The relationship between human rights and development in international law

The international law of human rights and the international law of development are fairly circumscribed, as other chapters in this work clearly point out. International norms and institutions govern each of these fields, although with overlapping domains and ambiguous conceptual linkages. Human rights law draws upon and has its own standards relating to such issues as discrimination based on gender or race, refugees, victims of armed conflict, workers, children, and the like, and therefore covers a wide range of situations in which the human person is in need of the protection of the law from harm and abuse, as part of a broader endeavour to promote human welfare.¹

The law of development is less well defined but includes such topics as international finance, aid, trade, investments, anti-corruption, and lending. The treaties and other standard-setting instruments considered part of international development law in one way or another contribute to national and international efforts to protect vested interests, while often introducing a discourse about raising the populations of developing countries out of poverty and establishing a rules-based international political economy conducive to human welfare.²

How should these two strategies of human welfare be distinguished? Reduced to their most basic purposes, international human rights law promotes the flourishing of the human person while international development law promotes wealth creation and growth. Some approaches to development – often called ‘classical’ or ‘neoliberal’ and preceded by the word ‘economic’ – treat wealth creation as an end in itself, whereas others, usually using the

¹ ‘Welfare’ is used here in the economic sense of health, education and resources adequate for a life worth living rather than the political meaning of government ‘handout’ to those unable or unwilling to provide for themselves. This use is virtually synonymous with well-being.

² For a systematic critique of the pretensions of international development law, see Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance (Cambridge University Press, Cambridge, 2003).
language of ‘human development’, consider wealth creation as a means to improving human welfare or well-being. Growth-based models of development are those that consider development as the increase of goods and services for consumers, of infrastructure, social capital and industry for productive capacity, of market efficiency for maximising utility, and of trade and investment for comparative advantages in the global economy. The welfare models refer to approaches to development that focus on the human person as the end rather than a means of development, on sustainability in order to meet the needs of future as well as present generations, and on expanding choices through increased capabilities. The welfare model corresponds to a large extent with the concept of ‘human development’, defined by the United Nations Development Programme (‘UNDP’) in its Human Development Report as ‘creating an environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interests’.3

This chapter focuses on the legal dimensions of the relationship between international human rights law, on the one hand, and both of these approaches to development, on the other. I will define the scope of human rights in development as a sub-branch of international human rights law dealing with the legal norms and processes through which internationally recognised human rights are applied in the context of national and international policies, programmes and projects relating to economic and social development.

The application of human rights in development is based on the general proposition that the theory and practice of development may be enriched by the introduction of normative dimensions of a human rights framework and that development and human rights are mutually reinforcing strategies for the improvement of human well-being. However, there remains considerable uncertainty regarding the content and practical value of human rights in development practice and the mutually reinforcing character is highly contested.

There are several approaches to human rights in development, ranging from the basic concern for specific duties under human rights treaties within specific sectors of development (such as health or education) to more systematic efforts to link human rights norms to the entire process of development, through the concept, identified in the early 1970s, of the ‘right to development’ and subsequently further elucidated in both non-binding and binding legal instruments. Although I will begin with the right to development, the topic is broader and is best identified as ‘human rights in development’, a terminology adopted by the Office of the High Commissioner for Human

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Rights. The meaningful application of human rights concepts to the process of development requires linking the essentially legal and political approach of the former to the essentially economic and social context of the latter.

This chapter will examine successively the legal basis of the right to development, human rights law as applied to aid and poverty reduction strategies, and the tensions between human rights law and the legal regimes of international trade and investment. In other words, we begin with the full integration of human rights into development through the claim that development itself is a human right, then examine the emerging law and practice of the phased introduction of human rights means and methods into development practice, and end with the claim that human rights and development are separate spheres that intersect only in minor ways.

2 The legal basis of the right to development

The right to development has been defined in the 1986 Declaration on the Right to Development\(^4\) and in the writings of many scholars, including the UN Independent Expert on the Right to Development. Briefly expressed, it is a right to a process as well as to progressive outcomes aiming at the full realisation of all human rights in the context of equitable growth and “sustained action . . . to promote more rapid development . . . [and] effective international cooperation . . . in providing [developing] countries with appropriate means and facilities to foster their comprehensive development”, in the words of the DRD.

The right to development and human rights in development are related in the sense that the implementation of the right to development requires that governments and development partners apply human rights in their development policies and practices in an integrated way, along with the other requirements stipulated in or implied by the DRD. Thus the right to development includes but is not coterminous with a human rights approach to development insofar as this approach – to be discussed in the next section – may be applied in a single sector of the economy or in a localised development project, whereas the right to development calls for human rights to be systematically integrated into all sectors of development in the context of international efforts to facilitate such development.

The greatest challenge of any definition of the right to development or of a human rights approach to development is to make it operational in practice. Describing the component elements of the right to development does not specify the steps required to implement it. At the current stage of experience with

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the right to development, this right cannot be implemented with the same rigour as other human right norms, nor can appropriate measures of accountability and remedial action be put in place to respond to instances of failure to implement this right. However, it can be reasonably argued that taking this right seriously means that states, civil society and international institutions should treat it with a sufficient degree of rigour by identifying and applying appropriate measures of accountability. Otherwise, the right to development will remain primarily rhetorical.

A Legal status of the right to development
Governments have taken widely varying positions regarding the legal status of the right to development, ranging from the outright rejection of the claim that it is a human right at all to the position that it is a core right that should be legally binding and central to all efforts to promote and protect human rights. The intermediate view considers the right to development to be grounded in international law but the extent to which it constrains states legally is in the process of evolution. Indeed, official statements of governments since the mid-1970s, especially in their support for the DRD and for the right to development in the 1993 Declaration of the Vienna Conference on Human Rights,\textsuperscript{5} and other resolutions of the General Assembly and summits, attach legal significance to this human right. The DRD, like other declarations adopted by the General Assembly, creates an enhanced expectation that governments will move from political commitment to legal obligations. The DRD, therefore, is a legitimate reference by which to hold governments at least politically accountable as an international norm crystallises into law.

