

TOWARDS A JUST INSTITUTIONAL ORDER: A COMMENTARY ON THE FIRST SESSION OF THE UN TASK FORCE ON THE RIGHT TO DEVELOPMENT

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Abstract

A novel mechanism that brings together human rights experts with the representatives of the international development, finance and trade institutions was recently established within the United Nations (UN) under the auspices of the Working Group on the Right to Development. At its first session, this High-Level Task Force adopted a range of recommendations on challenges to the Millennium Development Goals and on the importance of human rights impact assessments. In so doing, it took some initial steps towards integrating the international law of human rights, including the framework provided by the 1986 UN Declaration on the Right to Development, into the priority areas of these other international actors. The aim of this commentary is to provide insight into the conclusions adopted by the Task Force and to highlight the contribution of the human right to development to the topics under its consideration. It also seeks to reflect on the significance of human rights law to issues that were tabled, such as, accountability for human rights at the international level, international cooperation, economic growth, and trade-offs in the allocation of resources. In concluding that the Task Force must face head on the impediments to the realisation of human rights posed by the institutional arrangements for the governance of the international economic order, the article ends by offering suggestions for its future work.

1. THE TASK FORCE: ITS STRUCTURE AND MANDATE

The United Nations High-Level Task Force on the Implementation of the Right to Development¹ met for the first time from 13-17 December 2004. The Task Force was established by the Commission on Human Rights (CHR) at its 60th session in 2004 as a subsidiary body of the intergovernmental Working Group on the Right to Development.² Beset by a history within the UN of entrenched polarised views

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¹ Hereinafter, the Task Force.

² CHR Res. 2004/7, para. 9.

between Northern and Southern States on elements central to the right to development,³ the Task Force was given a limited mandate of one year, subject to review, along with the mandate of the Working Group itself.⁴ Despite this discordant legacy, the first Task Force session was a success, albeit a qualified one. Significantly, many of its conclusions were endorsed by the Working Group,⁵ and the Working Group's conclusions and recommendations were subsequently endorsed by the Commission on Human Rights at its 61st session in 2005. The mandates of both the Task Force and the Working Group were renewed.⁶

The Task Force was an innovative construct, since it sought to bring together, under the formal auspices of a UN human rights mechanism, human rights experts⁷ and representatives of the international development, finance and trade institutions.⁸ The objective was to strengthen the global partnership for development by bridging diverse perspectives. The outcome was intended to produce the start of a shared workable vision offering operationally constructive suggestions to the

³ While most if not all States agree that the right to development has both national and international dimensions, Northern States tend to place considerable emphasis on the fulfillment of human rights, including good governance and anti-corruption measures, in developing countries, while Southern countries emphasise the need for an international economic environment conducive to being able to develop economically, socially and culturally. So acrimonious were the debates at the 4th session of the Working Group on the Right to Development that it failed to adopt conclusions and recommendations, as it had done annually since its first session in 2000. In a final effort to save the Working Group and to make it a constructive deliberative forum able to produce meaningful recommendations, the Commission on Human Rights mandated the Office of the High Commissioner for Human Rights (OHCHR) to convene, prior to the 5th session of the Working Group, a High-Level Seminar on the Right to Development. The Seminar focused on the theme of Global Partnerships for Development (CHR Res. 2003/83, para. 5). In relative terms, the High-Level Seminar represented the art of the possible. It was an interesting, engaging, professional exchange between human rights experts and States and attended by the international financial institutions, specialised agencies and representatives of bilateral development agencies. Papers were commissioned by the OHCHR on a range of pertinent themes which informed the discussion. The goodwill generated by the Seminar spilled over into the session of the Working Group that followed bringing with it a willingness among States to engage. At the same time a new and able Chair was elected and the diplomatic skills of Ambassador Ibrahim Salama proved pivotal in facilitating widespread agreement on recommending the establishment of the Task Force.

⁴ CHR Res. 2004/7, para. 10.

⁵ *Report of the Working Group on the Right to Development*, 6th session, UN Doc. E/CN.4/2005/25, paras 35-38, 54(h) and 58. Australia, Canada and the USA chose to disassociate themselves from the conclusions and recommendations of the Working Group, but they did not block the consensus. *Report of the Working Group*, para. 32.

⁶ CHR Res. 2005/4, paras 4 and 11. The USA requested a roll-call vote. Of the 53 States members of the Commission, 48 voted in favour of the resolution on the right to development, Australia and the USA voted against it and Canada and Japan abstained (Gabon was not in the room).

⁷ The Task Force human rights members were: Silvio Baro Herrera (Cuba); Ellen Sirleaf-Johnson (Liberia), Chairperson; Stephen P. Marks (United States of America); Sabine von Schorlemer (Germany); and Arjun Sengupta (India).

⁸ World Bank, IMF, UNCTAD, UNICEF, UNDP, WTO. Note that the exact formation of the Task Force is somewhat ambiguous. While both the named human rights experts and the representatives of multilateral institutions (MLIs) constitute the Task Force in a general sense and it is that group as a whole which adopted the conclusions (*Report of the High-Level Task Force on the Implementation of the Right to Development*, UN Doc. E/CN.4/2005/WG.18.2, para. 29), technically, it is only the human rights experts that are noted as 'members' (*Report of the High-Level Task Force*, para. 7). The representatives of MLIs 'participated as experts' (*Report of the High-Level Task Force*, para. 8). The use of the term Task Force herein refers to the group as a whole.

Working Group in several areas relevant to the implementation of the right to development.

The subtext, it is proposed, was to create an opportunity for these two camps – the human rights community and the representatives of development and trade multilateral institutions (MLIs) – to come together and talk about the place of human rights in global governance and collective action and to see if common terminology and agreed approaches could be found. If so, the common positions would be widely communicated so as to influence global discourse and policy in areas critical to the fulfillment of human rights today. The right to development – the blueprint for which was given legal effect in the 1986 UN Declaration on the Right to Development (DRD)⁹ – underpinned the deliberations. The Declaration denotes human participation in and benefit from economic, social, cultural and political development processes; the individual and collective duty of States in the creation of national and international conditions conducive to the realisation of human rights; and it focuses on a process that is informed by the procedures and substance of the international law of human rights.

For its first report, the Task Force was mandated to provide recommendations on obstacles and challenges to the implementation of the Millennium Development Goals (MDGs) in relation to the right to development at the national and international levels; social impact assessments in the areas of trade and development at the national and international levels; and best practice in the implementation of the right to development, which was fed into the other two topics, largely as an underlying objective.¹⁰ The Task Force met in public. As such, States, NGOs and other stakeholders were present and able to contribute to its deliberations. The conclusions and recommendations were drafted in a private session of the Task Force members, including representatives of development, finance and trade institutions,¹¹ as well as invited experts.

An aim of this commentary is to bring the work of the Task Force to a larger audience. It seeks also in part to demystify the right to development and link some of its key components to the wider effort at the creation of a just global institutional order. This article provides the central conclusions adopted by the Task Force, reflects on some conceptual and practical issues from the point of view of

⁹ General Assembly Res. A/RES/41/128, 4 December 1986, annex, 41 UN GAOR Supp. (No. 53) 186, UN Doc. A/RES/41/53 (1986).

¹⁰ The Task Force was mandated by the Commission on Human Rights to provide analysis and recommendations to the 6th session of the Working Group on the Right to Development in these three areas (CHR Res. 2004/7). Prior to the start of the Task Force, the Chairperson-Rapporteur of the Working Group on the Right to Development gave notice that the issue of best practice would be considered within the scope of the other two mandates and not as a stand alone item. *Preliminary Concept Note* by the OHCHR, High-Level Task Force on the Right to Development, UN Doc. HR/GVA/TF/RTD/2004/2, para. 1.

¹¹ The extent of participation among multilateral institutions, development agencies and others varied considerably. The representative of the WTO gave a formal presentation during the public session, followed by discussion, but did not contribute to the drafting of the conclusions. The UNDP followed the entire session, but on this occasion its representative did not actively contribute. The absence of the ILO was apparently due to no fault of its own, and its attendance and participation will be encouraged in the future. UNCTAD and the IMF participated throughout, although perhaps greater contributions would have been welcomed. From among the multilateral institutions the World Bank reflected the most engaged and consistent contribution to the work of the Task Force. UNICEF was also present throughout and actively engaged.

international law and human rights that surfaced during the deliberations, and concludes by offering suggestions for the future work of the Task Force.

2. WHAT IS THE RIGHT TO DEVELOPMENT?

The right to development is understood today as a human right to development. It was first codified in the African Charter on Human and Peoples' Rights in 1981¹² and then found legal recognition at the global level with the adoption by the UN General Assembly of the Declaration on the Right to Development (1986). It is defined in Article 1 as '...an inalienable human right by virtue of which every human person is 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'.

Development has been defined in the preamble of the DRD as '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'.¹³ The DRD reflects a normative shift beyond development measured in terms of economic growth and physical infrastructure to a multidimensional definition of development linked specifically to the exercise and fulfillment of human rights.

The Declaration on the Right to Development identifies the human person as being at the centre of development both as participant and as beneficiary, and further, recognises the realisation of *all* human rights as integral to the right to development. Recognition of the indivisibility and interdependence of all human rights is repeatedly articulated in the Declaration,¹⁴ drawing on the totality of rights as an integrated whole. Taken together, human rights principles and standards are meant to inform this particular process of development with the fulfillment of human rights (be it progressive or immediate) as measures of the outcome of development.¹⁵ That rights taken together reflect more than the sum of their parts can be an important policy tool, serving to emphasise the value of norm coherence and increasing sensitivity to legitimate means of determining any trade-offs in rights that may come as a result of resource constraints. These issues are revisited below.

Insofar as economic growth is necessary for the sustained realisation of human rights, the right to development requires '...equality of opportunity for all in access to basic resources, education, health services, food, housing, employment and the fair distribution of income (...) [and that] [a]ppropriate economic and social reforms should be carried out with a view to eradicating all social injustices'.¹⁶ This has several implications: the search for growth, or any economic or social reforms,

¹² Organization of African Unity (OAU) Doc. CAB/LEG/67/3 rev. 5.

