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Filling the Gaps in the Right to Development

*A Study on the Understandings (and Misunderstandings)
of Rights-Holders and Duty-Bearers*

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Summary

The right to development (RTD) is an inalienable human right that has been affirmed by the United Nations General Assembly in the Declaration on the Right to Development (DRD), in 1986. The right has also been reaffirmed by several international declarations and in two regional human rights conventions, the African [Banjul] Charter on Human and Peoples' Rights and Arab Charter on Human Rights, and it is often discussed in development discourse.

In the RTD development is viewed as a human right. This human right entails that development is a process where all human rights will be realized. An important component of this right is that the development process needs to be framed in terms of entitlements for rights-holders and duties on duty-bearers.

The concepts of rights-holders and duty-bearers are crucial in any human right, since effect implementation of a right warrants an understandable framework that denotes what actor has a right and what actor has a corresponding duty to realize the right. In the DRD two rights-holders are designated, the human person and all peoples. Furthermore the DRD prescribes that states are the duty-bearers, and that these duty-bearers have obligations in the national as well as the international level. Although these actors have been identified in the DRD and there have been discussions on the RTD in international discourse for the better part of three decades, there still remains much confusion on how to interpret who the rights-holders are, especially what "all peoples" mean, and the interrelationship between the rights-holders. The same confusion is present when discussing duty-bearers. The presence of an international obligation for duty-bearers, pegs the questions: what the different obligations of states are in the national and the international level? As well as what the interrelationship between the different forms of duties is?

This thesis aims at clarifying the understanding of rights-holders and duty-bearers in the RTD and pointing out gaps that still needs to be resolved. The intention is that a clear understanding of these concepts will hopefully lead to a more implementable right.

In this thesis it is argued that the RTD is essentially a right of individuals. They have the right both in their individual capacity as human beings and as part of a collective, a "people". In the collective individuals cannot actuate an individual claim, but they are beneficiaries as the right of the "people" they are a part of is realized. In regards to "people" it has been found that there exist misunderstandings in regards to the definition of a "people". The different definitions that have been expressed are that "people" are states, the entire population of states or indigenous people and minority groups. This thesis has clarified that "peoples" should not be misunderstood as

meaning the state, rather it is collectives of persons. The true identification of a “people” is that it denotes the entire population of a state, as well as indigenous peoples and minority groups when they are present. Furthermore a question regarding rights-holders is whether they exclusively refer to individuals and “peoples” in developing countries or if they apply to all human persons and all peoples. This thesis has argued that since human rights are universal the latter notion must be a correct interpretation of the scope of rights-holders.

In regards to duty-bearer the thesis clarifies that they are states that are understood to have obligations to create a favourable national and international environment for the realization of the RTD. The primary obligation falls on states in the national context where they have an obligation to implement the right. However, to enable the full realization of the RTD it is deemed necessary that states cooperate to implement the right. This entails that states have an individual duty and a collective duty to advance the realization of the RTD internationally. Both of these duties are discussed in detail in the thesis.

Sammanfattning

Rätten till utveckling (på engelska "Right to development" (RTD)) är en mänsklig rättighet som har bekräftats av FN: s generalförsamling i "the Declaration on the Right to Development" (DRD) från 1986. Rätten har också bekräftats av flera internationella deklamationer och två regionala mänskliga rättighetskonventioner, "the African [Banjul] Charter on Human and Peoples' Rights" och "Arab Charter on Human Rights". Dessutom diskuteras RTD ofta i utveckling diskurs.

I RTD anses utveckling vara en mänsklig rättighet. Denna mänskliga rättighet innebär att utveckling är en process där alla mänskliga rättigheter kommer att uppfyllas. En viktig komponent i denna rättighet är att utvecklingsprocessen måste utformas som en rätt för rättighetsinnehavare (eng: rights-holders) och plikt för skyldighetsbärare (eng: duty-bearers).

Begreppen rättighetsinnehavare och skyldighetsbärare är en viktig komponent i alla mänsklig rättighet, eftersom en effektiv implementering av en mänsklig rättighet kräver att det finns en tydlig identifiering av vilken aktör som har en rätt och vilken aktör som har en motstående skyldighet att realisera rättigheten. I DRD identifieras två rättighetsinnehavare, individen och alla "folk" (eng: "peoples"). Vidare föreskriver DRD att stater är skyldighetsbärare och att de har skyldigheter i den nationella samt internationella sfären. Även fast dessa aktörer har identifierats i DRD och DRD har diskuteras internationellt i nära tre decennier så råder det fortfarande avsevärda oklarheter kring hur man ska tolka vilka rättighetsinnehavarna är, speciellt vad alla "folk" betyder, och även förhållande mellan rättighetsinnehavarna. Samma oklarheter finns närvarande när skyldighetshavare diskuteras. I och med att en internationell förpliktelse har inkluderats så är frågorna: vilka de olika skyldigheterna är i den nationella samt den internationella kontexten? Dessutom så frågan om det inbördes förhållandet mellan internationella och nationella skyldigheter relevant?

Denna uppsats syftar till att klargöra förståelsen av rättighetsinnehavare och skyldighetsbärare i RTD och att identifiera luckor i förståelsen av dessa koncept. Förhoppningen är att en klar förståelse av dessa koncept kan leda till en rättighet som är mer genomförbar.

I denna uppsats anges det att RTD är i huvudsak en rättighet för enskilda. De har en rättighet både i sin kapacitet som individer och som en del av ett kollektiv, ett "folk". Som en del av kollektivet har inte individer ett enskilt anspråk till rättigheten, tanken är istället att de är förmånstagare när "folkets" rättighet realiseras. Dessutom så har uppsatsen identifierat att det råder missuppfattningar angående hur "folket" ska definieras. De olika definitioner som har framförts är att ett "folk" betyder staten, hela befolkningen i en stat, ursprungsbefolkningar och minoritetsgrupper. I

denna uppsats har det klargjorts att ett "folk" inte ska uppfattas som en stat. "Folket" ska istället förstås som hela befolkningen i en stat, och när de finns även ursprungsbefolkningar och minoritetsgrupper. Ännu en fråga som har avgjorts angående rättighetsinnehavare är om RTD är en rättighet för alla individer och folk, eller om det ska uppfattas att rätten är exklusiv för individer och folk i utvecklingsländer. I uppsatsen hävdas det att den senare tolkningen måste uppfattas som den riktiga eftersom mänskliga rättigheter är universella.

Uppsatsen klargör att skyldighetsbärare är stater och att de har en skyldighet att skapa en nationell och en internationell miljö som främjar förverkligandet av RTD. Statens skyldighet i den nationella kontexten anses vara en primär skyldighet, och det är nationellt som rättigheten främst implementeras. För att kunna implementera rättigheten till fullo anses det även vara nödvändigt att stater samarbetar för att förverkliga rättigheten. Detta innebär att stater har en individuell och en kollektiv skyldighet att främja förverkligandet av RTD globalt. Båda skyldigheterna diskuteras i detalj i uppsatsen.

Preface

After six long years at the Faculty of Law I have finally concluded my studies. It is with great happiness I submit this thesis as it is the culmination of my studies in law and international human rights, but also a little sadness as it marks the end of a chapter that truly has been one of the happiest and interesting parts of my life thus far.

Coming in to my law studies six years ago, I had an idea that I would devote my specialization to international law and human rights, however I would never have thought that one of my greatest study interests would lie within development. I attribute this “new” passion for development to interesting course held by primarily two people, Prof. Maria Green at the RWI and Prof. Akhil Gupta at UCLA. Prof. Gupta’s introductory course to development, was an odyssey in the evolution of the field “development” and a critical appraisal of former and contemporary development thought. The course was a true revelation for me and it encouraged me to keep exploring the field of development. In connection to thanking Prof. Gupta I would also like to thank his teaching assistant Nicholas Smith who held very interesting seminars that elaborated on the class lectures.

Prof. Maria Green later managed to link development to my other academic passions, human rights and international law. Her course in the Right to Development encouraged us students to think of human rights as development, and to pose the difficult questions that are related to operationalizing the Right to Development. She influenced me personally to study the Right to Development in this thesis. Furthermore I want to thank Prof. Green in a second capacity, that is as my supervisor when writing this thesis. It is fair to say that the resulting thesis would not have seen the light of day, or at least not been as well-written, if it was not for her support. My whole-heart thanks goes out to her for her encouragement of my research question, her affirmation whenever I managed to “connect the dots” or found new avenues to study the question in, her constructive criticism of my drafts and for her encouraging words and support whenever I hit a brick wall in the research or was just simply tired of writing.

Furthermore I would like to thank my friends and family for their support in this process. Especially my classmates in the RWI-library and “exjobbsrummet”, you all lightened my mood and made the writing process durable on a daily basis. Since you are many in number there is no need to single anybody out in person, but no one is forgotten. Three people are worthy of special recognition, Mackda Goitom, Johan Bengtsson and Eric Elander Duque. Thank you all for proofreading my manuscript, and offering constructive criticism.

Abbreviations

ACHPR	African [Banjul] Charter on Human and Peoples' Rights
AComHPR	African Commission of Human and Peoples' Rights
ACHR	Arab Charter on Human Rights
CESCR	United Nations Committee of Economic, Social and Cultural Rights
DRD	Declaration on the Right to Development
Global Consultation	Global Consultation on the Right To Development
HLTF	High-Level Task Force on the Implementation of the Right to Development
HRC	United Nations Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE	Independent Expert on the Right to Development
IFI	International Financial Institution
IMF	International Monetary Fund
Maastricht Guidelines	Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
Maastricht Principles	Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights
NGO	Non-Governmental Organization
OEWG	Open-Ended Working Group on the Right to Development
RTD	Right to Development
UDHR	The Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UNCHR	United Nations Commission on Human Rights

UNHRC	United Nations Human Rights Committee
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA Vienna Conference	United Nations General Assembly Second United Nations World Conference on Human Rights in Vienna
Vienna Declaration	Vienna Declaration and Programme of Action
WGGE	Working Group of Governmental Experts on the Right to Development

1 Introduction

1.1 Overview

The right to development (RTD) is an inalienable human right that has been affirmed by the United Nations General Assembly (UNGA) in the Declaration on the Right to Development¹ (DRD), in 1986. The adoption of the right was the culmination of discussions to include a human right to development that had been on-going since the 1970s.² In the DRD it is prescribed that development is a process where all human rights will be realized.³ This right incorporates all human rights, economic, social and cultural as well as civil and political, and solidifies the notion that all human rights are indivisible and interdependent.⁴ The importance of the right has been reaffirmed several times, and it has also been proposed in the UNGA that the right is as important as the Universal Declaration of Human Rights.⁵

Since the right was adopted in the DRD continuous efforts have been taken in the United Nations (UN) to operationalize the right and there have been plans to codify the right into a treaty.⁶ This has led to the creation of several UN bodies tasked with defining the right and making it implementable. However, the efforts taken have seldom led to a real effect.

One of the problems with the right is that nearly 30 years after its adoption in the DRD states still disagree over fundamental principles in the right.⁷ One of the most contentious issues regards the interpretation of the rights-holders and the duty-bearers in the RTD. This is problematic. Clear information on what actor has a right, rights-holder, and what actor has the correlative duty to fulfil the right, duty-bearer, is imperative for the possibility to understand a human right. Without this understanding the

¹ *Declaration on the Right to Development*, UN General Assembly resolution 41/128 of 4 December 1986 UN Doc A/RES/41/128. The full declaration can be found in Supplement A of this document.

² Fukuda-Parr, Sakiko, "The Right to Development: Reframing a New Discourse for the Twenty-First Century". In: *Social Research*, Vol. 79, Issue 4, 2012, p. 839.

³ Sengupta, Arjun, "On the Theory and Practice of the Right to Development". In: *Human Rights Quarterly*, Vol. 24, No. 4, 2002, p. 846 ff. [Hereinafter referred to as Sengupta (2002)].

⁴ *Ibid.*, p. 840.

⁵ Marks, Stephen P. and Andreassen, Bård A., "Introduction". In: Andreassen, Bård A., Marks, Stephen P. (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed., Intersentia, Antwerp, 2010, p. xxiii.

⁶ Human Rights Council Resolution 4/4, of March 30 2007, UN Doc. A/HRC/RES/4/4, para. 2 (d); Marks, Stephen P., "Introduction". In: Marks, Stephen P., *Implementing the Right to Development: The Role of International Law*, Friedrich-Ebert-Stiftung, Geneva, 2008, p. 11. Available at: <http://library.fes.de/pdf-files/bueros/genf/05659.pdf> [Accessed on 17 May 2013].

⁷ Fukuda-Parr, p. 839.

realization of human rights is not feasible. In the DRD two rights-holders are designated, the human person and all peoples. Furthermore the DRD prescribes that states are the duty-bearers, and that these duty-bearers have obligations in the national as well as the international level.

Although these actors have been identified in the DRD, there still remains much confusion on how to interpret who the rights-holders are, especially what “all peoples” mean, and the interrelationship between the rights-holders. The same confusion is present when discussing duty-bearers. The presence of an international obligation for duty-bearers, pegs the questions: what the different obligations of states are in the national and the international level? As well as what the interrelationship between the different forms of duties is?

In the RTD this information is not clear from the DRD and there is a tendency among scholars and states to tangle up the concepts. Moreover most scholars, although usually mentioning both rights-holders and duty-bearers, often chose to only study one of the concepts extensively. Due to these facts there is a need for a holistic study on the concept of both rights-holders and duty-bearers, and their interrelationship. This is especially relevant, for the purpose of implementing the right or if there are efforts to codify the right into an international human rights convention.

1.2 Purpose and research question

The purpose and research question of this thesis is to clarify the understanding of the rights-holders and the duty-bearers in the RTD, as they are stated in the DRD, and to identify eventual gaps in the understanding of these concepts. A clear understanding of these concepts is imperative for the implementation of the right. This research question is split into six sub-question. These regard specific questions in regards to rights-holders and duty-bearers and are explained in below.

The first question examined is the rights-holders. In the DRD two rights-holders are identified, the human person and the individual, article 1 (1). As such the RTD is both an individual and a collective right. However, there is some confusion in connection to these rights-holders. These confusions mainly regard the question of who a “people” are in the context of the RTD, and the interrelationship between the human person and “peoples”. There is therefore a need for clarifications on both of these aspects. The research questions attributed to my study on these subjects are:

- What is the interrelationship between human persons and “peoples” as rights-holders in the RTD?
- What is the identity of a “people” in the RTD?

The second scope of this paper concerns duty-bearers in the RTD. The actor that has been identified as the duty-bearer in the RTD is the state. According to the DRD the state has obligations in two spheres, the national and the

international. The first obligation is that states have the primary obligation to implement the right in the national context, articles 2 (3) and 3 (1) DRD, secondly states also have a duty to cooperate and take collective action in the international sphere to further the realization of the RTD, articles 3 (3) and 4 (1) DRD. What is problematic in the understanding of duty-bearers is how to delimit the different obligations, the national and the international. This means that there is a need for clarification of the exact scope of obligations that states have in the national as well as the international context. Furthermore there is a need to understand what the obligations to cooperate and to take collective action means, in the context of the RTD. The sub-questions in regards to duty-bearers are:

- What are the duty-bearers' obligations in the national context and in the international context?
- Is there an added value in having international obligations in the RTD?
- What is the interrelationship between the obligations of the duty-bearers in the national and international context?

Finally when all of this information has been untangled and the concept of rights-holders and duty-bearers are clear this paper will conclude by pointing out if there are any gaps in the understanding of rights-holders and duty-bearers that needs to be explored further. The final sub-questions are thus:

- Are there any gaps in the understanding of rights-holders and duty-bearers in the RTD?

1.3 Delimitations

The content of the study is, as stated above, to examine the rights-holders and the duty-bearers of the RTD, basing my examination on the content of the DRD. I will therefore not extend my study to encompass human rights obligations in other legal regimes. However, there is a caveat, where it is suitable I might use interpretations of provisions in other international instruments as analogies, when these can help the interpretation of duties in the RTD. More on this will be discussed in the section on method and theory.

Another area that is closely related to the concept of rights-holders and duty-bearers is the concept of justiciability. However, justiciability will not be examined at all in this paper. This is because the two different concepts are distinct from each other. My research aims at elaborating on the identification and functions of the rights-holders and duty-bearers in the RTD. Justiciability is distinct from this scope, since it concerns the question of implementation of a right. More specifically, it is when the right-holder's claim (or right) has not been implemented or enforced by a designated duty-bearer that justiciability comes into question.

Another aspect that will not be studied is implementation of the RTD. Several UN working groups and the IE has conducted research on this matter. I will only utilize these sources materials when it is applicable to the research questions of this thesis. However, I will not generally discuss the question of implementation of the RTD.

1.4 Method and Theory

As I have written in the purpose section, there are several problems concerning the understanding of rights-holders and duty-bearers. This fact should not be understood as that there is a lack of information on this subject. Both UN working groups and experts have written on this subject, as well as scholars and practitioners. But as has been explained above, these examinations are often tangled or only discuss one dimension of the concepts, i.e. either rights-holder or duty-bearers.

The method applied in this paper is to conduct a literature review, encapsulating writings from recognized scholars and UN working groups. Most often these writings are specifically on the topic of the RTD. The thesis is thus mainly a descriptive study with the aim of clarifying the concepts in the RTD. The UN reports that are studied often come from the Open-Ended Working Group on the Right to Development (OEWG), High-Level Task Force on the Implementation of the Right to Development (HLTF), the Working Group of Governmental Experts on the Right to Development (WGGE) and the Independent Expert on the Right to Development (IE). This methodology has been utilized throughout the thesis. Furthermore, some parts of this study have necessitated research on the *travaux préparatoires* of the DRD. While some parts necessitated a study of sources on human rights in general, or other human rights disciplines than the RTD. One of these chapters is the third chapter, which studies general theories on the relationship between rights-holders and duty-bearers.

In the chapter that examines the rights-holders a literature review has been undertaken as the basis of the study. However, the question of identifying the rights-holder, “peoples”, and the reasoning of including this rights-holder required considerable research of the *travaux préparatoires* of the DRD. This include writings from the Working Group of Governmental Experts on the Right to Development (WGGE), which was the first working group in charge of developing the RTD, and summary records from the meetings of the Third Committee of the General Assembly. Furthermore the examination of the identity of a “people” also necessitated research into the area of self-determination where a lot of work has been undertaken to identify what the term “people” denotes.

The chapter that discusses duty-bearers in the RTD is mostly a literature review by recognized sources writing on the RTD. However, since a large part of this chapter examines the international obligations of states, this

paper also studies secondary international instruments that prescribe duties on states in the international level. The aim of which is to make analogies on the interpretation of state obligations in the DRD, whenever the obligations in the RTD is unclear.

Material that is presented in the study will continuously be analysed, and both the chapter on rights-holders and duty-bearers will end with general conclusions that analyses the whole chapter. The final chapter, thus, only aims at drawing on previous analysis, and will offer a consolidated conclusion.

1.5 Structure of the Paper

Excluding this introduction, the paper consists of five chapters. The second chapter is an introduction to the RTD. The belief is that an insight to the history and content of the right is necessary to properly understand the examination of the research question. Therefore a brief introduction is included in the second chapter. In the third the concept of human rights in general is examined. This examination is confined to mainly discuss the relationship between rights-holders and duty-bearers in human rights. This information will be used when analysing the relationship between the rights-holders and the duty-bearers in the RTD.

The fourth chapter discusses the rights-holders in the RTD, which are the human person and “peoples”. It first examines the distinction between these different types of rights-holders and the reasons why the drafters chose to have dual rights-holders. Furthermore the chapter explains the role of the human person in the RTD framework, since that subject enjoys the right both as a rights-holder and a beneficiary. Lastly the chapter examines “peoples”. In this section of the chapter what a “people” is in the context of the RTD will be identified, and who represents a “people”. Lastly the chapter discusses the interrelationship between the rights-holders in the RTD and whether it is a right for all “peoples” and individuals in the world, or whether rights-holdership is confined to individuals and peoples in developing countries.

In the fifth chapter the duty-bearers in the RTD is in focus. The identified duty-bearers are states, and they have obligations both in the national and in the international level. Both levels will be devoted a respective section. Furthermore more, general questions in regards to the duty-bearer structure in the RTD is discussed, such as complex and contested issues, as well as justifications for having a duty in the international level. Lastly the interrelationship between these levels of the duty is examined.

The sixth and last chapter offers general conclusions on the thesis subject. The aim of this chapter is to highlight the interrelationship between all the actors in the RTD. The chapter can be viewed as a consolidated finding of all the analyses and conclusions I have made in previous chapters.

Furthermore this final section also points out gaps in the understanding of rights-holders and duty-bearers that could not be answered by the thesis.

1.6 Terminology

Certain terms that is used in the paper need to be clarified. First of all I use *rights-holder* and *subject* interchangeably as denoting the person or entity that has a rights claim. Furthermore *duty-bearer* and *object* is used interchangeably as the entity that has a duty in regards to a rights claim. In regards to duty-bearers the terms *duty*, *obligation* and *responsibility* are used to denote the same thing. Lastly in the DRD the *human person* is mentioned as a rights-holder; in this study I will also use the term *individual* as denoting that same subject.

2 The Right to Development

This chapter intends to give the reader a brief introduction to the RTD.

2.1 History

The question of who should be the rights-holders, and which actors had a duty in respect to development has been hotly debated since the origin of the RTD. Mohammed Bedjaoui⁸ has explained that the first concept of the RTD was developed in the 1960s.⁹ At this point in time the world was becoming decolonized and the right was argued by the developing states. In this first form of the right it was intended as a right of poor states and “peoples” to development, which could be claimed against rich states.¹⁰ It was not until 1972 that the RTD was introduced as a human right after being launched by the Senegalese jurist Keba Mbaye. This was the first instance that development practice became an issue that was discussed within the framework of human rights.¹¹

At the same time an intense debate on the so-called New International Economic Order took place in the world community, especially within the auspice of the United Nations. This movement was led by several prominent nationalist from developing countries. The movement was heavily influenced by the Organization of the Petroleum Exporting Countries’¹² successful oil embargo, and in the movement it was widely believed that this was the start of a restructuring of the world economy. During the first half of the 70s, there were, therefore, several negotiations in the UN which aimed at changing the fundamental politics behind “global political of trade, finance, investment, aid and information flows.”¹³ These discussions were generally initiated by developing countries that used their majority within the UN to more or less force these topics on the agenda.¹⁴

Over time the method of furthering development as a human right has primarily been promoted by developing states. On the other side western states, who have generally been more developed have been hesitant to

⁸ Bedjaoui has, among other things, been a judge at the International Court of Justice, and foreign minister of Algeria.