The political support for this transformation has been reiterated at several UN summits, which tend to make one allusion to the right to development, often as a reluctant political compromise, and then deal with the key issues of the event without any further reference to the right to development. For example, world leaders agreed in September 2000 at the United Nations Millennium Summit on a set of goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women, which eventually became the Millennium Development Goals (‘MDGs’). The Summit Declaration included the commitment ‘to making the right to development a reality for everyone and to freeing the entire human race from want’.\textsuperscript{6}

\textsuperscript{5} UN Doc A/CONF.157/23 (12 July 1993) [72] (‘Vienna Declaration’).
The *Human Development Report 2003* of the UNDP, which was devoted to the MDGs, affirmed that the MDGs contribute to the right to development.\(^7\) In particular, the report not only affirmed that ‘achieving the Goals will advance human rights’\(^8\) but also recognised ‘that the targets expressed in the Goals are not just development aspirations but also claimable rights’.\(^9\) The analysis uses the language of obligations:

Viewing the Goals in this way means that taking action to achieve them is an obligation, not a form of charity. This approach creates a framework for holding various actors accountable, including governments, citizens, corporations, and international organizations. Human rights carry counterpart obligations on the part of others – not just to refrain from violating them, but also to protect and promote their realization.\(^10\)

Finally, the report affirms that ‘[t]he Millennium Development Goals more explicitly define what all countries agree can be demanded – benchmarks against which such commitments must be measured’.\(^11\)

It is understandable that the political climate in which the right to development emerged continues to place this right more in the realm of rhetoric than as the normative basis for setting priorities and allocation of resources. Taking the right to development seriously requires that development partners put in place bilateral facilities or country-specific arrangements.\(^12\) Such arrangements offer an alternative to human rights conditionality in that they institutionalise the responsibility of developing countries to fulfil the obligations which they have freely accepted to apply human rights-consistent development policies. Equally important is the responsibility of donor countries and institutions to support the right to development through international cooperation, including debt relief, better conditions of trade and increased development assistance. The appeal of the right to development lies in its perceived potential for transforming international economic relations, especially

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\(^8\) Ibid 28.

\(^9\) Ibid.

\(^10\) Ibid.

\(^11\) Ibid.

between the developed and developing countries, on the basis of equity, partnership and shared responsibilities rather than creating confrontation. A moral commitment to such goals is easier to achieve than a legal commitment.

B Legal commitment to the right to development

To the extent that the human right to development reaffirms rights that are already contained in legally binding instruments, such as the two international Covenants on human rights, it builds on and integrates binding norms. Taken as a composite right, the right to development involves ‘perfect obligations’ of its component rights and, therefore, the duty-bearers may be identified and claims of non-conforming action may be legally adjudicated.

However, to the extent that the right to development establishes the obligation to integrate those components into a coherent development policy, it corresponds more to the notion of ‘imperfect obligation’, the realisation of which requires complex sets of actions and allocation of resources to develop and apply indeterminate policies at national and international levels. Governments have a moral obligation to establish such policies to ensure that development is advanced in a way that systematically integrates the five principles of equity, non-discrimination, participation, transparency and accountability. In this sense, it is an aspirational right to which governments may be politically committed but for which there are not yet legal remedies. The imperfect obligation to realise the right to development should be progressively translated into more specific obligations if the political posturing that has so far characterised this right can be replaced by specific policies and programmes with measurable outcomes. The current role of the Open-Ended Working Group on the Right to Development and its high-level task force offer an opportunity to move in that direction.

While the political discourse shows divergent approaches to the duties implied by the DRD, the legal basis for asserting that states do have such obligations derives not from the legal nature of the DRD, which is a resolution expressing views of member states in an instrument that did not purport to create legally binding rights and obligations, but rather, on the legal obligation to act jointly and separately for the realisation of human rights and ‘economic

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and social progress and development’, as stipulated in the *Charter of the United Nations* at Articles 55 and 56. For the states parties to the ICESCR, the core legal argument is contained in Article 2 of that treaty. It is in the logic of the right to development that the full realisation of ‘all rights’ cannot be successful if pursued piecemeal, but can only be achieved through a policy that is deliberately designed to achieve all the rights, progressively and in accordance with available resources. In that sense, the ICESCR creates legal obligations to do essentially what the right to development calls for. These are the legal obligations of each of the 160 states parties (as of March 2009) not only to alter its internal policy but also to act through international cooperation toward the same end. Specifically, the duty, in Article 2(1) ICESCR, ‘to take steps, individually and through international assistance and cooperation’ provides a legal basis for the reciprocal obligations mentioned above. The putative extension of this duty to co-operate with the right to development is expressed in Article 4(2) DRD: ‘[a]s a complement to the efforts of developing countries [to promote more rapid development], effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.’