¹³ DRD, preambular para. 2.

¹⁴ DRD, preambular para. 11, Articles 6(2) and 9(1).

¹⁵ 'On the concept and content of the right to development as a right to a process', see Sengupta, A., *The Fourth Report of Independent Expert on the Right to Development*, UN Doc. E/CN.4/2002/WG.18/2, paras 2-4.

¹⁶ DRD, Article 8(1). Notably, this article refers specifically to the need for special measures to ensure that women have an active role in the development process.

must not violate any human right; it must target people or groups with unequal opportunity to access the minimum essential level of rights, for example the poor, minorities, indigenous peoples, children, women, people in rural areas; and it must have as its objective the elimination of injustices characterised by the 'non-fulfillment' of human rights, including poverty.¹⁷

While poverty reduction and development are not synonymous, as long as poverty is widespread, strategies aimed at the reduction of poverty will remain a central feature of development initiatives and can contribute to the fulfillment of the right to development. And though the right to development is not limited to poverty eradication, as long as global poverty is pervasive and regionally concentrated, tackling this scourge will remain a central feature of the right to development in light of its focus on the duty of international cooperation.¹⁸

As for all human rights, the primary responsibility for implementing the right to development belongs to States acting at the domestic level.¹⁹ The international community has the duty to cooperate to enable States to fulfill their obligations.²⁰ The beneficiaries of the right are individuals.²¹ The first paragraph of the Declaration reaffirms the purposes and principles of the UN Charter being the achievement of international cooperation in solving international economic and

¹⁷ While beyond the scope of this article, whether we should speak of poverty as reflecting the non-fulfillment of human rights or a denial of human rights or a violation of human rights is a topic of on-going and significant consideration. Likewise, relevant discussions continue as to whether efforts at the eradication of poverty benefit from distinguishing between poverty and extreme poverty.

¹⁸ Similarly, the human rights approach to poverty reduction might be understood as forming part of, but not exhausting, the human rights approach to development more broadly.

¹⁹ DRD, preambular, para. 15.

²⁰ DRD, Articles 3(2), 3(3), 4(1), 4(2) and 6. The scope and content of this duty is undergoing increasing jurisprudential elaboration notably by the Committee on Economic, Social and Cultural Rights in the context of the obligation of international assistance and cooperation and through specialist consideration. On the latter see, for example, Hunt, P., Nowak, M. and Osmani, S., *The Draft Guidelines on the Human Rights Approach to Poverty Reduction Strategies*, OHCHR, Geneva, 2002, Section B, The International Level.

In the context of international development and the alleviation of world poverty the term 'international community' is used more narrowly (as opposed to, for example, standard-setting within the UN which has the 'international community' constituting all UN Member States.) In the former application, it constitutes those States in a position to assist. States with the strongest duty to assist in the alleviation of world poverty are those that are: a) rich; b) who wield the greatest power, including in intergovernmental organisations and less formal formations such as the G8, that so influence international finance, trade and economics; and c) who benefit most from the existing global system. Among the defining conceptual elements of this idea of an international community more broadly, is that its members are to a certain degree interdependent in the satisfaction of their needs and rely on the same global environment in order to have them met. This interdependence informs the content of the duty of international cooperation. See Salomon, M.E., *International Cooperation and the Global Responsibility for Human Rights*, Oxford University Press, Oxford, forthcoming 2006. While international cooperation in the furtherance of human rights might take the form of North-North cooperation (for example, agreement being reached among EU states to abolish the trade distorting Common Agricultural Policy), and it could be argued to include South-South cooperation where the failure to cooperate undermines regional efforts at development, it is most commonly applied in relation to North-South arrangements and expectations.

²¹ DRD, preambular para. 14, Article 2(1). While the beneficiaries of the right are individuals, the right is exercised collectively, both by the people in the country as a whole, and by groups within the national collective. See further Salomon, M.E. and Sengupta, A., *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, MRG, London, 2003.

social problems and promoting human rights.²² This is soon followed by a reaffirmation of the entitlement of everyone, as per Article 28 of the Universal Declaration of Human Rights, 'to a social and international order in which all rights and freedoms (...) can be fully realized'.²³ Entrenching the notion that States are duty-bearers not only at the national level, but also at the international level, the right to development seeks to provide a juridical framework for oft-repeated claims against the public international order for the failure to enable the realisation of human rights for all. The debates and negotiations that took place during the drafting and adoption of the Declaration left no doubt that what the proponents of the right to development requested was an economic and social order based on equity and justice.²⁴ Hence, at the heart of the right to development lies the demand that global structural disadvantage be addressed.²⁵

In claiming the right to development from the international community a government acts as 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.²⁶ Where developing countries claim the right to development at the international level, their people are endowed with the right at the national level (development constituting a collective process) and the individual or group, while not asserting the right *per se*, may claim the establishment of conditions necessary for their development. The State is the plenipotentiary or international dimension of peoples.²⁷ A duty imposed on developed countries regarding the fulfillment of the right to development includes addressing structural impediments – the operation and reach of international financial institutions, international arrangements that entrench dependency, biases in the system and management of international trade. In an era of interdependence, the inter-State dimension of international human rights law comprises an increasingly vital area of enquiry.²⁸

²² DRD, preambular para. 1; UN Charter, Article 1(3), 59 Stat. 1031, TS 993, 3 Bevans 1193.

²³ DRD, preambular para. 3; UDHR General Assembly Res. 217A (III), 10 Dec. 1948, UN GAOR, 3rd Session Resolutions, pt. 1, at p. 71, UN Doc. A/810 (1948).

²⁴ See *Report of the Intergovernmental Working Group on the Right to Development*, UN Doc. E/CN.4/1983/11. See also, Sengupta, A., 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly*, Vol. 24, No. 4, 2002, p. 837, at pp. 849-850.

²⁵ See Salomon, M.E., 'The Right to Development and the Search For Global Justice', in: Andreassen, B.A. and Marks, S.P. (eds), *Processes of Expanding Freedom: The Right to Development and Human Rights in Development*, Harvard University Press, Cambridge, forthcoming 2005.

²⁶ Crawford, J., 'The Rights of Peoples: Some Conclusions', in: Crawford, J. (ed.), *The Rights of Peoples*, Clarendon Press, Oxford, 1988, p. 165, at p. 167.

²⁷ Obiora, L.A., 'Beyond the Rhetoric of a Right to Development', *Law and Policy*, Vol. 18, Nos 3-4, 1996, p. 366, at p. 369.

²⁸ On extraterritorial human rights obligations and obligations of international cooperation, see Künnemann, R., *Report to ICESCR on the Effect of German Policies on Social Human Rights in the South*, The Foodfirst Information and Action Network, 2001 (available at: www.fian.org); Skogly, S.I. and Gibney, M., 'Transnational Human Rights Obligations', *Human Rights Quarterly*, Vol. 24, No. 3, 2002, p. 781; *Duties sans Frontières: Human Rights and Global Social Justice*, International Council on Human Rights Policy, Geneva, 2003; Coomans, F. and Kamminga, M.T. (eds), *Extraterritorial Application of Human Rights Treaties*, Intersentia, Antwerp, 2004; Salomon, *op.cit.* (note 20).

2.1. Towards a Common Understanding

The preliminary aim of reaching a shared workable vision of the right to development between human rights experts and the representatives of the MLIs was met by the Task Force. This was illustrated in part by the fact that the Task Force agreed that a number of principles underlying the Declaration on the Right to Development guided the work of international development and financial institutions. These included

the indivisibility and interdependence of all human rights; a holistic view of human rights and development; the multidimensional nature of development strategies, including poverty elimination; the importance of empowering people as active agents in the development process, with rights and duties; and the centrality of the individual as the subject of human rights and the beneficiary of development. It [further] recognised that the role and responsibilities of the State and the international community with respect to the development process were also important in the implementation of the right to development.²⁹

That these agreed tenets were drawn from the formal presentation made by the representative of the World Bank perhaps adds to their significance.

However, despite authoritative views that the right to development is inclusive of, yet broader than, the human rights-based approach to development,³⁰ the Task Force could not reach a common position on this matter. In the end, it could only accept that '[f]or some [members], the terminology of a human rights-based approach was a sufficient reference; for others, the concept of the right to development, as defined in the Declaration on the Right to Development, embraced and exceeded a rights-based approach'.³¹ Under the human rights-based approach, human rights standards and principles as provided for in international law should be integrated into development processes at all levels, and development should be aimed at furthering human rights. This model seeks to develop the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.³² The emphasis is on rights not needs, entitlements not charity, addressing the causes of the denial of rights and not just the symptoms. The tools of development (programmes, policies, technical assistance) are meant to play an instrumental role designed to further the realisation of human rights.

The Working Group subsequently put an end to the debate. It 'recognised the multifaceted nature of the right to development [and] agreed that a rights-based approach to (...) development contributes to the realisation of the right to

²⁹ *Report of the High-Level Task Force, op.cit.* (note 8), para. 30.

³⁰ Marks, S.P., *The Human Rights Framework for Development: Seven Approaches*, 2003, p. 16 (available at: www.hsph.harvard.edu/fxbcenter/); Sengupta also sees the right to development as broader than the rights-based approach including economic growth with equity as a constituent element of the right. Sengupta, A., *The Fifth Report of the Independent Expert on the Right to Development: Frameworks for Development Cooperation and the Right to Development*, UN Doc. E/CN.4/2002/WG.18/6, paras 8-12.

³¹ *Report of the High-Level Task Force, op.cit.* (note 8), para. 28.