⁹ Bedjaoui, Mohammed, “The Right to Development”. In: Bedjaoui, Mohammed (ed.), *International Law: Achievements and Prospects*, UNESCO, Paris, 1991, p. 1177 f.

¹⁰ Bedjaoui, p. 1179; Beetham, David, “The right to Development and Its Corresponding Obligations”. In: Andreassen, Bård A., Marks, Stephen P. (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed., Intersentia, Antwerp, 2010, p. 102.

¹¹ Uvin, Peter, “From the Right to Development to the Right-Based Approach: How ‘Human Rights’ Entered Development”. In: *Development Practice*, Vol. 17, No. 4/5, 2007, p. 598.

¹² More commonly referred to as simply “OPEC”.

¹³ Uvin, p. 598.

¹⁴ *Ibid.*, p. 598.

incorporate the right to development within the legal human rights regime. The reasoning behind this has been two-pronged, the first is the argument that this will lead to a diminishing of human rights in general, and secondly, developed states are unwilling to be subjected to claims on their resources from developing states, an outcome they fear will come with the RTD.¹⁵

In 1981 the United Nations Commission on Human Rights (UNCHR) passed a resolution that urged the formation of the first working group on the RTD. The Commission decided to assemble a group of 15 governmental experts that would “[...] study the scope and contents of the right to development and the most effective means to ensure the realization, in all countries [...]”¹⁶

Later during the year the first legal instrument that mentioned the RTD came into fruition. In June of 1981 the Organization of African Unity adopted the treaty known as the African [Banjul] Charter on Human and Peoples' Rights¹⁷ (ACHPR), which entered into force on 21 of October 1986.¹⁸ In Article 22 of the charter the High Contracting Parties included the RTD, which was framed in the following manner:

Article 22

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Furthermore the drafters of the treaty made two more references to the RTD in the ACHPR in Articles 20 (1) and 24, even though the latter seems to refer to development in a pure environmental context.

After discussing the content of the right for the better part of a decade, there was finally an international effort to formalize the RTD. This led to the adoption of the Declaration on the Right to Development by the UN General

¹⁵ Rosas, Allan, ”The Right to Development”. In: Eide, Asbjørn; Krause, Catarina and Rosas, Allan (eds.), *Economic, Social and Cultural Rights – A Textbook*, 2nd rev. ed., Martinus Nijhoff Publishers, Dordrecht, 2001, p. 122 f.

¹⁶ United Nations Commission on Human Rights Resolution 46 (XXXVII), of 11 March 1981. The United Nations Economic and Social Council approved UNCHR decision to establish this working group in a subsequent decision, see United Nations Economic and Social Council decision 1981/149, of May 1981.

¹⁷ Article 22 of the African Charter on Human and Peoples' Rights, adopted 27 June 1981.

¹⁸ African Union, *List of Countries Which Have Signed, Ratified/Accessed to the African Charter on Human and Peoples' Rights*, 2013. Available at: <http://www.au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.pdf> [Accessed on 19 May 2013].

Assembly (UNGA) in 1986. However, since the declaration was adopted as a resolution, it is not of a binding nature.¹⁹

As Peter Uvin describes, this could have been the end of the right. He argues that several rights that have been established as declarations in this manner, end up fading out into obscurity by being handed over to be studied by various working groups or commissions. In the end the usual outcome is that the right does not amount to any significant impact. This could very well have been the case for the right to development. However, in 1993 the the Second United Nations World Conference on Human Rights in Vienna (Vienna Conference) reaffirmed the right.²⁰ At the conference the right was incorporated in the Vienna Declaration and Programme of Action, with the following statement:

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.²¹

The RTD was adopted, in this manner, by a consensus, which resulted in a comeback for the right with renewed vigour.²²

This development also led to the formation of a host of different institutions that had the mission of developing and advancing the RTD. I will shortly summarise these various bodies below.

Subsequent to the Vienna Conference, the UNCHR also confirmed that the RTD was an inalienable human right in a resolution. In the resolution the UNCHR decided to institute the Working Group on the Right To Development, which had the mandate to investigate and recommend how the RTD could be implemented and realized.²³

When this Working Group's mandate ended in 1995, it was followed up by a new working group called the Intergovernmental Group of Experts on the right to Development.²⁴ At the conclusion of the latter group's mandate, they recommended that a follow-up mechanism should be established to continue the advancement of the RTD.²⁵

¹⁹ Rosas, p. 123.

²⁰ Uvin, p. 598.

²¹ Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. On Human Rights, 48th Sess., 22nd plenary, mtg., part. I, para. 10, U.N. Doc. A/CONF.157/23. Available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) [Accessed on 11 February 2013].

²² Uvin, p. 598.

²³ United Nations Commission on Human Rights Resolution 1993/22, of 4 March 1993.

²⁴ Rosas, p. 125; *Right to Development*, United Nations General Assembly Resolution 50/184 of 6 March 1996, UN Doc. A/RES/50/184.

²⁵ *Report of the Intergovernmental Group of Experts on the Right to Development on its second session*, of 7 November 1997, U.N. doc. E/CN.4/1998/29, paras. 76-81.

The UNCHR acknowledge these suggestions in 1998 by recommending the set-up of two institutions to follow the development of the RTD. The first of which was the OEWG, and second was the IE.²⁶ The Economic and Social Council affirmed this recommendation and decided on their formation.²⁷ The last of the institutions that was created to develop this area of law was the HLTF.²⁸

Today the RTD can be found in several international instruments. Apart from the DRD and the ACHPR it can also be found in; the Arab Charter on Human Rights²⁹ (ACHR), the United Nations Declaration on the Rights of Indigenous Peoples³⁰ (UNDRIP), and the Millennium Declaration.³¹

2.2 The Content of the Right to Development

The definition of development, in the context of the RTD, has been elaborated in the Preamble of the DRD as;

[...] development is a comprehensive economic, social, cultural and political process, which aims 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 benefits resulting therefrom³²

This definition notwithstanding, it is not simple to in easy terms describe the actual content of the RTD. However, several scholars and the IE have examined the actual right and we can find suitable interpretations for the right in these studies.

The IE has given us an authoritative interpretation on what the RTD entails by referencing article 1 (1) of the DRD. That article states that

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to

²⁶ United Nations Commission on Human Rights Resolution E/CN.4/RES/1998/72 of 22 April 1998, para. 10.

²⁷ United Nations Economic and Social Council Decision 1998/269, of 30 July 1998, UN Doc. E/DEC/1998/269.

²⁸ United Nations Commission on Human Rights Resolution 2004/7, of 13 April 2004, UN Doc. E/CN.4/2004/7 and United Nations Economic and Social Council Decision 2004/249, of 22 July 2004, UN Doc. E/DEC/2004/249.

²⁹ Article 37 of the Arab Charter on Human Rights, adopted 22 May, 2004.

³⁰ Article 23 and preambular para. 6 of the *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations General Assembly Resolution of 13 September 2007, UN Doc. A/RES/61/295.

³¹ *United Nations Millennium Declaration*, United Nations General Assembly Resolution 55/2 of 18 September 2000, UN Doc. A/RES/55/2, paras. 11, 24.

³² Preambular para. 2, DRD.

participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.³³

This article gives us three principles for what the RTD is according to the IE.

first, there is a human right called the right to development which is inalienable; second, there is a particular process of “economic, social, cultural and political development” in which “all human rights and fundamental freedoms can be fully realized”; and third, the right to development is a human right by virtue of which “every human person and all peoples” are entitled to “participate in, contribute to and enjoy” that particular process of development.³⁴

When describing the second principle the IE concludes that the RTD is a process of development that aims at realizing all human rights.³⁵ It is also concluded that all human rights will be realized in the process of development, meaning that there is a specific substantive content in the right. These two aspects of the RTD will be discussed in different subsections, starting with studying the RTD as a process of development.

2.2.1 The Right to a Process of Development

Viewing the RTD as a process of Development needs to be contextualized by looking at prior conventional theories and methods of development, which to a certain degree are still present today.

Traditional development theory has often had one primary objective, economic growth (increase in GDP and GNI). The conventional discourse of development was thus wealth accumulation. The methods employed to achieve the objective was to expand the capacity to produce goods and service and thereby creating a larger economy. However, utilizing this method to develop does not necessarily mean that the state is combating problems such as income inequality and poverty. In essence, there is much proof that only concentrating on economic growth, mainly result in funnelling more resources to the segments of society that are already wealthy. Furthermore, most claims that development through economic growth will help the most marginalized and poor people in society, such as the ”trickle down-effect” (which entails that eventually all persons will

³³ Article 1 (1) DRD.

³⁴ *Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/5, of 2 January 2001*, UN Doc. E/CN.4/2001/WG.18/2, para. 4. [Hereinafter referred to as Independent Expert’s 3rd Report].

³⁵ *Right to Development: Note by the Secretary-General – Report of the Independent Expert on the Right to Development, 17 August 2000*, UN Doc. A/55/306, para. 4. [Hereinafter referred to as Independent Expert’s 2nd Report].

benefit from a growing economy since wealth will trickle down from the rich), has been disproved. This method of "development" must therefore be viewed as a moral failure when discussing development in terms of lifting up all segments of society from poverty.³⁶

The following presentation will explain Sengupta's concept on the RTD as a process of development. First of all he has explained that development efforts that only aim at economic growth and do not address or show improvement in "social development" such as health, education, gender balance and increased respect and protection of human right, both economic, social and cultural, as well as civil and political, does not fulfill the process of development inherent in the RTD.³⁷

The RTD incorporates a process of development that takes account of justice and equity. In this way the process takes account of the most deprived, poverty stricken segments of society, by improving their living standard and enhancing their capabilities to keep strengthening their social standing. The end goal of development is that the all citizens of a country are well of.³⁸

As opposed to previously preeminent development theory, the process of development inherent in the RTD aims a strengthening the capabilities of individuals. The strengthening of a person's capabilities to live the life he or she wants to live comes by expanding the person's substantial freedoms. The expansion of these freedoms should therefore be both the "primary end" and the 'principal means' of development, both in a 'constitutive role' and in the 'instrumental role'".³⁹ Sengupta has, while referring to Amartya Sens theory on capability, further explained it as;

In that sense development becomes the expansion of capabilities or the substantive freedoms to allow people to lead the kind of life they value. But then capabilities are also instrumental to further expansion of these capabilities. Being educated and healthy permits them, for example to enjoy their freedoms. The free agency of people who enjoy civil and political rights is essential for that process.⁴⁰

The RTD is a human right. It has been explained as a right to human development, and as such there are specific concerns when implementing development. A human right puts emphasis not only on reaching development objectives, but also on the process in which these objectives are being fulfilled. This approach to development means that the objectives, as well as the process of development are human rights in their own right. This means, as explained above, that participation, equity, justice and

³⁶ Peet, Richard & Hartwick, Elaine, *Theories of Development : Contentions, Arguments, Alternatives*, 2nd ed., Guilford Press, New York, 2009, p. 2.

³⁷ Sengupta (2002), p. 848.

³⁸ *Ibid.*, p. 848 ff.

³⁹ *Ibid.*, p. 851.

⁴⁰ *Ibid.*, p. 851.

freedom are central concepts within the RTD, and are a part of the human right. Furthermore the process cannot violate other human rights. There is also a need that the process is framed in terms of obligations and responsibilities since it will establish accountability for the actor in charge of development, and lastly there needs to be a system in place for observing and rectifying any failures in the implementation of the process.⁴¹

Furthermore Sengupta has written that the process should be employed in a rights-based manner, meaning that it takes into account human rights values in decision-making and implementation of development efforts. These human rights values are namely participation, non-discrimination, accountability, and transparency as well as equity in developmental processes. Another dimension that is important for the query of this paper, is that the goals of development need to be phrased in entitlements or claims of rights-holders and corresponding obligations to promote or protect these values by duty-bearers. Lastly, there is a requirement that the procedures for implementing the obligation need to be “realized through appropriate social arrangement.”⁴²

In essence the right to development, urges subjects within development activities to refocus their view, from a macro-level, concentrating on national economic growth, to a micro-level, focusing on the individual person and their inherent right to self-realization. Each person is according to the RTD allowed to a process of development that enhances his or her own capabilities and freedoms so that they are free to live the kind life they want.

2.2.2 The Substantive Content of the Right

In regards to the substantive content of the right the IE has termed that the RTD is a vector. A vector entails that the right is a composite of several elements, which are all the human rights “together with the rates of growth of representative resources such as per capita consumption, output and employment.”⁴³ He points out that this vector has two features. The first is that all the elements have to be realized in a rights-based manner. The second feature is that all of the elements are interdependent. This means that the “level of realization of a right” in the vector is dependent on the “level of realization” of other rights in the vector. Furthermore realizing the rights are also dependent on the increase of resources, which are also a part of the vector.⁴⁴ Furthermore viewing the RTD as a vector has an important

⁴¹ *Ibid.*, p. 851.

⁴² Sengupta (2002), p. 846.

⁴³ *Study on the Current State of Progress in the Implementation of the Right to Development Submitted by Mr. Arjun K. Sengupta, Independent Expert, Pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155, of 27 July 1999, UN Doc. E/CN.4/1999/WG.18//2.*, para. 67. [Hereinafter referred to as Independent Expert’s 1st Report]; Independent Expert’s 2nd Report, para. 23.

⁴⁴ Independent Expert’s 2nd Report, para. 24.

consequence on the assessment on the fulfilment of the RTD. The IE states that the RTD can only be considered as improved if at least one element of the vector is increased with any other element being diminished.⁴⁵ Therefore it is required that no human right are violated or that no retrogression of human rights occur if the RTD is going to be realized.

2.2.3 Legal Force of the Right to Development

The RTD can be found in different instruments, among them the DRD, the ACHPR and the ACHR. These are documents with a varied precision when describing the concept. Furthermore the instruments carry a different degree of legal force.

Even though international consensus has been reached on the existence of the RTD, see the Vienna Conference, the right is not legally binding for the whole world. Since the right is only codified into a declaration, in the international sphere, there is no general legal obligation on states in regards to the right. However, regionally the right is incorporated in the ACHPR and the ACHR, and the state parties to those convention do have a legal binding obligation to obey the RTD.⁴⁶

Furthermore Eva Brems has argued that, since the DRD is a UNGA resolution it is in fact binding on the organs under UNGA as well as the UN Secretariat. This would mean that these institutions needs to adhere to the principles prescribed in the right whenever they plan and implement any of their activities.⁴⁷

2.3 What Actors Are Mentioned in the Right to Development

There are essentially three actors mentioned in the DRD and subsequent texts concerning the right. They are:

- States,
- the human person, and
- all “peoples”.⁴⁸

In the following portion of this chapter it is briefly explained in which context, as a duty-bearer or as a right-holder, these subjects appear. Since the topic of the thesis is rights-holders and duty-bearers these actors will be elaborated on in more detail in the subsequent chapters of the thesis.

⁴⁵ *Ibid.*, para. 25.

⁴⁶ Brems, Eva, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, The Hague, 2001, p. 452.

⁴⁷ *Ibid.*, p. 452.

⁴⁸ See the DRD, inter alia articles 1, 3 and 4.

2.3.1 Right-Holders

The right-holders in the RTD are mentioned in the first article of the declaration. It states:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

There are, therefore, two subjects that have been pointed out as right-holders in the DRD, the human person and all “peoples”.

2.3.1.1 The Human Person

The human person is the central subject within the RTD, and as such has the right to be the beneficiary and active participant of the right, which is prescribed in Article 2 (1) DRD and also explained in the preamble of the same declaration. As have been quoted above Article 1 (1) of the declaration also states that the human person has a right to “contribute to, and enjoy economic, social, cultural and political development”⁴⁹.

Further ahead in this paper, Section 4.2, the rights of the human person is explained in more detail.

2.3.1.2 Peoples

In Article 1 it is also mentioned that all “peoples” are rights-holders within the right to development. Aside from having the same rights as the every human person in the first paragraph of the mentioned article, they also have the right to self-determination, including the “full sovereignty over all their natural wealth and resources”⁵⁰.

In Section 4.3, the concept of “peoples” is clarified. Relevant questions are what the definition of a “people” is, and who represents a people’s claim for development under the RTD.

⁴⁹ Article 1 (1) DRD.

⁵⁰ Article 1 (2) DRD.

2.3.2 Duty-Bearers

The duties of the state can be found in several articles in the DRD. First of all the state has the primary responsibility to formulate national development plans, and to actually realize the RTD.⁵¹ This refers to a duty purely within the domestic context.

Furthermore the DRD prescribes that states, in addition to having a national duty, also have a responsibility internationally to create favourable condition for the implementation of the RTD. It is also mentioned that states have an obligation to work collectively, as well as individually, when formulating international development policies to achieve the RTD.⁵²

It is evident that the obligation of the state is dual, one set of duties being in the domestic sphere and the other set in the international sphere. In this paper this dichotomy will be referred to as the state's internal (domestic) and international duties.

In chapter 5 of this paper, I will discuss the duties of states in greater detail. I will also show what duties correlate to the state's international obligation and what duties are within the state's internal obligation.

⁵¹ See, inter alia, Articles 2-3.

⁵² See, inter alia, Articles 3-4.

3 Duty-Bearer and Right-Holder theory

To be able to properly analyse and understand the relationship of the rights-holders and duty-bearers in the RTD it is imperative to have clarity on the nature of rights and in extension the interrelationship of the claimant of rights and the bearer of the corresponding duties. This chapter will examine theories on this subject. This first section will briefly explain what human rights are and the interrelationship between rights-holders and duty-bearers. The next section, in turn will examine different views on how to understand the duties in human rights. First the nature of duty-bearers obligations will be examined, thereafter the notion of perfect and imperfect human rights will be studied, and lastly the notions of respect, protect and fulfil will be combined with imperfect and perfect obligations.

The word right is often used with two different connotations, Donnelly explains them as “rectitude” and “entitlement”. These terms represent either a moral or a political value. In terms of rectitude the word is used as “something *being* right or wrong”, an example being the phrase this is “the right thing to do”. In contrast when using the word right in terms of entitlement, the focus is on “someone *having* a right”.⁵³ Ronald Dworkin originally explained the difference between the utilization of the word right. Dworkin explains that when someone has the right to do something (right as an entitlement, as Donnelly would phrase it) she has a claim or a liberty to do something, even though it might be the wrong thing for that person to do. An example could be smoking, the individual is at liberty to smoke, eventhough it could be vived as the wrong thing to do to yourself, since it causes cancer. At the same time, when someone has a right, it is often understood that it is wrong to interfere when the person exercises that right. When something is the right thing for a person to do (rectitude in Donnelly’s terms), it does not necessarily mean they have a right to do this thing, as meaning it would be wrong for another person to interfere in the first person’s conduct. Dworkin contextualizes this with an example of an soldier being captured by enemy forces. In this scenario, it could probably be argued that the right thing to do for the soldier is to try to escape, but at the same time her captors are not doing wrong if they interfere in the soldier’s attempted escape.⁵⁴

Donnelly explains that another way that differs with rights as “entitlement” is in the relationship between rights and obligations. While rights as “rectitude” focuses on a specific standard of conduct, e.g. “that is wrong”, and highlights the duty-bearer’s obligation to follow the standard, right as entitlement focuses on the right-holder’s claim. As such the duty-bearer

⁵³ Donnelly, Jack, *Universal Human Rights in Theory and Practice*, 2nd ed., Cornell University Press, Ithaca, 2003, p. 7. [Hereinafter referred to as Donnelly (2003)].

⁵⁴ Dworkin, Ronald, *Taking Rights Seriously*, Duckworth, London, 1977, p. 188 ff.

need to draw attention to the right-holders privilege to enjoy the right.⁵⁵ It is only in the explanation of a right as an entitlement that we are discussing human rights. As such the word right on the continued text, will only refer to this meaning, unless explicitly stated otherwise.

The rights-holders relationship to the right itself is privileged. If M has a right to *x*, it is owned by that subject and if not already in M's "possession" it is owed to her by a duty-bearer. Furthermore *x* has a specific standing, so the right-holder's claim to it could normally not be rejected because of any other concern, such as "social-policy and moral and political grounds."⁵⁶

If we reconcile the two previous paragraphs on the relationship to a right, it shows that the rights-holder has a relationship to both the right and the duty-bearer. In this sense a right is centred on the right-holder, and generate "a field of rule-governed interactions", that are controlled by the subject.⁵⁷ Donnelly explains it as:

'A has a right to *x* (with respect to B) specifies a right-holder (A), an object of the right (*x*), and a duty-bearer (B). It also outlines the relationships in which they stand. A is entitled to *x* (with respect to B). B stands under correlative obligations to A (with respect to *x*). And, should it be necessary, A may make special claims upon B to discharge those obligations.'⁵⁸

Being entitled to a right means that the subject A has an entitlement to *x*, as such if B does not meet his obligations towards A, A is entitled to restitution in the form of a special remedial claim against B, and at the same B could be the subject of sanctions. This separates rights as entitlements from rectitude since an entitlement gives the subject an enforceable legal claim, while the rectitude rights might bring moral consequences for the duty-bearer but no legal sanctions.⁵⁹

The dichotomy of rights and duties has been discussed by several people and explained in many ways. While writing on the concept of the RTD Sengupta often reverts to utilizing a description of rights proposed by Morton Winston. Winston asserts that rights should be understood in the following manner:

An agent A has a right R to a particular good G if and only if the possession of R by A provides the basis of a justified claim that society has a duty to protect (and promote) A's enjoyment of this good G. [...] What is important about rights is that they give their holders a basis for claiming that other agents within society have certain duties which they are bound to fulfill with respect to their (the right-holders') enjoyment of certain goods. Rights, in short,

⁵⁵ Donnelly (2003), p. 7.

⁵⁶ *Ibid.*, p.8.