The obligation to co-operate as a legal obligation can have a restrictive and an extensive interpretation. According to the restrictive interpretation, an affluent state could argue that its legal obligation to engage in ‘effective international co-operation’ in the realisation of the right to development is fulfilled by three elements of its foreign policy. The first is its policy of foreign aid; the second is its participation in development institutions like the UNDP and the Organisation for Economic Co-operation and Development (‘OECD’), as well as in international financial institutions, like the World Bank and the regional development banks; and the third is its role in deliberations about development issues at the General Assembly, the Economic and Social Council (‘ECOSOC’), and international conferences and summits. Beyond that general involvement in the process of international co-operation, according to this restrictive interpretation, it has no other legal (or moral) obligations. Thus, under the restrictive interpretation, a country that provides aid at any level, even far below the 0.7 per cent of GDP target prescribed in the MDGs; that participates in development institutions, even without doing much to promote innovative development policies; and that joins in deliberations on development at the UN, regardless of how it votes, would have no further obligations under the right to development. It has ‘co-operated’ in development and could argue that the reference to be ‘effective’ in Article 4(2) DRD is too vague to require more. This narrow approach does not give sufficient attention to the politically significant pronouncements of high-level conferences and the legally significant interpretations of expert bodies, which suggest a more extensive interpretation.
Such an extensive interpretation of the legal obligation to co-operate in development would add substance to the vague obligation to co-operate through the incorporation by reference of the most significant documents relating to the specifics of co-operation. According to this interpretation, the content of the obligation to co-operate would be provided by such documents as the General Comments drafted by the human rights treaty bodies, the declarations and programmes of action of the international conferences and summits, resolutions that purport to contribute to the progressive development of international law, and opinions expressed by leading experts and institutions. The declarations and programmes of action of international conferences and summits are not directly linked to a binding legal instrument in the way the General Comments are. Such declarations, and the General Assembly resolutions that endorse them, do nevertheless provide a considerable degree of guidance as to the specifics of the general legal obligation of international co-operation contained in the Charter of the United Nations and the ICESCR. Thus, a broader interpretation extends the responsibility of countries and other entities – including non-state actors – to the creation, in the words of Article 3(1) DRD, ‘of national and international conditions favourable to the realization of the right to development’ and, therefore, to structural transformation of the international political economy. The commitment of the international community to meeting the MDGs and the recent assessments of the human rights dimensions of the MDGs may be invoked in this context, notwithstanding the low probability that the MDGs will be reached by 2015.

The process of globalisation and the trend favouring free markets and free trade is rightfully seen by many as exacerbating the disparities and injustices of unequal development and weakening human rights protections. It is equally true that free movement of ideas, peoples, goods, images, technology, capital and labour offers enormous opportunities for the equitable growth and poverty alleviation that are essential to the realisation of the right to development. The predatory trends and negative impact of globalisation should be seen as the result of the failure of states to create ‘national and international conditions favourable to the realization of the right to development’ and ‘to formulate appropriate national development policies’, as required by Article 2(3) DRD. Thus, the right to development perspective offers a normative toolkit for assessing processes of globalisation through the lenses and principles of international distributive justice.

This duty, expressed in the non-binding DRD, is reinforced by the legally binding obligation on member states of the United Nations to act jointly and separately for the realisation of human rights and for states parties to the ICESCR to contribute through international co-operation to the realisation of economic, social and cultural rights, including through foreign aid, and to reflect this concern in their voice and vote in international financial institu-
tions and development agencies. Although the same obligation of international co-operation is not present in the ICCPR, the preambles of both Covenants refer to the need to create ‘conditions . . . whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights’ and the *Universal Declaration of Human Rights*\(^{15}\) refers, in Article 28, to the right to a social and international order in which all rights can be fully realised. These universally accepted standards reinforce the idea of an obligation to co-operate internationally for the realisation of the right to development. The reference in Article 3(1) DRD to responsibility of states for the creation of ‘international conditions favourable to the realization of the right to development’ applies primarily to affluent countries, which have ‘the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development’. Accordingly, donor countries – acting through their development programmes or through the international institutions to which they belong – have a duty to facilitate the efforts of developing countries to advance the right to development by relaxing constraints on productive resources, and by supporting institutional development.

Another relevant interpretative document is the *Maastricht Guidelines*,\(^{16}\) which include the following regarding the obligations of states parties to the ICESCR:

> The obligations of States to protect economic, social, and cultural rights extend also to their participation in international organizations, where they act collectively. It 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.\(^{17}\)

The ICESCR, accordingly, requires that states act in international agencies and lending institutions, as well as during Security Council consideration of sanctions, in a way that does not cause economic, social or cultural rights to suffer in any other country. It is, therefore, possible to speak of ‘obligations’, even of legal obligations, falling on those states that have ratified the ICESCR. These obligations do not fall only on developed countries but also apply to developing countries, which have a legal obligation to pursue development policies based on meaningful participation, equitable sharing, and full realisation of

\(^{15}\) GA Res 217A (III), UN Doc A/810, 71 (1948).

\(^{16}\) ‘Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691 (‘*Maastricht Guidelines*’). The *Maastricht Guidelines* were adopted by a group of more than thirty experts. They are not legally binding.

\(^{17}\) *Maastricht Guidelines* Guideline 19.
human rights, all of which are explicitly contained in the DRD. Thus the DRD articulates in terms acceptable to virtually every country a set of obligations that derive their legal force from existing treaty obligations. Whether this particular articulation of duties, including international co-operation aimed at the full realisation of the DRD, will acquire a legally binding character through a new treaty or the emergence of a customary norm is uncertain.

In 2004, the UN Commission on Human Rights established a high-level task force on the implementation of the right to development, within the framework of the Working Group on the Right to Development (which had been established in 1998), and gave it a mandate at its first session to consider ‘obstacles and challenges to the implementation of the MDGs in relation to the right to development’ and to identify specifically social impact assessments and best practices in the implementation of the right to development. At its second session, in 2005, the mandate of the task force was ‘to consider Millennium Development Goal 8, on global partnership for development, and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the right to development’. The task force completed this mandate at its November 2005 session and its report was approved by the Working Group by consensus in February 2006. The task force’s mandate has focused since then on applying the 15 criteria it developed to selected partnerships ‘with a view to operationalizing and progressively developing these criteria, and thus contributing to mainstreaming the right to development in the policies and operational activities of relevant actors at the national, regional and international levels, including multilateral financial, trade, and development institutions’.

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C Toward a convention on the right to development?