³² See, generally, *The Second UN Interagency Workshop on Implementing a Human Rights-Based Approach in the Context of UN Reform*, 5-7 May 2003, Stamford, USA, Attachment 1: The Human Rights-Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies, pp. 17-18.

development while it does not exhaust its implications and requirements at both the national and international levels'.³³ Pragmatically, the Working Group 'encourage[d] all stakeholders – Member States, experts, development practitioners, international institutions and civil society – to move towards a common understanding of the substantive components of the right to development regardless of the possible nuances in the use of terminology'.³⁴ One implication of the Working Group's conclusions is that member States, individually and collectively, are responsible to pursue dialogue through their membership in various agencies and organisations.³⁵ This is consistent with the language in the Declaration, reaffirmed by both the Task Force and the Working Group. Both bodies noted that

[s]tates have the primary responsibility for the creation of the national and international conditions favourable to the realisation of the right to development and that they have the duty to take steps, individually and collectively, at the national and the international levels, to formulate policies and practices with a view to facilitating the full realisation of the right to development.³⁶

The right to development has been reaffirmed by the international community of States in every world conference declaration adopted since 1986 and forms the normative basis of the Millennium Declaration's call to eradicate extreme poverty.³⁷ These standard-setting documents recommit the international community of States to address collectively the key imperatives of our time among them, the urgent need for an inclusive and equitable globalisation.³⁸ The right to development, with its focus on global structural obstacles to the realisation of human rights, duties of international cooperation, the need for enabling environments at all levels, and rights-focused development processes and outcomes, makes it a highly relevant juridical framework to the challenges of the 21st century.³⁹

³³ *Report of the Working Group, op.cit.* (note 5), para. 46.

³⁴ *Ibidem*, para. 38.

³⁵ See the Working Group on the Right to Development, 6th session, *Opening Statement of the Chairperson-Rapporteur, Ambassador Salama*, para. 14.

³⁶ DRD, Article 3(1); *Report of the High-Level Task Force, op.cit.* (note 8), para. 26; *Report of the Working Group, op.cit.* (note 5), para. 40.

³⁷ General Assembly Res. A/55/2 (2000), III. Development and poverty eradication, para. 11. 'We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want'. V. Human rights, democracy and good governance, para. 24. 'We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development'.

³⁸ 'We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed...' Millennium Declaration, para. 5. The global agenda for the 21st century focuses on the interrelated imperatives of development, security and human rights. See also Report of the UN Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005.

³⁹ On the right to development and the contemporary re-conceptualisation of the purposes of international law, see Salomon, *op.cit.* (note 20).

The right to development as a right under international law, the commitment the international community has shown in seeing it given effect rhetorically if not in practice, and its process of substantive legal maturation creates expectations that it will be fulfilled. As a universal and inalienable right it cannot be retracted, subjects must be made capable of claiming it, and duty-bearers are endowed with the responsibility to uphold it, and to remedy its violation. So while still undergoing a process by which its normative precision might be entrenched, the right to development is increasingly finding its place within international human rights law and contributing to the standards against which states, acting not only nationally but internationally, will be judged.

3. ACCOUNTABILITY AND HUMAN RIGHTS

The accountability failures that undermine the attainment of the Millennium Development Goals were listed among the challenges to the implementation of the MDGs identified by the Task Force,⁴⁰ a view subsequently adopted by the Working Group.⁴¹ The consideration of human rights accountability generally can be seen in several aspects of the Task Force's work: a) as a distinctive feature of the human rights contribution to the MDGs; b) in the context of social impact assessments; and c) with regard to the duty of international cooperation.

3.1. *The MDGs and Human Rights*

For every right there are corresponding obligations, that is, rights create duties and thus duty-bearers. Human rights require the identification of responsibilities and the attribution of accountability, including for failure to exercise due diligence in meeting those responsibilities. It entrenches legal rights and actors are charged with a role in the prevention of having those rights violated and of pro-actively working to seeing them fulfilled. The MDGs⁴² should be explicitly linked to existing human rights and imperfect obligations need to be rendered perfect through the identification of duty-bearers at all levels.⁴³ This also serves the purpose of highlighting which rights are left outside of the MDG framework. To these and

⁴⁰ *Report of the High-Level Task Force, op.cit.* (note 8), para. 40.

⁴¹ *Report of the Working Group, op.cit.* (note 5), para. 51.

⁴² The MDGs are: a reduction by half of the proportion of people living in extreme poverty; achieving universal primary education; promoting gender equality; reducing the child mortality rate; improving maternal health; combating HIV/AIDS and other diseases; furthering sustainable development which includes reducing by half the proportion of people without access to safe drinking water and improving the lives of slum dwellers; developing a global partnership for development which includes developing fair trade rules, improving governance nationally and internationally and committing to poverty reduction nationally and internationally. The MDGs now dominate the policy objectives of many States and development agencies to the year 2015.

⁴³ For Sen on Immanuel Kant's perfect and imperfect obligations, see Sen, A., *Development as Freedom*, Oxford University Press, Oxford, 1999, pp. 230-231. For a concise sum of Kant, Dworkin and Sen on this subject, see Marks, *op.cit.* (note 30), p. 17. See also Sengupta, A., *The Second Report of the Independent Expert on the Right to Development*, UN Doc. A/55/306 (2001), paras 6-9; and the *Fourth Report, op.cit.* (note 15), paras 15 and 34-35. See also Alston, P., *A Human Rights Perspective on the Millennium Development Goals*, Contribution to the UN Millennium Project Task Force on Poverty and Economic Development, 2004.

other ends,⁴⁴ the Task Force recommended that a clear and rigorous mapping of the Millennium Development Goals against the provisions of the relevant international human rights instruments be made available to policy makers and development practitioners. The framework should benefit from the interpretation and application of international human rights law by drawing upon the work of the treaty-bodies and special procedures.⁴⁵ The Working Group endorsed this recommendation and mandated the Office of the High Commissioner for Human Rights to undertake the study.⁴⁶

Among the major challenges for the implementation of the MDGs as identified by the Task Force was to put into practice several distinctive features of human rights, including the right to development framework. First, strategies for achieving the MDGs should draw on the specificity of human rights that are derived from universally recognised and legally binding standards and principles reflected in the relevant human rights instruments. Second, there is a need to emphasise the notion of indivisibility and interdependence of human rights in the context of formulating coherent policies and holistic development strategies. Third, there is scope to make use of the human rights framework and empowering discourse for mobilising civil society to participate in and monitor MDG development efforts. Fourth, the need for human rights accountability to inform the MDG process at all levels was recognised by the Task Force and it remarked on the need ‘to establish and make use of clearly defined accountability mechanisms at the national and international levels which are participatory in nature, accessible, transparent and effective and are based on identification of rights-holders, duty-bearers and procedures for claiming human rights through judicial or other means’.⁴⁷

3.2. Social Impact Assessments

Under international human rights law States have both negative and positive obligations. They have obligations to abstain from undertaking that which would violate human rights, and obligations of action to fulfil human rights, including to protect people from violations by third parties. So while human rights violations carried out by public authorities are directly imputable to the State, an act which violates human rights and which is not directly imputable to the State since, for example, it was carried out by private actors or the perpetrator is unknown, can still trigger the responsibility of the State. The State may not be responsible for the act itself, but it may be responsible for its failure to prevent the violation or to respond adequately to it.⁴⁸ At the heart of this standard of due diligence lies the premise that the duty-bearer may have failed in meeting its positive human rights obligations if it could have foreseen that its conduct and decisions would lead to violations occurring, that is, if it knew or ought to have known of the possible repercussions and failed to take measures within the scope of its powers which, judged reasonably,

⁴⁴ ‘...as a means of mobilizing, strengthening and sustaining efforts to implement the Goals at the national and the international levels.’ *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 45.

⁴⁵ *Idem*.

⁴⁶ *Report of the Working Group*, *op.cit.* (note 5), para. 54(j).

⁴⁷ *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 37.

⁴⁸ *Velasquez Rodriguez vs Honduras*, Inter-American Court of Human Rights, Series C, No. 4, 1988, para. 172.

might have been expected to avoid said risk.⁴⁹ This ‘duty to prevent’⁵⁰ and the applicability of the standard of due diligence at the international level was raised during the proceedings of the Task Force and discussed, albeit briefly, in the context of the need for social impact assessments (SIA) in the areas of trade and development.⁵¹ It is suggested here that there is scope for its further consideration by the Task Force in future. Some elements in this regard will be highlighted in the section on Collective State Action.

Social impact assessments involve the use of analytic tools to examine the broader impact of policies and programmes on the well-being of people (especially the poor), the impact of the stakeholders on the reform process and the response of the people to opportunities created by policy measures.⁵² Yet, as noted by the OHCHR, ‘...the explicit use of human rights norms, standards and principles in the available initiatives for assessment of trade and development policies is practically absent’.⁵³ A separate but related issue to assessing the effects of trade policies on human rights in order to prevent violations, is the central human rights principle of providing for a system of accountability.

The discussion of the Task Force around social impact assessments focused on the methods and means of integrating SIA into the World Trade Organization’s Trade Policy Review Mechanism (TPRM) and on the extent to which *ex ante* assessments – assessments taken prior to, during or at the end of a round of trade negotiations – can be employed by governments to measure the impact of trade policies on the poor and socially vulnerable. The function of the TPRM is to undertake periodic reviews to assess the impact of a Member’s trade policies and practices on the multilateral trading system⁵⁴ and constitutes an *ex post* assessment – undertaken after a period of implementation. The review is undertaken by the Trade Policy Review Body, a body made up of WTO members. The two reports upon

⁴⁹ *Osman vs UK*, Application, No. 87/1997/871/1083, ECtHR, October 1998, para. 116. See further *Mastromatteo vs Italy*, October 2002, Application No. 37703/97, ECtHR, para. 68; *Velasquez Rodriguez vs Honduras*, *op.cit.* (note 48), paras 172 and 174; Human Rights Committee, General Comment No. 31, *The Nature of Legal Obligations Imposed on States Parties to the Covenant (Article 2)*, 80th session, 2004, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 8. On the topic of due diligence and the responsibilities of the international community, see Salomon, *loc.cit.* (note 25).

⁵⁰ *Velasquez Rodriguez vs Honduras*, *supra* note 48, para. 174.

⁵¹ The consideration of social impact assessments focused on international trade policy.

⁵² *Preliminary Concept Note* by the OHCHR, *op.cit.* (note 10), para. 10. See, generally, the *Preliminary Concept Note* for a helpful overview of social impact assessments.

