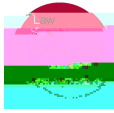


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Legal Cosmopolitanism and the Normative Contribution of the Right to Development

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Abstract: This essay unpacks the normative potential of the right to development in addressing contemporary disparities of the international political economy. Among the significant elements provided for in the UN Declaration on the Right to Development (1986) is its 'responsibilities approach': rather than establishing a new substantive right its provisions advance a system of international duties that might give better effect to existing socio-economic rights. It challenges the classical reading of international human rights law that



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INTRODUCTION

This paper is concerned with the legal responsibilities of states for the violation of socio-economic rights globally. In particular, it considers the normative function of the right to development in offering a legal framework with the potential to humanise the global marketplace. It provides that the right to development has an important juridical contribution to make given the defining features of the international economic order, with the most salient el

appropriate national development policies,' the 'right' being exercisable against the international community.⁴ Another particularity is that the Declaration is characterised by a 'responsibilities approach;' its articles focus on delineating duties rather than detailing rights. This element reinforces the appreciation that the right to development is less about establishing a new substantive right, and more about framing a system of duties that might give better effect to existing rights.

A brief sketch of the legal foundations of the international (ie external) obligations of states regarding inter alia the right to an adequate standard of living, the rights to food, health and education in developing countries reminds us that the external responsibilities of states have always been a core element in human rights treaties that address socio-economic rights.⁵ The United Nations (UN) Charter's emphasis on social justice and human rights linked those elements to a stable international order.⁶ The realisation of these common goals was recognised as requiring cooperation among states, and it is this tenet that constitutes the essence of this foundational treaty. Subsequent legal sources addressing international cooperation can be found in the Universal Declaration of Human Rights (UDHR),⁷ notably at Articles 22 and 28. Article 22 recognises that 'social security' – a right receiving increased attention as a response to market failures – requires 'national effort and international co-operation.'⁸ Article 28 establishes the

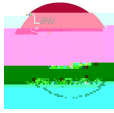
⁴ DRD, art 2(3). 'Appropriate' development policies, as per article 2(3), are t,TA:*x)5)1o6A:*x)5)1l6s':5A'77)* 2 ,TA:*x)5)1o6):75x7'1reT5



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entitlement of all to a just social and international order in which human rights can be realised.

fundamental right of everyone to be free from hunger' (Article 11(2)). References to obligations of international cooperation for economic, social and cultural rights appear throughout the Convention on the Rights of the Child (CRC), which explicitly includes the requirement that 'particular account shall be taken of the needs of developing countries.'¹² International cooperation has found its most recent endorsement via the adoption of the Convention on the Rights of Persons with Disabilities, which, notably, anticipates ratification by regional organisations with the European Community having already signed.



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Paramount among the legal questions that vex the meaningful application of an obligation of international cooperation for the realisation of economic, social and cultural rights is the interplay between the domestic and external nature of obligations.¹⁹ Despite the repeated codification of human rights obligations of 'international cooperation' (international assistance and cooperation), and regardless of the fact that the realisation of economic, social, and cultural rights is envisaged as giving rise to responsibilities for states other than the rights-holder's own, there remains a sense that these external obligations challenge the classical

is unable to fulfil the rights on its own²¹ with the use of its 'maximum available resources,'²² as treaties dealing with this matter require.²³

In considering the normative content of the right to development this briefing note challenges the assumption that the contemporary obligations of external states to 'fulfil' socio-economic rights abroad are necessarily of a secondary nature. The gross inequality that characterises world poverty today, the power differential that accompanies it, and the reality of global economic interdependence, serve to erode the legitimacy of this model that assigns secondary as opposed to shared responsibility to a developed state to fulfil the basic rights, for example, to food, water, and health of people elsewhere.

The figures are important to this claim. Six million children in developing countries die annually from malnutrition;²⁴ a person from a developing country dies of starvation every 3.6 seconds, the large majority of whom are children under the age of five;²⁵ women living in sub-Saharan Africa have a one in 16 chance of dying in pregnancy.²⁶ What these appalling figures fail to disclose on their own is that these maternal deaths are 100 times more likely to occur in sub-Saharan Africa than in high income countries;²⁷ only 10 per cent of the world's health resources service the needs of 90 per cent of the global population;²⁸ while there is

²¹ Here I limit my reference to states that are unable to alleviate poverty, working from an assumption that if the global economic environment better facilitated poverty alleviation most states would avail themselves of that opportunity. In any event, whether a state is 'unable' versus 'unwilling' does not impact on the determination of external responsibility. As Wenar notes, 'the difference [between whether the primary responsibility-holder is unable or unwilling] concerns only the appropriateness of blaming or punishing the person with the responsibility. We blame and punish those unwilling to discharge their responsibilities; we excuse those who are unable. Yet the appropriateness of blame and punishment makes no difference to the assignment of secondary responsibility... You are just as responsible for rescuing the drowning child whether the man on the park bench is callous, or whether he is rather



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enough food to feed everyone on the planet, one in three (640 million) children in developing countries are malnourished;²⁹ 44 per cent of the world's population

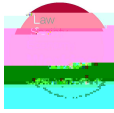


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THE STRUCTURAL APPROACH TO HUMAN RIGHTS: A CONTRIBUTION OF THE RIGHT TO DEVELOPMENT

Consistent with the ICESCR which preceded it, and followed by the entry into force of the Convention on the Rights of the Child a few years later, the DRD likewise entrenches the notion that states are duty-b

obligations, are constrained by the structural arrangements and actions of the



to people in far off places.⁴⁷ The duties of international cooperation for addressing poverty and underdevelopment that form its core, distinct from the classical human rights model, are thus inter-state duties with the beneficiaries being the poor of developing countries. Far from being unprecedented under international law, this horizontal aspect of human rights protection has a rich pedigree.⁴⁸ The Global Partnership for Development, envisioned under Millennium Development Goal 8, reflects its current expression.