The general trend in international human rights law-making has been from study to declaration to convention to optional protocol with a complaint procedure. In the case of the right to development, the path-breaking study by the UN Division of Human Rights of 1979 provided the first stage;\textsuperscript{22} the DRD provided the second in 1986. The Non-Aligned Movement (‘NAM’) countries have pushed for a convention, especially in resolutions adopted at the summit level of the heads of state, for example in Havana in September 2006.\textsuperscript{23}

In spite of this strong political support for a convention from NAM, a convention would not create obligations either for institutions essential to the realisation of the right to development, such as the World Trade Organization (‘WTO’), the World Bank, the International Monetary Fund (‘IMF’) or the OECD, or for the equally important private sector. It is unlikely that donor countries would support a convention since there are other vehicles of international law for the cancellation of bilateral debt, or more favourable terms of trade, or enhanced aid. It is difficult to conceive of an international convention on the right to development containing the full range of obligations implied by this right; a comprehensive convention seems unlikely and would have to be quite unwieldy. Existing negotiating frameworks, such as those in the OECD, the WTO, the international financial institutions, the International Labour Organization (‘ILO’), the UN Conference on Trade and Development (‘UNCTAD’) and others are more likely to appeal to the broad range of states involved than a new politically motivated convention.

However, the Human Rights Council has agreed to have the Working Group use the RTD criteria being developed by the high-level task force to elaborate ‘a comprehensive and coherent set of standards for the implementation of the right to development’, which could take the form of ‘guidelines on the implementation of the right to development, and evolve into a basis for consideration of an international legal standard of a binding nature, through a collaborative process of engagement.’\textsuperscript{24} In addition, legal scholars have examined the pros

\textsuperscript{22} Secretary-General, The International Dimensions of the Right to Development as a Human Right in Relation with other Human Rights based on International Co-operation, including the Right to Peace taking into account the Fundamental Human Needs, UN Doc E/CN.4/1334 (2 January 1979).
\textsuperscript{24} The Right to Development, HRC res 9/4, 9th session, UN Doc A/HRC/RES/9/3, at [2(c)] and [2(d)].
and cons of a convention and proposed numerous alternative approaches to using binding obligations under international law to advance the right to development.\textsuperscript{25}

3 Human rights law as applied to aid and poverty reduction strategies

The second dimension of the intersection of human rights and development in international law is the idea of ‘human rights in development’ – or the ‘human rights-based approach to development’, by which is meant the application of legal obligations and other commitments concerning human rights that states have accepted to their development policies and practices. The recent trend of governments and international institutions to develop, clarify and apply their own definitions and policies in this area represents a new and promising trend in development discourse, leading in some cases to new models for development interventions and programmes by national and international actors. As discussed in the previous section, the right to development requires that human rights be systematically integrated into development policy and international assistance and co-operation. This section deals with a less burdensome and therefore less controversial interpretation of the place and function of human rights in development, namely, development policies and practices that selectively imbed a human rights dimension. The most salient of these are: (a) adaptation of national policies and practices in co-operation with the UN system and bilateral donors, (b) poverty reduction strategies, and (c) the MDGs.

A Obligations of states regarding their national policies and practices in co-operation with the UN system and bilateral donors

The primary responsibility for the realisation of human rights and development rests with the state, although other states and civil society are also instrumental in achieving national goals in relation to both. The state is legally bound by its international human rights obligations and politically bound by its commitment to internationally agreed development goals (‘IADGs’), including the MDGs, adopted at the global summits and conferences. The cumulative effect is that the state has an obligation to impose duties in the context of development on its agents to respect human rights in the development process, to protect people from violations of these rights by third parties (non-state actors, including business enterprises), and to take steps to promote, facilitate and provide for human rights to the limits of its capacity, including by drawing on external support and assistance.

\textsuperscript{25} Stephen P Marks (ed) Implementing the Right to Development: The Role of International Law (Friedrich Ebert Stiftung and Harvard School of Public Health Program on Human Rights in Development, Geneva, Switzerland, 2008).
Therefore, the essence of human rights in development is to draw on the combined IADGs and human rights treaty obligations and to devise coherent and integrated policies and practices. Perhaps the most frequently used term to link human rights and development policy has been the so-called ‘rights-based’ approach to development, affirming that development should be pursued in a ‘human rights way’ or that human rights must ‘be integrated into sustainable human development’. The ‘rights way to development’ is the shorthand expression for ‘the human rights approach to development assistance’, as articulated in the mid-1990s by André Frankovits of the Human Rights Council of Australia.26 The essential definition of this approach is:

[T]hat a body of international human rights law is the only agreed international framework which offers a coherent body of principles and practical meaning for development cooperation, [which] provides a comprehensive guide for appropriate official development assistance, for the manner in which it should be delivered, for the priorities that it should address, for the obligations of both donor and recipient governments and for the way that official development assistance is evaluated.27

The Office of the High Commissioner for Human Rights uses the expression ‘rights-based approach to development’, which it defines as the integration of ‘the norms, standards and principles of the international human rights system into the plans, policies and processes of development’.28 Such an approach incorporates into development the express linkage to rights, accountability, empowerment, participation, non-discrimination and attention to vulnerable groups.29

In his report on Strengthening of the United Nations: An Agenda for Further Change, the UN Secretary-General called human rights ‘a bedrock requirement for the realization of the Charter’s vision of a just and peaceful world’30 and listed, among 36 actions, ‘Action 2’ on joint UN efforts at the country level, which formed the basis for the Action 2 Plan of Action, adopted

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27 Ibid.


29 Ibid.

30 See Kofi Annan, Strengthening of the United Nations: An Agenda for Further Change, UN Doc A/57/387 (9 September 2002) [45].
by 21 heads of UN departments and agencies.\textsuperscript{31} The Action 2 interagency Task Force, consisting of the Office of the High Commissioner for Human Rights (‘OHCHR’), UNDP, the UN Population Fund (‘UNFPA’), the UN Children’s Fund (‘UNICEF’) and the UN Development Fund for Women (‘UNIFEM’), has pursued the clarification and training of staff in this approach, including an Action 2 Global Programme and a common learning package.\textsuperscript{32} The Programme became fully operational in 2006.\textsuperscript{33} It is ‘a global programme designed to strengthen the capacity of UN country teams to support the efforts of Member States, at their request, in strengthening their national human rights promotion and protection systems’.\textsuperscript{34} This programme integrates human rights throughout humanitarian, development and peacekeeping work in the UN system.