⁵³ *Ibidem*, para. 11. The OHCHR does explain however that a UNEP Reference Manual for the Integrated Assessment of Trade-Related Policies could be used to study economic, environmental and social effects of trade measures (para. 11), and notes that social impact assessments of development policies and programmes at country level is reasonably well developed, particular mention being made of the joint World Bank-IMF SIA of economic policies (para. 13). Robert Howse, an invited expert, remarked that the World Bank’s ‘empowerment’ framework could provide a blueprint for the integration of rights into SIAs, a view adopted by the Task Force. *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 43. See, generally, Howse, R., *Social Impact Assessment in the Areas of Trade and Development at the National and International Levels*, prepared for the OHCHR (2004).

⁵⁴ One issue of concern is the TPRM focus on the trading system and not on people. See, generally, Howse, *op.cit.* (note 53), p. 18 *et seq.* Also, the trade policy review process monitors the extent to which member States apply WTO rules, they do not examine whether TNCs apply these (or any other) rules. Given that it is the TNCs who are the major traders, and that their activities go unreviewed by the WTO, methods of monitoring compliance are not comprehensive.

which the review is based, are prepared by the government under review and an economist at the WTO secretariat.⁵⁵

The language adopted by the Task Force on the integration of human rights impact assessments into WTO trade review via its TRPM was cautious. It remarked simply that: 'States should be encouraged to undertake independent assessments of the impacts of trade agreements on poverty, human rights and other social aspects, and these assessments should be taken into account in the context of the Trade Policy Review Mechanism process and future trade negotiations...'⁵⁶ And although the issue of having formal assessments conducted within the trade policy review process by civil society was raised, there seemed to be little support for it among trade representatives and the World Bank. With respect to the possibility of *ex ante* reviews, the view was expressed by the World Bank that poverty and social impact assessments, as a relatively new analytical tool, are unrefined and still deficient in being able to measure a results chain which in the area of trade policy is especially complex. Additionally, it was remarked that for impact assessments to be effective as a measurement tool, governments need reliable statistics which are often lacking, especially in the poorest countries. Elsewhere, the important point has been made that complex technical tools should not inadvertently contribute to taking debates out of the hands of parliaments and civil society, and leaving it in the hands of officials.⁵⁷ These issues notwithstanding, the importance of *ex ante* assessments was noted,⁵⁸ including in terms of 'special and differential treatment'⁵⁹ being built into trade agreements.⁶⁰

Vander Stichele, M., *Towards a World Transnational' Organisation?*, The World Trade Organisation Series, No. 3, Transnational Institute, 1998, p. 10, as cited in: Dommen, C., *Adding Values: Business, the WTO and Human Rights*, working paper, International Council on Human Rights Policy, Geneva, 2002, p. 7 (available at: www.ichrp.org).

⁵⁵ Notably, Howse points out that: 'The TPRM operates on the typical assumption that greater "liberalization" of trade and trade-related domestic policies will enhance domestic welfare in the relevant sense, and thus these reviews do not seek actually to measure the real effect of trade rules and their implementation on the achievement of the objectives of the WTO system, such as "raising standards of living" and "sustainable development" [goals of the organization as per the WTO Agreement].' Howse, *op.cit.* (note 53), pp. 18-19.

⁵⁶ *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 51.

⁵⁷ Hanlon, J., *Response to the UK Department for International Development draft paper on Partnerships for Poverty Reduction: Changing Aid 'Conditionality'*, September 2004, Open University, Milton Keynes, UK, November 2004 (on file with author).

⁵⁸ 'The Task Force agreed that social impact assessments provide important methodological tools to promote evidence-based policy formulation by including distributional and social effects in the *ex ante* analysis of policy reforms and agreements...' *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 41.

⁵⁹ Preferential treatment that WTO rules accord to developing countries.

⁶⁰ The language eventually adopted was quite general: 'The Task Force recommends that States give considered attention to special and differential treatment provisions under the World Trade Organization agreements with a view to enhancing their effectiveness as an instrument to harmonise human rights and multilateral trade requirements.' *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 52.

3.3. Collective State Action

The Task Force, however, did not address more fully the inter-State dimension of contemporary human rights obligations as opposed to the familiar vertical relationship between the State and the individual. The human rights/social impact assessments might begin at the point of evaluating the existing negotiating position of the country in question in order to ascertain whether that country's negotiating position is optimal from the perspective of the fulfillment of its human rights obligations and thus in preventing negative social impact domestically.⁶¹ The application of the due diligence standard at the international level would seem to imply a collective requirement for these types of predictive measures, since the Member States of international organisations are under an obligation of due diligence which compels them to ensure that their transfer of competences to an organisation does not weaken their responsibilities under international human rights law.⁶²

Greater consideration of the inter-State dimension required in meeting human rights obligations would be important in light of State duties of international cooperation central to the contemporary protection and promotion of human rights.⁶³ Further reflection on this inter-State component would seem necessary to strengthen initially the requirements of States to refrain from acts that make it more difficult for people to realise their human rights, to remove obstacles that impede the realisation of human rights, and to guarantee that decisions, policies and agreements at the international level do not undermine the ability of a State to fulfill human rights domestically. In light of the endorsement by the international community in the Millennium Declaration and in the subsequent MDGs,⁶⁴ international cooperation includes the clear 'commitment to making the right to development a reality for everyone and to freeing the entire human race from want'.⁶⁵ It also establishes a duty to work actively towards equitable multilateral trading, investment and financial systems that are conducive to poverty eradication, development and the realisation of human rights.⁶⁶

In considering positive obligations, the Preamble to the WTO Agreement has free trade as an objective of a system aimed at the fulfillment of basic human values. The preambular references to raising standards of living, ensuring full employment and to sustainable development reflect the objective that human development and well-being is a central concern of the trade regime under the WTO.⁶⁷ This position

⁶¹ See Howse, *op.cit.* (note 53), p. 12.

⁶² Sands, P. and Klein, P., *Bowett's Law of International Institutions*, 5th ed., Sweet and Maxwell, London, 2001, pp. 524–525. See, for example, the *Matthews Case* in which the European Court of Human Rights held that: the '[European Convention on Human Rights] does not exclude the transfer of competences to international organizations provided that the Convention rights continue to be "secured"'. Member States' responsibility therefore continues even after such a transfer.' *Matthews vs. the United Kingdom* (1999), Application No. 24833/94, ECtHR, para. 32.

⁶³ UN Charter, Articles 55 and 56; ICESCR, Articles 2(1), 11, 15, 22 and 23; DRD, Article 4(1); CRC, Articles 4, 17(b), 24(4) and 28(3).

⁶⁴ Millennium Declaration, para. 13; MDG 8.

⁶⁵ *Ibidem*, para. 11.

⁶⁶ *Ibidem*, para. 13. See further Hunt, Nowak and Osmani, *op.cit.* (note 20), para. 216.

⁶⁷ Agreement Establishing the World Trade Organization (1994), 1867 UNTS 31874, preambular para. 1.

was in fact endorsed by the WTO representative at the first session of the Working Group on the Right to Development in 2000, when he claimed that the WTO shared the same objectives for development as those set out in the UN Charter and the Universal Declaration of Human Rights.⁶⁸ The mandate of the TPRM, (the treaty for which is annexed to the WTO Agreement), while not explicitly stated in human rights terms could be expected to include as a start 'analyse of the affect of trade rules and policies on human capacities, the protection of which is a fundamental dimension of human rights as related to development'.⁶⁹

The Declaration on the Right to Development incorporates explicitly both the inter-State and vertical dimensions of human rights law illustrated by the references to '...equality of opportunity for development [being] a prerogative both of nations and of individuals who make up nations',⁷⁰ and noting that '[s]tates 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...'⁷¹ The 'prerogative' and the 'right' can be exercised by the State against those with the power to deny or constrain their capacity to formulate policies that improve the well-being of their populace and further their inalienable right to development.⁷² Conditions that give rise to the types of claims that the right to development seeks to address was highlighted recently by the Vice-President for External Affairs of the World Bank. When asked how the rich countries are doing on trade, he responded: 'Trade remains the most damaging of the [macro] policies, the most economically illiterate, the most politically short-sighted, the most environmentally destructive, and the most socially ineffective form of intervention of the rich countries in the economy'.⁷³

The Working Group endorsed the objectives outlined by the Task Force agreeing that 'it is necessary to consider introducing and strengthening human rights standards and principles in undertaking impact assessments of trade and development rules and policies at both national and international levels (...) [as] critical for the implementation of the right to development'.⁷⁴ It noted the need to develop suitable tools and a methodology to support human rights impact assessments for the right to development, as well as the urgent need to build national statistical and other capacities.⁷⁵ In encouraging the use of human rights impact assessments in guiding public policy at the national and international levels⁷⁶ the Working Group recommended that '[s]tates be encouraged to undertake independent impact assessments of trade agreements on the right to development, as a potentially useful instrument (...) and consider using these

⁶⁸ *Report of the open-ended Working Group on the Right to Development*, 1st session, 18–22 September 2000, UN Doc. E/CN.4/2001/26, para. 112.

⁶⁹ Howse, *op.cit.* (note 53), p. 18. See, generally, *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 51.

⁷⁰ DRD, preambular para. 17.

⁷¹ DRD, Article 2(3).

⁷² See Orford, A., 'Globalization and the Right to Development', in: Alston, P. (ed.), *Peoples' Rights*, Oxford University Press, Oxford, 2001, p. 127, at p. 137.

⁷³ Goldin, I., *Meeting the Challenge of Development – An Action Agenda to Achieve the Millennium Development Goals*, London School of Economics, 3 February 2005.

⁷⁴ *Report of the Working Group*, *op.cit.* (note 5), para. 52.

⁷⁵ *Ibidem*, para. 53.