⁵⁷ *Ibid.*, p. 8.

⁵⁸ *Ibid.*, p. 8.

⁵⁹ *Ibid.*, p. 8.

are grounds of duties of others which benefit the right-holders.⁶⁰

What can be ascertained from these definitions is that there is an inherent binary relationship in human rights, between the rights-holder and the duty-bearer. That means that the existence of human rights implies the existence of a correlative duty.⁶¹

3.1 The Nature of Duty-Bearers Obligations

The understanding of the different forms of obligations that the duty-bearer has in respect to human rights is also of relevance to understand the relationship between rights-holders and duty-bearers.

For the understanding of the duty-bearers duties under human rights scholars have mentioned that there are three types of obligations. These are “the obligations to *respect*, to *protect* and to *fulfil*.”⁶² This methodology was first proposed by Henry Shue but with a different terminology. It was later refined into respect, protect, fulfil by Asbjørn Eide. This notion of the nature of obligations is often referred to as the tripartite typology.⁶³

The obligation to respect entails that the duty-bearer need to refrain from violating the rights-holders enjoyment of human rights. The obligation to protect means that the duty-bearer need to ensure that third parties do not infringe on the rights-holders enjoyment of human rights. Lastly the obligation to fulfil entails that the duty-bearer need to actively work for the realization of human rights.⁶⁴ This is especially relevant when the rights-holder would not be able to enjoy the right otherwise.⁶⁵

⁶⁰ Winston, Morton E. (ed.), *The Philosophy of Human Rights*, Wadsworth, Belmont, 1989, as cited in, Sengupta, Arjun, “The Human Right to Development”. In: *Oxford Development Studies*, Vol. 32, No. 2, 2004, p. 187.

⁶¹ Salomon, Margot E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford University Press, New York, 2007, p. 115.

⁶² Eide, Asbjørn, “Economic, Social and Cultural Rights as Human Rights”. In: Eide, Asbjørn; Krause, Catarina and Rosas, Allan (eds.), *Economic, Social and Cultural Rights – A Textbook*, 2nd rev. ed., Martinus Nijhoff Publishers, Dordrecht, 2001, p. 23.

⁶³ Sepúlveda, Magdalena, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia, Antwerpen, 2003, p. 157 ff.

⁶⁴ Maastricht Guideline 6, in: Boven, Theo C. van, Flinterman, Cees & Westendorp, Ingrid (eds.), *The Maastricht guidelines on violations of economic, social, and cultural rights: proceedings of the workshop of experts organised by the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, USA), and the Maastricht Centre for Human Rights of Maastricht : University, 22-26 January 1997*, Studie- en Informatiecentrum Mensenrechten, Utrecht, 1998, p. 4.

⁶⁵ Sepúlveda, p. 162.

3.2 Perfect and Imperfect Obligations

Even though a right is intrinsically linked with a corresponding duty it does not necessarily mean that there is only one duty or one duty-holder to each right. A statement such as this has been the cause of much debate in the human rights community. Classically human rights has been interpreted very inflexibly, where every right had corresponding duties that show distinct methods which would lead to the realization of the right, and one duty-bearer that was responsible for this implementation. If the model could not be applied to a right the opinion was that it was not realizable.⁶⁶ Amartya Sen has referred to this forced linkage by the Kantian concept of “perfect obligation”.⁶⁷

Sen is, however, not of the opinion that rights are only effective when a state of “perfect obligations” prevails. He argues that human rights are entitlements shared by all human beings, and that everyone should reap its benefits. The belief is then that instead of making the duty a strict requirement on a specific person or agency, “the claims can be generally addressed to all those who are in a position to help”. Sen argues that this argument would correspond to the Kantian concept of “imperfect obligations”.⁶⁸

Sengupta has adopted this train of thought in his various examinations of the RTD, albeit with some alterations to make it fit better with both a legal and moral view of human rights. It is his belief that human rights nowadays do not mandate the rigid structure that it had earlier. By referencing Winston Sengupta asserts that the valuable component of human rights is that they bind certain actors, i.e. the duty-bearers, to fulfil the right towards the rights-holder and that both of these types of actors are identified. However, there might be several actors with a duty in respect to a right.⁶⁹

Furthermore the pertinent factor that makes a claim into a right is the feasibility of realizing that claim in the assigned institutional arrangement. According to Sengupta, only claims that can be realized should be considered rights. If the claim is unfeasible it cannot. Furthermore Sengupta mentions that “feasibility in principle does not automatically lead to actual realization. Realization would depend on the agreement of the duty holders to work together according to a program and some binding procedures to honor the agreement.”⁷⁰ In regards to a binding agreement on procedure, Sengupta argues that this could take several different forms, and does not exclude arrangements that are not legislated. In this context “an agreed procedure, which can be legally, morally or by social convention binding on

⁶⁶ Sengupta (2002), p. 843 f.

⁶⁷ Sen, Amartya, *Development as Freedom*, Oxford University Press, Oxford, 1999, p. 230.

⁶⁸ *Ibid.*, p. 230.

⁶⁹ Sengupta, Arjun, “The Human Right to Development”. In: *Oxford Development Studies*, Vol. 32, No. 2, 2004, p. 187. [Hereinafter referred to as Sengupta (2004)].

⁷⁰ Sengupta (2002), p. 844.

all parties, would be necessary to realize a valid right, that is, a right that is feasible to realize through interaction between the holders of the right and of the obligations.”⁷¹

This notion of human rights could be useful when analysing the duty-bearers within the RTD.

3.3 Linking Perfect and Imperfect Obligations With the Obligations to Respect, Protect and Fulfil

The IE has suggested that perfect and imperfect obligations can be linked to the different types of obligations that states have. This section will briefly examine this assertion.

The IE has based his reasoning on the linkage between the obligations to respect, protect and fulfil and the notion of perfect and imperfect obligations, on the thoughts of Stephen Marks.⁷² Sengupta argues that obligations to respect and protect are typically perfect obligations. Which means that these obligation are legally enforceable, or as the IE writes; “enforced through judicial process, where ‘accountability takes the form of enforceable remedies’”.⁷³ The obligation to fulfil, which incorporates obligations to facilitate, provide and facilitate, however, is recognized as an imperfect obligation. The IE describes imperfect obligations as obligations that are legal in nature, but nonjusticiable⁷⁴. He writes that they prescribe

[...] general commitments to pursue a certain policy or achieve certain results which are typically not justiciable, that is, immediate individual remedies through the courts are not normally provided, where the State falls short of its responsibilities with respect to these obligations, although they are still legal obligations⁷⁵

Essentially the state do have an obligation to realize these rights, progressively, and they are exemplified as creating an environment

⁷¹ *Ibid.*, p. 845.

⁷² Sadly enough the IE does not offer a reference to which publication or other form of informational source from which he got the quotes from Marks. However, it is my belief that Sengupta made a correct reference, since Stephen Marks has been thanked in the first footnote of the report for efforts in commenting and giving suggestions to the author, p. 25. Any wrongful citations should therefore have been omitted by Marks during his review.

⁷³ *Fourth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2001/9*, 20 December 2001, UN Doc. E/CN.4/2002/WG.18/2, para. 35. [Hereinafter referred to as Independent Expert’s 4th Report].

⁷⁴ *Ibid.*, para. 35

⁷⁵ *Ibid.*, para. 35.

conducive to realize the RTD, or supplying different forms of resources, “when the normal functioning of the market and other institutions fail.”⁷⁶

⁷⁶ *Ibid.*, para. 35.

4 The Rights-Holders Within the Right to Development

This chapter studies the rights-holders in the RTD, which is imperative for the understanding of the RTD. The topics that are studied are the identity of the different rights-holders, what their respective rights are and the interrelationship of the rights-holders in the RTD. As has already been described in chapter 2 of this thesis, article 1 of the DRD has identified two different rights-holders, the human person and all “peoples”. These two rights-holders have different properties, the first one denotes an individual and the latter a collective. There is therefore a need to discuss the reasoning behind such an assigning of rights-holders, and how to view the different subjects in the rights-structure. This is examined in the first section of this chapter. The second section examines the rights of the human person. The following section will describe the rights of “people” and it will identify what a “people” is the RTD. In the fourth sections the interrelationship of the two forms of rights-holders is assessed. This section aims to discuss whether both human persons and “people” have national rights, or whether the rights of “people” only refer to a claim towards other states. Lastly, it will be assessed if the RTD only is applicable in regards to individuals and “peoples” in developing countries, or whether the right is universal and applies for all “peoples” and individuals.

4.1 The Distinction Between Individual Rights and Collective Rights

The DRD points out two distinct categories of rights-holders in the RTD. The first is the human person, which represents an individual level. The second is “peoples”, which represents a collective level.⁷⁷ In the collective right, the group itself is the subject of the right. The understanding of the collective as opposed to individuals should therefore be: “while groups themselves are collective entities (made up of individuals), group rights may be said to reflect the rights of ‘units and not simply as aggregations of individuals’ and so, although ‘the individual is the object of protection, the fundamental element is the group’.”⁷⁸ This construction of rights-holders was deliberately chosen, since it was believed to be the best way to realize the RTD. This chapter will describe the reasoning behind choosing these two rights-holders for the RTD. This entails an examination of how states argued for the rights-structure when drafting the RTD, and the view of

⁷⁷ Article 1 DRD.

⁷⁸ Salomon, Margot E with Sengupta, Arjun, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Minority Rights Group International, London, 2003, p. 10.

scholars on how to interpret the interrelationship between a collective and an individual right.

This division of the right into two categories of rights-holders, where one subject is a collective, was widely argued during the drafting of the DRD. Some states unequivocally argued that human rights could only be viewed as individual rights, and should not be constructed as collective rights. One main concern of these states was the belief that collective rights could be used as an argument for violating the rights of individuals on the basis of furthering the rights of the collective. This would mean that collective rights inevitably consume or undermine individual's rights.⁷⁹ Other states highly contended this assertion. These states argued that the collective was imperative in terms of development operations and in turn collective rights were necessary for a right to development. Furthermore they argued that the collective dimension of the right, would only be complementary to the individual right, and thus it could not be used as an argument or tool of any sort for the violation of individual rights.⁸⁰

Collective rights were finally included in the adopted DRD, but contentions still exist, mainly within academia, on how the relationship between a collective right and an individual right should be viewed. Donnelly has challenged the existence and the suitability of collective rights. He argues that the basis for human rights is the inherent dignity of the human person. Due to this reason, Donnelly argues, the human rights are formulated to distinguish the individual from society as a whole. He points at two factors that show this relationship, the first is that the rights are held against society and the state. The second being that the individual's right should always prevail if there is a conflict between the right and societal interests or goals. He claims that the concept of collective rights, therefore, deviates from the very fundament of human rights.⁸¹

Alston has spoken out in favour of collective rights. Stating that viewing rights as "exclusively of an individualistic nature" may be unproductive for the implementation of rights. He argues that a primarily individualistic view does not take into account that people live in communities and that the prospect for individuals' development is linked to their socio-economic

⁷⁹ See, *inter alia*, Third Committee of the General Assembly, Summary records of meetings No. 36 of the forty-first regular session, held on 5 November 1986, UN Doc. A/C.3/41/SR.36, paras. 13 ff. (statement from Sweden); paras. 18 ff. (United States of America); Third Committee of the General Assembly, Summary records of meetings No. 34, of the fortieth regular session on 8 November 1985, UN Doc. A/C.3/40/SR.34, paras. 1 f. (the Netherlands).

⁸⁰ See, *inter alia*, Third Committee of the General Assembly, Summary records of meetings No. 37 of the forty-first regular session, held on 6 November 1986, UN Doc. A/C.3/41/SR.37, para. 4 f. (Cuba); para. 25 (Mexico); para. 56 (Senegal).

⁸¹ Donnelly, Jack, "In Search of the Unicorn: The Jurisprudence and politics of the Right to Development". In: *California Western International Law Journal*, Vol. 15, Issue 3, 1985, p. 495 ff. [Hereinafter referred to as Donnelly (1985)].

context, and to people living in their vicinity.⁸² It is believed that it is imperative that certain collective rights exist so that individual rights can actually be realized. Some rights are therefore suitable to be assigned directly to the collective, although the individual must always be the end beneficiary when the right is realized.⁸³ Sengupta also contends that an overly individualistic view of human rights is undesirable. He states that the prerogative of human rights is to establish a specific right for an identified rights-holder and corresponding obligations on duty-bearers, which makes the implementation of the right feasible. Viewing human rights in this manner should make it illogical to distinguish between collective and individual rights-holders, rather what is important is that the right follows the methodology of human rights, ergo that there is at least one rights-holder and at least one duty-bearer.⁸⁴ Instead the imperative question would be the construction of the respective rights, of the collective and the individual, so that the collective dimension does not oppose the realization of the individual.⁸⁵

In the RTD the right of “peoples” is supposed to be exercised for the benefit of the individual, a fact that is evident from the formulation “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”⁸⁶ As such, the collective right, in addition to furthering the claim of the collective entity as an objective in itself, the collective entity also acts as a vessel for the realization of the individual persons within that entity’s rights.⁸⁷ Therefore it is evident that the realization of all the rights in the RTD (collective as well as individual) intends to advance the individual’s development. In this sense the collective right should not be viewed as opposed to the individual’s right to the RTD.⁸⁸

The idea of featuring the collective, “people”, and the individual as rights-holders in the RTD stems from the thought that the collective is a necessary component of development endeavours. It is, however, important to remember that the collective is a compilation of individuals, as such the furthering of the rights of the collective, is a step forward in the development of the individuals as well. As such the collective should only act as a vessel for the realization of the RTD of individuals. Therefore the standing of individuals and collectives should not be viewed as contradictory to each other.

⁸² Alston, Philip, “The Shortcomings of a “Garfield the Cat” Approach to the Right to Development”. In: *California Western International Law Journal*, Vol. 15, Issue 3, 1985, p. 516.

⁸³ Salomon with Sengupta, p. 9.

⁸⁴ Sengupta (2002), p. 858 f.

⁸⁵ *Ibid.*, p. 862.

⁸⁶ Article 2 (1) DRD.

⁸⁷ Salomon with Sengupta, p. 10.

⁸⁸ Sengupta (2002), p. 862 f.

In conclusion, this structure of parallel individual and collective rights-holders in the RTD, should not be viewed as two subjects that are mutually exclusive, but as complementary.

4.2 The Human Person as a Rights-Holder

This section explores the position of the human person in respect to the RTD. The first section briefly enumerates the various rights of individuals in the DRD. The second sub-section discusses the dual nature of individuals relationships in the RTD, one as a rights-holder and the other as a beneficiary of the rights of “peoples”.

4.2.1 The Rights of the Individual Within the Right to Development

The functioning and content of the RTD as a system of norms has been described in the second chapter of this thesis. Therefore this section only briefly recounts the various rights that have been bestowed on human persons in the operational articles of the DRD. In the declaration the individual has a right to;

1. “[...]participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”,⁸⁹
2. be the central subject of development;⁹⁰
3. “[...] active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom”;⁹¹
4. Conditions favourable to the RTD at the national and international level;⁹²
5. “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and fair distribution of income”.⁹³

⁸⁹ Article 1 (1) DRD.

⁹⁰ Article 2 (1) DRD. This article also prescribes that the individual has a right to participate, but since this is referenced in the bullet-point above I thought it be redundant to reference it again. Furthermore it states that the individual is the beneficiary of the RTD, but as will be described in section 4.2.2, beneficiaries do not have legal claims, and as such are not rights-holders.

⁹¹ Article 2 (3) DRD.

⁹² Article 3 (1) DRD.

⁹³ Article 8 (1) DRD.

4.2.2 The Dual Nature of the Individual's Relationship to the RTD

The individual is present as a participant in the RTD in two different capacities. As a subject to the individual right, and as a beneficiary of the collective right. In this portion of the essay the distinction between the concepts will be described.

Rights-holders are easily defined. Summarized it entails that the subject has a claim (entitlement) to a right, and that a corresponding duty-bearer is charged with the realization of the right, from which the rights-holder can direct his personal claim.⁹⁴

A beneficiary on the other hand, even though meant to gain from the realization of the right, is not in a position to actuate a personal claim in respect to the right.⁹⁵ The distinction from a right-holder is therefore that a beneficiary does not have legal standing to claim the right.

4.3 Peoples as Rights-Holders

The second rights-holder in the RTD is "peoples". This section explores what "peoples" are and their rights in connection to the RTD. The first sub-section will briefly enumerate the rights that have been granted "peoples" in the DRD. In the following that sub-section the definition of a "people" in the context of the RTD is examined. This sub-section discusses whether a "people" should be interpreted as a euphemism for the state, as denoting the entire population of a state, or whether it can be understood as a small domestic group, such as indigenous peoples and minority groups. Furthermore this section discuss who represents "people", an important question since each subject who has a right should be able to claim it.

4.3.1 The Rights of People Within the Right to Development

In this section I will briefly list the various rights that have been bestowed to "peoples" in the operational articles of the DRD. The rights of "peoples" are to:

⁹⁴ *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 Requirements of the New International Economic Order and the Fundamental Human Needs, Report of the Secretary-General, UN Doc. E/CN.4/1334, 1979, p. 43. [Hereinafter referred to as Report of the Secretary-General (1979)].*

⁹⁵ *Ibid.*, p. 43.

1. “[...]participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”;⁹⁶
2. the “full realization of the right to self-determination, which includes [...] the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”;⁹⁷
3. “ [...] active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom”;⁹⁸
4. Conditions favourable to the RTD at the national and international level.⁹⁹

4.3.2 Definition of a People

To adequately be able to find out who the subject “people” is, and to analyse the rights bestowed to “peoples” within the RTD, it is imperative to be able to have a clear definition of what “peoples” are. The right of “peoples” has been discussed in several context, e.g. within the framework of self-determination, indigenous peoples rights etc.. The aim of the section is to identify what a “people” in relation to the RTD.

4.3.2.1 Is The Right of Peoples a Right of States?

Many governments, such as the US, and scholars, such as Donnelly, have in different ways argued that the state could be a rights-holder in the RTD. This is a somewhat strange statement, since the state is not formally named in article 1 of the DRD as one of the rights-holders of the RTD. This section briefly recounts some of the arguments that have been given for considering the state as a rights-holder.

Afterwards I discuss if the term “peoples” can be interpreted as meaning the state. Since there are only two identified rights-holders, the individual and the collective “peoples”, it is safe to assume that if the DRD lacks an express right of states it must be in the collective sphere of the right that certain persons has interpreted such a right. That is also why I am discussing the question of states as rights-holders in this chapter. Any assertion that states have rights according to the RTD, is therefore only valid if the rights-holder “people” could be interpreted as a euphemism for the state. To be able to examine whether this is a valid interpretation of states I trace the assertion that states are a rights-holder according to the RTD, from its origin in the early 1960s to the state of the RTD today. This includes an analyse of the *travaux préparatoires* of the declaration, as well as academic commentary.

⁹⁶ Article 1 (1) DRD.

⁹⁷ Article 1 (2) DRD.

⁹⁸ Article 2 (3) DRD.

⁹⁹ Article 3 (1) DRD.

Orford has explained that an issue that has always been the cause of argument regarding the interpretation of the subjects of development, is whether the RTD entails a right of states. Both governments that seek to adopt the right as well as governments that aim to discredit the right have argued that the RTD could be interpreted to grant a right of states. It is argued that this right would prescribe that the state could pursue an economic model of development, and that this could be used as a justification for circumventing the human rights of people in their territory. What is more troubling is that this interpretation seems to have gained acceptance by many states and scholars.¹⁰⁰

One state that assumes that there is a right of states in the RTD is the United States. In a meeting of the UNCHR:s 61st session in 2005 their representative mentioned that

[...] one could talk about an individual's right to development, but not a nation's right to development, at least not within the context of the Commission, for the simple reason that nations did not have human rights, people did. While nations might have sovereign rights, it was not within the Commission's mandate to discuss them [...]¹⁰¹

This statement makes it obvious that the United States interpret that the RTD includes a right of states.

Furthermore several scholars have discussed the unsuitability of having states as rights-holders in human rights in general and the right to development in particular. Jack Donnelly, one of the most notable writers on this topic, wrote extensively on this fact, prior to the adoption of the DRD. In this piece Donnelly argued that a human right for the state is a logical contradiction, since human rights are bestowed to the individual person as a guarantee against the tyranny of the state. In this respect human rights functions as claims on the state to protect the individual, or claims on the state to provide the individual with certain necessities, such as a standard level of "goods, services and opportunities".¹⁰²

In similar terms, he argues that a right of the collective, primarily of "peoples", would not be a human right. His arguments were that a collective rights will essentially be exercised by the state.¹⁰³ Felix Kirchmeier¹⁰⁴, a

¹⁰⁰ Orford, Anne, "Globalization and the Right to Development". In: Alston, Philip (ed.), *People's Rights*, Oxford University Press, Oxford, 2011, p. 135.

¹⁰¹ United Nations Commission on Human Rights, Summary records of meetings No. 16 of the sixty-first regular session, held on 22 March 2005, UN Doc. E/CN.4/2005/SR.16, para. 71.

¹⁰² Donnelly (1985), p. 499.

¹⁰³ *Ibid.*, p. 498 f. The question of representation will be discussed in further detail in section 4.3.2.4 of this paper.

¹⁰⁴ It should be noted, however, that Kirchmeier is a proponent of the RTD, as opposed to Donnelly who opposes the right.

practitioner who has studied the RTD, makes the same argumentative leap stating that is states could be viewed as rights-holder is they are representing “peoples”.¹⁰⁵ In this sense it seems like Donnelly and Kirchmeier are confusing the question of representation of a “people” with the actual rights-holders. Seeming to suggest that, if in fact the state would have to exercise the right granted to “people”, the right will essentially be a right of states.

