Part II. Duties and Responsibilities

4 Obligations to Implement the Right to Development: Philosophical, Political, and Legal Rationales
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The assumption of the Declaration on the Right to Development (1986) is that states have obligations with respect to this putative right. In fact, the Declaration enumerates four duties and responsibilities of states:

1. “The duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom;”¹

2. “The primary responsibility for the creation of national and international conditions favourable to the realization of the right to development;”²

3. “The duty to co-operate with each other in ensuring development and eliminating obstacles to development;”³ and

4. “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.”⁴

Furthermore, "should" appears 18 times in the text, usually defining what states should do, and the more imperative "shall" is used three times, twice defining duties of states⁵ and once indicating how the Declaration shall be construed.⁶ The claim that such duties and responsibilities are established in international law and relations as matters of accepted morality and law is problematical from the philosophical, political, and legal perspectives. This essay briefly explores each of these ways of understanding obligations in the context of the right to development.

Philosophical Rationale

Philosophers have addressed the idea that people have responsibility for the welfare of less fortunate people. Charity is a common obligation within most religious traditions. But the moral basis of an obligation of states to comply with the human

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² Id., article 3 (1).
³ Id., article 3 (3).
⁴ Id., article 4 (1).
⁵ Article 5 stipulates that "states shall take resolute steps to eliminate the massive and flagrant violations of the human rights" and Article 8 requires that "states shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment, and the fair distribution of income."
⁶ Article 9 (2).
right to development is not based on charity or beneficence. It is rather based on the logic of human rights, that is, a legitimate and enforceable claim by rights-holders against duty-bearers, explainable according to several philosophical approaches. I will offer a few, necessarily simplified, remarks about possible interpretations of obligations underlying the right to development from the perspective of natural law, contractarianism, consequentialism, and some of their contemporary variants, such as moral cosmopolitanism.

Under natural rights theory, the moral basis for a duty toward other humans is their human nature and is independent of human constructs like borders and nationality — although in several leading natural rights theories, the political community does determine the extent of the duties. These theorists, from Thomas Aquinas and William Blackstone to Ronald Dworkin, consider that, within each society or political community, all humans are equally endowed with natural rights, and therefore have an equal entitlement to benefit from liberty and equality. The equal importance of each human life is, from this perspective, an objective truth with moral consequences. Dworkin refers to the principle of equal importance of each human life as “the special and indispensable virtue of sovereigns,” meaning that the political community must treat all citizens equally.

An interesting preliminary reflection on the implication of natural law theory for the right to development is to take the proposition of classical naturalism that a human law in direct conflict with the natural right is not law. This way of thinking might be applied to the right to development. The 1986 Declaration uses the natural language of “an inalienable human right,” the essence of which is that “every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.” Internally, a law that allowed corrupt leaders to exploit resources for their own profit and against the people’s right to development or that suspended human rights guaranteed by the constitution and international treaties — allegedly because the country had not gained a level of development to afford them — would be a “perversion of law,” contrary to the “inalienable human right to development.”

Externally, the right to development focuses as much on international society as it does on national social structures. Extending the reasoning of classical naturalism to international law, a similar argument could be applied, for example, to a particu-

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7 The natural law tradition in legal theory considers certain rights to belong self-evidently to individuals as human beings and to be based on universally valid principles governing nature and society, the aim of which is the preservation of the natural and imprescriptible “rights of man,” in the vocabulary of the 18th century. Finnis defines natural law theory as one that is “able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct.” John Finnis, Natural Law and Natural Rights (Oxford: Clarenden Press, 1980), p. 18.


9 Aquinas famously said that “Since a tyrannical law is not in accord with reason, it is not a law absolutely speaking, but is instead a kind of perversion of law . . . For it has nothing of the character of law except to the extent that (a) it is a dictate of someone who is in charge of the subjects and that (b) it intends that the subjects obey the law in the right way; i.e., that they be good — not absolutely speaking, but in relation to that regime.” Thomas Aquinas, “On the Law,” Summa Theologiae, First part of the second part (i-i) (Trans. Alfred J. Freddoso). Available at http://www.thomasinternational.org/projects/step/treatiseonlaw/delege092_1.htm.
larly predatory investment agreement that blatantly favored exorbitant returns on investment by a multinational corporation at the expense of the development of the host country. Such an agreement would have a direct impact on the enjoyment by every human person of this development and, accordingly, would not be valid as law.

The moral egalitarianism of liberal political philosophy tends to accept differences beyond rather than within state boundaries — not because the arbitrary division into geographical jurisdictions is just but because of the significance of the community to which one belongs, which to a large extent is coterminous with those national boundaries. It is within each state that the just distribution of opportunity or resources is to be settled, whether argued in terms of equality of resources\textsuperscript{10} or equality of welfare.\textsuperscript{11} The right to development includes the right to the “constant improvement of the well-being of the entire population and of all individuals,\textsuperscript{12} which suggests equality of welfare. However, other provisions are much more in line with equality of resources and even equality of opportunity. Specifically, the 1986 Declaration calls on states to “ensure, \textit{inter alia}, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.” The frequent references in the Declaration to rights that are “inalienable” and “universal,” to treatment that is “equal” and “fair,” and to “the human person [as] the central subject of the development process” have a certain natural law resonance to them.