⁷⁶ *Idem*.

assessments in the context of all the relevant international trade forums, including the Trade Policy Review Mechanism and future trade negotiations...'⁷⁷

From a human rights perspective, impact assessments are important in order to prevent violations, notably among marginalised groups most likely to be negatively affected by international policies that do not explicitly include the protection of their rights. These assessments may also be valuable in the effort to remedy existing violations that may have occurred, *inter alia*, as a result of a failure of States within the WTO to have taken the necessary steps to prevent violations in the negotiation and implementation of trade agreements. While still in the formative stages of development,⁷⁸ human rights impact assessments aim to contribute to a system of accountability both at the domestic level and at the international level.⁷⁹ The application of the due diligence standard may be relevant to the establishment of a system of accountability as described above, since it does not require that a direct causal relationship be established between a perpetrator and a violation, rather, it demands that the necessary steps be taken to avoid the violation and to remedy the breach should it occur. In fact, the failure of States to commit to elaborating and applying an effective system for the assessment of trade and development programmes and policies on the exercise of human rights in and of itself may contravene the due diligence standard. Giving effect to these obligations of conduct, which require action reasonably calculated to realise the enjoyment of rights, would be an important component in fulfilling the right to development which entails a particular process of development.⁸⁰

In sum, consistent with the right to development approach there would seem to be a need to give effect to the interdependence of all human rights through the creation of comprehensive indicators based on internationally recognised civil, cultural, economic, political and social rights. Greater consideration also needs to be given to the inter-State obligations envisioned under international law for the protection and observance of human rights and both the national and international

⁷⁷ *Ibidem*, para. 54(e). Australia disassociated itself from the conclusions and recommendations of the 6th session of the Working Group on the Right to Development adopted by consensus. It was vocal in insisting that there be no mention of mainstreaming the right to development into the WTO or in the TPRM, points of central importance to developing countries collectively represented through the negotiating block known as the Non-Aligned Movement (NAM). The other States to disassociate themselves from the final document were the USA and Canada (*ibidem*, para. 32). On the politics of the right to development, see Marks, S.P., 'The Human Right to Development: Between Rhetoric and Reality', *Harvard Human Rights Journal*, Vol. 17, Spring, 2004, pp. 137-168.

⁷⁸ Walker notes four practical difficulties in undertaking human rights impact assessments: the complexity of undertaking HRIAs of trade rules and policies; the time needed to undertake such assessments; the need for political support from governments in light of their sensitivity to having their human rights performance measured, and; the identification of technical and financial support, particularly for governments of poor countries. Walker, A., 'Human Rights Impact Assessments of Trade-Related Policies', in: Gehring, M.W. and Cordonier Segger, M-C. (eds), *Sustainable Developments in World Trade Law and Jurisprudence*, Kluwer Law International, The Hague, forthcoming 2005.

⁷⁹ For example, indicators in relation to participation rights might reflect the need for greater democratic accountability through strengthening the role of national parliaments in scrutinising the positions taken by governments in international fora. See *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Participation and its Application in the Context of Globalization*, UN Doc. E/CN.4/2005/41, para. 27.

⁸⁰ On the right to development as a right to a particular process of development, see Sengupta, *op.cit.* (note 43), paras 15-26.

dimensions of trade and development-related human rights impact should be measured. Ultimately, a value of these impact assessments would be reflected in their ability to prevent human rights violations, and in strengthening a system of accountability and ensuring the provision of remedies.

3.4. International Cooperation Indicators

The duty of international cooperation has always been a contentious issue in the Working Group. Habitually, Northern States fear any suggestion that they are bound to provide financial assistance to developing countries⁸¹ (maintaining a reductive approach to the duty that invites much more than the transfer of resources) and Southern States emphasise that the duty of international cooperation requires addressing the inequities that plague the international economy.⁸² The Task Force session, the public meetings of which were attended by a number of State representatives,⁸³ saw these on-going concerns revisited.⁸⁴ However a number of other issues were put on the table, and while largely left unexplored, spoke to some of the key matters in the protection and promotion of human rights today.

Included amongst these issues were the limited evaluation and lack of a uniform system for assessment of international cooperation in the context of MDG 8 – to Develop a Global Partnership for Development. Not surprisingly, this mirrors a weak point in the concept and practice of the right to development, despite the centrality of the duty of cooperation in the Declaration on the Right to Development. The self-

⁸¹ The Chairperson-Rapporteur, keen to have the Commission on Human Rights renew the mandate of the Task Force, sought to reassure Northern States in his opening statement to the Commission by remarking that: 'Although the Working Group avoided definitional and legalistic debates, both the letter and the spirit of its agreed conclusion clearly indicate that the right to development is not a right to assistance (...) [on the question of] the legal nature of the duty of states to cooperate at the international level for the realization of the right to development, the agreed conclusions and recommendations addressed this question in its proper perspective and right sequence by stating that "mutual commitments, as part of the duty of international cooperation, can lead to specific binding arrangements between cooperating partners to meet the right to development requirements. Such arrangements can only be defined and agreed upon through genuine negotiations".' For a more expansive view on the issue of international cooperation and the right to development, see Salomon and Sengupta, *op.cit.* (note 21).

⁸² See, for example, *Report of the Working Group, op.cit.* (note 5), para. 22: '(a) the right to adequate financing for development; (b) the right to equitable global trade rules; (c) the right to fair access to knowledge and technology; (d) the right not to be subjected to discriminatory treatment in the global economy on the basis of political or other non-economic reasons; and (e) the right to effective participation in international economic decision-making'. At points the growing importance of South-South cooperation, both in terms of trade relations as well as development cooperation was also raised.

⁸³ For an attendance list see, *Report of the High-Level Task Force, op.cit.* (note 8), paras 8-13.

⁸⁴ For example, Sweden, among the few donor countries to have actually met the MDG target of 0.7 percent GNI in overseas development assistance, nonetheless felt the need to state: 'our position is no secret we have no legal obligation of international cooperation, we do it out of a sense of international solidarity (...) we have a moral obligation (...) a shared responsibility'. The USA, while rejecting a 'right' to development, recognised its 'duty to assist', as did Sweden. Notably, the European Union made a bold start by reaffirming the language of the Declaration on the Right to Development in its opening statement presented by the Ambassador of the Netherlands remarking that '...states have a duty to cooperate with each other in ensuring development and eliminating obstacles to development...' This debate continued into the Working Group. See the compromise language in *Report of the Working Group, op.cit.* (note 5), para. 44.

assessment reports by some of the Organization for Economic Cooperation and Development (DAC) donors, and the MDG country reports by developed countries on the delivery of the commitments under MDG 8, were largely felt to be insufficient in this regard. It remained unclear as to who was being reported to, and whether the reports could be better linked to reporting under the human rights treaties.

The need to develop better indicators and measurements to assess international cooperation was evident. Based on the Task Force's proposal for its future work, the Working Group recommended it examine Millennium Development Goal 8. The Task Force was charged with suggesting criteria for the periodic evaluation of Goal 8, the aim being to improve the effectiveness of global partnerships with regard to the realisation of the right to development.⁸⁵ This proposed mandate was subsequently endorsed by the Commission on Human Rights.⁸⁶

Since the number of actors and the volume of actions make it increasingly difficult to determine causal links in the area of poverty-related human rights violations, these indicators could provide an important step in facilitating the attribution of responsibility and elaborating systems of global accountability. It could also help to refine the contours and content of international cooperation as it pertains to international human rights law more generally (as found in the International Covenant on Economic, Social and Cultural Rights⁸⁷ and in the Convention on the Rights of the Child).⁸⁸ In light of their complementary work, the relevant treaty-bodies, special procedures and experts of the Sub-Commission on the Promotion and Protection of Human Rights should be invited to contribute to the forthcoming session.⁸⁹

In the context of considering MDG 8 on development partnerships some time was dedicated to hearing from bilateral donor agencies on the nature and degree of human rights integration in their development programmes.⁹⁰ However, critical issues as to whether the focus on human rights and development has actually led to greater donor accountability was not broached,⁹¹ nor was the issue of the known lack of policy coherence developed in any substantial way which sees, for example, a rights-based approach inform a donor government's development cooperation, at the same time that its trade policies might be undermining human rights abroad.⁹²

⁸⁵ *Ibidem*, para. 54(i).

⁸⁶ CHR Res. 2005/4, para. 5.

⁸⁷ General Assembly Res. A/RES/2200A (XXI), 993 UNTS 3.

⁸⁸ General Assembly Res. 44/25, annex, 44 UN GAOR Supp. (no. 49), at 167, UN Doc. A/44/49 (1989).

⁸⁹ In 2003 the Sub-Commission was mandated by the Commission on Human Rights: '...to prepare a concept document establishing options for the implementation of the right to development and their feasibility, *inter alia*, an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address...' CHR Res. 2003/83, para. 2.

⁹⁰ Summaries are provided in the *Report of the High-Level Task Force*, *op.cit.* (note 8).

⁹¹ On this topic, see Uvin, P., *Can Human Rights Make Aid Agencies More Accountable?*, Human Rights and Poverty Reduction Meeting Series, 31 January 2005, Overseas Development Institute (summary available at: www.odi.org.uk/speeches/rights2005).