In 2003 representatives from across the UN system met in Stamford, Connecticut, USA, and defined a UN Common Understanding on a Human Rights Based Approach.\textsuperscript{35} This document has become a standard reference for translating normative human rights commitments of Member States into development co-operation policies and projects of UN agencies, funds and programmes. The core definitions of the Common Understanding of a human rights based approach to development co-operation and development programming by UN agencies are:

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.

3. Development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.\textsuperscript{36}

UNICEF contributed to the translation of the ideas of rights-based development into development practice through its \textit{Human Rights-Based Approach to Programming} (‘HRBAP’).\textsuperscript{37} UNDP, for its part, adopted a policy of integrating human rights with human development in January 1998.\textsuperscript{38} According to the Director of the Bureau for Development Policy, ‘[s]ince 1998, human rights have emerged as a key area of the organisation’s development activities, something reflected in the decisions of the UNDP Executive Board when adopting the UNDP Strategic Plan’.\textsuperscript{39} Since adopting that policy, it has devoted an issue of its \textit{Human Development Report} to human rights,\textsuperscript{40} trained staff at headquarters and in the field, created the Human Rights Strengthening Programme (‘HURIST’) to fund activities based on the 1998 policy,\textsuperscript{41} and issued ‘practice notes’ on UNDP’s commitment to the integration of human rights with human development,\textsuperscript{42} and it currently supports human rights initiatives in more than 100 countries. Significantly, the \textit{Practice Note on Human Rights in UNDP} calls human rights the business of every staff member, and guides the work of country teams who are expected to develop ‘a comprehensive and coherent process towards genuine human rights-based programme development in all policies and programmes supported and implemented by UNDP’.\textsuperscript{43}

\textsuperscript{36} Ibid.
\textsuperscript{43} UNDP, above n 42 (2005).
Parallel to multilateral institutions building on government human rights obligations to implement human rights in development, bilateral development agencies, responding to parliamentary statutory authority, have integrated human rights features in their development partnerships. International assistance and co-operation, primarily through official development assistance (‘ODA’), is a significant source for financing development, reaching $107.1 billion in 2005 but declining to $104.4 billion in 2006 and $103.7 billion in 2007, due mainly to the decline in debt relief grants. In 2005 developed countries committed to increasing aid to $130 billion in 2010 although it is doubtful they will meet these commitments. Since 1990, the goal for developed countries is to devote 0.7 per cent of their gross national income (‘GNI’ – the value of all income earned by residents of an economy whether it is earned within or outside of the national borders) to ODA. However, only Denmark, Luxembourg, the Netherlands, Norway and Sweden had reached or exceeded this target by 2007, the combined figure for the developed countries as a group in 2007 being 0.28 per cent.

The donor countries have been embracing human rights-based approaches to ODA for several decades. A recent study by the OECD on the approaches of its member states drew the lesson that ‘human rights offer a coherent normative framework which can guide development assistance’. The advantages identified by OECD relate to adaptability to different political and cultural environments, the potential for operationalising human rights principles, relevance to good governance and meaningful participation, poverty reduction and aid effectiveness. Extensive analysis and elaborate policy

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papers have been drawn up by the major European and Canadian funding agencies, incorporating a human rights approach, most notably by the UK Department for International Development and the Swedish International Development Agency. The United States, for its part, announced at the International Conference on the Financing for Development in Monterrey, Mexico, in March 2002, the doubling of ODA by $5 billion by the 2006 financial year, through a newly created Millennium Challenge Account (‘MCA’). Human rights (defined as ‘civil liberties’ and ‘political freedoms’) are among the criteria assessed before funding is approved. However, the MCA has failed to meet the goals set, and has been criticised for pushing a neoliberal agenda and devoting little attention to human rights.

To complete the picture of human rights based approaches to development, mention must also be made of the policies and practices of non-governmental organisations. Several major development NGOs, such as Oxfam, CARE, Save the Children and Médecins Sans Frontières (‘MSF’) have similarly embraced a human rights framework for their operations. The growing trend among scholars, development NGOs and international institutions to use the human rights based approach to development both integrates concepts that already had currency in development and adds a dimension with which development practitioners were less familiar. The familiar components of this approach include accountability and transparency in the context of good governance, and equity and pro-poor policies in the definition of objectives. The less familiar component is the explicit reference to government obligations deriving from international human rights law and procedures.

From the standpoint of human rights, ODA presents three controversial issues: the donor’s control over the character of the aid, the legitimacy of the donor’s control over the character of the aid, the legitimacy of

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49 See below n 73.
51 The President proposed only $3 billion for the MCA in 2006 and 2007 and Congress allocated only $2 billion in 2007 and the MCA has greatly underspent the allocation. See W Dugger, ‘US Agency’s Slow Pace Endangers Foreign Aid’, New York Times (New York), 12 December 2007.
conditionality, and the value of directing aid towards human rights purposes. The sensitivity of these issues is reflected in the 2005 Paris Declaration on Aid Effectiveness.\footnote{Paris Declaration [2].} The Paris Declaration seeks to reform the delivery of aid by scaling up and ‘to increase the impact of aid . . . in reducing poverty and inequality, increasing growth, building capacity and accelerating the achievement of the MDGs’.\footnote{Marta Foresti, David Booth and Tammie O’Neil, Aid effectiveness and human rights: strengthening the implementation of the Paris Declaration (London: Overseas Development Institute, October 2006).} It outlines the five overarching principles of ownership, alignment, harmonisation, managing for development results and mutual accountability, with agreed indicators, targets, timetables and processes to monitor the implementation up to 2010. Each of these has been examined critically from the human rights perspective in a paper commissioned from the Overseas Development Institute by the OECD and arguing for using human rights to broaden the scope and content of the Paris Declaration’s 56 commitments and indicators on mutual accountability.\footnote{The workshop, organised jointly by the DAC Networks on Environment and Development, Governance and Gender Equality and the Working Party on Aid Effectiveness, was held in Dublin on 26–27 April 2007. See www.oecd.org/dac/effectiveness/inpractice at 15 January 2009.} Although the focus on aid delivery mechanisms in the Paris Declaration has merit, it reflects a technocratic approach to development that neglects the human rights commitments both of donors and recipients of aid and a reluctance on the part of donors to be seen as imposing human rights conditions on aid, which is often greatly resented by the recipients.