To reflect on the philosophical rationale for duties in the context of the right to development, we need to examine natural law theory that considers equal worth of human beings outside the confines of one’s own political community. Such global approaches to moral egalitarianism are shared by proponents of “global liberalism” and “cosmopolitan liberalism” to be discussed below in the context of contractarian theories. Before doing so, it is worth looking at one more variant of natural law theory, namely, the substantive, neo-naturalist perspective. According to this view, certain basic goods, such as friendship, religion, play, knowledge, aesthetic experience, health, and life itself, are universal and thus the same moral principles guide human beings everywhere in the pursuit of those goods. Law provides authoritative rules with sanctions and adjudicative institutions to solve coordination and access problems in the enjoyment of those basic goods and thus contributes to the common good.\textsuperscript{13}

The right to development could be conceived, from this perspective, as an effort at the coordination of access to these common goods on a global scale. Thus, an international norm establishing responsibility of an affluent state for the realization of development in a poorer country in a manner that ensures human rights would be based on the tenant that all human beings are endowed with the same natural rights to these basic goods. Under this argument, all humans have an equal natural right to benefit from the resources available in their respective countries and to a coordinated

\textsuperscript{10} Dworkin, \textit{supra}, note 8, pp. 65-119.

\textsuperscript{11} \textit{Id.}, pp. 11-64.

\textsuperscript{12} Declaration on the Right to Development, Preamble and Article 2 (3).

\textsuperscript{13} Finnis, \textit{supra}, note 7, pp. 85-99.
effort internationally to share access to those basic goods. The 1986 Declaration affirms the “inalienable right” of peoples “to full sovereignty over all their natural wealth and resources.”14 Their “natural right” to development thus favors optimal social arrangements for participation in development and its benefits and a duty of those living in nations with greater economic advantages to act in ways that increase the potential for enjoyment of this right by the people in poorer countries. The abolition of slavery and the slave trade and the struggle for self-determination against colonialism are clear examples from history of a moral obligation to ensure the right to development of peoples. Natural law arguments have certainly been invoked to justify both of these movements, and their relevance to the right to development is evident.

Social contractarians15 see law and the power of the state as a necessary protection from the brutality of the State of Nature (Hobbes) or from violent disputes over property in the State of Nature (Locke). Civil government provides the legislative, judicial, and enforcement powers to protect people from transgression of the Law of Nature. The Hobbesian and Lockean versions are not as relevant to the theoretical proposition that there are duties to realize what we call today the right to development as is Rousseau’s version. For Rousseau, private property produces dependence, and social and economic inequality and laws, established under the *naturalized* social contract, protect those who have power through private property. The *normative* social contract remedies this factual situation by submitting individual wills to the collective or general will, which places the collective good above individual interests. The general will is directed toward the good of the individuals in society, who, in turn, are committed to the collective good through a democratic process. By the social contract, they constitute a political society and enact laws designed to ensure the freedom and equality with which they were naturally endowed.

This concept of a contract could be extended to international society to justify a sort of global social contract in which the members of the global community submit to the common will and reduce the corrupting influence of private property and accumulation of power by the few at the expense of the many. The concept of development compacts is akin to a global social contract in the sense that developing countries give up certain prerogatives to benefit from the advantages of international cooperation. Specifically, they agree to pursue development in ways that are participatory, equitable, transparent, accountable, and respectful of human rights in exchange for the benefits to be derived from a collective effort to advance the right to development and to gain the resources needed from international cooperation for such development. Developed countries provide better conditions of aid, trade, and debt relief in exchange, presumably, for the benefits they derive from seeing their resources go toward people-centered development that reduces potential internal and international instability and conflict. The global social contract also responds to a moral sense — noticeable in bilateral donor agencies, especially in countries like

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14 Declaration on the Right to Development, Article 1 (2).
15 The doctrine of the social contract holds that individuals relinquish their freedom to appropriate property and use violence at will in exchange for the protection of society.
Norway, Denmark, and the UK — that justice requires poverty and oppression to be alleviated by those in a position to do so.

The most significant variant of the contractarian theory is John Rawls’, *A Theory of Justice*, as revised in *Political Liberalism*. Rational judgments made behind the “veil of ignorance” of what principles would be fair in society result, theoretically, in the determination of principles of justice based on fairness. The first such principle of justice is that everyone should enjoy as much civil liberty as possible so long as these liberties are distributed equally among citizens. The second principle is that economic inequalities are allowed only when the least-advantaged member of society is better off than would be the case under alternative arrangements. The two principles are linked in that we cannot relinquish some civil liberties in order to gain an economic advantage but must ensure equal distribution of civil liberties before allowing economic advantages to emerge, subject, as mentioned above, to the improvement of the condition of the least well off. These principles of justice therefore constrain the social contract.

It is not difficult to extend the idea of justice as fairness to obligations related to the right to development. That civil liberties sequentially precede economic advantages is confirmed by the requirement of the right to development that development must not take place at the expense of civil and political rights. The principle that economic inequalities cannot be allowed unless and until the least advantaged are better off than would otherwise be the case is affirmed by the obligation that development must benefit all and that “appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.” Frequent references to poverty reduction and the realization of the Millennium Development Goals (MDGs) in the context of the right to development further reflect the concern for the least-advantaged members of society and, through MDG 8 on global partnerships, on the least-advantaged societies within the community of nations.

These speculations on the global application of justice as fairness, however, are outside of the Rawlsian model, which focuses on the relative deprivation of citizens within the domestic society. As Michael Blake points out in his valuable survey of theories of international justice, for Rawls there is “no moral reason to regard the gap between wealthy and impoverished nations as morally problematic.” Rawls assumes self-sufficient nation-states and focuses on the basic structures of the territorial state and the relationships among the citizens of that state. When he does address international politics, in *The Law of Peoples*, he rejects the liberal principle of distributive justice because, unlike the national society, international society is made up of corporate entities, peoples that cannot be treated like individual moral agents.