As referenced above the first version of a “right to development”¹⁰⁶ that arose in international discourse was aimed as a right of states and “peoples” alike. This proposal for a new legal regime was closely related to the “new international economic order”. Thus it called for a reformation of the international law system that would be based on values such as solidarity, social relations between states and co-operation of states on different stages of development. Bedjaoui expressed that the right to development in this context, would place a firm obligation on developed states to advance development in less developed states. Bedjaoui explained this proposed relation between states in his address at the congress of the Association of Attenders and Alumni of The Hague Academy of International Law on theme “new international social law” in 1969. The congress was convened by Algeria, Bedjaoui’s home state, which was an early proponent of the idea of an RTD.¹⁰⁷ He presented his ideas of the right to development in the following manner:

The gulf separating the rich and poor countries is growing ever wider and this threatens disastrous consequences for the entire human race. The problems of the ‘proletarians of all nations’, taken individually, must not make us forget those of the ‘proletarian nations’ of the international community. What we need is an international social law on the scale of nations. The developing countries... recently called for international solidarity in Algiers at the Conference of the 77... Economic co-operation must be the expression of a *new international law* which entails for the most well off States *the obligation to contribute to the development* of the most disadvantage countries in a spirit of human solidarity to the exclusion of any idea of exploitation.¹⁰⁸

When the RTD subsequently became more formalised it changed its legal structure, and was from 1972 and onwards placed among human rights.¹⁰⁹

¹⁰⁵ Kirchmeier, Felix, “The Right to Development – where do we stand?: State of the debate on the Right to Development”. In: *Friedrich Ebert Stiftung Occasional Papers No. 23*, 2006, p. 12. Available at: <http://library.fes.de/pdf-files/iez/global/50288.pdf> [Accessed on 25th April 2013].

¹⁰⁶ Note that this is not the RTD as it is understood in the DRD or the contemporary interpretation of the RTD. This was an earlier discourse, before the aim of development was framed in a human rights context. See this distinction in; Bedjaoui, p. 1179. In this portion of his text Bedjaoui explains that the RTD was placed firmly within human rights discourse in 1972 by Kéba Mbaye, as has also been explained in chapter 2.

¹⁰⁷ Bedjaoui, p. 1177 ff.

¹⁰⁸ Originally in Bedjaoui, Mohammed, “Pour un nouveau droit social international”. In: *Annuaire de A.A.A. – Yearbook of the A.A.A.*, The Hague, 1969, Vol. 39, p. 29, as cited in Bedjaoui, p. 1178.

¹⁰⁹ Bedjaoui, p. 1179.

However, the belief that the right, even in its new form as a human right, should entail a right of states to development was maintained even after this transformation. In the first draft declaration of the RTD, which was a compilation of proposals by the Working Group of Governmental Experts on the Right to Development (WGGE), there was an explicit reference to the right of states. The draft prescribed that: “The right to development is the right of all States and peoples for peaceful, free and independent development.”¹¹⁰ Sadly, since this document was a compilation of different proposals there is no indication on what state or states actually proposed this wording.

The perception that states could be a rights-holders within a human right was a topic of contention in international discussions of the right to development. This matter was also the object of several discussions at the Third Committee of the UNGA. Among others in 1984 the delegate from Canada affirmed that his government did in fact support the efforts to define a new human right to development, however his state vocalized the discontent that there was a “persistent tendency to attribute human rights to States”.¹¹¹ A similar objection was raised by the delegate of Finland at the same meeting, by also stating that his state could envision their country supporting the RTD, but at that stage there was an over emphasis on the right of states.¹¹²

The explicit reference to a right of states to development was soon omitted, and subsequent drafts and consolidated texts from the WGGE did not contain such a provision. The same applied for drafts sent from other states or organisations to the Working Group. The only part that remained was a reference to the right of “peoples” and of the human person.¹¹³

Even though the reference to a direct right of states to development was removed from the first article of the DRD, one reference to the “right of the state” was left in Article 2 (3) of the adopted DRD. Article 2 (3) of the DRD states that:

States have the right and the duty to formulate appropriate national

¹¹⁰ *Report of the Working Group of Governmental Experts on the Right to Development*, of 9 December 1982, UN Doc. E/CN.4/1983/11, Annex IV, page 5, Part One, para. 2.

¹¹¹ Third Committee of the General Assembly, Summary records of meetings No. 34 of the thirty-ninth regular session, held on 8 November 1984, UN Doc. A/C.3/39/SR.34, para. 8.

¹¹² *Ibid.*, para. 13.

¹¹³ Among others, noteworthy examples are; The Technical Consolidated Text from the WGGE after their sixth and seventh session where in article 1 it is prescribed that “The right to development is an inalienable human right of every person, individually or in entities established pursuant to the right of association, and of other groups, including peoples.”, found in *Report of the Working Group of Governmental Experts on the Right to Development*, of 14 November 1983, UN Doc. E/CN.4/1984/13, Annex II. Other examples can be found in the WGGE’s report from its 8th and 9th sessions, In Annex II the Non-Aligned Movements draft proposal only mentions peoples and individuals as possessing the right, in Article 1. The same was the case in Article 3 of a draft proposal submitted from France and the Netherlands in Annex III. *Report of the Working Group of Governmental Experts on the Right to Development*, of 24 January 1985, UN Doc. E/CN.4/1985/11.

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.

The question is therefore if this makes states a rights-holder or if it could indicate that “people” should be interpreted as the state.

This should not be misinterpreted to create an actual right of the state as a recipient *vis-a-vis* development. When analysing this article it is of importance to look at the actual formulation of the articulated norm. The article merely prescribes that the state is the holder of the right to function as an agent of development towards its own population, both as “peoples” and as individuals. In that respect it should only mean that the state has a possibility to assert its right to formulate national development policies toward forces that are denying or constraining its capacity to do so.¹¹⁴ But it does not imply a human right of states.

At the time, there was a real concern of some states that international forces in the form of states and institutions would misuse the argument of human rights to exert political leverage on other states, which could explain the inclusion of the word right in the above mentioned article. The delegate of Yugoslavia to the Third Committee of the UNGA expressed this fear in the following manner:

The Member States should bear in mind that the realization of all human rights depend on national and international conditions, and in particular on the effective and selfless co-operation to which they were committed under Article 1, paragraph 3, of the Charter. Yet, human rights were often misused for political purposes or, as was particularly the case at present, seriously jeopardized by the deterioration of international relations, which were characterized by the violation of the right of States to sovereignty and independence, military intervention and foreign interference in the internal affairs of countries, policies of domination and hegemony and the confrontation of the great Powers in their struggle to preserve spheres of influence, colonialist and neo-colonialist policies and persistent efforts to perpetuate the current unjust system of international economic relations. As had been stated at the Ministerial Meeting of the Group of 77 held at the beginning of the current session, it was the non-aligned and other developing countries which were most adversely affected by that situation [...]¹¹⁵

As a conclusion to this section I will argue that it is evident that the right granted to “people” in the RTD should not be viewed as a right of the state.

¹¹⁴ Orford, p. 137.

¹¹⁵ Third Committee of the General Assembly, Summary records of meetings No. 34 of the thirty-ninth regular session, held on 8 November 1984, UN Doc. A/C.3/39/SR.34, para. 20.

First of all, in the origins of the RTD a right of states was argued for by certain states and the WGGE itself. The RTD was then affirmed as a right of states, peoples and individuals. After being criticised the term “states” was subsequently excluded from the various draft declarations as well as the following declaration. Omitting the inclusion of the state as a rights-holder in the RTD was therefore a conscious decision and should inevitably be interpreted as indicating that the state is not a rights-holder.

Secondly, in the early drafts of the right, both the state and “peoples” were identified as rights-holders. This must lead to the conclusion that the different terms had different connotations in respect to the RTD. It is therefore inadvisable to believe that the right of “peoples”, should be interpreted as a right of states. They had existed independently from each other in previous drafts, and should therefore have different definitions.

Third, when it comes to the interpretation of article 2 (3) I believe that the article in essence prescribes a duty upon the state to formulate “right-based” domestic development policies, in accordance to the values enunciated in the DRD. At the same time it prescribes that the state has the sole right to formulate these development policies without interference from other states or institutions. These two facts should not be viewed as controversial or paradoxical, since it is a general principle of international law, that states are sovereign and by extension therefore have the right to manage their own territories in any way they see fit. This includes creating and implementing development policies.¹¹⁶ This article should, therefore, not in any way be interpreted as suggesting that there is a right of states in the RTD.

Fourth and lastly comes the question of representation. This aspect of the right of “peoples” is discussed in section 4.3.2.6. But I find it imperative for the readers understanding to confront Jack Donnelly’s claims here. The question of representation is irrelevant when discussing the actual holder of the right, since the rights-holder is always meant to be the subject of the particular right. If an entity other than the rights-holder is responsible to exercise the right for a right-holder, it should be considered that the entity’s task is to enforce the right on behalf of the subject. In this way the right itself does not shift hands. Therefore in the case of rights and representation we must always distinguish between enjoying a legal claim and having procedural capacity to exact it. This position has, *inter alia*, been conveyed by the international law scholar Sir Hersch Lauterpacht.¹¹⁷ The UN Secretary-General (UNSG) has contextualized this by using an analogous example, that of infants’ or weak minded persons’ standing in domestic law. These individuals are subjects of the law and have rights but they lack procedural capacity to actuate these claims themselves.¹¹⁸ However, if these

¹¹⁶ For example see Article 2 (1) (4) and (7) in the Charter of the United Nations, of 26 June 1945 (UN Charter), which prescribes different dimensions of the principle of sovereignty.

¹¹⁷ Lauterpacht, Hersch, *International Law: Being the Collected Papers of Hersch Lauterpacht. Vol. 2, The law of peace, p. 1 : International Law in General*, Cambridge University Press, Cambridge, 1975, p. 510.

¹¹⁸ Report of the Secretary-General (1979), p. 44.

individuals' rights are asserted for them by a different person, it does not mean that the legal claim itself has shifted hands. The infant or weak minded person still retains ownership of the right.

4.3.2.2 The Parallel Between the Law of Self-Determination and the Right to Development

When examining "peoples" in the RTD a good references point is the law of self-determination. The understanding of the term "peoples" is generally associated with the notion of self-determination. This is also the case of the the RTD where self-determination has explicitly been mentioned as a feature of the RTD in the DRD.¹¹⁹ Similarly when the subject "peoples" has been incorporated into other human rights instruments it is usually as a right to self-determination, such as in article 1 of the ICESCR and article 1 of the International Covenant on Civil and Political Rights (ICCPR). Furthermore Mohammed Bedjaoui has held that the RTD has its origin in the peoples' right to self-determination, thereof suggesting that the concepts are undoubtedly linked.¹²⁰ Since the RTD and self-determination of "peoples" is intrinsically linked it seems relevant to use analogies from the concept of "peoples" within the framework of the right to self-determination for discerning how that term should be interpreted in the RTD.

This section will first examine whether a general definition can be found of "peoples" utilizing concepts from self-determination discourse. Moving on I will in two sub-sections discuss whether "peoples" in the RTD should be understood as the entire population of a country or as minority groups and indigenous peoples.

Self-determination is a widely used term, and the conventions, UN declarations and resolutions that mention it are numerous.¹²¹ It is elevated as one of the most fundamental legal norms in international law, and is not seldom referred to as *jus cogens*.¹²² There is, however, a problem regarding the understanding of the norm, which is that the term "people" continually is not defined, in these instruments. This fact makes the concept of "people" very ambiguous and vague.¹²³ For the purpose of my question, i.e. of trying

¹¹⁹ See, *inter alia*, Article 1 (2) DRD.

¹²⁰ Bedjaoui, p. 1184.

¹²¹ Nirmal, B.C., *The Right to Self-Determination in International Law*, Deep & Deep Publications Pvt. Ltd., New Delhi, 1999, p. 100 ff.

¹²² Anaya, S. James, *Indigenous Peoples in International Law*, 2nd ed, Oxford University Press, Oxford, 2004, p. 97.

¹²³ Nirmal, p. 100 ff; Türk, Danilo, "The Human Right to Development". In: van Dijk, Pieter, van Hoof, Fried, Koers, Albert and Kamiel, Mortelmans, *Restructuring The International Economic Order: The Role of Law and Lawyers: proceedings of the Colloquium, organized by the Department of International and Economic Law on June 12 and 13, 1986 on the occasion of the 350th anniversary of the University of Utrecht*, Kluwer Law and Taxation Publishers in co-operation with the Netherlands Institute for Social and Economic Legal Research, NISER in Utrecht, Deventer, p. 88; Cristescu, Aureliu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, United Nations Publication, New York, 1981, paras. 269-279.

to define the subject “people” within the context of the RTD, this problem is rather unfortunate.

Several scholars and jurists have, however, tried to construct a definition of the term “people”. In broad strokes these definitions refer to a group which inhabits three characteristics in common; a ‘common language’, ‘common culture’ and a ‘common fate’ (‘historical community’). Furthermore it has been proposed that a group of people can only be defined as a “people” if they are large in number and populate a common territory. In summary the group should be linked by one or several of the following characteristics; “national, cultural, linguistic, religious bond, common history, economic and social life and even state power.”¹²⁴ As such, a “people” constitute a social entity with a distinct identity and in some aspects unique characteristics, that can be linked to a specific territory. The relationship to territory is, however, not terminated if the “people” are forcibly removed.¹²⁵

In an international meeting of experts hosted by the UN Educational, Scientific and Cultural Organization (UNESCO), on the topic of the rights of “people”, the experts discussed how “people” should be interpreted in different instruments. The meeting did not, however, result in a clear definition for “peoples”. Even though the experts did not relay a fixed definition, they did give some advice on how to view “peoples”. In their opinion it is possible that the group “peoples” may differ, depending on the purpose of the law in which the term appear. As such, when discerning what the term “peoples” means in respect of “peoples’ rights”, it is advisable to distinguish what the value or function connected to the rights in question is.¹²⁶ Simply stated “peoples” should be interpreted with the help of the object and purpose of the relevant instrument.

While not creating a definition for “peoples”, the meeting proposed a set of characteristics that they believed were inherent in the description of the “people”. The following characteristics were suggested:

1. a group of individual human beings who enjoy some or all of the following common features:
 - (a) a common historical tradition;
 - (b) racial or ethnic identity;
 - (c) cultural homogeneity;
 - (d) linguistic unity;
 - (e) religious or ideological affinity;
 - (f) territorial connection;
 - (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;

¹²⁴ Nirmal, p. 118 f.

¹²⁵ *Ibid.*, p. 119.

¹²⁶ United Nations Educational, Scientific and Cultural Organization, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations*, UN Doc. SHS-89/CONF.602/7, 1990, para. 22-23.

3. the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and possibly;
4. the group must have institutions or other means of expressing its common characteristics and will for identity.¹²⁷

Depending on how homogenous the population of a certain country is, these characteristics could seem to refer to the entire population as a whole or indigenous peoples as well as minority groups in the country. Thus, even though some broad criteria exists they are of little or no help. In the next sub-sections I will discuss if “peoples” in the RTD could be understood as either or both the entire population or minority groups and indigenous peoples.

4.3.2.2.1 Peoples as Entire Populations

Two instruments that should be at the forefront when discerning the meaning of “people” in the RTD are the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). In Article 1(2) of the DRD there is a direct reference to the “International Covenants on Human Rights” while stipulating the rights of peoples to self-determination. This right is evident in the two covenants in their respective first articles, which is articulated in the exact same manner.¹²⁸ Danilo Türk¹²⁹ has affirmed that “people”, in the RTD, should be understood in the meaning given to it in relation to “people” that have a right to self-determination in accordance to international covenants on human rights. According to him this was also the opinion of the WGGE.¹³⁰ But returning to our original dilemma there has not been established a permanent or universally accepted definition for the term in context to the covenants, neither by the United Nations Human Rights Committee (UNHRC) nor the United Nations Committee of Economic, Social and Cultural Rights (CESCR).¹³¹

¹²⁷ *Ibid.*, para. 22.

¹²⁸ Article 1 ICCPR, Article 1 ICESCR.

¹²⁹ Danilo Türk is a former member of the WGGE.

¹³⁰ Türk, p. 88.

¹³¹ Joseph, Sarah, Schultz, Jenny and Castan, Melissa, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, Oxford, 2000, p. 100 f; United Nations Human Rights Committee, *General Comment No. 12: The Right to Self-Determination of Peoples (Art. 1)*. Available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument) [Accessed on 31 March 2013]. In this General Comment, the UNHRC does not even suggest a possible definition for “people”. The CESCR does not even go that far, since they have simply neglected to publish a General Comment in respect to Article 1. This fact may, however, be understandable. Since the provisions in the ICESCR and the ICCPR are the same, it might have felt redundant to elaborate two General Comments of the exact same article.

Even though this is the case there is one preeminent interpretation of what the definition, in connection to the ICCPR and the ICESCR, should be. This was formulated by Antonio Cassese. After interpreting the provisions in light of the treaties preparatory work and general spirit and context of the law, Cassese concludes that “people” should be defined as:

1. “entire populations living in independent and sovereign States,
2. entire populations of territories that have yet to attain independence, and
3. populations living under foreign military occupation.”¹³²

This definition of “peoples” in regards to the ICCPR has also been affirmed by Manfred Nowak in his Commentary to the convention. When commenting on article 1 of the ICCPR Nowak has simply referred to Cassese’s interpretation, thus granting it authority.¹³³

Furthermore if we examine the second paragraph in the preamble and Article 2 (2) of the DRD, it seems to suggest a corresponding definition to peoples. In these texts it is referred to “the constant improvement of the well-being of the entire population and of all individuals [...]”. As can be seen the right of “peoples” are not directly referenced in these segments of the text, however a “new” collective entity, “the entire population”, is. This could be interpreted as an evidence that the interpretation of Cassese on “people” in the ICCPR could be adequate also for the RTD. However, we cannot with certainty determine it is.

When the OEWG is discussing the RTD their usage of the term “people” seem to suggest that they generally use it as meaning the entire population of the state.¹³⁴ The same observation could be made when reading several scholars work on the RTD.¹³⁵

The definition of “people” in the RTD could therefore, possibly be analogous to the definition formulated by Cassese in connection to international covenants on human rights. However, this is problematic for reasons that will be discussed below.

4.3.2.2 Peoples as Minority Groups and Indigenous peoples

A question that arises when trying to figure out a definition for “people” is whether it could be viewed as several fragmented “collectives of people”,

¹³² Cassese, Antonio, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995, p. 59.

¹³³ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed., N.P. Engel, N.P. Engel, Kehl, 2005, p. 20.

¹³⁴ *Report of the Open-Ended Working Group on the Right to Development*, of 20 March 2001, UN Doc. E/CN.4/2001/26, 2001., see *inter alia* paras. 44, 51 and 139 [Hereinafter referred to as OEWGs 1st Report]; Iqbal, Khurshid, *The Right to Development in International Law*, Routledge, London, 2010, p. 55.

¹³⁵ Salomon, p. 115; Beetham, p. 104 f.; Kirchmeier, p. 10.

such as minority groups and indigenous peoples, within the state. This would de-bunk the theory elaborated above.

Koen De Feyter has written that the rights-holder “people” in the DRD, originally was meant to refer to the “entire population of states”. He does not offer any references for this assertion, other than the belief that the explicit reference to self-determination should be understood as meaning the entire population.¹³⁶ De Feyter also mentions that at the time when the DRD was drafted, the rights of indigenous peoples had not entered international discourse. The question of indigenous rights came into prominence later.¹³⁷ However, De Feyter argues that indigenous peoples should fall under the category of “people” in its current interpretation. He derives this fact from the *Endorois*-case and the fact that the RTD has been included in UNDRIP (both of these will be elaborated on below). Furthermore he states that there is reason to believe that other groups than indigenous peoples, should also be included in the definition of a “people” in the RTD.¹³⁸

In the context of self-determination Anaya has argued that understanding “peoples” as only referencing the entire population of a sovereign or colonized state is obsolete.¹³⁹ Instead “peoples” should be viewed as “all those spheres of community, marked by elements of identity and collective consciousness, within which people’s lives unfold – independently of considerations of historical or postulated sovereignty.”¹⁴⁰ Thus the concept of “people” could also include communities of indigenous peoples and other minority groups that share a common identity.¹⁴¹

In the report of the Global Consultation on the Right To Development¹⁴² (Global Consultation) it is argued that the term “people” in the RTD does not necessarily correspond with the same term in the context of a classical interpretation of self-determination. In their opinion the terminology should also encompass groups in the state, such as indigenous peoples and minorities, even though the DRD does not explicitly mention those groups.¹⁴³ In similar terms the UNSG has also suggested that the rights-holders of the RTD could be minorities.¹⁴⁴

¹³⁶ De Feyter, Koen, “Indigenous Peoples”. In: Marks, Stephen and Purvimanasinghe, Shyami, *The Right to Development in Practice: Studies for the Twenty-fifth Anniversary of the Declaration*, United Nations Office of the High Commissioner for Human Rights, Forthcoming Fall 2013, p. 163.

¹³⁷ *Ibid.*, p. 162.

¹³⁸ *Ibid.*, p. 170.

¹³⁹ Anaya, p. 100 ff.

¹⁴⁰ *Ibid.*, p. 103

¹⁴¹ *Ibid.*, p. 103

¹⁴² The Global Consultation was an international conference convened by the UN Secretary-General in 1990. The topic of the conference was to discuss the implementation of the RTD.

¹⁴³ “The challenge of implementing the right to development in the 1990s: report of the Global Consultation on the Right to Development as a Human Right”. In: Marks, Stephen and Purvimanasinghe, Shyami, *The Right to Development in Practice: Studies for the Twenty-fifth Anniversary of the Declaration*, United Nations Office of the High Commissioner for Human Rights, Forthcoming Fall 2013, unpaginated. [Hereinafter

Returning to the texts of the OEWG, even though it seems like they usually value “peoples” as meaning the entire population, there are instances where they explicitly refer to the RTD of smaller groups, such as indigenous people and minorities. In this context it cannot be discerned whether they feel that these sets of groups could also be characterized as a “people”.¹⁴⁵ Similarly commentators have discussed the rights of minorities and indigenous peoples under the RTD, also suggesting that they fall under the category “peoples”.¹⁴⁶

Another indication that smaller groups, than the entire population of the state, could be viewed as “people” under the RTD is case-law from the African Commission of Human and Peoples’ Rights (ACoMHPR). In the *Endorois-case*¹⁴⁷ the question was whether the Endorois Indigenous People’s right to development had been violated by the Kenyan government. This due to the fact that they had been removed from their ancestral land so that the government could create a game reserve.¹⁴⁸ While discussing the legal question the ACoMHPR asserted that the RTD under Article 22 of the ACHPR was a right of peoples and within that norm indigenous people should be protected as a “people”.¹⁴⁹ Although the norm examined was in a regional human rights treaty the conclusions of the ACoMHPR have some merit and should be viewed as guiding even when discussing the RTD in general. The RTD as it is stated in the DRD should be comparable to Article 22 of the ACHPR. A further indication of this fact is that the ACoMHPR to a large extent referenced the DRD and the works of the IE when they explained the normative content of the RTD as elaborated in Article 22 of the ACHPR.¹⁵⁰

A secondary source of relevance is the UNDRIP. It mentions explicitly that indigenous peoples have a right to development both in its preamble and in its operational articles.¹⁵¹

4.3.2.3 Conclusion On the Character of People

What can be concluded is that there is a serious lack of conceptual clarity in terms of what “peoples” mean in respect to the RTD. The scholars who have taken it upon them to examine what a possible definition could be have always come up shorthanded, forced to admit that there is no clear

referred to as Global Consultation].