⁹² Policy coherence was discussed in the context of perhaps invoking Article XX on General Exceptions of the General Agreement on Tariffs and Trade (1994) on human rights grounds. Article XX allows for measures to be taken to protect, *inter alia*, human life and the environment, and to provide domestic support in several areas. Sweden mentioned the issue of policy coherence

Remarking that Article XVIII of the General Agreement on Tariffs and Trade (1994)⁹³ allows developing countries to suspend concessions to develop domestic industries, the WTO representative spoke about the demands of developing countries to create domestic ‘policy space’ as part of MDG 8. This compelled the Chair of the Task Force to query whether the multilateral trading system allows for sufficient flexibility for the realisation of human rights and of the MDGs. A sovereign government’s right to regulate in the public interest⁹⁴ may have similar objectives to the idea of national governments using their human rights obligations as a shield against international economic policies that push members of their society, often the poor and most vulnerable, below the basic international minimum threshold.⁹⁵

The issue of strengthening the national policy space in order to allow for developing countries to pursue their own national objectives (consistent with and in pursuit of the fulfillment of their human rights obligations) was noted although not developed by the Task Force.⁹⁶ This issue of space for national economic policy in the implementation of the right to development figured among the topics targeted by the Working Group to guide future work,⁹⁷ although it was a point of

in its presentation on development cooperation (*Report of the High-Level Task Force, op.cit.* (note 8), para. 18), and the Task Force linked *ex ante* trade policy assessment as a potential instrument in bringing about greater policy coherence (*ibidem*, para. 41). The issue will likely inform future deliberations on the right to development, see the Chairperson-Rapporteur’s statement to the Working Group upon re-election, *Report of the Working Group, op.cit.* (note 5), para. 6. On the issue of policy coherence and human rights, see Ziegler, J., *Report of the UN Special Rapporteur on the Right to Food*, UN Doc. E/CN.4/2005/47; Hunt, P., *Report of the UN Special Rapporteur on the Highest Attainable Standard of Health, Mission to the WTO*, UN Doc. E/CN.4/2004/49/Add.1; A Fair Globalization, *Report of the World Commission on the Social Dimension of Globalization*, ILO, Geneva, 2004; and the ILO follow-up regarding a ‘Policy Coherence Initiative’, see ILO Governing Body, 292nd session, Working Party on the Social Dimension of Globalization, GB.292/WP/SDG/1, March 2005; and the *Report of the Working Party on the Social Dimension of Globalization*, GB.292/15, March 2005. Issues in relation to policy coherence are also addressed in some of the MDG donor country reports, see, in particular, *Finland’s Report on the Millennium Development Goals*, 2004 (available at: www.undp.org/mdg/donorcountryreports.html).

⁹³ Article XVIII: Governmental Assistance to Economic Development.

⁹⁴ See UNCTAD, *World Investment Report*, 2003, New York/Geneva, Chapter 5.

⁹⁵ On the point about using human rights as a shield, see Hunt, P., ‘Relations Between the UN Committee on Economic, Social and Cultural Rights and International Financial Institutions’, in: Van Genugten, W., Hunt, P. and Mathews, S. (eds), *World Bank, IMF and Human Rights*, Wolf Legal Publishers, Nijmegen, 2003, p. 139, at pp. 145-150.

⁹⁶ *Report of the High-Level Task Force, op.cit.* (note 8), para. 33. The issue of democratic governance – essential to the right to development in light of its incorporation of civil and political rights and instrumental in the furtherance of the MDGs – was not addressed in any detail either.

⁹⁷ *Report of the Working Group, op.cit.* (note 5), para. 55(a). See also para. 41 in which the Working Group ‘...urges States, in pursuing the discussion [on national economic policy space], to bear in mind its relevance to the realization of the right to development’.

considerable tension along traditional North-South lines.⁹⁸ Finding a balance between the calls by the South for increased domestic policy space, refining the explicit content of the term from the perspective of the right to development, and, considering any corresponding commitment of developed States to meeting the duty of international cooperation in this regard, are likely to seize the Working Group's deliberations in future.⁹⁹

Human rights are concerned primarily with challenging abuse of power at all levels – preventing it, ensuring a system of accountability, and remedying the violations brought about by its occurrence.¹⁰⁰ The requirement of establishing an enabling environment conducive to the exercise of rights by all people follows from this fundamental premise. Means and mechanisms able to contribute to this objective are increasingly assessed for their utility in securing human dignity as codified in international law. As such, human rights generally, and the right to development specifically, come to the global poverty reduction project with a specific emphasis. And therein lie their importance to the development enterprise.

4. RIGHTS-BASED ECONOMIC GROWTH

A principle challenge to and benefit of the Task Force lay in the multidisciplinary of its composition. The general discussions as well as the drafting of the conclusions and recommendations forced a meeting of minds, largely of economists on one side and human rights lawyers on the other. Nowhere was this more evident than in the discussion pertaining to economic growth.

The position of the World Bank was that development has to be grounded in 'sound economic policies that fostered growth', though with income gaps widening in some of the world's poorest countries, the Bank noted that it is encouraging governments to adopt policies targeting more equitable distribution of the benefits of growth. The human rights experts supported this focus on more equitable growth, but as a means to securing human rights.¹⁰¹ Significantly, the conclusions and recommendations as adopted by the Task Force recognised 'that development had to be grounded in sound economic policies that fostered growth with equity...'¹⁰² agreement being echoed by the Working Group when it noted that 'the implementation of the right to development requires growth with equity [and that] [d]evelopment has to be grounded in economic policies that foster growth with

⁹⁸ The inclusion of a reference to 'national policy space' was supported by Pakistan and the Non-Aligned Movement of developing States. Compromise language proposed by the European Union suggesting a reference to 'space for national economic planning' was still unacceptable to Australia and the USA, both of which disassociated their states from the final consensus document adopted by the Working Group. Northern States were concerned that the vaguely defined notion of national policy space leaves wide open the possibility for it to be used by developing States as a blanket waiver on trade issues.

⁹⁹ *Report of the Working Group, op.cit.* (note 5), para. 22. See further *A Fair Globalization, op.cit.* (note 92), paras 249 and 253.

¹⁰⁰ See, generally, Tomaševski, K., *Strengthening Pro-Poor Law: Legal Enforcement of Economic and Social Rights*, Overseas Development Institute Meeting Series, January 2005 (available at: www.odi.org.uk/rights).

¹⁰¹ On the instrumental role of growth, see Sen, *op.cit.* (note 43).

¹⁰² *Report of the High-Level Task Force, op.cit.* (note 8), para. 31.

social justice'.¹⁰³ This linking represents an added-value of the right to development to the development process,¹⁰⁴ and exemplifies the first objective of this entire exercise – establishing and agreeing on the human rights imperatives to the topics under consideration.

The emphasis on growth with equity aims to ensure that growth serves as a means to the larger goal of overall well-being measured in terms of the realisation of human rights for all. As the Working Group has agreed, respect for human rights must determine the strategies for growth as well as guide its distribution.¹⁰⁵ This approach moves away from prescriptions that view development purely in terms of increased national income based on the 'trickle down approach' and aggregate benefit, with inadequate attention being given to concurrent increases in intra-State inequality and regional disparities or to exploitive conditions of employment. Under the Task Force consensus, the primary utility of growth is as an instrument in ensuring the right to development and eradicating poverty,¹⁰⁶ and it would need to be achieved in a manner that is consistent with the human rights obligations of all States (including, for example, obligations of developed States in relation to the participation of developing countries in the global economy). To these ends, the Working Group adopted the view that 'a rights-based approach to economic growth and development contributes to the realisation of the right to development...'¹⁰⁷ As summed up by the Chair of the Task Force, the right to development tends to focus on missing elements of conventional development thinking. It represents a shift in the development paradigm from growth-oriented strategies to rights-based strategies, compelled by the call of people for greater ownership over the processes that impact on their lives.

As has been elsewhere noted 'the right to development, in requiring that development be pursued through and along with the respect for and furtherance of all internationally recognized human rights, stipulates the categorical rejection of one of the most prominent narratives about the nature of development and growth (...) that "you cannot make an omelette without breaking a few eggs"'.¹⁰⁸ The issue of 'trade-offs' is another topic worth revisiting here.

5. MAKING 'TRADE-OFFS' CONSISTENT WITH HUMAN RIGHTS

Where the representatives of the multilateral institutions emphasised that development implies establishing policy priorities and addressing trade-offs in

¹⁰³ *Report of the Working Group, op.cit.* (note 5), para. 42.

¹⁰⁴ *Statement by Ambassador Ibrahim Salama to the 61st CHR; Report of the Working Group, op.cit.* (note 5), para. 46. On the significance of including rights-based economic growth with equity and justice as a constitutive element of the right to development, see Sengupta, *op.cit.* (note 30), paras. 8-12.

¹⁰⁵ *Report of the Working Group, op.cit.* (note 5), para. 46.

¹⁰⁶ This emphasis on the instrumental role of income can be seen in the way in which poverty itself is defined. It is no longer understood as constituting only a lack of income, but includes deprivations in capability, choice, security and power. CESCR, *Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights*, 25th session, 2001, UN Doc. E/C.12/2001/10, para. 8.

¹⁰⁷ *Report of the Working Group, op.cit.* (note 5), para. 46.

¹⁰⁸ Howse, R., *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization*, UN Doc. E/CN.4/Sub.2/2004/17, para. 13.

resource allocations and in benefits, intra- and inter-temporally¹⁰⁹ the human rights advocates reaffirmed that any trade-off should seek to be consistent with human rights, both in its process¹¹⁰ and outcomes. This balancing of methodologies found its way into the agreed conclusions of the Task Force,¹¹¹ although perhaps without the full consideration it deserves given the considerable influence that the World Bank and IMF have on economic policies in developing countries.¹¹²

During the discussion, the representative of the IMF expressed the view that trade-offs require only that the concerns of the 'losers' are addressed as best as can be. This view, while unacceptable from a human rights perspective, did serve to emphasise the importance of identifying the effects of policies on the poor and vulnerable, the need for the provision of special measures including in the form of social safety nets and targeted transfers and subsidies, and the role of multilateral trade and development institutions in supporting national efforts in this regard.¹¹³ Nonetheless, the categorical approach expressed by the IMF that anticipates economic policy winners and policy losers in a system requiring trade-offs, gives rise to grave concerns from the standpoint of international human rights law.

While often suggested by people working outside of human rights, it is not the case that there is a necessary incompatibility between economic planning – which as the international financial institutions highlight, require trade-offs of various kinds – and adherence to human rights including the principle that all rights are indivisible and interdependence. The recognition of resource constraints that gives rise to the idea of progressive realisation of economic, social and cultural rights also makes it inevitable that policy-makers will have to face trade-offs among rights since all rights cannot be fulfilled at the same time and to the same degree. However, the human rights principle of indivisibility requires that no human rights be considered intrinsically inferior and that prioritisation can only be done on practical grounds – e.g., because a certain right has remained historically more under-realised than others, or because it is likely to act as a catalyst towards the speedy fulfillment of other rights.¹¹⁴ Further, no one group of rights can be seen as intrinsically more valuable, that is, focusing on the right to health or the right to education (economic and social rights) should not be at the exclusion of building a culture in which the

¹⁰⁹ A possible weakness of the human rights regime is its lack of detailed focus on our responsibilities to future generations. In light of potential inter-generational trade-offs, this area would benefit from greater analysis by human rights experts, drawing on environmental law and on sustainable development law. This gap notwithstanding, '[t]he right to development must be implemented so as to meet developmental and environmental needs of present and future generations in a sustainable and equitable manner. This includes the duty to cooperate for the eradication of poverty in accordance with Chapter IX on International Economic and Social Cooperation of the Charter of the United Nations...' International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, Resolution 3/2002, para. 2.3 *et seq.*

¹¹⁰ Meeting the minimum universal human rights standards and applying the human rights principles of transparency, equality, participation, accountability and non-discrimination.