18 “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights . . . .” Declaration on the Right to Development, Article 6 (3).
19 Declaration on the Right to Development, Article 8 (1).
Further, international society lacks a basic structure similar to the nation-state. Blake criticizes Rawls’ parallel between the autonomy of individuals with their state, on the one hand, and of states in their mutual relations, on the other. Rawls contends that in relations among states, there should be toleration of non-liberal states similar to the toleration of diverse beliefs of individuals within the liberal states. Blake’s objection is that this results in tolerating illiberal states that do not allow individuals to enjoy human rights.22 Rawls’s answer seems to be that an outlaw state that violates universal human rights “is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention.”23 However, he uses “human rights” in a somewhat idiosyncratic way. While human rights “set a necessary, though not sufficient, standard for the decency of domestic political and social institutions,”24 only Articles 3-8 of the Universal Declaration (civil and political rights) contain “human rights proper.” Norms banning massive violations, such as apartheid and genocide are a “second class of rights,” while economic, social, and cultural rights “presuppose specific kinds of institutions” and presumably are not “human rights proper.”25

Distributive justice, for Rawls, does not apply to international relations, where the only duty to provide aid is limited to the minimum necessary to maintain basic political institutions, a functioning system of public law, and acceptable relations with other states but not to reduce gaps between the rich and poor nations or among people within their own countries. Blake criticized Rawls for seeming “to permit the forms of substantive oppression fundamentally in tension with liberalism.”26 This concern is curiously addressed by the 1986 Declaration insofar as it requires all states to respect all human rights in the context of development. I say “curiously” because the Declaration neither purports to be nor is based on a well-thought-out theory of justice but is rather a highly political document, replete with compromise language that was not necessarily intended to be coherent or consistent. Nevertheless, the right to development is based on a concept of international cooperation in which toleration of each state’s “right and . . . duty to formulate appropriate national development policies” is constrained by the requirements of distributive justice (“fair distribution of the benefits resulting therefrom”) and human rights (“promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all”). It would, therefore, be contrary to the principles of the right to development if international cooperation to promote development allowed “nonliberal states” to deny human rights. In this sense, the right to development responds to Blake’s critique of Rawls.

Rawls includes among “familiar and traditional principles of justice among free and democratic peoples” eight principles, the last of which is “People have a duty to

23 Rawls, supra, note 21, p. 81.
24 Id., p. 80. Elsewhere, he enumerates human rights as the rights to life (including “the means of subsistence), liberty, and informal equality as expressed by the rules of natural justice.” Id., p. 65.
25 Id., p. 80, note 23.
26 Blake, supra, note 20.
assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.”

While Rawls concedes that “... [w]ell-ordered peoples have a duty to assist burdened societies,” he does not consider that this duty of assistance includes “a principle of distributive justice to regulate economic and social inequalities among societies.” It does, however, include “insisting on human rights.” He is correct that “mere dispensing funds will not suffice to rectify basic political and social injustices... [whereas] an emphasis on human rights may work to change ineffective regimes and the conduct of the rulers who have been callous about the well-being of their own people.” While coercion is not appropriate for this duty of assistance, “certain kinds of advice” and making assistance conditional on such matters as respect for the rights of women, are appropriate. These elements of the Law of Peoples favor certain aspects of the right to development, but Rawls stops short of requiring distributive justice among peoples and explicitly rejects global egalitarianism. Some of his arguments are worth pondering in the context of the right to development.

First, Rawls does not reject the application of a global principle of distributive justice to “our world as it is with its extreme injustices, crippling poverty, and inequalities,” as long as it applies temporarily to help the burdened societies achieve a working liberal or decent government such that they are “able to determine the path of their own future for themselves,” in accordance with the “principle of transition.” This principle is not incompatible with the right to development principle that each state has “the right and the duty to formulate appropriate national development policies.” However, for Rawls, as soon as they reach the “target and cutoff point” of having “just liberal or decent basic institutions,” or the “political autonomy of free and equal liberal and decent peoples,” the duty of others to assist ceases. He shifts the target a page later to the “point at which a people’s basic needs (estimated in primary goods) are fulfilled and a people can stand on its own.” His concern is with the just institutions of society and not the well-being of its people.

27 Id., p. 37.
28 Rawls, supra, note 21, p. 90.
29 Id., p. 106.
30 Id., p. 108.
31 Id., Emphasis in original.
33 Id., p. 117.
34 Id., p. 118.
35 Id., p. 118.
36 Id., p. 119.
Second, the right to development does not require countries in need of assistance or of more favorable conditions of trade and investment to meet the standard of cultural values and industriousness or of just institutions that Rawls seems to set. It does, however, call for “sustained action” on the part of developing countries, in exchange for “effective international co-operation . . . in providing these countries with appropriate means and facilities to foster their comprehensive development.”

Development compacts, as proposed by Arjun K. Sengupta, would establish a duty to encourage and reward countries that demonstrate many of the virtues that Rawls considers determinative of wealth and poverty, as well as respect for human rights. If we can substitute the principles of equity, non-discrimination, accountability, transparency, and respect for human rights for the virtues listed by Rawls, there is a certain parallel between the Law of Peoples and the right to development. However, under the Law of Peoples, a poor but well-ordered society would have no claim to assistance, whereas, under the right to development, a poor society would not be entitled to assistance (that is, reduction of resource constraints) unless it was moving toward the well-ordered state, understood in terms of respect for human rights.