The deficiencies of the Paris Declaration from the human rights perspective were further elucidated at a workshop on Development Effectiveness in Practice convened in April 2007 by the government of Ireland,\footnote{Third High Level Forum on Aid Effectiveness, Accra Agenda for Action, available at http://www.oecd.org/dataoecd/58/16/41202012.pdf.} the main message of which was that gender equality, human rights and environmental sustainability should be ‘fundamental cornerstones for achieving good development results’ and used in the implementation of the Paris Declaration. This effort did result in a reference to the need to address ‘in a more systematic and coherent way’ the issues of gender equality, respect for human rights, and environmental sustainability in the Accra Agenda for Action, adopted by the Third High Level Forum on Aid Effectiveness on 4 September 2008.\footnote{Paris Declaration [2].}
B Poverty reduction strategies (‘PRS’)

In 1993, the World Conference on Human Rights declared,

The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.\(^{60}\)

[Extreme poverty and social exclusion constitute a violation of human dignity and . . . urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.\(^{61}\)]

The central strategic concern of development is the reduction of mass poverty. Using a revised method of calculation, the World Bank estimate that in 2004 2.548 billion people (2.096 billion excluding China) were living in poverty (less than $2 per person per day), just under one billion people (969 million) were living in extreme poverty (less than $1 per person per day) or 841 million if China is excluded.\(^{62}\) According to the World Bank’s *Global Monitoring Report 2007*, the share of the world’s population living on less that $1.08 per day has gone from 40.6 in 1981 to 28.7 in 1990 then progressively down to 18.4 in 2004, with an estimated figure of 11.8 by 2015; the figures for those living on less than $2.15 per day are 67.1 in 1981, 60.8 in 1990, 47.7 in 2004 and 34.2 estimated in 2015.\(^{63}\)

The focus of the World Bank and the IMF has been on the Poverty Reduction Strategy process to reduce the debt of Heavily Indebted Poor Countries (‘HIPCs’) that have submitted Poverty Reduction Strategy Papers (‘PRSPs’). Launched in September 1999, PRSPs ‘provide the basis for assistance from the World Bank and the IMF as well as debt relief under the HIPC

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\(^{60}\) Vienna Declaration [14].

\(^{61}\) Vienna Declaration [25].


Initiative. PRSPs should be country-driven, comprehensive in scope, partnership-oriented, and participatory’.\(^{64}\)

How have the institutions responsible for international human rights promotion and protection engaged with the poverty reduction agenda? In a Concept Note, the High Commissioner for Human Rights drew the World Bank’s attention to the following:

In linking a Poverty Reduction Strategy to a universal normative framework and State obligations emanating from the human rights instruments, the goals of the Poverty Reduction Strategy could be sustained with enhanced accountability of the relevant stake-holders. The universal nature of human rights, their mobilization potential and their emphasis on legal obligations to respect, protect and promote human rights, while encouraging national ownership and people’s empowerment makes the human rights framework a useful tool to strengthen the accountability and equity dimensions of the Poverty Reduction Strategies.\(^{65}\)

The issue had already been raised by the Commission on Human Rights, which in 1990 requested its Sub-Commission to consider the relationship between human rights and poverty,\(^{66}\) and the Sub-Commission appointed a Special Rapporteur on human rights and extreme poverty, whose report was published in 1996.\(^{67}\) The High Commissioner hosted an expert seminar in February 2001 to consider a declaration on human rights and poverty, leading the Commission to request the Sub-Commission to consider ‘guiding principles on the implementation of existing human rights norms and standards in the context of the fight against extreme poverty’.\(^{68}\)

In a related development and in direct response to a request from the Chair of the Committee on Economic, Social and Cultural Rights, the High Commissioner commissioned in 2001 guidelines for the integration of human rights into poverty reduction strategies from professors Paul Hunt, Manfred


Nowak and Siddiq Osmani. The authors consulted with national officials, civil society and international development agencies, including the World Bank, and produced a 60-page document setting out basic principles of a human rights approach to: (a) formulating a poverty reduction strategy; (b) determining the content of a poverty reduction strategy; and (c) guiding the monitoring and accountability aspects of poverty reduction strategies, with a special section on accountability.\textsuperscript{69}

In 1998 the Commission appointed an Independent Expert on the subject of human rights and extreme poverty\textsuperscript{70} and between 1999 and 2008 the three successive Independent Experts have issued ten annual reports\textsuperscript{71} and reports of visits to nine different countries: Portugal (October 1998), Bulgaria, Yemen (November 1998), Bolivia (May 2001), Benin (August 2001), the Dominican Republic (December 2002), Yemen (October 2003), Sudan (November 2004), the United States of America (October 2005) and Ecuador (November 2008).\textsuperscript{72}

\section*{C Millennium Development Goals}

The MDGs define the priorities for the international community and guide much of the technical co-operation and assistance provided by bilateral and multilateral donors.\textsuperscript{73} They are a set of eight goals with 18 numerical targets and over 40 quantifiable indicators. The MDGs are:


\textsuperscript{73} The MDGs build on the commitments of the heads of 189 countries, meeting in New York in September 2000, to adopt a United Nations \textit{Millennium Declaration}: see G A Res 55/2, UN GAOR, 55th sess, 8th plen mtg, UN Doc A/Res/55/2 (8 September 2000).
• Eradicate extreme poverty and hunger
• Achieve universal primary education
• Promote gender equality and empower women
• Reduce child mortality
• Improve maternal health
• Combat HIV/AIDS, malaria, and other diseases
• Ensure environmental sustainability
• Develop a global partnership for development.