¹¹¹ *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 33.

¹¹² 'Questions remain about the amount of genuine autonomy enjoyed by countries, given the greater financial power and technical capacity of donors in some aid dependent countries.' *Partnerships for Poverty Reduction: Rethinking Conditionality*, Department for International Development, UK Policy Paper, March 2005, para. 5.17. The World Bank and IMF have recently remarked likewise, para. 6.1.

¹¹³ *Report of the High-Level Task Force*, *op.cit.* (note 8), paras 24 and 38.

¹¹⁴ Hunt, Nowak and Osmani, *op.cit.* (note 20), para. 22.

rule of law thrives and free and fair elections are held (civil and political rights).¹¹⁵ Consistent with the human rights principle of non-retrogression, no State, group, or person has a right to engage in any activity or perform any act aimed at the destruction of rights and freedoms or to limit them to a greater extent than provided for in human rights law.¹¹⁶ And any deliberately retrogressive measures would require a full justification by reference to the totality of rights to be progressively realised and weighed against the standards that obligate the full use of the maximum available resources,¹¹⁷ which include those available from the international community.¹¹⁸ Finally, the recognition of resource constraints notwithstanding, the international human rights system specifies core obligations that require States to ensure, with immediate effect, certain minimum levels of enjoyment of each economic, social and cultural right.¹¹⁹ All actors in positions to influence domestic policy, be they the developing States, developed States or international institutions, should be seeking to reach these minimum standards as a priority. Notably, the Committee on Economic, Social and Cultural Rights has concluded that these basic obligations form part of customary international law, thereby binding all subjects of international law, which would include international organisations as well as States.¹²⁰

The possibility that there will be tensions in reconciling the rights of individuals and the interests of society as a whole, or between groups, is foreseen under international human rights law. However, any interference with a person's human rights must strike a fair balance between the demands of the others, be it the general interest of the community or another group, and the fundamental rights of the person or persons.¹²¹ The critical element seemingly absent from the non-human rights consideration of the topic espoused by the IFIs is the methods by which a trade-off, *i.e.*: the potential limitations on a person's rights, is determined. Consistent with general human rights principles any limitation on rights must not

¹¹⁵ A converse example would be equally valid. On trade-offs, see Donnelly, J., 'Human Rights, Democracy and Development', *Human Rights Quarterly*, Vol. 21, No. 3, 1999, p. 608, at pp. 626-627, where he remarks on the 'trade-offs' of sacrificing distributional equity in favour of rapid accumulation (equity trade-off) and the sacrifice of civil and political rights in the name of efficiency in addressing underdevelopment (liberty trade-off). Notably among development actors, human rights are often understood largely as civil and political rights.

¹¹⁶ See, for example, International Covenant on Civil and Political Rights (1966), General Assembly Res. A/RES/2200A (XXI), 999 UNTS 171, Article 5.

¹¹⁷ CESCR, General Comment No. 3, *On the Nature of States Parties' Obligations*, UN Doc. E/1991/23, Annex III, 1990, para. 9.

¹¹⁸ *Ibidem*, para. 13.

¹¹⁹ *Ibidem*, para. 10; CESCR General Comment No. 15, *On the Right to Water*, UN Doc. E/C.12/2002/11, para. 37. Civil and political rights are not subject to progressive realisation.

¹²⁰ CESCR Concluding Observations: Israel, 30th session, 2003, UN Doc. E/C.12/1/Add.9, para. 31.

¹²¹ *Belgian Linguistics Case* (1968), 1 EHRR 252, para. 7; *Sporrong and Lönnroth vs Sweden* (1983), 5 EHRR 35, para. 69; *Aka vs Turkey* (September 1998), Application No. 107/1997/891/1103 ECtHR, para. 44. In finding a violation of Article 1, Protocol No. 1 of the European Convention on Human Rights which provides for the protection of property the Court held, *inter alia*, that: 'According to the Court's well-established case-law, an "interference", including one resulting from expropriations intended to assist with the development of large-scale public work schemes, must strike a "fair balance" between the demands of the general interest of the community and the fundamental rights of the person whose property had been expropriated'.

be arbitrary,¹²² must ensure a reasonable relationship of proportionality between the means employed and the aim pursued,¹²³ must have both a reasonable and objective justification,¹²⁴ and must meet the test of necessity.¹²⁵ Further, human rights law requires that there be a remedy, should trade-offs violate a person's or groups' rights,¹²⁶ and that in any process of trading-off no one should fall below the minimum essential level of rights¹²⁷ required to live in conditions of dignity.¹²⁸

The Working Group took the position that the right to development enriches such strategies aimed at building synergies between growth-oriented development and human rights. It does this through systematically incorporating human rights standards and principles, including those of transparency, equality, participation, accountability and non-discrimination into development processes, at both national and international levels.¹²⁹ It was suggested therefore that 'the right to development should guide in setting priorities and resolving trade-offs in resource allocations and policy frameworks'.¹³⁰ Given the general favouring among IFIs of economic

¹²² *Kitok vs Sweden* (1988), Human Rights Committee Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985, para. 9.1.

¹²³ *Belgian Linguistics Case*, *supra* note 121, para. 10: '...difference of treatment in the exercise of a right (...) must not only pursue a legitimate aim: (...) [it] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised; *Aka vs Turkey*, *supra* note 121, para. 47. 'The Strasbourg human rights organs have consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests of society'. Arai-Takahashi, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Court of Human Rights*, Intersentia, Antwerp, 2002, p. 14.

¹²⁴ *Belgian Linguistics Case*, *supra* note 121, para. 10: '...following the principles which may be extracted from the legal practice of a large number of democratic States (...) the principle of equality of treatment is violated if the distinction has no objective and reasonable justification...'; *Lovelace vs Canada* (1981), Human Rights Committee Communication No. 24/1977, UN Doc. CCPR/C/OP/1, para. 16; *Kitok vs Sweden* (1988), Human Rights Committee Communication No. 197/1985, UN Doc. CCPR/C/33/D/197/1985, para. 9.8.

¹²⁵ In the European case-law, justification of an interference on this ground must be both 'relevant and sufficient' and most importantly, the 'necessity' implies the existence of a 'pressing social need'. Thus, the interference must be proportional to the legitimate aims pursued. *Handyside vs United Kingdom* (1979-1980), 1 EHRR 737, paras 48-50. See Arai-Takahashi, *op.cit.* (note 123), pp. 11-12. The consideration of that which is 'necessary in a democratic society' in determining justifiable limitations on human rights highlights the important link between democracy and development. See World Conference on Human Rights, Vienna Declaration and Programme of Action, para. 8; and Sen, *op.cit.* (note 43), chapter 6.

¹²⁶ The right to a remedy is expressly guaranteed in both global and regional human rights instruments. It contains two separate concepts: the procedural aspect of effective access to a fair hearing and the substantive aspect of relief afforded to a successful claimant. Shelton, D., *Remedies in International Human Rights Law*, 2nd ed., Oxford University Press, Oxford, 2005, p. 9.

¹²⁷ CESCR General Comment No. 3, *supra* note 117, para. 10.

¹²⁸ *The Government of the Republic of South Africa vs Irene Grootboom and Ors* (October 2000), Constitutional Court of South Africa, Case CCT11/00, para. 83; *Minister of Health and Ors vs Treatment Action Campaign and Ors* (July 2002), Constitutional Court of South Africa, Case CCT 8/02, para. 28; the international community has recognised extreme poverty as constituting a 'violation of human dignity'. Vienna Declaration and Programme of Action (1993), para. 23.

¹²⁹ *Report of the Working Group*, *op.cit.* (note 5), paras 42-43 as drawn from the *Report of the High-Level Task Force*, *op.cit.* (note 8), para. 32.

¹³⁰ *Report of the Working Group*, *op.cit.* (note 5), para. 43.

efficiency over equity,¹³¹ combined with the power and the lack of human rights accountability that characterise multilateral financial and trade institutions that so considerably impact on the exercise of human rights, it is difficult to conclude that these human principles, so fundamental to the rule of international law and valuable in justly reconciling competing claims and interests, are adhered to in any significant way. In future, the Task Force may wish to elaborate on the ways in which the right to development guides the setting of domestic priorities, can contribute to resolving trade-offs in resource allocations and as a result of particular policy frameworks, entrenches a system of accountability for any international actor with influence over the domestic policy space, and ensures remedies commensurate to harms done, including for the most poor and vulnerable.

6. STRUCTURAL DISADVANTAGE

If we reflect on why only half of the world's poor and not all of the world's poor are eligible to be lifted from extreme poverty we can assume only that the international community has determined that this is the maximum number of people that *can* be lifted from poverty by 2015. This determination begs the question – based on what model? Is this the maximum number of people to be lifted from extreme poverty while maintaining the existing inequalities in the global trading system?¹³² The unsustainable levels of debt?¹³³ The existing insufficient levels of international resources being transferred?¹³⁴ The same limited degree of participation and influence of developing countries in the Bretton Woods institutions and the WTO?¹³⁵ Despite the objective of MDG 8 which pledges to develop a global partnership for development, has the MDG project adequately addressed the existing global structural imbalance associated with the human rights violations that the Goals seek to address (right to food, right to education, child rights, women's rights, right to health *etc.*), and that is central to the claims for a just economic and social order as per the right to development?¹³⁶ To a limited degree, the Task Force deliberations moved beyond the MDGs and the theme of monitoring the impact of

¹³¹ Notably, the forthcoming World Bank, *World Development Report 2006* will address the issue of equity and development.