Third, there is clearly more to poverty than lack of certain virtues. At a deeper level, poverty and vastly unequal opportunities to make choices and to lead a life that one values involve processes that cannot be contained within the borders of each state. Investment and employment patterns of transnational corporations (TNCs), rules and practices of international trade, pricing of commodities, migration flows, international monetary policy, international banking, and numerous other structural dimensions of the international economy determine these opportunities as much if not more than the virtues Rawls speaks of. China and India have not suddenly discovered virtues of industriousness and efficiency; they are growing at rates of 8 and 9% and slowly reducing poverty because they have overcome obstacles to taking advantage of those structures. It can be argued that the right to development is based on an understanding of development that seeks distributive justice within and among nations. If that is so, a strong case can be made for a theory of international justice that entails obligations to contribute to such a process.

Utilitarianism assesses the rightness of decisions by their impact on the well-being of all affected individuals, or, as Jeremy Bentham expressed in his “fundamental axiom”: “it is the greatest happiness of the greatest number that is the measure of right and wrong.” A utilitarian could explore whether and to what extent a duty to respond to development needs in other countries maximizes utility, although extending utilitarianism to various international patterns of exchange and processes of change is complex, as Sengupta’s chapter in this book demonstrates. The basic question is whether there is a utilitarian advantage for the people in country A to support the development needs of the people in country B.

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37 Declaration on the Right to Development, Article 4 (2).
Consequentialist arguments may be more evident in supporting the idea of obligations in the right to development. In an essay that introduces human rights into the framework of consequential evaluation, Amartya Sen proposes a "rights-inclusive consequentialism" that has advantages over "rights-independent consequential evaluation" of utilitarianism and over libertarianism. Turning to "human rights that individuals are supposed to have . . . because of their status as human beings," Sen acknowledges "the responsibilities that others have — irrespective of citizenship, nationality, and other denominations — to help this person to attain these freedoms. If others can help, then there is a responsibility that goes with it." What is important for our purpose is that ". . . some of these obligations tend to be more fully specified than others" and that "even the fulfillment or violation of precisely specified obligations can go with imperfect obligations of others to help in a general way." This general duty to help, he continues, "through a consequential link, may be rather inexact specified (telling us neither who must particularly take the initiative, nor how far he should go in doing this general duty), but this loosely formulated obligation — Immanuel Kant would call it an 'imperfect obligation' — to help may nevertheless be seriously considered by (and be influential with) responsible people." The essential point from our perspective of the rationale for positing a duty to support the human right to development in other countries is this:

It is important to see that in linking human rights to both perfect and imperfect obligations, there is no suggestion that the right-duty correspondence be denied. Indeed, the binary relation between rights and obligations can be quite important, and it is precisely this binary relation that separates out human rights from the general valuing of freedom (without a correlated obligation of others to help bring about a greater realization of human freedom). The question that remains is whether it is adequate for this binary relation to allow imperfect obligations to correspond to human rights, without demanding an exact specification of who will have to do what, as in the case of legal rights and specified perfect obligations.

Sen correctly observes that ". . . [I]n the absence of such perfect obligations, demands for human rights are often seen just as loose talk." He responds to this challenge with two questions: "Why insist on the absolute necessity of [a] co-specified perfect obligation for a putative right to qualify as a real right? Certainly, a perfect obligation would help a great deal toward the realization of rights, but why cannot there be unrealized rights, even rights that are hard to realize?" He resists the claim that any use of rights except with co-linked perfect obligations must lack cogency and explains that ". . . [h]uman rights are seen as rights shared by all — irrespective of citizenship — and the benefits of which everyone should have. The

40 Id., p. 494.
41 Id., p. 495.
42 Id.
43 Id.
44 Id., p. 496.
claims are addressed generally — in Kant’s language ‘imperfectly’ — to anyone who can help. Even though no particular person or agency has been charged with bringing about the fulfillment of the rights involved, they can still be very influential.”

This argument can be applied to the right to development. Indeed, the language of the Declaration on the Right to Development is a catalogue of imperfect obligations, which are nevertheless subject to specification as to what steps should be taken, when, with what forms of assistance, by whom, with what allocation of resources, with what pace of progressive realization, and through what means. As noted by Martin Scheinin in his chapter in this book, jurisprudence of human rights courts suggests a justiciable right to development, and therefore perfect obligations, at least in embryonic form. Sandra Liebenberg shows what steps South African has taken, and Yash Ghai indicates how the state’s legal structure should be adapted to meet these obligations and, one could say, to move from imperfect to perfect obligations.

The general problem of whether and to what extent states have responsibilities has been addressed extensively in the literature by such authors as Stanley Hoffman,46 Henry Shue,47 and Thomas Pogge,48 among others.