¹⁴⁴ Report of the Secretary-General (1979), para. 91.

¹⁴⁵ OEWGs 1st Report, para. 185.

¹⁴⁶ Salomon with Sengupta, p. 14 ff; De Feyter, p. 169 f.

¹⁴⁷ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, No. 276/2003, African Commission on Human and Peoples' Rights.

¹⁴⁸ *Ibid.*, paras. 2-3.

¹⁴⁹ *Ibid.*, paras. 150 and 162.

¹⁵⁰ *Ibid.*, paras. 277-278, 283.

¹⁵¹ Article 23 and preambular para. 6 of the United Nations Declaration on the Rights of Indigenous Peoples.

understanding of the term under the RTD. However, these examinations have seldom been extensive. But what is more problematic is that most UN-forums that have been in charge of developing the RTD, such as the UNCHR and the IE, as well as scholars continually keep referencing the right of “people”, while notoriously avoiding to define it.¹⁵²

The interpretation that can be made on how “peoples” should be understood in the RTD is that it encapsulates both the entire population of a state as well as smaller groups such as minorities and indigenous people. Salomon and Sengupta has suggested this as well stating that: “The rights-holder are the collective population of a state and in case of minorities and indigenous peoples, the right-holders are also group with specified rights within the collective.”¹⁵³

Left to discern, however, is the interrelationship between these different groups, and when a group should be considered a “people”, thus becoming a rights-holder of the RTD. Unfortunately a more extensive study of the definition of a “people” is outside the scope of this paper. An approach that can be taken, though, is to use a set of criteria that should be the lowest common denominator for “peoples”. Since the international meeting of experts has given us a set of characteristics that should be considered when defining a “people”, it could be useful to use these criteria as a definition of a “people” in the RTD.

4.3.2.4 Who Represents Peoples?

The last question that remains to be answered is in regards to representation. One thing that differentiates collective rights from individual rights is the question of representation. Since individual rights are legal claims of the person, it stands as evident that each person represents themselves in most cases. For collective rights however, the claimant of the right is the collective group. As such to assert the rights given to the group it is necessary to identify the representative of the collective.

The actor that has been identified by scholars as the presumed¹⁵⁴ representative of the “people” is the state. This conclusion has been reached from two facts. Firstly, due to the dual nature of the obligations within the RTD, i.e. that there are obligations on the national as well as the international level for the realization of the RTD¹⁵⁵. Secondly, since the public international law system is mainly an inter-state system. Since this area is still a domain that is operated by states, while excluding other entities. It is therefore believed that it is up to the state to claim the right on behalf of its “people(s)” within the international community. This is also the

¹⁵² Alston, Philip, “Peoples’ Rights: Their Rise and Fall”. In: Alston, Philip (ed.), *Peoples’ Rights*, Oxford University Press, Oxford, 2001, p. 285 f; Iqbal, p. 55.

¹⁵³ Salomon with Sengupta, p. 8.

¹⁵⁴ The term presumed is key to this conception, since there is no definitive evidence in the *travaux préparatoires* or the DRD to affirm this as fact.

¹⁵⁵ More will be written on the duties within the RTD in the next chapter.

case for individuals, states are assumed to represent them in the international sphere as well. From this process it is, subsequently, meant that the state shall deliver the RTD to its “peoples”.¹⁵⁶

There is, however, a possible exception in regards to the state’s possibility to represent their peoples (and individuals) in the international context. Green and Randolph have argued that “in the rare situations (such as those that might trigger the Responsibility to Protect¹⁵⁷) where there is overwhelming evidence that state representatives are unwilling or unable to fulfill the core functions of government” the state should not be able to represent their people.¹⁵⁸

There are some problems inherent in the assumption that the state is the representative of its people(s). First of all, several scholars persistently use very soft terms when defining the relationship of the state as a representative of their people(s). Such as ‘it is up to the state to...’, or ‘it is assumed that states will represent people’. However there is no definitive answer, and not a real description of what this relationship should look like. If states have a duty to represent their people(s) and individuals or if it is just a benevolent act of the state.

A second problem with this formulation of a representative for a “people” is that it is exclusively attributed towards the international dimension of the RTD. There is, however, a very important national dimension to the right, since it prescribe firm duties on states to realize the RTD in their respective domestic spheres. The question withstand on who the representative of a “people” is in a pure national context.

4.4 The Interrelationship Between the Rights-Holders

An interesting discussion for the understanding of the rights-structure of the RTD is the interrelationship between the two rights-holders. Granted a part

¹⁵⁶ Salomon, p. 115 f; Green, Maria & Randolph, Susan, *Bringing Theory into Practice: Operational Criteria for Assessing Implementation of the International Right to Development*, consultant report prepared for the Working Group on the Right to Development and the High Level Task Force on the implementation of the right to development, sixth session Geneva, 14-22 January 2010, of 14 January 2010, UN Doc. A/HRC/15/WG.2/TF/CRP.5, para. 57.

¹⁵⁷ As a clarification I feel it is relevant to describe the the responsibility to protect. It is the suggestion that the international community has a moral and legal obligation to protect all people in the world from mass atrocity crimes. It has primarily been discussed as the justification to intervene in states where genocide or other mass atrocity crimes occur, when the government of the state failing to protect its citizens from these crimes, either because it is responsible for perpetrating the acts, or if it is unable or unwilling to curb the atrocities. From: Office of the Special Adviser on the Prevention of Genocide, *The responsibility to protect*. Available at: <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> [Accessed on 5 May 2013].

¹⁵⁸ Green and Randolph, para. 57.

of this question has already been answered in the part 4.1 of this chapter. In that section it was explained that a “people” is a collective of individuals and that individuals are the beneficiaries when the rights of a “people” are fulfilled. The distinction between these forms of rights-holders is that each individual cannot themselves actuate the claim of “people”, however in the individual rights this is possible. Since this discussion has already taken place what will be discussed in this section is whether the rights-holders in the RTD refer to different spheres of action, i.e. if it could be understood that the right of “people” is not a right in the national context, but exclusively a right towards states.

Iqbal has argued that the collective dimension of the right should be viewed as an international obligation and that the individual obligation of the right should be viewed as a national obligation. Iqbal mainly bases his assertion on an interpretation of “people” as meaning the state. Furthermore he references Bedjaoui while discussing the collective right as an international right.¹⁵⁹ In the section that Iqbal is referencing, Bedjaoui writes extensively on issues such as state sovereignty, sovereign equality and sovereignty over natural resources, in a chapter where he discusses the content of the RTD. Even though Bedjaoui on a few occasions actually mentions the provisions on the DRD, his discussion is very dissimilar from any other notion of the RTD that I have read or cited in this paper. No where does he mention, for example, that the RTD is a process of development. Furthermore he never mentions a right of the human person in these pages. Even though he cites a “right of the state” on a number of occasions, Bedjaoui does not explicitly reference the state as a rights-holder in the DRD, although that seems implied.¹⁶⁰ Iqbal references Bedjaoui while discussing how the collective right should be understood, he writes his argument in the following manner

The content of the RTD, according to Bedjaoui, comprises firstly, *erga omnes*, claims (rights of obligations towards all), and secondly, a right, due from other states or the international community. The first implies that the state must be ‘master in his own house’ by having meaningful exercise of permanent sovereignty over its natural resources, in the absence of which world peace is in danger. ‘State sovereignty, permanent sovereignty over natural resources and the [RTD]’, argues Bedjaoui, are inseparable from each other and the RTD thus deserves to be recognized as *jus cogens*. The second includes the due rights of the state in the global distribution of wealth and the right to ‘receive a fair share of what belongs to all’.¹⁶¹

After this assertion Iqbal, identifies what rights should be viewed as collective and thus exclusively international. It should be noted that Iqbal only references Bedjaoui in the above cited paragraph, when he actually proclaims that all people’s rights denote an international obligation he has no

¹⁵⁹ Iqbal, p. 52 & 57 f.

¹⁶⁰ Bedjaoui, p. 1188 ff.

¹⁶¹ Iqbal, p. 58

references.¹⁶² The reasoning of either one of the authors is hard to follow and their views seem separate from the majority of scholars that have written on the RTD.

It is my opinion that the rights-holder “people” does not refer exclusively to an international right. The argument for the assertion is the following. First of all Iqbal has wrongfully interpreted “peoples” as the right of states. As has been proven in the previous pages this is a wrongful assumption, “people” denote a collective of individuals, which can be defined as the entire population of the state and when applicable indigenous people and minority groups.

Having small groups such as indigenous peoples and minority groups as rights-holders should further affirm the notion that the rights-holder “people” has rights in the national context. The Global Consultation has for example mentioned that indigenous peoples have often been “victims” when the state conducts development in the national context. Therefore it is important that they are allowed to participate nationally so that their rights can be fulfilled RTD.¹⁶³ This should render the interpretation that indigenous people in particular and “people” in general have the RTD in the national context.

Furthermore the AComHPR have in the *Endorois-case* tried whether the RTD of the Endorois Indigenous People was violated by the Kenyan government, their own state authority. The case concluded that this was the case. If the rights of “peoples” only referred to an international right, it would impossible for a “people” to assert their rights vis-à-vis their national government such as in this case.

This should be enough evidence to prove that the rights of “peoples” should not be misconstrued as an exclusively international right. Rather it should, just as the right of individuals, be viewed as a right towards their government as well as the international community. These dimensions of duty-holders will be explained further in the next chapter.

4.5 Is the Right to Development a Right of All People or Only of People in Developing Countries

The last question that will be discussed in terms of rights-holders is whether the RTD is a right for all human persons and all “peoples”, or if it is a right exclusively for human persons and “peoples” in developing countries. The view in this matter differs among writers.

¹⁶² *Ibid.*, p. 58 f.

¹⁶³ Global Consultation, unpaginated.

First of all it is important to reiterate article 1 (1) of the DRD. In this provision it is mentioned that “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.” It should be noted that the qualifying term used in the DRD is “every human person and all peoples”. A textual interpretation of this provision is therefore that the RTD ought to be a right of all, not only of people in the developing countries.

The IE has, however, mentioned that the “the holders of the right to development are peoples and individuals in developing countries as specified in the 1986 Declaration”.¹⁶⁴ This is an interesting assertion by the IE, and it needs to be properly examined by studying how other authors’ view the right.

In contrast to the IE Green and Randolph have argued that “the right entails obligations on all states, regardless of their level of development.”¹⁶⁵ They clarify their assertion in the following manner:

This is clear from the text of the Declaration, but worth iterating, as the right has often been understood to be primarily a right to transfer of resources from higher- GDP countries to lower-GDP countries. The principle adopted here speaks both to the obligations of all countries to those under their jurisdiction and to the external obligations of all countries, including for instance obligations of middle- and low- income countries towards each other.

Green and Randolph therefore discuss the question in terms of obligations of states. Obligations under the RTD will be discussed further in the next chapter of this paper. It is unquestionable, however, that Green and Randolph refers to the right as a right of all “peoples” and all human persons. Furthermore all interpretations of the rights-holders should occur in the light of universality. The principle of universality is a norm, which is often used to describe human rights. Brems has described that a definition of universality is that human rights should apply to all or that they are “all-inclusive”¹⁶⁶. This entails that international human rights instruments are formulated to include every person in the world.¹⁶⁷ The IE has also said that human rights are universal and that the practice of the RTD should adhere to that principle.¹⁶⁸ In regards to universality he writes:

[...] universality implies that every individual is endowed with human rights, by virtue of being human. This principle has

¹⁶⁴ Independent Expert’s 2nd Report, para. 4.

¹⁶⁵ Green and Randolph, para. 57 (2).

¹⁶⁶ Brems, p. 4.

¹⁶⁷ *Ibid.*, p. 4 & 16.

¹⁶⁸ Independent Expert’s 4th Report, para. 22.

sometimes been used misleadingly to exclude certain group rights or minority rights or gender rights or community rights from the purview of human rights, as their enjoyment is restricted to the members of the respective groups.¹⁶⁹

Furthermore he states that such groups can have human rights, if they are instituted through proper procedures, and if they all they should apply to all belonging to such groups.¹⁷⁰

It is worth noticing that the IE never mentions that all people in developing countries should be viewed as a group or community. However, the only way his previous argument, of “peoples” and individuals in developing countries being the rights-holders, would make sense is if they could be regarded as peoples. As the IE mentions human rights are universal, and should apply to all human beings, and if they are group or community rights they are still universal meaning that they belong to people of the targeted “group” in the whole world. I do not believe that the IE wants to denote all “peoples” and individuals in developing countries as belonging to a specific “group” or community. Therefore it could be viewed as a paradox that the IE both references that the rights-holders are only individuals and “peoples” in countries with a specific level of development, but also references that universality is a core concept in human rights and the RTD.

After a textual reading of article 1 (1) of the DRD and in terms with the principle of universality it should be clear that the RTD should apply to all “peoples” and individuals in the world, not only the categories of people in developing countries.

¹⁶⁹ *Ibid.*, para. 23.

¹⁷⁰ *Ibid.*, para. 23.

5 The Duty-Bearers Within the Right to Development

In the previous chapter we examined the rights-holders and their rights within the RTD. This chapter will be devoted to the correlative part of the RTD, which is; who the duty-bearers of the right are and their respective duties. This first part will generally address who the duty-bearers are and the obligations that the DRD prescribes for them.

The conclusion on the rights-holders was that they are human beings, either as individuals or in collectives as peoples. Then who are the duty-bearers responsible for realizing the right? In the RTD the state is pointed out as the duty-bearer on two different levels. First there is duty of the state to realize the RTD in the national context, and secondly there is a duty on the “international community of states” to implement the RTD.¹⁷¹

This structure of the obligations within the RTD is also evident in the DRD. Below I have compiled the various sets of duties that can be found in the articles of the DRD in a matrix. They have been sorted as national or international duties. Furthermore, if one duty refers to several contexts they will be in the same row, if not the duties will be in different rows.

<i>National duties</i>	<i>International duties</i>
States have the right and 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. (art. 2 (3))	
States have the primary responsibility for the creation of national ... conditions favourable to the realization of the right to development. (art. 3 (1))	States have the primary responsibility for the creation of ... international conditions favourable to the realization of the right to development. (art. 3 (1))
	The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations. (art. 3 (2))
	States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights. (art. 3 (3))
States have the duty to take steps, individually ..., to formulate international development policies with a view to facilitating the full realization of the right to development. (art. 4 (1))	States have the duty to take steps, ... collectively, to formulate international development policies with a view to facilitating the full realization of the right to development. (art. 4 (1))
	Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development. (art. 4 (2))

¹⁷¹ Salomon, p. 115 f.

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, <i>threats of war and refusal to recognize the fundamental right of peoples to self-determination.</i> (art. 5).	
	All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion. (art. 6 (1))
	All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries. (art. 7)
States should undertake, at the national level, all necessary measures for the realization of the right to development and 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. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. (art. 8 (1))	
States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights. (art. 8 (2))	
Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national ... levels. (art. 10)	Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the ... international levels. (art. 10)

Simplified it can be mentioned that the overall responsibility of the duty-bearers is to create an environment, both nationally and internationally, which is favourable to the implementation of the RTD.¹⁷²

Other proposed duty-bearers in the RTD are national and international civil society.¹⁷³ But since my research question is to study the concepts of duty-bearers and rights-holders in the DRD, and since civil society has not been mentioned in the instrument, studying this notion falls outside the scope of the paper.

This chapter is divided up into four different sections. The first discusses complex and contested issues in regards to duty-bearers. What will be highlighted in this section is how the question of duties in the RTD has divided the international community of states. Secondly the obligations of state's in the national context is briefly examined, and the states relationship to the rights-holders. In the third chapter there is an extensive study of the

¹⁷² OEWGs 1st Report, paras. 18 & 51; Green and Randolph, para. 62.

¹⁷³ Independent Expert's 2nd Report, para. 26 (e).

international obligations of states. Lastly the interrelationship between the different dimension, national and international, of duties is discussed.

5.1 Complexities Regarding the Issue of Duty-Bearers

The issue of obligations in respect to the RTD has caused tremendous debate within the world community. Politically the question of duty-bearers and their duties might be the most contested part of the RTD.

Stephen Marks has described that the contention on the precise role of duty-bearers can explain why the RTD has not been evolved into hard law. According to him the dividing line between states refers to their stance, mostly, of how they view the obligation for international co-operation. The separating opinion are whether the RTD should refer to a firm legal commitment on rich countries and international institutions to transfer resources to poor countries, or whether the international obligations under the RTD should only refer to an ambiguous moral pledge to pursue good development policies. The former of these views is supported by a majority of developing countries, by most countries that contribute a large part of their gross domestic product as official developmental assistance, as well as a large part of international agencies and non-governmental organizations (NGOs). The latter is the argument of a select few donor countries that oppose the RTD in general, among these countries are the US and Japan (the most unwavering contestants to the RTD), and occasionally Australia, New Zealand, Canada and Sweden.¹⁷⁴

What can be discerned is that the differences in views are often politically motivated. Developing countries feel it is clear that the RTD implies resource distribution to their advantage, in the form of “aid, debt-relief, terms of trade and more equitable globalization”, and that this obligation is binding in the RTD. Opposite we have the countries that feel targeted as donors in development, who seldom wants to feel that they have an obligation to contribute resources.¹⁷⁵

Sakiko Fukuda-Parr¹⁷⁶ provides an excellent example of this international schism in the discussion of the RTD. According to Fukuda-Parr the High-Level Task Force on the Implementation of the Right to Development (HLTF) submitted a report to the OEWG in 2010, which stirred a lot of controversy among states. She describes it in the following manner:

¹⁷⁴ Marks, Stephen P., “Obligations to Implement the Right to Development: Philosophical, Political and Legal Rationales”. In: Andreassen, Bård A., Marks, Stephen P. (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed., Intersentia, Antwerp, 2010, p. 86 and 89. [Hereinafter referred to as Marks (2010)].

¹⁷⁵ *Ibid.*, p. 89.

¹⁷⁶ Sakiko Fukuda-Parr is a former member of the High-Level Task Force on the Implementation of the Right to Development.

The HLTP¹⁷⁷ submitted a report on an operational list of criteria and indicators to the 2010 session of the WG. This appears to have brought the political divisions to a head, and the proposal was rejected by the NAM group on grounds of its ‘overemphasis on national responsibilities, [in] neglect of the basic notion of international cooperation, for the purposes of creating an enabling environment’ (Government of Egypt 2010; European Union 2010). This reaction was puzzling to the HLTF, whose members were convinced of the international dimensions as the essential value of the RTD and intended their proposal to reflect a balanced approach with equal emphasis on international and national dimensions (Marks 2011). Indeed, the report went quite far in outlining what an enabling international economic environment for development would require, including issues such as maintaining stable global financial markets and commodity prices. In the context of international economic policy debates, these positions reflect positions of developing countries and quite radical alternatives to the status quo.¹⁷⁸

Several other authors have also explained this divide between developed and developing countries, or as some say between the North and South. Yash Ghai mentions that the “North” believes that the “South” want to use the RTD as a pretence “to extract resources” with no real intent to actually realize the RTD, while the “South’s” view is that the “North’s” reluctance to commit to the international obligations of the RTD is due to an interest in sustaining the contemporary “unequal economic and political order”, that works in their favour.¹⁷⁹ Felix Kirchmeier in turn explain it as a fear of developed countries that a possible interpretation of the RTD could be that it is “a right to everything”, and as such they risk being sued by other states and individuals for the fulfilment of that right.¹⁸⁰

In similar terms Lindroos has explained that the contested issue over which fraction should bear the largest responsibility in regards to the RTD, the national state, or the collective of states in the international community has caused an ambiguous and diffuse description of the duties in the DRD. Lindroos has voiced that just as the question of resolving who the rights-holders are in the RTD is complex, there is a similar complexity in actually distinguishing what the duties of the duty-holders are. Foremost, the problem lies in discerning what duties the state has towards their own population, but also what obligations can be claimed on other states and the international community in general towards developing countries.¹⁸¹

She continues by mentioning that the centrality of the state as the rights-holder has been affirmed in, foremost, the Declaration, pointing at Article 3

¹⁷⁷ This seems to be a typo from the author, the correct abbreviation should be HLTF.

¹⁷⁸ Fukuda-Parr, p. 847.

¹⁷⁹ Ghai, Yash, ”Redesigning the State for ”Right Development””. In: Marks, Stephen P., and Andreassen, Bård A. (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, 2nd ed., Intersentia, Antwerp, 2010, p. 177 f

¹⁸⁰ Kirchmeier, p. 12.

¹⁸¹ Lindroos, Anja, *The Right to Development*, Forum Iuris, Helsinki, 1999, p. 34.

