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### **The Right to Development and its Role in International Economic Law** *By Olasupo Owoeye*

**This paper provides a brief discussion on the right to development and examines some of the criticisms often raised against its significance as a cognizable human right. The paper argues that the principles encapsulated in the right to development represent the foundational principles of the international legal order. The right to development is therefore both a human right and an economic right. Thus, the principles it embodies are not only incorporated into the International Bill of Human Rights, they are also well reflected in World Trade Organization agreements and the field of international economic law. The paper argues that the right to development can play an important role in the interpretation and enforcement of rights under international economic law.**

#### **Introduction**

The right to development is a human right that is well recognized in different international and regional human rights instruments. Development, social justice and economic equity constitute the fundamental underpinnings of the international legal order as embodied in the United Nations (UN) Charter and the international human rights treaties under the UN framework.<sup>1</sup> Development was initially associated largely with economic growth.<sup>2</sup> However, in the second half of the 20<sup>th</sup> century, following the general disenchantment with global inequality and poverty despite global economic growth, the emphasis began to shift from the economic growth theory of development to human development.<sup>3</sup> Amartya Sen in his seminal piece on development and freedom accentuated the significance of human development in the development rhetoric by noting that development is about “enhancing the lives we live and the freedom we enjoy”.<sup>4</sup> While there is an inundating volume of literature on the right to development, the precise meaning and scope of the right remains largely unresolved. The view has been expressed that development

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<sup>1</sup> Ubong E. Effeh, “Back to the Future: The UNDRD as a Blueprint for the Realization of Human Rights and Sustainable Development in Sub-Saharan Africa” (2008) 4(2) *McGill International Journal of Sustainable Development Law and Policy* 131, 138.

<sup>2</sup> See O. Owoeye & J. Oduwole, “Access to Medicines and the Ebola Virus Epidemic in West Africa” (2017) 24 *Journal of Law and Medicine* 722, 724.

<sup>3</sup> See D. Seers, “The Meaning of Development”, 4 *International Development Review* (1969), 11.

<sup>4</sup> See A. Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999), p. 14.

may be construed as a right exercisable and available to populations in countries that are not yet developed.<sup>5</sup> In other words, it is a right designed to remedy the effects of poverty, health and economic inequality, unfair trade rules and the negative economic consequences of trade liberalization or globalization in developing countries.<sup>6</sup>

This paper provides a brief discussion on the right to development and examines some of the criticisms often raised against its significance as a cognizable human right. The paper argues that the principles encapsulated in the right to development represent the foundational principles of the international legal order. The right to development is therefore both a human right and an economic right. Thus, the principles it embodies are not only incorporated into the International Bill of Human Rights, they are also well reflected in World Trade Organization agreements and the field of international economic law. The paper argues that the Right to Development can play an important role in the interpretation and enforcement of rights under international economic law.

### **The Right to Development in International Law and the Criticisms**

It has been observed that a major challenge in conceptualizing the right to development is the fact that it belongs to a set of 'emerging and indeterminate' third generation human rights.<sup>7</sup> There is also the criticism that the right to development may be a superfluous instrument given the fact that a number of human rights treaties contain provisions addressing the challenges of underdevelopment.<sup>8</sup> There is also the argument that the right to development rhetoric tends to ignore the fact that people have a right to choose "not to develop" as the economic activities that spur development may erode their traditional and cultural ways of life.<sup>9</sup> While it is true that commercial activities in indigenous communities may in some cases be detrimental to the traditional and cultural ways of life of such people especially where such activities result in their displacement or degradation of the environment, it is important to note that the right to development clearly provides for the protection of indigenous peoples and their cultural or traditional ways of life. To this end, Article 2 of the United Nations Declaration on the Right to Development (UNDRTD) provides:

*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 fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.*

Thus, the right to development can be designed to appropriately respond to the needs of indigenous communities who seek to protect their traditional and cultural values while still pursuing their human development objectives.

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<sup>5</sup> Laura Westra, "The Conflict Between Development and the Right of the Child to Health" (2013) 42 *Denver Journal of International Law & Policy* 1, 2.

<sup>6</sup> The Right to Development, Report of the Independent Expert on the Right to Development, Arjun Sengupta, Pursuant to General Assembly Resolution 54/175 and Commission on Human Rights Resolution E/CN.4/RES/2000/5, Commission on Human Rights, U.N. Doc. E/CN.4/2000/WG.18/CRP.1 (Sept. 11, 2000).

<sup>7</sup> Effeh, "Back to the Future", p. 144.

<sup>8</sup> Ibid, p. 148.

<sup>9</sup> Laura Westra, "The Conflict Between Development and the Right of The Child to Health" (2013) 42 *Denver Journal of International Law & Policy* 1, 3.