While economists may be best equipped to define and analyse poverty in terms of market forces, income distribution, utility, budgeting, and access to resources, concepts of good governance, the rule of law and human rights have become widely accepted as part of sustainable human development and poverty reduction, and consequently of the MDGs. The High Commissioner for Human Rights has focused attention on the relationship between MDGs and human rights by disseminating to governments charts on the intersection of human rights and MDGs and has published a fairly exhaustive analysis of how human rights can contribute to MDGs,\(^74\) as have the UNDP\(^75\) and national development agencies.\(^76\)

Philip Alston has characterised the relation between human rights and the MDGs as ‘ships passing in the night’ and takes the argument for mainstreaming human rights in the MDGs a step further by noting that these goals ‘have been endorsed in an endless array of policy documents adopted not only at the

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international level but in the policies and programmes of the national governments to whom they are of the greatest relevance’. In assessing whether the MDGs involve obligations under customary international law, Alston applies the two tests for a human rights claim having that character: ‘(i) the right is indispensable to a meaningful notion of human dignity (upon which human rights are based); and (ii) the satisfaction of the right is demonstrably within the reach of the government in question assuming reasonable support from the international community’ – and concludes that ‘many of the MDGs have the virtue of satisfying these criteria without giving rise to great controversy’ and therefore ‘that at least some of the MDGs reflect norms of customary international law’.

Alston has reservations regarding MDG 8 (global partnerships for development) because, with respect to that goal, ‘developed country governments would be expected to resist strongly any suggestion that there are specific obligations enshrined in customary international law’. He points out that the persistent rejection by developed countries of a more general legal duty to provide aid ‘and the failure of even the most generous of donors to locate their assistance within the context of such an obligation, would present a major obstacle to any analysis seeking to demonstrate that such an obligation has already become part of customary law’. Further, he considers that ‘[a]t some point, the reiteration of such commitments [to mobilize resources to ensure that countries committed to the MDGs have the additional resources necessary] . . . will provide a strong argument that some such obligation has crystallized into customary law’.

As described above, the way the UN system and bilateral donors approach aid programmes and policies, the rethinking of poverty reduction strategies, and the realigning of MDGs have accommodated to a considerable degree a human rights approach. The same cannot be said for the international legal regimes of trade and investment.


78 Ibid.

79 Ibid 775.

80 Ibid 777.

81 Ibid 778.
4 The tensions between human rights law and the legal regimes of international trade and investment

The third dimension of human rights in development is the most visible feature of globalisation, namely international trade and investment. Regarding the relationship between trade, development and finance, it is widely acknowledged that least developed countries, landlocked developing countries and small, vulnerable countries, particularly in Africa, do not benefit from the global trading system and need greater access to markets in developed countries, as well as to financial assistance to remove supply-side constraints (lack of capacity to produce a surplus of exportable goods of sufficient quantity and reliable quality).

Similarly, in the realm of international law, the tension that characterises the relationship between international human rights law and the legal regimes of trade and investment is based on perceived teleological incompatibility. The essential aims of international trade are to make goods and services available at low prices for consumers of the importing country, to improve trade balances for the exporting country, and to increase the gross national product for the trading partners. The related aims of foreign direct investment are to maximise profits for multinational corporations investing abroad and to provide jobs for workers and revenue and related advantages in the country of investment. These are the interests pursued by those who negotiate legal arrangements for trade and investment. Vast numbers of legal relationships are involved at all levels of these operations, which are often characterised by asymmetrical power relations giving advantages to rich countries and powerful corporations and causing resources to flow to investors and national treasuries (or to private bank accounts where corruption occurs). These ends are best pursued by means of free markets and free trade, thus creating potential conflicts with a human rights agenda, which may be negatively affected by these means.

The related issues of trade and investment each pose serious problems and give rise to much controversy regarding the applicable norms of international law.

A International trade

At a ministerial meeting of the WTO held in Doha in November 2001, the ‘Doha Round’ of trade negotiations was launched, the purpose of which was ‘to ensure that developing countries, and especially the least developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development’. The negotiations collapsed in July

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82 UN Doc A/C.2/56/7 annex (14 November 2001) [2].
2008 and it was unclear at the time of writing whether they would resume. The WTO has been criticised not only for failing to meet the development needs of less-developed countries, but also for reinforcing the tendency of government representatives from the finance sector to disregard the human rights obligations better known in other departments of government. A considerable body of scholarship has emerged in the last decade on the failure of the international trade system to engage productively with the international human rights regime.\textsuperscript{83}

Several human rights concerns regarding the international trade regime are discussed in the chapter by Adam McBeth in this volume.\textsuperscript{84} Another is respect for international labour standards. There are fears that the trade liberalisation drive by WTO rules might generate a ‘race to the bottom’, whereby states compete with each other for foreign investment by lowering regulatory costs, such as labour standards: WTO rules restrict the ability of states to protect their workforces from such transnational regulatory competition. Formally the trade ministers meeting in Singapore in 1996 renewed their ‘commitment to the observance of internationally recognized core labour standards’ and acknowledged the ILO as the competent body to set and deal with these standards, and affirmed their ‘support for its work in promoting them’.\textsuperscript{85} However, they added:

\begin{itemize}
    
    \textsuperscript{83} See Chapter 6 at pp. 000.
    
    \textsuperscript{84} \textit{Singapore Ministerial Declaration}, WTO Doc WT/MIN(96)/DEC (18 December 1996) [4].
\end{itemize}
We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.\textsuperscript{86}

Even though the Singapore meeting agreed that the ILO and WTO secretariats would continue to collaborate, as the ILO candidly recognised, ‘it is not easy for them to agree, and the question of international enforcement is a minefield’\textsuperscript{87}

Whether protecting workers’ rights against the race to the bottom, or any of the myriad other problems resulting from free market and trade liberalisation, the basic argument from the human rights perspective is that governments should respect their human rights obligations when they negotiate membership in and participation in the treaties adopted under the auspices of organisations like the WTO.