(1) of the DRD, see the matrix above. Furthermore she explains that the central role of the state is mentioned and reaffirmed in several other international instruments.¹⁸² Among these instruments are *inter alia*:

1. ACHPR, which states that “states shall have the duty, individually and collectively, to ensure the exercise of the right to development”¹⁸³;
2. The Vienna Declaration where it is mentioned that: “States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development”¹⁸⁴;
3. The Global Consultation from 1990, where it is also mentioned that there are national as well as international obligations on states.¹⁸⁵

The examples are many, and they all mention a national duty of states to create development policies and an international duty to cooperate. Lindroos mentions, however, that even though this dichotomy of obligations is widely mentioned in the DRD and other instruments that reference the RTD, it is seldom described “how the respective duties should be assigned”. In her opinion the DRD only prescribes general duties in the national level, and rather highlights the need for effective international co-operation and international collective action.¹⁸⁶

Her analysis ends, by stating that it is problematic to definitely define the actual duties of the different level of duty-bearers, since this issue is widely contested. In her own words she describes it as:

Determining the action required of states is a difficult task; the stakes of the South and the North are high when it comes to determining their respective obligations. Whether it is the developing countries that should take action, or whether – and to which extent – the Western countries should contribute to the development process, remain contested issues. Clearly, no one single answer can be given, but some general guidelines seems to exist.¹⁸⁷

She asserts that these guidelines are that the implementation requires “effective national policies in the national level, as well as equitable economic relations and a favourable economic environment at the international level”.¹⁸⁸

The following sections of this chapter will look into these different levels of duties. The aim of the chapters is to clarify if the respective duties on the

¹⁸² *Ibid.*, p. 34 f.

¹⁸³ Article 22 ACHPR.

¹⁸⁴ Part 1, para. 10 Vienna Declaration.

¹⁸⁵ Global Consultation, unpaginated.

¹⁸⁶ Lindroos, p. 35.

¹⁸⁷ *Ibid.*, p. 35.

¹⁸⁸ *Ibid.*, p. 36.

national and the international level have been defined or if just like Lindroos argues, there are only “general guidelines” to what these obligations entail. If the latter is true, it is still interesting to see how well the concepts of the duties are outlined. The more information we receive on the specificity of the duties of states, the more likely it is that this paper will be able to reach conclusions on the conceptual relationship between rights-holders and duty-bearers.

5.2 States’ Internal Duties

This section explores the internal dimension of states’ duties under the RTD. It has been explained by the IE that the primary responsibility for implementing the RTD is vested in states acting in the national context.¹⁸⁹ This is clearly indicated in article 2 (3) of the DRD and article 3 (1). Other scholars have also affirmed this. For example Yash Ghai explains that it is at the level of the state and through its national obligations that the actual realization of the right to development occurs.¹⁹⁰ In similar fashion Felix Kirchmeier explains that the responsibility to create an environment in which the RTD can be realized first and foremost falls on the nation state in the national context.¹⁹¹

When discussing the national obligations of the State, the Global Consultation stated that: ”Recognition of the right to development and human rights in the national legal system is not sufficient in itself. States must also ensure the means for the exercise and enjoyment of these rights on a basis of equal opportunity.”¹⁹² This grants the view that the obligation of the state entails positive actions to fulfil the right.

Furthermore they laid emphasis the on the national duty of the state to formulate national development policies. They stated that there was a ”key role played by national conditions, policies and programmes in the realization of the right to development as a human right.”¹⁹³ In respect to the duty to adopt national development policies it was mentioned that suitable development strategies where imperative for the realization of the RTD. The policies in turn need to adequately address the implementation and respect for human rights. However, it was stressed that these development policies where for each country to decide themselves, as is indicated by art. 2 (3) as well. There is not a singular model on how a national development plan should look like, but they had to be adapted to the people and demography of each individual state.¹⁹⁴

Even though it was stressed that there exist no singular model of how development plans look like, it was the opinion of the consultation that

¹⁸⁹ Independent Expert’s 1st Report, para. 78; Independent Expert’s 2nd Report, para. 27.

¹⁹⁰ Ghai, p. 179.

¹⁹¹ Kirchmeier, p. 11.

¹⁹² Global Consultation, p. unpaginated.

¹⁹³ *Ibid.*, p. unpaginated.

¹⁹⁴ *Ibid.*, p. unpaginated.

certain elements were necessarily included in national development policies, for them to be in line with human rights. These elements were democracy and participation, the consultation also stated that the development strategies needed to “include explicit provisions for the realization of all human rights.”¹⁹⁵

The IE has also written extensively on this topic in his fourth report. In this report the IE aims at discussing national actions in detail, so it could serve as a guideline when states are designing a development programme.¹⁹⁶ The emphasis is therefore laid on the national states obligation to create and operate development programming in their national contexts. The exact criteria for the creation of development programming are not within the scope of this paper, since it aims at examining the conceptual underpinning to the RTD. That portion of the IE’s report is therefore excluded from this chapter. What will be explained are his ideas in the general scope and extent of state’s obligations in the national context.

In his writing the IE mentions that in the national context the state’s obligation must follow the general principles of the tripartite typology, i.e. that the state has an obligation to respect, protect and fulfil the human right in question. These obligations require different forms of action. The obligation to respect implies that the state needs to refrain to indulge in any action that would result in a violation of the RTD of its citizens. The obligation to protect means that the state need to ensure that the right to the RTD of individuals in their jurisdiction is not violated by action of third parties, such as non-state actors or individuals. Lastly the obligation to fulfil implies that the state itself has a duty to provide for the realization of the right, this means that they need to supply the necessary resources and service to achieve the right. The IE states that this last obligation “in effect [...] implies the obligation to facilitate, provide and promote” development.¹⁹⁷

In summary the national obligation of the RTD should be understood as the main level for operationalizing and implementing the right. The national state is thus responsible for actually providing the right to the peoples and individuals in its jurisdiction. The precise interrelationship between the state and the rights-holders will be discussed in the next section.

5.2.1 Relationship Between the National State and Rights-Holders

There is a special relationship between individuals and duty-holders in respect to the RTD. In the declaration there is a provision stating, “All human beings have a responsibility for development”.¹⁹⁸ It’s from a reading

¹⁹⁵ *Ibid.*, p. unpaginated.

¹⁹⁶ Independent Expert’s 4th Report, para. 17.

¹⁹⁷ *Ibid.*, para. 34.

¹⁹⁸ Article 2 (1) DRD.

of this provision that the IE has described the relationship between the rights-holders and the state in its capacity as duty-bearer in the national level. As has been described above this obligation consists of a duty to create national development programming and policies.

In this relationship the thought is that states have the obligation to create the environment that is conducive for the implementation of the RTD. However the IE has argued, both as a scholar and in his capacity as IE, that this national obligation of states does not necessarily extend to mean that they are “realizing development”.¹⁹⁹ According to him only the rights-holders themselves can have the responsibility to actually develop. Which makes development a conscious act of the rights-holder, and also obligates him to actively participate in the development process.²⁰⁰

In essence this means that the national duty in regards to the RTD extends to create an atmosphere were it is possible for rights-holders to realize their human right to development. This atmosphere or environment should facilitate development, which means among other things that it is an environment in which all human rights can be fulfilled, and that it e.g. increases the capabilities of rights-holders. However, the development process is not a passive process, rather the rights-holder itself is ultimately responsible to grab the opportunity to partake in the process of development.

5.3 International Obligations Under the Right to Development

As have been said in short, there is a duty in the international dimension in regards to the RTD. The question that is answered in this sub-section is in what forms this duty takes shape. The aim of this sub-section is to, in broad strokes, examine how the international obligations in the RTD have been explained by different UN forums and scholars.

The outline of the following sub-chapters in this section starts with a section discussing the necessity and added value of having an international dimension to the RTD. If in contrary there is no added-value, and this dimension was not pertinent for the realization of the RTD, it is hard to understand why this obligation was included in the RTD framework.

Afterwards the different capacities in which the state serve as a duty-bearer at the international level is discussed. Of relevance for the categorization of state’s international duties is a study for the HLTF from two OHCHR consultants, Maria Green and Susan Randolph. The study was conducted because the authors were tasked to formulate criteria, sub-criteria and indicators for the RTD. For this purpose the study had to extensively

¹⁹⁹ Sengupta (2002), p. 853.

²⁰⁰ Independent Expert’s 1st Report, paras. 40-41,

examine the conceptual framework, to “clarify” its “normative content”.²⁰¹ This makes it a good source for defining the wider contours of the duty-holder dimension in the RTD. While discussing the international obligations in regards to the right the authors identified that the international obligations can be grouped in two categories. The first is an “obligations of individual action with regard to peoples and individuals outside of the state’s jurisdiction”, and the second “obligations of collective action at regional and global level.”²⁰²

This categorization of state’s duties is used in this study, but with a slight difference in terminology. At first the “obligations of individual action with regard to peoples and individuals outside of the state’s jurisdiction” is discussed, which is referred to as state’s external duty in this study. A subsection to this section is on the interpretation of secondary international instruments that incorporate an external duty. The relevant instruments for this study are articles 55 and 56 of the UN-Charter and article 2 of the ICESCR.

Secondly this paper discusses state’s “obligations of collective action at regional and global level”, which is referred to as state’s collective duty in this study. Lastly, I offer concluding remarks on the nature of state’s international obligations in the RTD.

5.3.1 Reasons Why There Should Be Obligations on the International Level to Implement the Right to Development

There are well-founded reasons why the RTD has established an international obligation of states to co-operate and to take collective action. This section will address how different scholars and institutions have justified the inclusion of international obligations to realize the international human right to development.

As has been seen in the section on state’s internal obligations, the national state has the primary obligation to implement the RTD for the rights-holders. This occurs through development programming. The IE has maintained, that the realization of the RTD entails more than merely fulfilling one or some rights individually, but is a concerted plan of fulfilling all human rights. This will in some cases mandate extensive institutional change and structural changes to the economy, which is necessary to induce a “high and sustainable” economic growth in line with human rights principles. Due to these facts he felt it is evident that this process will need the assistance and cooperation of other states. His argument being that developing countries, which are the states in most need of development and therefore will probably have to implement the most extensive development

²⁰¹ Green and Randolph, para. 2.

²⁰² *Ibid.*, para. 57.

policies, often suffer from a lack of resources.²⁰³ Therefore he argued that there is a real need for some form of resource redistribution from developed countries to developing countries.²⁰⁴ The implied risk being that if not, these countries will not be able to fulfil the right.

Fukuda-Parr has also written in regards to the underlying reasoning behind having an international obligation. She mentions that the RTD answers a specific problem, which is that the realization of human rights is stunted by a multitude of hindrances that are beyond the power of any one state to confront. Therefore there is a real need for international cooperation when realizing human rights. She then describes that there are three kinds of impediments that need to be addressed; “resources, broadly defined; international economic policies; and systemic asymmetry of power.”²⁰⁵

Furthermore Fukuda-Parr explains what actions in these three areas would entail. First, in regards to resources she explains that the realization of human rights is a resource heavy operation. There are requirements for “financial investments, administrative capacity and improved technologies” which are often beyond the purview of developing states, since they have a hard time collecting large sums financial resources in either lending or taxes.²⁰⁶ To help in this aspect development aid is necessary, but also international cooperation and exchange in the areas of technology and administration are important components to further development. Second, the access to global markets on equitable terms is also needed for the realization of the RTD. Fukuda-Parr explains that the current paradigm of the global market is unfavourable to developing countries. This, since they often face a variety of disadvantages, such as fluctuating prices on primary commodities, which often is their main source of “foreign exchange earning”, bad trading conditions from other states, and hardships accessing markets due to protectionism from developed states. The consequence of market imbalances that are adverse to developing nations, she explains, is that the enjoyment of human rights in these countries will suffer. Third and last with “systemic asymmetry in global governance” she mean that in the current set-up of the international system there is a discrepancy in the value of the opinions of developing countries as opposed to developed states. It is a fact that developing countries, although many in numbers, seldom have an equivalent say in global governance, Fukuda-Parr goes as far as to label this a “democratic deficit”. Therefore there is a need to strengthen these countries positions in global decision-making and governance.²⁰⁷

Another justification for obligations on the international level is the fact that in an increasingly globalized world, the actions of one state more than ever have consequences in the development, both economic and social, of other

²⁰³ Independent Expert’s 2nd Report, paras. 27-28.

²⁰⁴ *Ibid.*, para. 30.

²⁰⁵ Fukuda-Parr, p. 854.

²⁰⁶ *Ibid.*, p, 854.

²⁰⁷ *Ibid.*, p. 854 f.

states.²⁰⁸ Therefore it would be wrong for any country to assume that they can institute and follow any policies, without assessing the consequences it will have on the development of other countries.²⁰⁹

In conclusion there are several reasons for why an obligation on the international level is pertinent for the realization of the RTD. Therefore there is a concrete added value to the concept of the RTD to include international obligations in the duty-bearer structure. Broadly these justifications can be summarized into two different categories. The first is that many developing countries suffers from resource constraints, which entails that there is a need for a distribution of resources to these countries, both fiscal and technological, so that they have the ability to actually implement the RTD. The second category refers to the interdependence of today's globalized world. This entails that national policies of one country also have effects on people outside of the countries territory. Therefore it is suitable that these countries need to think about the effects of their policies on other countries and adjust them if there is a risk that they will harm the implementation of the RTD in other countries. This category also includes the effect of international policies and international governance on states, since an unfair international regime will also lead to consequences on some states' attempts to realize the RTD. The argument here is often, that it is developing countries that suffer from unfavourably from international policies.

5.3.2 States External Obligation

This section will explore the duty of states to partake in conduct that helps the realization of the RTD internationally. This obligation entails different forms of actions for states, and it concerns the extraterritorial effect that states' actions can have. As has been explained earlier, this category of duties rest on the understanding that in an interdependent globalized world the policies and actions of any state can also have effect on development practices and people not strictly within the state's own jurisdiction.²¹⁰

What is interesting to examine in this context is in what form this obligation should be fulfilled. To make a complete study of all the ways in which states need to act to comply with this obligation is beyond the purview of this study. However, it is still necessary to conceptually define this obligation further. The following section aims at describing the conceptual understanding of states' external obligation.

A relevant provision in the DRD for the understanding of this obligation is article 4 (2), which states that: "As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster

²⁰⁸ Green and Randolph, para. 64; Salomon, p. 111.

²⁰⁹ Independent Expert's 3rd Report, para. 32.

²¹⁰ Green & Randolph, para. 64.

their comprehensive development.”²¹¹ Other articles in the DRD that explicitly mentions a duty of states to co-operate are articles 3 (3) and 6 (1) DRD. These provisions are relevant for the study in this section since the external duty of states is usually termed an obligation to co-operate.

Several scholars and UN agencies have affirmed that in the RTD there is an obligations on states to co-operate to realize the right. For example, before the adoption of the DRD the Secretary-General stated, “In situations where a lack of resources or other constraints, and especially those constraints which are externally imposed, prevent the enjoyment of human rights, there is an obligation on the international community in general and States in particular, according to their abilities, to render assistance.”²¹² Similarly the Global Consultation has mentioned that cooperation of states should result in the creation of an international environment suitable to effectively realize the RTD. Inherent in this cooperation is among other things “the democratization of decision-making in intergovernmental bodies and institutions that deal with trade, monetary policy and development assistance, and by means of greater international partnership in the fields of research, technical assistance, finance and investment.”²¹³

Green and Randolph have, in their report to the HLTF, explained a few examples of measures that states take individually that can have an effect on the enjoyment of human rights of human beings outside of their jurisdiction. They have described it in the following manner:

[...] the impacts range from formally global (*e.g.* via votes on the governing boards of international financial institutions); to formally regional (*e.g.*, via votes in regional organizations); to specific to people in particular countries (*e.g.*, via decisions concerning bilateral aid programs, trade disputes, etc.). Sometimes actions by individual states that are formally domestic in nature, *e.g.* decisions concerning interest rates or subsidies for domestic industries, have very large implications for individuals, groups of individuals, or peoples in other countries, even to a global level.²¹⁴

This is a good reference point when ascertaining the external obligations of states. If certain state conducts lead to an implications for the enjoyment of the RTD in other countries, these actions should logically be involved in the external duty of states to respect the RTD. This seems to be the conceptual reasoning in their text. Furthermore external duties of states should be understood as individual norms for conduct for each state, even when it concerns the actions taken within international organizations.

²¹¹ Article 4 (2) DRD.

²¹² Report of the Secretary-General (1979), para. 127.

²¹³ Global Consultation, unpaginated.

²¹⁴ Green and Randolph, para. 64.

Green and Randolph have held, in regards to states' duties towards people outside of their jurisdiction, that the complete scope of this area has not been well developed within international human rights law. Furthermore in their opinion one aspect that is not adequately defined in the DRD. This regards the preferred action of states, when deciding on policies, when the interests of their citizens collide with the interest of people outside the jurisdiction of the state.²¹⁵ This conflict has been discussed by the scholar David Beetham as well, I present his reasoning further down in this section.

The study by these two scholars functioned as the material foundation, both conceptual and informational, for the HLTF when they constructed their final report²¹⁶ on criteria and sub-criteria that was presented to the OEWG. The report studied what operational criteria, sub-criteria and indicators that could be used for assessing the implementation of the RTD. As such it included a holistic study of the normative content of the RTD, and it intended to, *inter alia*, establish the outlines of the right.²¹⁷ These indicators could be of three types: structural, process and outcome.²¹⁸ Where two of these, structural and process, aim at assessing behaviours of states, "structural indicators measure the duty bearer's commitment, while process indicators measure their efforts to ensure the right concerned."²¹⁹ In the Green and Randolph report they included an extensive list of indicators that could be used to identify the responsibilities of states in respect to the RTD.²²⁰ The HLTF modified the indicators slightly in the report they presented to the OEWG.²²¹ Sadly enough, for the understanding of the RTD, the state representatives of the OEWG could not reach an understanding to adopt the framework. Since, just as Fukuda-Parr has mentioned above, some states, mainly developing, thought the report emphasized too much on national obligations and not enough on international obligations.²²² However, due to the rigorous academic study that has been undertaken when writing these reports, it should be possible to use these two documents as reference works, when examining the scope of the duties of states in respect to the RTD. We cannot, however, assume that they do adequately reflect the full scope of obligations involved, since the documents have not been accepted politically in the OEWG.

The IE has also weighed in on the discussions of the international obligation of states to cooperate in the RTD. According to him developing countries

²¹⁵ *Ibid.*, para. 65.

²¹⁶ *Report of the High-Level Task Force on the Implementation of the right to development on its sixth session: Right to Development Criteria and Operational Sub-Criteria*, of 8 March 2010, UN Doc. A/HRC/15/WG.2/TF//2/Add.2 [Hereinafter referred to as A/HRC/15/WG.2/TF//2/Add.2].

²¹⁷ Green and Randolph, para. 2; A/HRC/15/WG.2/TF//2/Add.2, para. 11.

²¹⁸ Green and Randolph, para. 87; A/HRC/15/WG.2/TF//2/Add.2, paras. 14-15.

²¹⁹ Green and Randolph, para. 87.

²²⁰ For a full set of their proposed criteria, sub-criteria and indicators, see Green and Randolph, paras. 201-211, these paragraphs extended between p. 98-131.

²²¹ A/HRC/15/WG.2/TF//2/Add.2, see Annex of report starting at page 8.

²²² Fukuda-Parr, p. 847; *Report of the Working group on the Right to Development on its eleventh session (Geneva, 26-30 April 2010)*, of 10 June 2010, UN Doc. A/HRC/15/23, paras. 30-35 & 42-44.

suffer from limitations in among other things resources and technology that negatively affects their possibilities to realize the RTD. Therefore it is imperative that there is an international obligation for cooperation. Part of this obligation is the contribution of resources but it also incorporates other duties. Among other things the IE has mentioned the following aspects of cooperation²²³:

[...] in the context of fulfilling the right to development the following would become a part of the obligations of the international community: international cooperation for supplying technology; providing market access; adjusting the rules of operation of the existing trading and financial institutions and intellectual property protection; and creating new international mechanisms to meet the specific requirements of the developing countries.²²⁴

The IE also mentions that cooperation should occur in two dimensions, both multilaterally and bilaterally.

First, cooperation measures should be conceived and executed internationally in a multilateral process in which all developed countries, multilateral agencies and international institutions could participate by providing facilities to which all qualifying developing countries could have access. Secondly, bilateral facilities or country-specific arrangements would deal with problems requiring measures adapted to particular contexts. The independent expert has drawn attention to the following multilateral facilities dealing with the debt problems of developing countries: structural adjustment and concessional financing facilities of international financial institutions, world trade organizations and developed industrial countries' programmes of providing market access, restructuring of the international financial system to solve the many problems of inadequacy and instability of financial flows of developing countries. All of these require intensive review from the point of view of meeting the obligations of international cooperation with States trying to realize the right to development.

Moving on several scholars have also studied the nature of states' external duties. When discussing the external duty of states in the RTD Salomon argues that this obligation is derived from articles 55 and 56 of the Charter of the United Nations²²⁵ (UN Charter).²²⁶ Marks makes a similar assertion, by stating that there already exist an external obligation on states to "act jointly and separately for the realization of human rights" in the

²²³ Independent Expert's 3rd Report, para. 33-34.

²²⁴ *Ibid.*, para. 34.

²²⁵ Charter of the United Nations, of 26 June 1945.

²²⁶ Salomon, p. 86.

aforementioned articles and in article 2 of the ICESCR.²²⁷ I will discuss these articles in the next sub-section, which studies subsidiary instruments that can be used to interpret the duty to cooperate in the RTD.

Salomon argues that there is a general obligation for international cooperation, which is evident in all economic, social and cultural rights, and references it as applying to the RTD as well. Furthermore she argues that “the parameters of the obligation to cooperate internationally in the realization of socio-economic rights are not yet clearly drawn.”²²⁸ An assertion that is very similar to the reasoning presented by Green and Randolph above. However she feels that this is not due to the fact there is a lack of the knowledge of how this obligation is defined, but rather that there is a lack of practical application of the obligation.²²⁹ Kirchmeier makes a similar argument stating that there are general definitions of the external obligations of states, but that there is no precise interpretation of these and no agreement of how these obligations should be interpreted.²³⁰ Marks argues along the same line and states that the duty to cooperate effectively (which the provision in the DRD states) can be interpreted in two ways by states, restrictively and extensively.²³¹

In the restrictive approach there are three elements that states need to satisfy in order to comply with the duty of international cooperation. The first is that the state has a policy regarding foreign aid. Secondly, there is an obligation to participate in development organizations and forums as well as international financial institutions (IFIs), he exemplifies the kind of institutions that are relevant by mentioning, the United Nations Development Programme, the Organization for Economic Co-operation and Development, the World Bank and regional development banks. The third and last element is that states should partake in discussions regarding development that are hosted by the UN and other international forums discussing development.²³²

According to Marks in this restrictive view there is no emphasis on what a minimum standard of cooperation should be, the mere presence of any degree of cooperation is argued to be enough to fulfil the obligation. Therefore in respect to aid as long as donation occurs, states would be in compliance with their duty. When it comes to participation in development institutions, no emphasis would be put on actually encouraging development policies, and lastly in regards to participation in UN forums on development, as long as states were present, no matter how they vote, that would be enough to meet the obligation to cooperate. Marks adds that the

²²⁷ Marks (2010), p. 91.