Another criticism against the right to development is that multinational organizations and political office holders in developing countries are the major beneficiaries of the commercial activities that are often presented as necessary for development in third world countries with and such activities hardly having any meaningful impact on the ordinary people.<sup>10</sup> It is however important to note the right to development imposes a clear obligation on governments to ensure the enjoyment of economic and social rights by all citizens. In this vein, Article 8 of the UNDRTD makes it obligatory on states to ensure amongst other things, “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income”.

Thus, it would be wrong to consider politicians and multinational corporations profiting from the exploitation of resources in developing countries as beneficiaries of the right to development. They are violators and infringers of the principles enunciated in the right to development. The right to development requires states to act in a manner that protects the individual and collective rights of citizens. Corrupt practices are not countenanced by the right to development nor can they be subsumed or disguised under it. It is also without doubt that multinational corporations are bound by the principles of the right to development too. To this end, paragraph 12 of the United Nations Guiding Principles on Business and Human Rights imposes an obligation on business enterprises to respect internationally recognized human rights with particular emphasis on rights enshrined in the International Bill of Rights and the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.

### **The Application of the Principles of the Right to Development in International Economic Law**

There have been intense scholarly discussions on whether the right to development may be perceived as a merely aspirational right or legally cognizable right. Given the fact that the right to development under the UN framework emanated from a UN General Assembly declaration, a declaration of the General Assembly does not on its own possess the legally binding effect of provisions enshrined in a treaty. That said, there is support for the view that the right to development is so germane to the international legal order that it could be rightly regarded as having assumed the status of jus cogens in international law.<sup>11</sup> The International Court of Justice (ICJ) had cause to pronounce on the status of a UN General Assembly Declaration in the Nuclear Weapons case. The ICJ thus opined:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio Juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see "whether an opinio Juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio Juris required for the establishment of a new rule."<sup>12</sup>

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<sup>10</sup> Ibid., p. 4.

<sup>11</sup> Mohammed Bedjaoui, "The Right to Development", in *International Law: Achievements and Prospects*, Mohammed Bedjaoui, ed. (Paris, UNESCO, 1991), p. 1179.

<sup>12</sup> Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion (1996) I.C.J. Rep. 226 at 254; quoted in Ubong E. Effeh, "Back to the Future: The UNDRD as a Blueprint for the Realization of Human Rights and Sustainable Development in Sub-Saharan Africa" (2008) 4(2) *McGill International Journal of Sustainable Development Law and Policy* 131, 152.

The right to development has indeed been given sufficient recognition in international law to be considered as constituting a well-accepted state practice.<sup>13</sup>

The pursuit of economic development is one of the foundational principles of the World Trade Organization (WTO). Thus, the opening paragraph in the preamble of the Marrakech Agreement Establishing the World Trade Organization explicitly recognizes the need for states to pursue their trade and economic relations “in a manner consistent with their respective needs and concerns at different levels of economic development”. While development is inexorably connected to economic, social and cultural rights, there is need for the right to development to be given more practical effect in the enforcement of international economic rights.<sup>14</sup> The right to development may be viewed not only as conventional human right but also as an economic right that is incorporated in trade and international investment agreements.<sup>15</sup>

It has thus been contended that trade and investment decisions must be interpreted in a manner supportive of the developmental goals and objectives of developing countries as a state should not be placed in a position where it would have to choose between pursuing developmental goals or implementing investment obligations at the expense of national development objectives.<sup>16</sup> It has indeed been observed that evidence that there is *opinio juris* of the existence of the right to development in international economic law could be garnered from the common incorporation of development objectives into the preamble of trade and investment agreements, the recognition of use subsidies as a means of fostering development and the recognition of health measures necessary for environmental protection.<sup>17</sup>

There also exists the unending debate on the justiciability of the right to development. The narrative has in fact been taken beyond its justiciability as a human right to its status as an economic right that is enforceable under international economic law.<sup>18</sup> With respect to intellectual property (IP), there is increasing emphasis on the need for multinational corporations to seek the enforcement of their intellectual property rights in a socially responsible manner.<sup>19</sup> While states certainly have an obligation to implement IP rights in a manner consistent with a balancing of rights and obligations involving all stakeholders, the principles of corporate social responsibility also make it expedient for corporations to continually ensure they do not adopt a socially reprehensible approach to the enforcement of their IP rights. This position is further reinforced by the human rights compliance obligations imposed on states under the United Nations Guiding Principles on Business and Human Rights.