Shue argues that, without a minimum guarantee of subsistence, along with minimum protection of physical security, the realization of other human rights is not possible. He postulates three duties: “to avoid depriving, to protect from deprivation, [and] to aid the deprived.”49 He clarifies that the duty to aid becomes relevant only if the first two duties have been violated. Of special importance for the right to development is Shue’s discussion of the duty to protect, which has two types: one being the duty to enforce the first duty (to avoid deprivation), and the second being the duty to design institutions that avoid the creation of strong incentives to violate the first duty. The requirement of adequate institutional protection leads him to condition sovereignty on the protection of basic rights and to justify intervention when the state fails to protect those rights. He argues that “the international community not only may but ought to step in.”50 Extended to the development field, he posits the “need for some institution to step into the breach when a national government fails” but laments that “at present no institution provides adequately for the subsistence rights of persons deprived, ignored, or ill-served by their own national government.”51 For this purpose, he favors philosophically “the adoption of transnational principles to nurture a sense of transnational responsibility.”52 He concludes on this

45 Id., p. 497.
46 Stanley Hoffman, Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics (New York: Syracuse University Press, 1981). For reasons of space, this work will not be discussed in the present essay.
49 Shue, supra, note 47, p. 60.
50 Id., p. 174.
51 Id., p. 142.
52 Id., p. 149.
point, “a government that does violate, or assist in violating the rights of people outside its own territory, is failing in its duties both to the victims of the deprivation and, as an agent with service duties, to its own population.”

Pogge addresses the same question from the perspective of moral cosmopolitanism, in both interactional and institutional variants. Cosmopolitanism considers the human person as the ultimate unit of moral concern, each human being of equal value for all, even those with the most remote affinity. His version of moral cosmopolitanism is formulated in terms of “a rather minimal conception of human rights, one that rules out severe abuses, deprivations, and inequalities while still being compatible with a wide range of political, moral, and religious cultures.” He argues that those who “are influential and privileged participants in a transnational scheme of social institutions under which some persons are regularly, predictably, and avoidably denied secure access to the objects of their human rights . . . share responsibility for human rights fulfillment abroad.”

He makes a distinction between “interactional cosmopolitanism,” according to which other individuals and collective agents are directly responsible for the fulfillment of human rights, and “institutional cosmopolitanism,” where institutional schemes are responsible, while individuals have a shared indirect responsibility for the justice of any practice. The two variants are complementary, although he assigns primary importance to the institutional. His institutional approach to distributive justice is “to choose or design the economic ground rules that regulate property, cooperation, and exchange and thereby condition production and distribution [with a view to achieving] an economic order under which each participant would be able to meet her basic social and economic needs.” “This,” he concludes, “is what the assertion of social and economic human rights amounts to within the proposed institutional cosmopolitanism.” The words “right to development” could be substituted for “social and economic human rights” in the sense that the Declaration affirms that “All human beings have a responsibility for development, individually and collectively,” although the right to development does not purport to rewrite “the economic ground rules.”

Pogge’s institutional cosmopolitanism includes a mechanism for making available to the global poor a small portion of the value of resources that states use or sell. This Global Resources Dividend (GRD) has certain similarities with the Right to Development-Development Compact (RTD-DC), and Pogge’s moral justification for responsibilities across borders appears to support the concept of an obligation to cooperate for the realization of the right to development.

53 Id., p. 152.
54 Pogge, supra, note 48, p. 169.
55 Id., p. 248, n. 270. He acknowledges that the absence of “a full list of well-defined human rights” makes his conclusions “less precise and less definitive than one might have hoped.” Id., p. 177.
56 Id., p. 227, n. 100.
57 Id., p. 170.
58 Id., p. 176.
59 Id.
60 Id., pp. 196-215.
Thus, institutional cosmopolitanism provides the strongest moral arguments in support of the obligation of affluent countries to contribute to the institutional reforms and to provide resources that poor countries need to carry out their obligations to realize the right to development. It is another matter to provide the political rationale for affluent countries to accept this responsibility and for the developing countries to endorse the political implications of the moral obligation of political liberalism.

**Political Rationale**

Politically, the rationale for the right to development varies according to interests and relative power of the country concerned. Since the beginning of the drafting process in the 1970s to produce a normative instrument on the right to development, a dividing line has existed between those countries that never contemplated anything more than a vague moral commitment to support, in the context of the UN Commission on Human Rights, sound development policies, without acknowledging any legal obligations whatsoever, and those that saw the right to development as an agenda for the legally sanctioned transfer of resources from rich to poor countries. Those divergent rationales have produced an unhealthy trend that persists today in the posture of damage control by some and unproductive provocation by others. In between, there are political rationales worth considering.

In the current political climate, governments that pay a relatively high percentage of their gross domestic product (GDP) in official development assistance (ODA), most developing countries, many international agencies, and most non-governmental organizations (NGOs) support the concept of the right to development without being explicit about the nature of the reciprocal responsibilities involved. A minority of skeptical donor countries (usually the US, Japan, and sometimes Australia, New Zealand, Canada, and Sweden) expresses opposition to any claim that the duties of donor countries are more than moral commitments to be carried out as each country sees fit and under no legal constraint.

A group of developing countries belonging to the Non-Aligned Movement (NAM) introduced language into UN documents about legal obligations to operationalize the right to development, presumably to reinforce the claim that donor countries have a duty to provide assistance, knowing that the countries in question will object. The most active members of the NAM in the Working Group on the Right to Development called themselves the “Like-Minded Group” (LMG) until 2004 and included Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam. They tended to insert into resolutions and speeches on the right to development language about reducing inequities of international trade, the negative impacts of globalization, differential access to technology, the crushing debt burden, follow-up to the 2001 Durban Conference against Racism, and “the need

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for an international environment which is conducive to the realization of the right to development.”