LESSONS FROM THE SELF-DETERMINATION MODEL

As remarked earlier, notable parallels can be drawn between the collective right of self-determination and the right to development, beginning with the fact that both are understood as having external and internal dimensions. The principle of self-determination, as provided for in the UN Charter had its status elevated to that of a right in the two human rights Covenants only once 'the agitation in the context of decolonization raised both the stakes and the normative aspirations of the proponents'.⁴⁹ A similar trajectory can be traced with regard to the right to development which began to take shape as a result of the most recent wave of economic globalisation and the remonstrations by developing states against its particular forms of subjugation. Like self-determination, the external aspect of the right to development demands liberation from power and control located outside of the developing state.⁵⁰ The locus of power today is found among a select minority of states, including via their influence over international financial institutions, within international trade, and by transnational corporations

⁴⁷ As noted by the Working Group of Governmental Experts drafting the Declaration: 'The right to development implies that states and the international community as a whole should aim at the creation of local and national conditions whereby everyone may enjoy the rights set forth in the Universal Declaration of Human Rights and the International Covenants on Human Rights,' Report of the Working Group of Governmental Experts on the Right to Development (4th session, 9 December 1982) UN Doc E/CN4/1983/11 annex IV, Compilation of Proposals Made by the Experts, Pt I, Section II, art 6; see similarly, art 7. See further, n 34 above, 53.

⁴⁸ 'When certain states assert that the right to development is a right of states, their argument can only be understood as another way of remarking on their role as a vehicle in the realization of the human right to development. Although a state may need to claim the right to development from the international community before it can be realized by the people to whom it is owed, this does not make the right to development a right of states. It simply reflects the role of the state in an inter-state system.' n 34 above, 116. As Crawford explains, 'the government may be the agent through which the right can be vindicated; however, it will be acting in a secondary capacity, rather than as the holder of the right.' J. Crawford, 'Some Conclusions' in J. Crawford (ed), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 167. 'The state becomes the plenipotentiary or international dimension of peoples...' L. A. Obiora, 'Beyond the Rhetoric of a Right to Development' (1996) 18 *Law & Policy* 3-4 in M. wa Mutua, L.A. Obiora, and R. J. Krotoszynski Jr. (eds), Special Issue on the Right to Development, 369.

⁴⁹ P. Alston, 'Peoples' Rights: Their Rise and Fall,' in P. Alston (ed), *Peoples' Rights* (Oxford: Oxford University Press, 2001) 261.

⁵⁰ The DRD also emphasises the integrated nature of these two rights, both of which have their roots in struggles for liberation from external power and control. Article 1(2) of the Declaration holds that the right to development 'implies the full realization of the right of peoples to self-determination.'

headquartered in industrialised countries. Collectively they constitute what one commentator defines as 'active networks of global patronage and power'.⁵¹

In view of the importance of the right of self-determination it has obtained a status in international law whereby every state is held to have a legal interest in its protection. In the East Timor case, the International Court of Justice recognised the 'irreproachable' *erga omnes* character (providing an obligation owed towards all) of the principle of self-determination of peoples as evolved from the UN Charter.⁵² It stated likewise in its 2004 advisory opinion on the Construction of a Wall in the Occupied Palestinian Territory,⁵³ a position consistent with its view on the principle taken in previous cases.⁵⁴

While there exist a few remaining examples of external self-determination (due to ongoing foreign occupation and the perpetration of gross violations of human rights providing the legitimating conditions for secession), this dimension of self-determination was for the most part addressed by decolonisation. Today, much of the attention focuses on its internal application – the right to democratic governance of the people or constituent groups within the state in relations with their own government. The right to political self-determination was the meta-right of the twentieth century in which the responsibility of the international community in giving it effect was clearly recognised. The right to 'self-determined development' is the meta-right of the twenty-first century, advocating nothing short of a place that allows for the functional equality of representative developing states on the international stage. Like the *ius cogens* principle of self-determination the right to development is defined by a prominent external dimension, with its legal parameters taking shape in this period of indefensible world poverty.

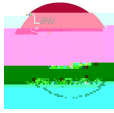
CONCLUSION

All aspects of contemporary life are influenced by the world beyond our borders and international human rights law is no exception. This truism invites a shift in mindset and demands that we inquire into the responsibilities, not merely of a developing state to its own people, as important as that is, but of the international

⁵¹ U. Baxi, *Human Rights in a Posthuman World* (Delhi: Oxford University Press, 2007) Ch. 4, The Development of the Right to Development, 153.

⁵² Case Concerning East Timor (Judgment) (Portugal v Australia) ICJ Rep [1995], [29].

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community of states. The structures that determine access to wealth and opportunity force us to question the circumstances under which various states might legitimately – and legally – constitute duty-bearers and what the scope of those duties might be. As we seek a meaningful application of the human rights norms articulated to shield those in need against the excesses of globalisation, we are confronted with both the significance of these standards, and the need for their evolutionary interpretation and improved enforcement.

The ideas of equity that animate the right to development are heretical to those with power and advantage since it proposes – in the language of international human rights – modifications to the very system that provides for their dominance. Yet, like the right of self-determination, the right to development while at times contentious and somewhat unconventional in its approach to