²²⁸ Salomon, p. 102.

²²⁹ *Ibid.*, p. 102.

²³⁰ Kirchmeier, p. 13.

²³¹ Marks (2010), p. 91.

²³² *Ibid.*, p. 91.

justification for arguing that this would be “effective development” is that the term is ambiguous and cannot be extended further.²³³

In the opinion of Marks this is not enough to contribute to effective cooperation. He mentions that there is a necessity to make the obligation to cooperate more substantive. In this line of argument he acknowledges that the process of granting substance to the obligation to cooperate in respect to the RTD, must occur through referencing corresponding obligations of other noteworthy and related international instruments. Relevant texts would be other conventions (such as the international covenants on human rights), “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 progressive development of international law, and opinions expressed by leading expert and institutions.”²³⁴

Marks believe that such an interpretation will grant credence to the opinion that states have long ranging external duties. These obligations would, among others, entail the duty of states to make sure that the actions they take nationally, as well as their conduct, such as voting and promotion of policy options, in bilateral and multilateral setting is in conformity with human rights. This implies that these policies should not cause violations or other detriment to economic, social and cultural rights in other states. He mentions that these are legally binding for states that have ratified the ICESCR, and that they are also a part of the obligations in the RTD. Furthermore he argues that these obligations are not exclusive for developed countries, rather they apply to both developed and developing states.²³⁵

When discussing external obligations, Salomon argues that states must always in their international negotiations, both in multilateral and bilateral situations, make sure that policy outcome does not infringe on persons human rights. As such the policy outcome from these international negotiations must be coherent with human rights values, such as the RTD. The same goes for states activities in intergovernmental organizations and IFIs, such as the World Bank, the International Monetary Fund (IMF), the UN etc.²³⁶ This seems to be in line with Marks idea of an extensive interpretation of the obligation to cooperate.

An important aspect of the obligation to cooperate is to create an international environment that is equal for all states. The belief is that the current regime is based on a structural imbalance, which benefit most rich states, and disfavours poor states. This in turn inhibits the possibility to realize human rights in the latter countries.²³⁷ Therefore she asserts that the objective for international cooperation in development for instance could be:

²³³ *Ibid.*, p. 91 f.

²³⁴ *Ibid.*, p. 92.

²³⁵ *Ibid.*, p. 93.

²³⁶ Salomon, p. 105 ff.

²³⁷ *Ibid.* p. 102 f, 110 f.

[...] strengthening the role of developing countries in global governance so as to be able to assert the economic rights of their people, imposing nothing short of a duty to reform the existing institutional economic system; establishing an independent and transparent debt arbitration mechanism [...]²³⁸

Furthermore some scholars have talked specifically about the role of rich states in international decision making and in the promotion of development. Salomon argues that since rich states often have more influence in IFIs they have an individual obligation to make sure that the decisions taken in those bodies are congruent with their human rights obligations.²³⁹ Kirchmeier in turn, believes that all states have external obligations to “promote, protect and fulfil” the RTD. However he has also mentioned that rich states have a special responsibility to help poor countries to the extent they have enough resources to assist.²⁴⁰ This in his mind is the equivalent of the obligation to fulfil, which involves the transfer of resources from developed states to developing states, to enable the possibility to realize development.²⁴¹

The two other obligations that Kirchmeier mentions are promote and protect. He mentions that the obligation to protect entails that the state needs to “abstain from action that could violate a poor nation’s RTD”.²⁴² As an example Kirchmeier mentions that this means that the system of international trade need to be restructured, and enable the fair access to global markets for all states. The obligation to respect would involve two obligations according to Kirchmeier; the first is that in some circumstances the international community might have to act when the citizens of a state are denied their RTD by their “corrupt” government. He mentions it in terms of that the international community may have to “protect citizens”, and that this action would be in opposition to “state sovereignty”. He does not elaborate more on how this point should be understood, but it seems to be a hinted reference to the discussion on the responsibility to protect. The second obligation is that states need to ensure that transnational corporations in their jurisdiction cannot act in manner that will infringe the RTD of developing states.²⁴³

Both the obligation to promote and protect to some degree references a negative obligation of states. This is somewhat different from the arguments that have been presented above. Beetham has, when discussing what external obligations in respect to the RTD are, also referred to negative obligations. He states that the overarching principle obligation of states

²³⁸ *Ibid.* p. 103.

²³⁹ *Ibid.*, p. 137.

²⁴⁰ Kirchmeier, p. 13.

²⁴¹ *Ibid.*, p. 13.

²⁴² *Ibid.*, p. 13.

²⁴³ Kirchmeier, p. 13.

should be “not to cause harm or damage”.²⁴⁴ This means that every state needs to ensure that any policy or action, which they undertake, or institutional actions or policies that they promote, both in the national and the international context, cannot by any means cause systematic damage or harm to the economic development of another state. Furthermore they cannot “encourage a markedly unequal form of that development”.²⁴⁵ This principle should be applied by states while acting both in the national and the international level.²⁴⁶

Beetham does not oppose the notion that states also have positive duties towards the realization of human rights, such as providing aid and other forms of assistance to less developed states. However, he asserts that only discussing these duties skews the debate somewhat. In his own words states arguing for such an obligation “tend to reinforce a relationship of one-sided dependency between the developed and the developing world”.²⁴⁷ Furthermore aid assistance is largely associated with being a benevolent action of developed countries towards the developing countries, without adequately portraying that the international policies of developed countries often perpetrate harm on the development of these states. Utilizing the RTD, however, we can change the debate to include the notion of state policies causing harm or damage and not only positive obligations derived from the duty to cooperate.²⁴⁸

Examples he gives of areas where the activities of developed countries structurally and systematically harms the development of developing countries are among others, trade, finance and the environment. The exact content of his argument is not necessary, but summarized it means that there are structural and systemic inequalities in access to markets and finances and that these should be mended so that developing countries can access them on the same terms as developed nations. Another argument is that environment threats, such as global warming, has mostly been caused by developed nations, while all nations will suffer the consequences, and many developing countries suffers more harshly due to occurrences of for example droughts and other natural disasters.²⁴⁹ What his argument gives us, though, is an indication of three areas where states most definitely will have to review their policies, so as not to cause harm, which are trade, finance and environment.

The last argumentation that Beetham provides is based on instances when the interests of the citizens of developed states is in conflict with the interest of individuals in developing states, which is a problem that Green and Randolph have argued is unclear, as stated previously in this section. The problem here being what obligation will supersede the other, the state’s

²⁴⁴ Beetham, p. 107.

²⁴⁵ *Ibid.*, p. 107.

²⁴⁶ *Ibid.*, p. 107.

²⁴⁷ *Ibid.*, p. 108.

²⁴⁸ *Ibid.*, p. 108.

²⁴⁹ *Ibid.*, p. 111.

obligation towards its own citizens, or its international obligations.²⁵⁰ He establishes two principles for when the international obligation should overrule a state's national obligation, one in regards to positive obligations of the state, and the other in regards to negative, i.e. not to do harm. The first is influenced by Peter Singer and termed "the marginal utility principle", the principle "endorses an overriding positive obligation to provide assistance to satisfy basic human rights from the discretionary expenditure of the well-off".²⁵¹ The rationale behind this argument is that there is a huge difference in living standards between developed and developing states. Therefore the impact of a relatively small amount of resources from the developed country, which would not cause their citizens much detriment, could substantially impact the living standards of people in the developing country. Inherent is thus a moral rationalisation for choosing to abide by the international obligation.²⁵²

The second principle Beetham terms "the relative sustainability of harms principle". This principle argues that the obligation to remove any international policies that can cause harm to "economic development of developing countries" always enjoys primacy, even if its removal will cause harm to citizens in the developed country.²⁵³ As can be seen from both of these arguments, Beetham only provides a rationale for cooperation between countries that are developed towards developing countries. However, these rationales do not mention how to solve similar situations between two developing countries or two developed countries.

Lastly, in connection to the external duty of states Salomon argues that the state should continuously have to monitor their involvement in cooperative measures with extraterritorial effect, such as aid and trade. If necessary they have to take "corrective measures" whenever their policies are incongruent with human rights norms. She continues to argue that it is necessary for the state to perform "human right impact assessments" in their activities within international trade, aid and development, but also in assessing the impact of transnational corporations in their jurisdiction. Just like Kirchmeier has, she argues that the state is responsible that these corporations do not violate human rights in other countries.²⁵⁴

This concludes this section, which aimed at bringing forward different opinions on the concept of external duties of states. Several of the referenced sources refer to other human rights and international law norms. To be able to draw adequate conclusions in this area, I feel it is relevant to first discuss the interpretation of these other sources of law. Furthermore collective obligations are also discussed before conclusions on the international obligations of states can be drawn.

²⁵⁰ *Ibid.*, p. 114.

²⁵¹ *Ibid.*, p. 116.

²⁵² *Ibid.*, p. 114.

²⁵³ *Ibid.*, p. 116.

²⁵⁴ Salomon, p. 107 f.

5.3.2.1 Secondary Instruments That Prescribe External Duties on States

There are several other instruments, in the form of both hard and soft law, which prescribe a duty on states to cooperate with the objective to implement human rights. These are instruments that are not directly related to the RTD (meaning that they do not mention the right), but can be understood as supplementary for the interpretation of the obligations under the RTD.

One of these legal sources is the UN Charter. In articles 55 and 56 of the UN Charter it is prescribed that the UN needs to create conditions suitable for the furtherance of among other things economic and social development²⁵⁵, and the realization of human rights.²⁵⁶ Furthermore it is prescribed that the states of the organization have an obligations to cooperate, but also to act individually, for the advancement of these objectives.²⁵⁷

Similarly the obligation to cooperate is also evident in article 2 of the ICESCR, which is binding on all of its states parties.²⁵⁸ An important document that has elaborated an interpretation of the provisions in the ICESCR and developed different forms of international obligations of states in regards to the covenant is the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines).²⁵⁹ Scholars as well as the IE have affirmed the relevance of examining both the covenants and the Maastricht Guidelines in connection to the RTD.²⁶⁰ Another document of relevance is the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles). This document was published in 2012.²⁶¹ Since it has not been introduced until very recently, it has not been referred to in connection to the RTD in any of the literature I have examined. However since it studies the area of state's international obligations in regards to economic, social and cultural rights, it should be relevant to draw analogies from it in this study.

Finally the UDHR also incorporated a provision, which directs an obligation on states to create a favourable "international order" that can facilitate the full realization of the rights in the declaration.²⁶² Fukuda-Parr mentions that

²⁵⁵ Article 55 (a) UN Charter.

²⁵⁶ Article 55 (c) UN Charter.

²⁵⁷ Article 56 UN Charter.

²⁵⁸ Marks (2010), p. 91.

²⁵⁹ *Ibid.*, p. 93.

²⁶⁰ *Ibid.*, p. 93; Independent Expert's 1st Report, para. 5; Iqbal, p. 68 f.

²⁶¹ *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, p. cover page. Available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf> [Accessed on 2 of May 2013]. [Hereinafter referred to as Maastricht Principles].

²⁶² Article 28 UDHR.

this is the basis from which the RTD flows, she mentions that the UDHR should be viewed as a precursor of the idea of an RTD.²⁶³ I believe it is important to mention this fact, but I will not delve into it further, since both the UN Charter and the ICESCR have more or less incorporated the same commitment. Furthermore since those two instruments are treaties and as such hard law, while the UDHR is soft law it is in my opinion more relevant to study the legally binding provisions.

This section will first discuss articles 55 & 56 in the UN Charter, then article 2 of the ICESCR and lastly the Maastricht Guidelines as well as the Maastricht Principles.

5.3.2.1.1 Articles 55 & 56 in the UN Charter

Articles 55 and 56 are examples of what is known as the "law of cooperation". This law takes the form of states joining around a shared objective and then agree to take actions to ensure the implementation of that objective.²⁶⁴ When exploring the contents of these articles I have confined my references to the commentary on the UN Charter written by Simma et al.²⁶⁵

In article 55 we can find the principal rule that prescribes that states should co-operate in the implementation and the furthering of human rights, and economic as well as social development.²⁶⁶ It is prescribed in the following manner:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.²⁶⁷

²⁶³ Fukuda-Parr, p. 842 & 858 at note 1.

²⁶⁴ Simma, Bruno, Khan, Daniel-Erasmus, Nolte, Georg & Paulus, Andreas (eds.), *The Charter of the United Nations: A Commentary Vol. II*, 3rd ed., Oxford University Press, Oxford, 2012, p. 1539.

²⁶⁵ *Ibid.* This is an extensive study, where Simma et al. have researched several sources that are relevant to figure out an adequate interpretation of the two provisions.

²⁶⁶ *Ibid.*, p. 1539.

²⁶⁷ Article 55 UN Charter.

As can be seen the principal scope of this article is the promotional efforts, which the UN needs to undertake to further this cooperation.²⁶⁸ Most relevant for the RTD are the provision on “economic and social progress and development” and “human rights” in paragraphs a and c.

Even though this article does not undertake to define the responsibilities of states for this co-operation it is still relevant in one aspect. The fact that scholars have said that there is a consensus that the article prescribes a duty of the UN as well as member states to comply with human rights.²⁶⁹

The mandate to co-operate to reach the objectives in article 55 is extended to apply to members of the UN in article 56. It is formulated in the following manner:

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.²⁷⁰

The article seems to prescribe a firm duty on states to cooperate to further the objectives in article 55. However, it must be noted that the provision only explicitly mentions a “pledge” of states “to take joint and separate action”. Scholars have maintained that the words “pledge” and “action” are open for interpretation. Pledge could mean that states are under a duty to act, but that has not been firmly established. Furthermore, to take action can denote a host of different measures that states should take, ranging from “legislative, administrative, and policy measures as well as the spending of funds and the provisions of resources.”²⁷¹ Since this article is not specific, it must, in the context to the article, be up for the individual state to actually decide what the proper methods for action are.²⁷² This is an interesting assertion when viewed in connection to Marks idea of an extensive and restrictive interpretation of the duty to cooperate. Marks mentions that an extensive interpretation of the duty to cooperate should be a correct interpretation of this obligation. However, Simma et. al. seem to be of the opposing view, at least when discussing the provisions in the UN Charter.

Similarly the article does prescribe that this action can be joint or separate. "Joint" meaning that it is undertaken by more than two states and "separate" logically means that it is national actions undertaken independently by one state.²⁷³ However, in the interpretation of this article it is not mentioned if the separate action is intended to have an extra-territorial dimension or not.

Furthermore the article explicitly references that states should cooperate with the UN when undertaking the actions prescribed. The complete scope

²⁶⁸ Simma, Khan, Nolte & Paulus (eds.), p. 1539.

²⁶⁹ *Ibid.*, p. 1570.

²⁷⁰ Article 56 UN Charter.

²⁷¹ Simma, Khan, Nolte & Paulus (eds.), p. 1604.

²⁷² *Ibid.*, 1604.

²⁷³ *Ibid.*, p. 1604.

of this cooperation cannot be ascertained from a textual reading of the article. The large questions are whether it entails that states cannot act before receiving a clear mandate from the UN, or whether states could also initiate joint concerted actions under the provision and then seek cooperation from the UN.²⁷⁴ After an analysis the latter interpretation is, however, recognized as the correct interpretation by Simma et. al.²⁷⁵

Even though article 55 and 56 prescribe a pledge of states to undertake cooperative measures for the creation of conditions conducive to development and the realization of human rights there is an ambiguity to how these articles should be interpreted.²⁷⁶ Neither is there a clear practice on how this cooperation should be carried out.²⁷⁷ The result of this vagueness is that there is no guidance on how a cooperative operation in regards to human rights should be undertaken. What we are left with is a rule that prescribes that cooperative measures are need and should be taken, but no indication on how to actually comply with the rule.

5.3.2.1.2 Article 2 of the ICESCR

The ICESCR prescribes the nature of the obligations that need to be undertaken by states in the first paragraph of its second article in the following manner:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

As can be read this provision actually imposes an obligation on states to cooperate to realize the rights prescribed in the covenant. The provision does not exhaust the ways in which this cooperation can occur, but it does specifically mention international assistance and cooperation in respect to economy and technology.

This article has been explained further in General Comment 3 of the CESCR. One aspect of relevance in this provision is that the term “to the maximum of available resources” refers both to domestic resources in the state where the right will be realized and also accessible resources from international cooperation. Furthermore the committee refers to articles 55

²⁷⁴ *Ibid.*, p. 1605 f.

²⁷⁵ *Ibid.*, p. 1606 & 1610.

²⁷⁶ *Ibid.*, p. 1609 f.

²⁷⁷ *Ibid.*, p. 1606 f. The authors have studied the practice and use of the article, and nowhere is it explained that any document or occurrence has elaborated how the articles transferred into practice.

and 56 of the UN Charter, and the Covenant, and means that both these instruments indicate that all states hold the duty to realize of economic, social and cultural rights. They also mention that all states that have the ability to help others should do so. It also references the DRD directly and argues that all states have an obligations to respect the principles for international cooperation in the instrument. Finally adding that the principles in the covenant for international cooperation and assistance are important for the possibility of implementing the rights in all of the world, without a program to fulfil these obligations it is apparent that economic, social and cultural rights risk not being fulfilled in many countries.²⁷⁸ The CESCR does not elaborate the international dimension of the obligation in any more substance. Thus failing to show in what forms the obligations to cooperate and assistance should be undertaken, as well as what the specificities of the “programme” where this cooperation will happen is.²⁷⁹ Due to space limitations I will not extend this examination further than this General Comment.

5.3.2.1.3 Maastricht Guidelines and Maastricht Principles

The Maastricht Guidelines is the result of a meeting of 30 human rights experts in Maastricht in 1997, where they discussed the then current state of international law in regards to economic, social and cultural rights. The result of the meeting was a set of rules in regards to the identification of violations to these rights. The rules were unanimously accepted by the experts at the meeting as representing current international law.²⁸⁰

In 2011 another meeting was convened in Maastricht to once more consider obligations under economic, social and cultural rights. The meeting was attended by human rights experts and international law experts. The result of this meeting was an elaborated set of principles of extraterritorial obligations of states in regards to economic, cultural and social rights.²⁸¹

Neither one of these documents are treaties, rather the intention when they were created was to clarify the obligations on states that can be derived from

²⁷⁸ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States Parties Obligations*, paras. 13-14. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) [Accessed on 23 of April 2013].

²⁷⁹ The CESCR makes a blanket statement in para. 13 of the General Comment, referring to General Comment 2 where they have “drawn attention ... to some of the opportunities and responsibilities that exist in relation to international cooperation”. This General Comment is an interpretation of the obligations under article 22 ICESCR, which prescribes that the UN has an obligation to provide technical assistance when needed. Even though General Comment 3 references General Comment 2, no information of value can be found, when trying to figure out how cooperative measures should be practically executed. See United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 2: International technical assistance measures*. Available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3659aaf3d47b9f35c12563ed005263b9?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3659aaf3d47b9f35c12563ed005263b9?Opendocument) [Accessed on 2 of May 2013].

²⁸⁰ Boven, Flinterman, and Westendorp (eds.), p. 1.

²⁸¹ Maastricht Principles, p. 1.

international law, mainly from the ICESCR but also from other human rights treaties.²⁸²

At first I will examine one rule in the Maastricht Guideline. The most relevant rule in this document for the understanding of obligations under the RTD is Guideline 19 Maastricht Guidelines. This guideline explains that states' obligations in respect to economic, social and cultural rights imply a duty to participate in international organizations. It is phrased in the following manner:

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. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.²⁸³

It should be clarified that this relates to a states external duty, since it is concern the unilateral actions of states, and should not be mixed up with the collective obligation in the RTD, that will be presented in section 5.3.3. The interpretation of the guideline is fairly self-evident since it has been written in an accessible manner, and thus does not need elaboration. However, the rationale behind the guideline has been elaborated by the expert group that constructed the rule. The reasoning behind it is that international polices, activities or programs stemming from cooperation in international organizations and organizations affect the enjoyment of human rights of individuals in all states. As such there is a risk the actions taken in these bodies might result in violations of economic, social and cultural rights. It is therefore the responsibility of states to actively ensure that the decisions taken in these bodies do not have a detrimental effect on the enjoyment of the aforementioned rights. In this context the experts highlight how dependent economically weak countries are on effective governing in international organizations. Their motivation was that these states often lack

²⁸² Preamble of the Maastricht Principles, paras. 6-8; Boven, Flinterman, and Westendorp (eds.), p. 1.

²⁸³ Guideline 19 of the Maastricht Guidelines, Boven, Flinterman, and Westendorp (eds.), p. 9.

the capacity to oppose policies even if they will have a detrimental effect on the enjoyment of human rights. Therefore there is a strong moral obligations on state that “are in a position to influence the policies and programmes [...] to bring pressure” on the organization so that all decisions are in line with their human rights obligations.²⁸⁴

Moving on to the Maastricht Principles, this document has as its main purpose to discern states’ extraterritorial obligations in respect to economic, social and cultural rights. Since, essentially the whole document prescribes external duties of states, most of it could be relevant for analogous interpretation when discussing the external duties in the RTD. For this study, however, I will only present a few principles that I feel are the most relevant for the understanding of the obligations under the RTD.

First of the instrument declare that all states have an obligation to respect, protect and fulfil all human rights both in their territory and extraterritorially, Principle 3. This principle is derived from a multitude of international covenants and declarations such as the above stated provisions in the UN Charter, article 28 of the UDHR, article 2 (1) of the ICESCR and the Convention of the Rights of the Child. It is also explicitly mentioned that this obligation exists in the RTD. The authors of the commentary to the Maastricht Principles, explains that both the ICESCR and the Convention of the Rights of the Child obliges states to cooperate to help the realization of economic, social and cultural rights. But also that a multitude of other treaty and non-treaty sources imply that states have an extraterritorial obligation for human rights, which are not only economic, social and cultural.²⁸⁵

Both principles 8 and 9 are of relevance as general principles for the obligations of states. Principle 8 defines what the meaning of extraterritorial is.