This trend is manifested by the proposal of an international convention at the XIII Conference of NAM heads of state. They affirmed that “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms of all peoples, in particular the right to development.” Further they “called on all States to undertake necessary policy formulation and institute measures required for the implementation of the right to development as a fundamental human right,” calling on the UN to “continue to give priority to the operationalisation of this important right including, inter alia, elaboration of a Convention on the Right to Development.” When the UN Commission on Human Rights, at the behest of the NAM, called on the Sub-Commission on the Promotion and Protection of Human Rights to include in a concept paper a discussion of an “international legal standard of a binding nature,” 47 countries voted in favor; the United States, together with Australia and Japan, cast negative votes; and Canada, Korea, and Sweden abstained. When the Sub-Commission failed to produce this concept paper, the Commission noted this fact with concern and requested the Sub-Commission, “without further delay, to submit the concept document” at the 62nd session (2006) of the Commission. The author of the report that was finally submitted side-stepped the issue of a binding legal instrument. After noting “strong differences of opinion among legal luminaries as to whether the right to development can be placed within a legally binding framework,” she said, “In view of the ongoing discussions among duty bearers, partners and stakeholders, I am of the view that the successful identification of ways to infuse human rights values and principles into the development process would better serve the realization of the right” and concluded that “the development of binding legal standards is premature at this time.” The Sub-Commission asked her to continue her work but did not mention the “international legal standard of a binding nature,” presumably having concluded, as had the author, that the political will was lacking to pursue the idea further, however important it was to the NAM.

62 Commission on Human Rights Resolution 2002/69, adopted on April 25, 2002, by a recorded vote of 38 votes to 0, with 15 abstentions.
64 Id., para. 345.
65 The Commission on Human Rights adopted Resolution 2003/83 on August 25, 2003, by a vote of 47 in favor and 3 against, with 3 abstentions, requesting its Sub-Commission “to prepare a concept document establishing options for the implementation of the right to development and their feasibility, inter alia, an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership.”
68 Id., para. 18.
69 Id., para. 69.
While the 1986 Declaration does amplify developing world demands on the industrialized world for a transfer of resources, including several references to the nearly forgotten New International Economic Order (NIEO), donor countries regard the allocation of resources to development assistance and their trade and debt policy as a matter of the sovereign choice of their parliaments and governments rather than falling under binding international obligations.

Although the United States government has been the strongest opponent of consideration by the Commission on Human Rights of human rights-based obligations in the fields of aid, trade, and finance, President George W. Bush, in his March 22, 2002, speech to the UN Conference on Financing for Development in Monterrey, Mexico, said, “Developed nations have a duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law, and human rights.” The policy that emerged from that affirmation of a duty is a fascinating paradox of the right to development debate. Indeed, in 2003, the US delegation explained to the Commission: “States . . . have no obligation to provide guarantees for implementation of any purported ‘right to development.’”

In the same speech in Monterrey, President Bush proposed a $5 billion annual increase of ODA through a new Millennium Challenge Account (MCA), “devoted to projects in nations that govern justly, invest in their people, and encourage economic freedom.” On January 23, 2004, President Bush signed the law creating the Millennium Challenge Corporation (MCC) to administer the MCA and the MCC Board began operation in February 2004.

The paradox resides in the considerable similarity between the MCA and the Right to Development-Development Compact (RTD-DC): both refer to mutuality of obligations; both are based on transferring resources to reward countries that have sound development and human rights practices; both use the language of compact (“new compact for global development” in the MCA case and “development compacts” in the RTD case); both insist on investment in education and health; and both emphasize principles of accountability and transparency as part of good governance. While the parallels are appealing, in reality the MCA is more a vehicle to support growth and anti-corruption development policies that favor free markets, free trade, entrepreneurship, and economic freedoms, with only minimal attention to investing in people (that is, social expenditure on health, education, and related sectors) and almost none on human rights, except the right to property.

Intense political controversy surrounds the question of whether and to what extent states have international obligations to respect, promote, and provide for the right to development. The political motivations are fairly clear. Developing countries that see the right to development as creating an entitlement to a transfer of resources in their favor — through aid, debt relief, terms of trade, and more equitable globalization — argue that the right to development creates binding obligations on industrialized countries and on international institutions. The countries that feel targeted strenuously oppose any concept of legal obligation, and the international institutions acknowledge a need to be attentive to General Assembly resolutions but are guided legally by their constitutions and the directors of their governing bodies.

Countries that spend considerable amounts of their taxpayers’ money on development in line with the right to development do not welcome being told that they have a legal obligation to do so. Several delegations have mentioned “shared responsibilities,” which avoids forcing the issue of legal vs. moral obligations. For some countries, that responsibility would mean a paradigm shift in development by systematically integrating human rights. For others, it would mean the responsibility to relieve debt and create more favorable terms of trade and investment for developing countries. The principle of shared responsibility means, at a minimum, that opportunities must exist to assess whether and to what extent each country’s development policy — including its relations with donors, lenders and investors — is consistent with the shared objective of human development and human rights.

In sum, the political rationale for considering that there is an obligation to cooperate to realize the right to development is based on the balancing of the interests of these different groups of countries. Some wish to benefit from the reduction of resource constraints while others wish to see greater security and stability resulting from improved governance and well-being of the former group. In other words, the political rationale has to do with promoting competing economic interests between those countries that want access to increased aid, debt forgiveness, foreign investment and a level playing field in trade and those that want access to stable and cheap sources of labor, open markets, and natural resources.

