than to other economic and social rights <sup>17</sup>. Other examples could be recalled, e.g.: the fundamental right to life and physical integrity of the human person presupposes the existence not only of penal provisions to punish any act contrary to that right but also institutional means and arrangements to be secured by the State; and the right to a fair and public hearing presupposes the existence of an independent and adequate structure of the Judiciary; and the guarantee of freedom of opinion and expression may demand from the State initiatives and acts to safeguard the freedom of the press and the communications media; and so forth. In sum, even the most "classical" rights may require the intervention of the State in order to secure their observance <sup>18</sup>.

The proposed classification of individual, social and peoples' rights is to be properly approached on the understanding that one category

<sup>16</sup> A. A. Cançado Trindade, A Questão da Implementação Internacional dos Direitos Económicos, Sociais e Culturais: Evolução e Tendências Atuais, San José/Costa Rica, Instituto Interamericano de Derechos Humanos (Vil Curso Interdisciplinario), 1989, pp. 3 and 6.

<sup>17</sup> Cf. *ibid*, pp. 13-14.

<sup>18</sup> A. Kiss, op. cit. supra n. 10, pp. 14-15.

of rights cannot prescind from the existence of the others. By the some token, the rights of certain categories of protected persons, regarded as belonging to particularly vulnerable groups and standing in need of special protection - such as, e.g., rights of workers, of refugees, of women, of the child, of the elderly, of disabled persons - are to be properly approached on the understanding that they are complementary to those enshrined in general human rights treaties. Whether one has in mind the protection of certain rights vis-à-vis the State (fundamental freedoms) and/or the guarantee of other rights by the State itself, the implementation of instruments turned to rights which may appear distinct as to the protected persons or as to the kind of protection sought is to be properly taken as complementary to that of general treaties on human rights protection (e.g., the two U.N. Covenants on Human Rights and the three regional - European, American and African - Conventions) <sup>19</sup>.

In the line of the more lucid thinking in International human rights law, it is a merit of the 1986 U.N. Declaration on the Right to Development that it provides guidelines for approaching the relation of the right to development to other human rights. In three of its particularly significant passages (Articles 6 (2), 9 (1) and preamble), the Declaration stresses that all human rights are indivisible and interdependent and that, in order to promote development, equal and urgent attention should be given to the implementation of civil, political, economic, social and cultural rights, and the observance of certain human rights cannot thus justify the denial of others; likewise, all the aspects of the right to development are indivisible and interdependent and each of them is to be considered in the context of that right as a whole. The Declaration in this way echoes the endorsement, by the celebrated U.N. General Assembly resolution 32/130 of 1977, of the thesis of the indivisibility and interdependence of all human rights advanced by the 1968 Proclamation of Teheran, the roots of which may be traced back to the 1948 Universal

19 A. A. Canêado Trindade, OJL CiL supra n. 16, pp. 7-8; A. A. Canêado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 Recueil des Cours de l'Académie de Droit International (1987) p. 57.

Declaration and its preparatory work undertaken by the U.N. Commission on Human Rights 20.

The globalist perspective pursued by the United Nations was prompted by the fundamental changes undergone by so-called contemporary International society (Inter alia, decolonization, capacity of massive destruction, population growth, environmental conditions, energy consumption). The globalist conception, externalized by U.N. 6A resolutions 32/130 of 1977 and others (res. 39/145, 43/113, 43/114, 43/125) and by the Declaration on the Right to Development, has contributed to focus on the promotion and protection of the rights pertaining to human collectivities and on the priority search of solutions to generalized gross and flagrant violations of human rights.

The 1986 Declaration can only come to re-enforce other human rights previously formulated, may it be recalled that this globalist approach, which emanated from the United Nations, was soon to have repercussions, and paved the way for distinct solutions, also at regional level. As known, in the African continent, the draftsmen of the 1981 African Charter on Human and Peoples' Rights opted for the inclusion in that single Convention of a catalogue of civil and political (Articles 3-14), economic, social and cultural (Articles 15-18), and peoples' (Articles 19-24) rights, with a mechanism of implementation common to them all (Articles 46-59 and 62). In the European continent, the Council of Europe distinctly opted for the adoption, in 1987, of the First Protocol to the European Social Charter, expanding the list of rights protected under this latter. And in the American continent, the OAS also distinctly opted for the adoption, in 1988, of the Additional Protocol to the American Convention on Human Rights Relating to Economic, Social and Cultural Rights, incorporating certain economic, social and cultural rights to the inter-American system of human rights protection 21. There could hardly be any pretense of a supposed antagonism of solutions at global (United Nations) and regional levels, the multiple instruments of protection being complementary to each other, given their overriding identity of purpose.

<sup>20</sup> Ibid, pp. 8 and 59, respectively.

<sup>21</sup> A. A. Cançado Trindade, OJL\_cjl supra n. 16, pp. 9-10, 12 and 29.

We are led to consideration of the second point, namely, that of undue restrictions to the exercise of human rights. It is jurisprudence constante of International supervisory organs that permissible restrictions to the exercise of guaranteed rights are to be restrictively interpreted; furthermore, there can hardly be room for implied limitations (limitations implicites)<sup>22</sup>. The right to development, as propounded by the 1986 Declaration, comes, in the context of development initiatives, to re-inforce existing rights and the interdependence and indivisibility of civil, political, economic, social and cultural rights; the globalist approach (supra) discloses the complementarity between so-called "individual" and "collective" rights and preserves the indivisibility of rights with predominantly individualist as well as collectivist orientations or inclinations<sup>23</sup>. In the same line of thinking, the requirements of material development could MI be invoked to justify restrictions to the exercise of guaranteed human rights; this is so given the interaction between human rights and development<sup>24</sup> (cf. U.N. GA resolution 37/199) and the Declaration's warning that all aspects of the right to development are also indivisible and interdependent and to be taken into account in the context of the whole.

The right to development, with its comprehensive nature, is commonly said to have at a time an "individual" and "collective" (social) dimension; to distinguish plainly, however, between so-called "individual" and "collective" rights may amount to reducing the substratum of those rights to the means of their exercise<sup>25</sup>. All those rights in a way have a social dimension, in that - whether exercised by individuals or groups - they are related in varying degrees to the community, and solidarity is not the exclusive apanage of any category of rights<sup>26</sup>. An atomized or

<sup>22</sup> Cf. A. A. Canéado Trindade, "Co-existence and Co-ordination...", QJL cit. supra n. 19, pp. 104-112 and 403.

<sup>23</sup> Ph. Alston, QJL cJL suora n. 8, pp. 107-109.

<sup>24</sup> A. Eide, oJLÇiLsjipxan. 11, pp. 402 and 410.

<sup>25</sup> J.-B. Marie, "Relations between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", 7 Human Rights Law ç\_ojoal(1986)pp. 197-200.

<sup>26</sup> MI, pp. 199-200.