- a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and
- b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.²⁸⁶

²⁸⁴ Dankwa, Victor, Flinterman, Cees and Leckie, Scott, ”Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights”. In: Boven, Theo C. van, Flinterman, Cees & Westendorp, Ingrid (eds.), *The Maastricht guidelines on violations of economic, social, and cultural rights: proceedings of the workshop of experts organised by the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, USA), and the Maastricht Centre for Human Rights of Maastricht : University, 22-26 January 1997*, Studie- en Informatiecentrum Mensenrechten, Utrecht, 1998, p. 29 f.

²⁸⁵ De Schutter, Olivier, Eide, Asbjørn, Khalfan, Ashfaq, Orellana, Marcos, Salomon, Margot and Seiderman, Ian, “Commentary on the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights”. In: *Human Rights Quarterly*, Vol. 34, No. 4, 2012, p. 1090 ff. [Hereinafter referred to as De Schutter et. al.].

²⁸⁶ Principle 8 Maastricht Principles.

Principles 9 in turn shows the “scope of jurisdiction” of states in respect to the economic, social and cultural rights.

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
- c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.²⁸⁷

Just like the scholars we have studied, the Maastricht Principles explains that the duty of states in respect to economic, social and cultural rights includes an external dimension. Generally it means that states cannot act in a way, or omit to act in a way that could have an adverse effect on the enjoyment of economic, social and cultural rights of persons, no matter if it is within or without of the state’s territory. As such a country’s jurisdiction should not simply be viewed as the territory where a state can legislate, but also in terms of situations where their action can actually effect the realization of human rights.²⁸⁸

In Principle 13 the idea that states should “avoid causing harm” to the realization of economic, social and cultural rights is mentioned. The principle also adds that “the responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct.”²⁸⁹ The drafters have stated that this obligation kicks in, when there is a real risk of harming the fulfilment of human rights in other states.²⁹⁰ This notion is the same as the norm Beetham has described in connection to the RTD.

Furthermore there is an obligation of states for responsible participation in international organizations, Principle 15. It is pronounced in the following manner:

As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international

²⁸⁷ Principle 9 Maastricht Principles.

²⁸⁸ De Schutter et. al., p. 1101 ff.

²⁸⁹ Principle 13 Maastricht Principles.

²⁹⁰ De Schutter et. al., p. 1112 f.

human rights obligations of that State.²⁹¹

The commentary of the Maastricht Principles mentions that this provision pronounces the idea that state parties to the ICESCR, cannot engage in activities in the international sphere that are incompatible with their treaty obligation.²⁹² This is very similar to the Maastricht Guideline 19. Also it reminds us of how several scholars have portrayed the obligation to cooperate in the RTD. For example Green and Randolph have also mentioned that the duty to cooperate extends to how states vote in international and regional arrangements.

Other noteworthy examples is that states have an obligation to ensure “that non-State actors which they are in a position to regulate ... such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights.”²⁹³ That states need to cooperate “to create an international enabling environment”, which favours the realization of economic, social and cultural rights. Affected areas for this obligation would be “bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation.”²⁹⁴ The commentary of the Maastricht Principles mentions that this obligation is inherent in the RTD. This assertion has also received several commitments from states among others in the DRD and the Millennium Declaration, which has “implications for the interpretation of the obligations of states under the human rights treaties they have ratified, as they embody a practice by these states that sheds light upon the interpretation of the existing treaty provisions.”²⁹⁵ Lastly it is stated that states need to contribute resources for the fulfilment of economic, social and cultural rights, when it is needed and they are able to spare resources.²⁹⁶

Even though the Maastricht Guidelines and primarily the Maastricht Principles have given us a rich interpretation of what the external duties of states are, it is unclear to what extent it can be used to ascertain the obligations under the RTD. Both instruments are well-researched and include well argued provisions from some of the most notable human rights experts in the world. However, since the instruments have not been affirmed as valid by states, they can only be referenced as how the concept of responsibilities ought to be understood, but not as fact.

²⁹¹ Principle 15 Maastricht Principles.

²⁹² De Schutter et. al., p. 1118 f.

²⁹³ Principle 24 Maastricht Principles.

²⁹⁴ Principle 29 Maastricht Principles.

²⁹⁵ De Schutter et. al., p. 1147 f.

²⁹⁶ Principles 31 Maastricht Principles.

5.3.3 Collective Obligations of States

The DRD explicitly prescribes a collective obligation of states.²⁹⁷ Although the extent or form of the collective obligation is not elaborated upon in the DRD, UN forums and scholars have expanded on the concept. In this section I will briefly recount the view of Green and Randolph.

Green and Randolph have mentioned that various actions from collectives of states often have a large influence on development process, be they in international institutions or other policies. As they say these actions often affect several “core issues around development” and the correct implementation of the RTD must involve collective actions by states in “development related institutions and processes”. These processes and policies are hard for single states to control, therefore having an obligation in the collective level is deemed warranted. They emphasize that areas in which this collective responsibility especially should fall are “global and regional financial, trade and development institutions.”²⁹⁸ The objectives stated here are similar to the ones that were described in connection to the external duty of states. It is safe to assume that they are the same, which means that the collective obligation should also, for example, aim at restructuring the international legal order so that it is fair and balanced towards all states, and to make sure that international policies do not violate the realization of the RTD in any country.

What is understood as being under the responsibility of states in the collective is to make sure that “international policies, institutions, processes and programs that are under the collective control of states serve to further the undertakings set out in the Declaration.”²⁹⁹

This aspect of states’ international duties might be easily mixed up with the duty to cooperate. But they are distinct. The writings of Green and Randolph suggests that whereas the duty to cooperate denotes an obligation for individual states’ to take unilateral action for the international realization of human rights, the collective duty of states should be understood as a combined responsibility for all states in the collective to make sure that the practices and outcomes of programs in the institution they are a part of is in conformity with the RTD.³⁰⁰ Green and Randolph, whose primary work was directed at formulating methods to assess if the RTD is being fulfilled, wrote this in connection to collective obligations:

[...] assessing the collective implementation of the right would imply, specifically, measuring the extent to which international policies, institutions, processes and programs that are under the collective control of states serve to further the undertakings set out in the Declaration. That is, assessment of the collective obligations

²⁹⁷ See article 4 (1) DRD.

²⁹⁸ Green and Randolph, para. 67.

²⁹⁹ *Ibid.*, para. 68.

³⁰⁰ *Ibid.*, para. 67-68, 70 & 74-76.

of states would look, not to the actions of any given state (which are covered under the individual obligations) but rather to the adequacy and processes of the international institutions themselves.³⁰¹

In a different section they elaborate on this distinction of collective rights from external rights like this:

[...] the collective obligation *tout court* serves a different function: it provides a shared standard through which all stakeholders, including state officials, staff in the Secretariats of international and regional organizations, representatives of civil society, and members of the public, can assess whether or not a given international policy, institution, program or process reflects the normative values established by the right.³⁰²

However, they mention that this does not mean that the collective institution is a duty-bearer; instead the responsibility is still on the states within the collective.³⁰³ What this obligation does is create a shared standard for the preferred outcome of collective action. Even though the exact influence of each state is hard to delineate, there is a shared obligation to take collective actions that will further the realization of the RTD.

5.3.4 Conclusions on the International Obligations of States

In the preceding chapter I have described that there are extensive international obligations on states to further the objectives of the RTD. Although the exact scope of duties is not exactly defined it is possible to understand their outlines. In broad strokes it is possible to find two categories of obligations of states, state's external duties and state's collective duties.

In regards to the external duties I believe it is possible to discern two distinct types of obligations, a negative obligation and a positive obligation. The negative obligation has been elaborated upon by for example Beetham, as has been shown above, and means that state have to avoid doing harm or damage. It entails that state's have to make sure that their own actions and policies, even if they are principally concerned with internal matters, do not have a detrimental effect on the enjoyment of peoples and individuals human rights in other states. This also includes the responsibility to make sure that actors under the state's jurisdiction do not violate the rights of people and individuals in other states. I have termed this obligation negative since it means that states should refrain from harmful behaviour.

³⁰¹ *Ibid.*, para. 68.

³⁰² *Ibid.*, para. 76.

³⁰³ *Ibid.*, para 76, at footnote 5.

The positive obligation in turn emphasizes that states also have an obligation to resort to action to help the realization of the RTD. This includes several different actions. An important part of this obligation is the state's behaviour in transnational institutions. In this respect several UN forums and scholars have mentioned that states have an obligation to promote international policies that are compliant with their human rights obligations in general and the RTD in particular. This also extended to how the states vote in multilateral institutions, both regional and global. This is an obligation of all states, however several scholars note that there is an asymmetry in the world order, where some states have greater authority to actually introduce changes. Since this is the case, the obligation to promote RTD-friendly policies in the international sphere especially falls on them. In addition to states' actions in transnational institutions, the positive obligation also entails bilateral measures. Most UN forums and scholars have pronounced that rich states, also referenced as developed states, have to contribute available resources, both financial, technological etc., for the implementation of the RTD in developing states.

Secondly, there is also a collective duty of states. This is closely related to many of the aspects I have mentioned in regards to the positive obligation of states under the external duties. But there is an important distinction. While the external duty centres on the individual actions of one state, the collective duty is centred on the combined measures of states.

The aim of the international duties is to create an environment that enables the implementation of the RTD. Exactly what areas of international governance that are affected, is not clear. The opinion seems to be that all parts of international governance that can have an effect on the enjoyment of human rights and development should be affected. Notable examples that have been given by scholars and UN forums, are to modify the international trade system so that it is equal for all states and is not imbalanced in who profits from them, restructuring the financial system, making sure that resources, such as aid, are available for developing states. The list can certainly be made longer.

Similarly, exactly what these specific duties are is uncertain. Several authors, and notably the Green and Randolph as well as the HLTF reports on criteria, sub-criteria and indicators, have expanded it but states have as of yet not been able to reach a consensus on the interpretation of these rights. I believe this is a threat to the interpretation of the RTD. Since, if states do not have clear guidelines on how to act in respect to human rights, there is a possibility that they will shirk their responsibility.

In addition to the body of work created by scholars and UN forums, several references to the states' external duty and to their collective duty can be found in other international instruments. Most authors that describe how the external and collective duties in the RTD should be understood, often reference provisions in other instruments. Marks even says that this is necessary to adequately interpret the obligations in the RTD. The examples I

have presented are articles 55 and 56 of the UN Charter, article 2 (1) of the ICESCR, the Maastricht Guidelines and the Maastricht Principles.

What is evident is that there are external duties of states in respect to human rights in general, UN Charter, and economic, social and cultural rights in particular, ICESCR, prescribed in hard law. However, these documents also lack clarity in the extent and scope of these obligations. What is even more troubling is that, often when authorities on the UN Charter and the ICESCR, describe the obligations in those treaties they reference each other as well as the DRD. It seems that the true interpretation of the obligations to cooperate has been lost somewhere in excessive cross-referencing. What is left is the knowledge that a duty exists, but not how to understand it.

Both the Maastricht Guidelines and the Maastricht Principles are important reference tools, since they clearly explain how state's duties should be understood, albeit only in connection to the ICESCR. However it is worth noting that they mainly stipulate external duties. Even though the documents seem useful to discern how the obligations should be interpreted in the RTD as well, I would like to put forward two reservations for this. The first one is that the Maastricht instruments were created to explain the obligations under ICESCR; even though the RTD incorporates all human rights it cannot be taken as self-evident that the DRD should be interpreted exactly like the covenant. Secondly, as I have already written, these instruments were created by human rights experts and have not been adopted formally by states. The legal value of them is therefore uncertain. Even though the Maastricht Guidelines and the Maastricht Principles most probably reflect how some of the external duties in the RTD should be understood, we cannot be assured of that fact.

5.4 Interrelationship Between The Different Dimensions Of Duty-Bearers

The last question to answer is to briefly examine the interrelationship between the different spheres of obligations, national and international, that that duty-bearers have.

As has been explained the state has the primary responsibility to implement the RTD. This means that it is responsible to implement it in the in the national context. This duty denotes that states need to create development programming that is conducive to the realization of the RTD.

The question should be how the international obligations of states should be viewed in the rights-structure. Labelling the national responsibility as primary might make some question whether the international obligation is secondary, meaning that it is actualized first when the national state is unable to realize the RTD.

Viewing the justifications for the international obligations should make this last assertion redundant. The reasoning behind the international obligations in respect to the RTD, is the understanding that several developing states will have a very hard task, maybe even impossible, to implement the RTD, without the support in the form of for example resource redistribution. Considering that the international obligations are only secondary would therefore make the purpose of the RTD void. Kirchmeier has affirmed this notion in the following manner: “As far as the Right to Development and its advancement are concerned, it is now important that all sides recognize the importance of both the national and the international level of its scope and embrace both as complementary, not contradictory.”³⁰⁴ In this respect it might be clearer semantically to describe the national obligations of states as the principal obligation to implement the RTD in the national context. Similarly the international obligation would be an obligation of all states to create an international environment that enables the implementation of the RTD.

Viewing the duty-bearer relationship as complementary, and that the international obligation is essential for the full realization of many countries, advances the question of how states should respond to their national obligations, if the international obligations of others states go unfulfilled. Is this an adequate excuse for states not to realize the RTD in the national sphere? The IE has answered this question in the negative. He states that: “The overall responsibility of developing countries in implementing the right to development, following the human rights approach, is not diminished even if international cooperation is not forthcoming to the extent desired.”³⁰⁵

In summary, the state has the principal national duty to operationalize and realize the RTD in its domestic territory. As a necessary complement to this duty, all states also have the duty in the international context to ensure that the RTD of all people and individuals can be fully realized.

Lastly it must be mentioned that the complete interplay between these dimensions is uncertain. As Fukuda-Parr has noted the HLTF-report on criteria, sub-criteria and indicators was widely debated, mostly by developing states feeling that there was too much emphasis on national obligations and not enough on international obligations.

³⁰⁴ Kirchmeier, p. 24.

³⁰⁵ Independent Experts 2nd Report, para. 33.

6 Conclusions

The concluding chapter of this thesis draws on existent information and analyses from the previous chapters; as such it functions mainly as a consolidation of my findings in the previous chapters. The first part of this chapter deals with rights-holders, who they are and how their relationship is understood. Furthermore one gap in the concept of rights-holders that is still persistent is discussed. This is the question of representation for the rights-holder “peoples” in the national context. The second part of this chapter is devoted to the duty-bearers in the RTD. Here the scope of their obligations in the national as well as the international sphere is discussed. Furthermore this part discusses gaps in regards to the understanding of these obligations.

Starting from the beginning there are two rights-holders in the RTD, the human person, denoting an individual level, and the collective, termed the “people” in the DRD. Even though there are two rights-holders they both denote human beings as the beneficiaries of the rights enshrined in the RTD. Whereas the individual is easy to identify, the subject “people” is harder. Often this rights-holder has been misunderstood as meaning the state, this assertion has however been strongly refuted and proven untrue in this paper. It is believed that this subject was originally intended to denote the entire population of a country. However, there has been a shift in opinion in regards to the definition of a “people”. This is partly due to the fact that the human rights of indigenous peoples and minorities have come into focus in the international discourse concerning human rights. A great leap for this shift of views in regards to peoples in the RTD was the *Endorois*-case from the AComHPR, which cemented the view that indigenous peoples are considered to be rights-holders in the RTD as it is codified in the ACHPR. It has been argued in this paper that this should be a valid interpretation of the current state of the international RTD as well, since human rights are universal, and since several interpretations of the RTD in the international sphere have corroborated such an understanding, among these is the UNDRIP and the report of the Global Consultation.

A gap that persists in the identification of a “people” is that there still does not exist an exact definition of when a group is considered a “people” in the RTD. The proposal given in this thesis is to solve this problem by using a definition that answers to the lowest common denominator of the identified groups, i.e. the entire population, indigenous peoples and minority groups. However, no real definition has been found or elaborated in the thesis.

Describing the nature of a “people” as a rights-holder is also necessary for the full understanding of the RTD. A collective rights-holder, in this case “people”, consists of individual persons. The group right is always aimed at furthering the enjoyment of human rights of the individuals in the collective. Therefore it acts a vessel for the realization of rights for human persons. The capacity individuals have in the group is as beneficiaries. It is important not

to forget about the individual component in the group right, since the individual has been mentioned as the central subject of the RTD, article 2 (1) DRD.

This dual structure of rights-holders is complementary and aims at the realization of human rights for all human people, both as individual rights-holders with their own claim, and as beneficiaries of the claims of the “people(s)” (both singular and sometimes plural) they belong to.

A gap that has not been cleared out in this thesis concerns the representation of peoples. When scholars have written about representation the scope is always in regards to the international obligation in the RTD. However, since peoples have rights in the national context, it is important that they have representatives in the national context that can claim their rights according to the RTD as well. Scholars have as of yet not solved this question but a solution is necessary for the possibility of a people to actuate their claims towards the state.

At the opposite end of the right there are duty-bearers. The duty-bearers in the RTD are states, and their duties are divided up into two categories, national obligations and international obligations. The objective of the duties of states is to create a national and international environment that is favourable to development, which in turn will enable the realization of the right for the rights-holders. However, the IE has pointed out that the ultimate responsibility to develop falls on the rights-holders. They therefore need to actively partake in the development process to be able to develop.

The first duty that will be discussed is the state’s internal duty. The state is considered to be the primary duty-bearer in the RTD, which is prescribed in article 2 (3) and 3 (1) in the DRD. The interpretation of this assertion is that the state has a primary obligation to realize the right domestically. It is understood that the internal obligation is the main level for operationalizing and implementing the right. The obligation to fulfil the right in the national context applies to all states. As has been discussed in this paper, a mere recognition of the right in national legislation is not sufficient for states to fulfil their national obligation. Instead the duty requires states to take positive action to realize the rights enshrined in the RTD.

One form of action has been mentioned by all the sources examined as the preeminent mean to implement the RTD; the creation of national development programs. There is no ‘one size fits all’ formula for the creation of these programs, rather when these are developed there is a need to consider the context they are created for. This includes taking the demography of the country and the areas in most need of development into account.

Lastly, just like all human rights the nature of the state’s internal obligations need to be congruent with the obligations to respect, protect and fulfil. This means that the state need to; *respect* the RTD of their citizens and refrain

from violating it, *protect* their citizens from the violation of their rights by third parties and take action to *fulfil* the right by providing essential resources and services.

In addition to the internal obligation the DRD prescribes international obligations on states. There are two broad reasons for including international obligations in the RTD. The first is that several developing countries suffer from resource constraints, and without cooperation and assistance from other states the full realization of the RTD would be impossible in these states. The second is that the world is interdependent, which means that the actions and policies of states can have extraterritorial effect on the enjoyment of the RTD. The same goes for international actions and policies taken by collective action.

The addition of international obligations of states, entails that there are more than one duty-bearer responsible for the realization on the RTD. A relationship where more than one duty-bearer is obligated to fulfil a right has been termed “imperfect obligations” by Sen. Sengupta has affirmed that human rights can have “imperfect obligations”.

External duties, denotes an individual obligation of states to work for the full realization of the RTD, even outside their jurisdiction. In this paper the state’s external duty has been categorized as having two characteristics, a negative and a positive duty. The negative duty is argued to denote an obligation of states to make sure that their actions and policies, even if they primarily concern internal matters, should not do any harm or damage on the enjoyment of the RTD of people in other states. This include that the state needs to make sure that actions of third parties within their jurisdiction, such as transnational corporations, do not cause detriment to the enjoyment of the RTD of people in other states as well.

The positive duty of states implies that states need to take action for the realization of the RTD in other countries. This occurs both in bilateral and multilateral arrangements. Scholars have argued that the obligation includes resource distribution from affluent states to less developed states, as well as the duty to promote and vote for international policies, which are compliant with the norms in the RTD, in international institutions. Furthermore it has been claimed that there is an asymmetry in the international community, since the opinions of developing countries do not carry as much weight as the opinions of developed countries. Therefore some scholars argue that states that have greater influence in the international community also have a greater responsibility to both further the aims of the RTD, and also to restructure the world order to make it equal for all states to participate in.

What has been seen is that the wider contours of the obligation can be found. Most scholars promote an extensive interpretation of the external obligation, usually by referencing that an external obligation to realize human rights has legal basis in the UN Charter and the ICESCR. This thesis has investigated both of the abovementioned treaties as well as the

Maastricht Guidelines and the Maastricht Principles to get an adequate understanding of the scope of external duties. The end result however is that sufficient clarity cannot be discerned. Whereas all provisions references a duty to cooperate the exact scope of this is not clear. What has been argued in this thesis is that the interpretation of the external duties of states have been lost in excessive cross-referencing between these various instruments. What is known is that the obligation exist, but the exact scope of it is unclear. This is a gap in the understanding of the external duty that needs to be untangled further.

Moving on, in addition to the external duty, there is a collective duty in the RTD. This obligation has been included since development processes in most states are heavily affected by actions and policies that are taken collectively and since individual states might have a minor effect in the adoption of these actions it is deemed necessary to include a collective obligation. This should be viewed as a combined responsibility for all states in the collective to make sure that the practices and outcomes of programs in the institution they are a part of is in conformity with the RTD.

What has been ascertained is that there are several duty-bearers in the RTD and that they have national as well as international duties. This takes the form of “imperfect obligations” for the realization of the RTD. What is left to discern are the actionable duties that these obligations entail. As can be seen there exist wide contention among states of how to define these duties. This question, however, is beyond the scope of this paper, so it us up to other scholars to define this area.

Supplement A – Declaration on the Right to Development

41/128. Declaration on the Right to Development

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims 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 benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources, Mindful of the obligation of States under the Charter to promote universal respect for

and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3. States have the right and 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.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States 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.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, *threats of war and refusal to recognize the fundamental right of peoples to self-determination.*

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and 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. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying 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.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

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