Part of the calculation as to how these economic advantages can be realized is that improved governance, including respect for human rights, is a desirable and probably necessary condition for stability and equitable economic development. Developing countries should be willing to accept obligations to integrate human rights into their development policies and practices regardless of whether the richer countries provide incentives for such polices and practices. Instead, the former group (resource-poor countries) uses the right to development as a political basis to claim that the latter group (resource-rich countries) has an obligation to provide those incentives; and the latter group has its own political motivation for considering that the former group has an obligation to respect human rights as part of development. The difficulty is that neither group wants one-sided obligations — hence, the political rationale for development compacts.
Newly developed countries also have a political agenda to stress obligations of older developed countries. However, the case can be made for obligations upon them to contribute to “effective international co-operation” — for example, through South-South cooperation — to provide poorer developing countries “with appropriate means and facilities to foster their comprehensive development,” as required by Article 4 of the 1986 Declaration. The right to development will not be taken seriously until each group accepts its obligations, whereas the politics are such that each group stresses the obligations of the other group. If and when the politics change, the legal rationale for reciprocal obligations will become more acceptable.

Legal Rationale

While the political discourse shows divergent approaches to the duties implied by the 1986 Declaration, it is argued by most of the authors represented in this volume that there is a legal basis for asserting that states do have such obligations. An impartial assessment requires a careful review of the international law applicable to the right to development, as regards both the duties of states toward one another and the duties of international institutions.

The arguments for a legal obligation stem not from the legal nature of the Declaration, which is a resolution expressing views of member states in an instrument that did not purport to create legally binding rights and obligations. They are based, rather, on the legal obligation to act jointly and separately for the realization of human rights and “economic and social progress and development,” as stipulated in the UN Charter at Articles 55 and 56. For the states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the core legal argument is contained in Article 2 of the Covenant. It is in the logic of the right to development that the full realization of “all rights” cannot be successful if pursued piecemeal but only through a policy that is deliberately designed to achieve all the rights, progressively and in accordance with available resources. In that sense, the Covenant creates legal obligations to do essentially what the right to development calls for. These are the legal obligations of each of the 153 states parties (as of May 2006) not only to alter its internal policy but also to act through international cooperation toward the same end. Specifically, the duty, in Article 2, “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 cooperate for the right to development is expressed in Article 4(2) of the 1986 Declaration: “As a complement to the efforts of developing countries [to promote more rapid development], effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.”

The obligation to cooperate 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 realization 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 United Nations Development Program (UNDP) and the Organization 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, Economic and Social Council (ECOSOC), and international conferences and summits. Beyond that general involvement in the process of international cooperation, 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% of GDP target; 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 “cooperated” in development and could argue that the reference to be “effective” in Article 4 (2) of the Declaration is too vague to require more. This narrow approach does not give sufficient attention to the politically significant pronouncements of high-level conferences and legally significant interpretations of expert bodies.

A study on duties across borders by the International Council on Human Rights Policy75 concludes that “the enormous and continuing increases in capacity of richer states, and other actors in richer societies, mean that very often they can provide assistance effectively . . . Their capacity also confers added responsibilities. This responsibility is set out in international human rights law, which states that richer societies have an obligation to assist poorer states, through international co-operation, with within their means, to achieve protection of [economic, social, and cultural] rights.”76 The authors consider that “richer states are not acting to remedy the effects of their policies when these damage the [economic, social and cultural] rights of people in other countries. They are failing to undo harm for which they are directly or indirectly responsible.”77 The Council’s analysis of international responsibilities in the matter of economic, social, and cultural rights is also applicable to the right to development. Indeed, the externalities that make well-intentioned and right-to-development-based national development policies ineffective are, to a large extent, the result of rich states “not acting to remedy the effects of their policies.”

A more extensive interpretation of the legal obligation to cooperate in development would add substance to the vague obligation to cooperate through the incorporation by reference of the most significant documents relating to the specifics of cooperation. According to this interpretation, the content of the obligation to cooperate would be provided by such documents as the General Comments drafted by the human rights treaty bodies, the declarations and programs of action of the international conferences and summits, resolutions that purport to contribute to the pro-

76 Id., p. 86.
77 Id., p. 87.
gressive development of international law, and opinions expressed by leading experts and institutions. The declarations and programs of action of international conferences and summits are not directly linked to a binding legal instrument in the way the general comments are. They, 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 cooperation contained in the UN Charter and the International Covenants on Human Rights.

Another relevant interpretative document is the Maastricht Guidelines, 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 organisations, 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 organisations of which they are members.

The Covenant, 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, and cultural rights to suffer in any other country. This approach is consistent with Article 30 of the Universal Declaration on Human Rights, which excludes use of the Declaration by any state, group, or person to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein. It is also consistent with Article 9 (2) of the 1986 Declaration, which excludes the interpretation of the Declaration in any way that would imply that any State, group, or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights. Trade, monetary, and development policies that violate rights guaranteed by the ICESCR would be suspect, but the use of the terms aimed at the violation — thus implying intentionality — would make it extremely rare that any activity or act would be contrary to this provision.

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 apply to developing countries as well. Although many resource-poor countries tend not to welcome being reminded of it, under the extensive interpretation they have a legal obligation to pursue development policy based on meaningful participation, equitable sharing, and full realization of human rights, all of which are explicitly contained in the 1986 Declaration. Thus the Declaration articulates in terms acceptable to virtually every country a set of obligations that derive their legal force from existing treaty obligations. Whether this particular articu-

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78 This is the approach taken by the Committee on Economic, Social, and Cultural Rights in its General Comment No. 3 on the nature of states parties obligations (Article 2, para. 1 of the Covenant), adopted by on December 14, 1990, UN Doc. document E/1991/23, para. 14.

lating of duties, including international cooperation aimed at the full realization of the Declaration, will acquire a legally binding character through a new treaty or the emergence of a customary norm is uncertain. The conclusion of the Sub-Commission member entrusted with the concept document “that the development of binding legal standards is premature at this time” illustrates the perils of the treaty route, although her failure to make a proper assessment of the potential of legally binding instruments is not the end of the story. Similarly, the frequent reference to the obligations of the right to development in high-level diplomatic settings does not provide a definitive answer to the question of a customary norm.