The Committee on Economic, Social and Cultural Rights threw down the gauntlet at the time of the Seattle Third Ministerial meeting of the WTO in 1999 when it stated that the process of global governance reform must be driven by a concern for the individual and not by purely macroeconomic considerations alone. Human rights norms must shape the process of international economic policy formulation so that the benefits for human development of the evolving international trading regime will be shared equitably by all, in particular the most vulnerable sectors.\textsuperscript{88}

Significantly, it sought to convince the ministerial gathering that trade liberalization must be understood as a means, not an end. The end which trade liberalization should serve is the objective of human well-being to which the international human rights instruments give legal expression.\textsuperscript{89}

It also urged WTO members to ensure that

\textsuperscript{86} Ibid.
\textsuperscript{87} WTO/ILO, \textit{Labour standards: consensus, coherence and controversy} (2008)
\textsuperscript{88} CESCR, \textit{Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization} (Seattle, 30 November to 3 December 1999), UN Doc. E/C.12/1999/9 (26 November 1999) [5].
\textsuperscript{89} Ibid [6].
their international human rights obligations are considered as a matter of priority in their negotiations which will be an important testing ground for the commitment of States to the full range of their international obligations".  

This claim was echoed in a resolution by the Sub-Commission requesting ‘all Governments and economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation’. 

The Secretary-General expressed the essence of the link between trade and human rights in the following terms:

There is an unavoidable link between the international trading regime and the enjoyment of human rights. Economic growth through free trade can increase the resources available for the realization of human rights. However, economic growth does not automatically lead to greater promotion and protection of human rights. From a human rights perspective, questions are raised: does economic growth entail more equitable distribution of income, more and better jobs, rising wages, more gender equality and greater inclusiveness? From a human rights perspective, the challenge posed is how to channel economic growth equitably to ensure the implementation of the right to development and fair and equal promotion of human well-being.

B Foreign direct investment

In 2006, global flows of foreign direct investment (‘FDI’) reached a new all-time peak, with FDI inflows to developed countries more than double the total amount of inflows from developed to developing countries. The total number of transnational corporations (‘TNCs’) is estimated by UNCTAD as representing 78,000 parent companies with over 780,000 foreign affiliates. This activity represents 10 per cent of global GDP and one-third of world exports.

These commercial non-state actors have been the object of efforts to establish guidelines for decades, beginning with the OECD Guidelines for Multinational Enterprises of 1976 and the ILO Tripartite Declaration of

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90 Ibid [7].
92 Kofi Annan, Globalization and its impact on the full enjoyment of all human rights, Preliminary report of the Secretary-General, UN Doc A/55/342 (31 August 2000) [13].
93 Ban Ki-Moon, Annual ministerial review: implementing the internationally agreed goals and commitments in regard to sustainable development, UN Doc E/2008/12 (21 April 2008) [62].
94 Ibid xvi.
Principles concerning Multinational Enterprises and Social Policy Reform of 1977. Other milestones in introducing human rights considerations into the practices of TNCs include the Global Compact, a voluntary and self-regulatory mechanism, launched by UN Secretary-General Kofi Annan in 2000, by which the corporations commit to nine core human rights, labour rights and environmental principles; and the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights,95 which were adopted by the Sub-Commission in 2003.96 In 2005, the Commission created the position of Special Representative on the issue of human rights and transnational corporations and other business enterprises,97 to which John Ruggie was appointed. His report of 2008 outlines the three core principles of the state’s duty to protect, the corporate responsibility to respect, and the need for more effective access to remedies.98 A more detailed discussion of the relationship between human rights and multinational corporations is provided in the chapter by Adam McBeth in this volume.99 The application of international law to relations between business and human rights in the context of globalisation is only partially covered by the work of the Special Representative. The field is evolving through law suits against corporations, revision of company policies incorporating human rights, proxy resolutions at meetings of shareholders, consideration of new standards by international organisations, and other ways of harmonising the international law of human rights with that of international business transactions.100

5 Conclusion
The relationship between human rights and development is relatively straightforward at the theoretical level since both deal with advancing human well-being, with the first focusing on normative constraints on power relations to ensure dignity and the elimination of repressive and oppressive practices, while the latter focuses on the material conditions and distributional arrangements that allow people to benefit from economic processes. The difficulty

99 See Chapter 6.
100 The Business & Human Rights Resource Centre provides access to a vast amount of information and analysis on all aspects of the subject. See http://www.business-humanrights.org/Home.
comes with the current state of international law governing this relationship. This chapter has outlined three dimensions of the international law of human rights and development, each of which provides a different approach with differing degrees of political acceptability.

The law governing the right to development, as we have seen, is fraught with political posturing but provides the most systematic legal definition of human rights in development by making development itself a human right and governments – of both developed and developing countries – the bearers of obligations to integrate human rights into the development process, including through international assistance and co-operation.

The law relating to development assistance and poverty reduction strategies is far less controversial, insofar as most governments and bilateral and multi-lateral development agencies have acknowledged the value of introducing human rights into the related strategies and programmes and have translated this awareness into specific modes of doing development in a human rights way.

The field of international trade and investment offers a stark contrast to the general consensus on human rights in development due to the fundamental divergence in objectives and purposes. Indeed, the law governing trade and investment has evolved over the centuries to increase the comparative economic advantages of transactions by powerful economic interests. Efforts to draw the attention of governments seeking those advantages to constraints based on human rights obligations are met with reactions ranging from benign neglect to open hostility.

Each of these three dimensions of the international law of human rights and development will evolve with the changes in the international political economy and is likely to be transformed in the coming decades by new market forces, especially in the energy sector, and by the emerging economic powers of India, Brazil, Nigeria, and above all China, but also by responses to growing disparities and inequalities, and by the wave of rising expectations generated by the refining and clarifying of human welfare through the law and practice of human rights.