While the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) in particular has economic development as one of the major objectives it is expected to achieve, the language of the agreement and its implementation has raised significant concerns in relation to access to knowledge and innovation especially in the access

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<sup>13</sup> See Ubong E. Effeh, “Back to the Future: The UNDRD as a Blueprint for the Realization of Human Rights and Sustainable Development in Sub-Saharan Africa” (2008) 4(2) *McGill International Journal of Sustainable Development Law and Policy* 131.

<sup>14</sup> Jose Manuel Alvarez Zarate, “The In Dubio Pro Development Principle: A Right To Development in Trade and Investment Regimes” (2015) 43(4) *Denver Journal of International Law & Policy* 333, 335-6.

<sup>15</sup> *Ibid.*, p. 336.

<sup>16</sup> *Ibid.*, p. 337.

<sup>17</sup> *Ibid.*, p. 341.

<sup>18</sup> *Ibid.*, p. 356.

<sup>19</sup> O. Owoeye, “Corporate Social Accountability in Developing Countries: A Recipe for the Socially Responsible Corporation” (2015) 3(1) *International Journal of Accounting and Business Management* 300, 302; J. Janewa Osei Tutu, “Socially Responsible Corporate IP” (2018) 21 (2) *Vanderbilt Entertainment & Technology Law* 483.

to medicines context.<sup>20</sup> There is also some significant concerns on the extent to which the TRIPS Agreement might have substantially whittled down the right of states to self-regulate or adopt measures necessary to protect and promote national development objectives. It has been argued that where development language has been used in an investment or trade agreement, that makes the right to development operational in the implementation of such agreements.<sup>21</sup> This is because the use of development language clearly evinces an intention by the negotiators to give effect to the principles of the right to development in pursuing their rights and obligations under the agreement.

The TRIPS Agreement explicitly recognizes the need for IP to promote economic growth and development. Article 8.1 of the TRIPS Agreement thus provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

This provision was considered by the Appellate Body in *DS435 Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*. In determining whether Australian plain packaging measures could be considered a justifiable encumbrance on the use of trademarks under the Article 20 of the TRIPS Agreement, the Appellate Body upheld the decision of the WTO Panel holding that the tobacco plain packaging measures fell within the scope of measures that could be adopted under Article 8 of the TRIPS Agreement.<sup>22</sup> The Appellate Body also upheld the decision of the Panel to the effect that the measures taken by Australia to enforce plain packaging of tobacco products were legitimate public health measures under Article 2.2 of the WTO Technical Barrier to Trade Agreement.<sup>23</sup> This decision represents an unequivocal recognition of the right of countries to adopt legitimate public policy measures that are designed to promote their development interests.

In Africa, the right to development is enshrined in the African Charter on Human and Peoples' Rights.<sup>24</sup> The right to development in the African Charter is fully justiciable under the African Human Rights courts framework.<sup>25</sup> In September 2015, the United Nations General Assembly adopted the Sustainable Development Goals (SDGs) to give effect to achieving developmental goals identified as of critical importance to humanity and the earth.<sup>26</sup> The United Nations has, through the Sustainable Development Goals, resolved "to create conditions for sustainable, inclusive and sustained economic growth, shared prosperity and decent work for all, taking into account different levels of national development and capacities". The SDGs are to be achieved by the year 2030. The SDGs largely represent the principles enunciated in the right to development.

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<sup>20</sup> Ibid, p. 483.

<sup>21</sup> Jose Manuel Alvarez Zarate, "The In Dubio Pro Development Principle", p. 354.

<sup>22</sup> *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/AB/R; WT/DS441/AB/R (9 June 2020) paragraphs 6.658-6.660, p. 213.

<sup>23</sup> Ibid., para. 6.519, p. 178-9.

<sup>24</sup> African Charter on Human and Peoples' Rights, Article 22.

<sup>25</sup> See O. Owoye & J. Oduwole, "Access to Medicines and the Ebola Virus Epidemic in West Africa" (2017) 24 *Journal of Law and Medicine* 722, 727-730.

<sup>26</sup> UN General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, UN Resolution No. A/RES/70/1, 70/1.

## **Conclusion**

The right to development has become a very important part of customary international law that can no longer be considered a mere exhortatory expression of political aspirations. It is becoming increasingly important for the right to development to be accorded significant consideration in the implementation and enforcement of trade agreements. The actualization of the SDGs, the protection of human rights and the promotion of global peace and prosperity all require a more practical use and implementation of development as an economic and human right. The recognition of the development objectives of the TRIPS Agreement and the public health objectives of the Agreement on Technical Barriers to Trade by the WTO Dispute Settlement Body in the Australia tobacco dispute is a remarkable demonstration of how development principles can play a critical role in the interpretation of rights and obligations created under international economic law. It also lends credence to the fact that the right to development has become accepted through state practice as forming part of customary international law.

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