The UN summits tend to make one allusion to the right to development, often as a reluctant political compromise, and then deal with the key issues and mechanisms 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 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.” In his report on the implementation of the MDGs, however, the UN Secretary-General quoted the above sentence on the right to development in the section on poverty eradication but not in the section on human rights. Nor did he provide any indication of whether or how the right to development could have a role in the MDGs. At the same time, development and UN agencies have devoted considerable attention to the relations between the MDGs and human rights. UNDP’s Human Development Report 2003, which was devoted to the MDGs, affirmed that the MDGs contribute to the right to development. In particular, the report not only affirmed that “achieving the Goals will advance human rights” but also recognized “that the targets expressed in the Goals are not just development aspirations but also claimable rights.” 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.” Finally the report affirms that “The Millennium Development Goals more explicitly define what all countries agree can be demanded — benchmarks against which such commitments must be measured.”

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, and gave it a mandate at its first

80 Supra, note 69.
81 General Assembly Resolution 55/2. United Nations Millennium Declaration, adopted on September 8, 2000, para. 11.
session to consider “obstacles and challenges to the implementation of the Millennium Development Goals 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 consensus by the Working Group in February 2006. If the Human Rights Council approves the Working Group’s recommendation, the task force will apply the 15 criteria it developed on a pilot basis, 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.”

Philip Alston 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 international level but in the policies and programs of the national governments to whom they are of the greatest relevance.” In assessing whether the MDGs involve obligations under customary international law, he 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.” He 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

87 Id., para. 77.
89 Id.
enshrined in customary international law.”90 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.”91

Nevertheless, Alston acknowledges “that the emergence of a growing international consensus around the MDGs provides a strong argument in favor of revisiting . . . in the years ahead” the development compacts as proposed by Sengupta in his capacity as Independent Expert on the Right to Development.92 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.”93 This line of argument is directly relevant to the right to development not only in the context of the proposed development compacts but more generally as part of the idea that an inchoate duty of the undifferentiated international community can evolve into a specific obligation to reduce resource constraints on countries that adhere to the principles of the right to development.

The philosophical and political arguments discussed above thus also have a legal rationale — namely, the emerging customary norm according to which developing countries must apply these principles and developed countries must reduce economic constraints over which they have control, where the developing country has made its best efforts to meet the MDGs or other development goals, and is unable to do so because of those constraints.

**Conclusion**

The claimed obligations in the Declaration on the Right to Development, as reaffirmed, *inter alia*, by the Vienna Declaration and Program of Action, the Monterrey Consensus, and the Millennium Declaration state moral positions that are consistent with several philosophical theories on duties in international affairs, including global liberalism, contractualism, consequentialism, and institutional cosmopolitanism. There is no doubt that they are also — and perhaps essentially — political affirmations of these obligations. However, the basis of all law is politics. The sustained effort to establish law through the politics of the Commission on Human Rights (and its successor Council), the General Assembly, and international summits and conferences has succeeded in two ways. First, the 1986 Declaration provided a normative basis for incremental confirmations and enactments of legal obligations. Thus, the jurisprudence of human rights courts and commissions cited by Scheinin and some of the interpretations of law by the treaty bodies cited by Salomon in their chapters emerge from the inchoate political will of states to affirm the right to development. Second, the Declaration provided the normative basis for the eventual recognition of

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90 *Id.*, p. 775.
91 *Id.*, p. 777.
92 *Id*.
93 *Id.*, p. 778.
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a legal right to development. The proposal of NAM and the mandate given to the Sub-Commission to examine the feasibility of “an international legal standard of a binding nature”94 have little likelihood of success under the current political climate. Whether the development of a binding legal instrument stands a better chance is the Human Rights Council is impossible to gauge. The preconditions for serious consideration of a binding legal instrument are that the affirmation of legal duties of the Declaration be depoliticized and that implementation of obligations be tested on a project or bilateral program basis.

The commitment of the Millennium Summit “to making the right to development a reality for everyone and to freeing the entire human race from want” is not trivial. The existence of a legal obligation does not ipso facto transform a philosophical precept or a political platform into behavior conforming to the norm. Sen is correct to note that “human rights may well be reflected in legislation, and may also inspire legislation, but this is a further fact, rather than a defining characteristic of human rights themselves.”95 Thus the “reality” of the right to development and the obligations it implies depends more on “social ethics and public reasoning” than on a formal legally binding instrument.

Whether states conform to the four duties and responsibilities and the score of “shoulds” and “shall” mentioned at the beginning of this essay is determined by complex webs of decision-making and balancing of interests and influence. Law and morality will constrain the forces that act against the principles of the right to development — many of which are identified and analyzed in other essays in this volume — only to the extent that power relations tilt in favor of putative beneficiaries of the right to development, namely, the vast majority of the population of world who enjoy neither the fruits of development nor respect for their human rights. The individuals, civil society organizations, governments, and international institutions that act resolutely on their behalf contribute to tilting that balance. The cumulative effect of the political, legal, and philosophical rationales that they use is to move the right to development incrementally from a political instrument of a group of states to a more fully enforceable legal right of the community of nations.

94 See infra, note 65.