¹³² See *A Fair Globalization*, *op.cit.* (note 92), paras 368-399. See also the UN Millennium Project Report 2005, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, United Nations, New York, 2005.

¹³³ *A Fair Globalization*, *op.cit.* (note 92), paras 459-462. See also the Millennium Project Report 2005, *op.cit.* (note 132).

¹³⁴ See the Millennium Project Report 2005, *op.cit.* (note 132).

¹³⁵ *A Fair Globalization*, *op.cit.* (note 92), paras 405-407.

¹³⁶ The point is often raised that while global imbalances exist, they have not prevented some countries from doing very well, and thus the bulk of any failure to reduce poverty is attributable to the State acting nationally. Pogge responds to this claim by remarking that while there are great international variations in the evolution of poverty that to some degree depend on country-specific situations these national factors do not nearly fully explain the overall performance and even if country-specific factors were to explain the variations, global factors may still play a major role in explaining why they did not do much better. Moreover, many of the country-specific factors commonly adduced to explain the persistence of poverty are themselves sustained by features of the present global order (*e.g.* the paying off of debts incurred under undemocratic regimes, bribery by multinational corporations, the international arms trade). Pogge, T., *The First UN Millennium*

trade policies on human rights, to the issues of global governance and the biases of the global institutional order.

During the opening remarks at the Task Force session certain States mentioned that the MDGs do not offer a broad enough vision since poverty is the sheer negation of human rights and this requires not just an increase in income but the proper operation of the international financial institutions and of global governance.¹³⁷ Another State, Venezuela, was concerned generally about an international structure that it believes promotes under-development and dependency supported by a delegate from South Africa who felt the focus of the MDGs and of development aid should be on the elimination of dependency by Southern States. The former Independent Expert on the Right to Development,¹³⁸ who was a member of the Task Force, noted in his opening remarks that international co-operation does not denote only the transfer of resources but addresses our international arrangement – he went on to question how we are evaluating the role of the international community, another member asked about the role of the private sector in the context of MDG 8.

On the issue of trade, one member of the Task Force pointed out that when international rules are applied uniformly to unequal societies the results will be unequal. It was further noted by UNCTAD that biases and asymmetries in the international trading system had evolved over the last decade only. Consequently, the idea that trade commitments would be qualified or written out of agreements if found through social impact assessments to be damaging to certain constituencies was pointed out as ‘heterodox’, since the issue of social impact assessments in relation to trade policies points to the entire structural architecture. If we take social impact assessment seriously, it was suggested by one expert, changes in WTO negotiations and architecture may be required.

The ability and primary responsibility of developing States to fulfil their human rights obligations cannot be disassociated from the role of the international community in the creation and perpetuation of an international system that structurally provides for their disadvantage. Until we give equal attention to reform of the very system that has allowed for 2.7 billion people – half of all people living in the South – to live in conditions of poverty,¹³⁹ while developed countries protect their markets at a loss to developing countries of USD 700 billion annually in export revenues,¹⁴⁰ we will have done not nearly enough. The UN Secretary-General’s Task Force Report on the MDGs calls for the democratisation of international institutions;¹⁴¹ in the run-up to the United Kingdom’s presidencies of the G8 and the European Union in the second half of 2005 its report by the independent

Development Goal (2003), Paper presented at the Oslo Lecture in Moral Philosophy, University of Oslo, September 2003 (available at: www.etikk.no/globaljustice). See further his work on the international resource and borrowing privileges. Pogge, T., ‘Priorities of Global Justice’, in: Pogge, T. (ed.), *Global Justice*, Blackwell Publishers, Oxford/Mass., 2001, p. 6.

¹³⁷ Group of Latin American and Caribbean states (GRULAC).

¹³⁸ And currently the Independent Expert on Human Rights and Extreme Poverty.

¹³⁹ UN Millennium Project, *Fast Facts: The Faces of Poverty*.

¹⁴⁰ Pogge, T., ‘Assisting’ the *Global Poor*, November 2003 (available at: www.etikk.no/globaljustice). Protection comes in the form of tariffs, quotas, anti-dumping duties and subsidies to domestic producers. Rich world farmers are protected in different forms to the tune of about 300 billion dollars a year. On the latter point, see Goldin, *op.cit.* (note 73).

¹⁴¹ The Millennium Project Report 2005, *op.cit.* (note 132).

Commission on Africa calls for African countries to have greater representation on the IMF and World Bank boards;¹⁴² there are on-going calls for the democratisation of the WTO to ensure greater transparency and better access for developing countries and observers.¹⁴³ To sum up, perhaps ‘what has been neglected is not so much the conditions of poverty or of exclusion, but rather those of acquisition and affluence at the other extreme of the population experience, and the mechanics or agents of the entire distribution’.¹⁴⁴

7. CONCLUSION: WHERE TO FROM HERE?

At one point or the other many of the big issues of the day were raised during the Task Force’s deliberations: the quality and quantity of development aid,¹⁴⁵ debt reduction to realise the MDGs¹⁴⁶ and the alignment of poverty reduction strategies with the MDGs.¹⁴⁷ The imperative that the application of social impact assessments should result in the identification of dislocative effects of adopted policies on the poor and the most vulnerable and provide special measures as remedies for those groups was noted by the Task Force, as was the need to build domestic institutional capacity to support social safety nets.¹⁴⁸ The Task Force reminded the Working Group that from the human rights perspective, the concept of social safety nets corresponds to the right to an adequate standard of living, including social security as defined in human rights treaties.¹⁴⁹ The Task Force also emphasised that the requirement of ‘necessary complementary measures’ within multilateral frameworks of trade, finance and development to support national efforts in mitigating the adverse consequences of trade and development policies,¹⁵⁰ would benefit from greater elaboration in its future work.

The human rights approach to global poverty with its emphasis on the added-value of the right to development framework could nonetheless be taken further in the future work of the Task Force. Many of the issues falling within its general mandate and that of the Working Group could be considered in much greater detail from the point of view of human rights and international law (perhaps initially

¹⁴² *Our Common Interest, Report of the Commission for Africa* (2005) (available at: www.commissionforafrica.org).

¹⁴³ *A Fair Globalization, op.cit.* (note 92), para. 347; *EU Heroes and Villains: Which Countries are Living up to their Promises on Aid, Trade, and Debt?*, Joint NGO Briefing Paper, ActionAid, Eurodad and Oxfam, 2005.

¹⁴⁴ Townsend, P. and Gordon, D., ‘The Human Condition is Structurally Unequal’, in: Townsend, P. and Gordon, D. (eds.), *World Poverty: New Policies to Defeat an Old Enemy*, The Policy Press, Bristol, 2002, p. xi, at p. xv.

¹⁴⁵ *Report of the High-Level Task Force, op.cit.* (note 8), paras 36 and 48-49. See also the Recommendations of the Working Group.

¹⁴⁶ *Report of the High-Level Task Force, op.cit.* (note 8), paras 36 and 48. See also the Recommendations of the Working Group.

¹⁴⁷ *Report of the High-Level Task Force, op.cit.* (note 8), paras 53-54.

¹⁴⁸ *Ibidem*, paras 24 and 38.

¹⁴⁹ *Ibidem*, para. 39. Among the list of issues to guide the future work of the Working Group is examining the institutional experience, feasibility and sustainability of having social security nets and social development policies as entitlements consistent with the realisation of the right to development.’ *Report of the Working Group, op.cit.* (note 5), para. 55(c).

¹⁵⁰ *Report of the High-Level Task Force, op.cit.* (note 8), paras 20, 21 and 38.

through the preparation of background papers). Some possibilities include the legitimacy of historical debts and the contemporary legal implications,¹⁵¹ and the legal dimensions of the international obligations of States to address global poverty.¹⁵²

A notable omission by the Task Force from the consideration of 'obstacles and challenges to the MDGs', was that it paid only the most cursory attention to the rights of minorities and indigenous peoples. In fact, its mandated focus on the MDGs was felt by some to have precluded it from integrating this element into its work since the Goals refer explicitly to gender equality only.¹⁵³ This provides a perfect example of the dangers that can come from the fact that the MDGs represent only a select number of development imperatives and do not offer the strength of commitment provided by human rights,¹⁵⁴ despite the possibility that they may provide measurable and progressive efforts to realise certain human rights. Human rights favour the most compromised and has ever-detailed standards to address this, and related objectives, notably the preservation of the cultural identities of minorities and indigenous peoples in development processes.¹⁵⁵ The right of peoples to self-determination – of self-determined development¹⁵⁶ – is central to the Declaration on the Right to Development¹⁵⁷ and its integration into the work of the Task Force from a number of perspectives should be seriously considered. Moreover, without a rigorous and consistent identification and integration of the rights of the most marginalised groups within the MDG process, how will we know which half is being lifted from poverty? Will it be those closest to the poverty line rather than those farthest from it? And of those who are lifted at what cost might that be to those who are not? Sustainable development and conflict prevention also necessitate the targeted inclusion of minorities and indigenous peoples in development processes.¹⁵⁸

¹⁵¹ See, for example, the suggestion to establish an appropriate mechanism to ensure the accountability of all States and international institutions involved in international cooperation through, *inter alia*, an international arbitration mechanism that would have jurisdiction over past debt including onerous debt accumulated by developing countries. Mudho, B., *Report of the Independent Expert on the Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of all Human Rights, particularly Economic, Social and Cultural Rights*, UN Doc. E/CN.4/2005/42, para. 45.

¹⁵² This could include consideration of extraterritorial obligations, obligations of international co-operation, the application of the doctrine of effective control, and the standard of due diligence at the international level *etc.* On several of these issues, see Salomon, *loc.cit.* (note 25).

¹⁵³ For the focus on women's rights, see *Report of the High-Level Task Force, op.cit.* (note 8), para. 54.

¹⁵⁴ Von Schorlemer, S., *Obstacles and Challenges to the Implementation of the MDGs in Relation to the Right to Development*, Briefing note submitted to the Task Force, December 2004 (on file with author).

¹⁵⁵ See Salomon and Sengupta, *op.cit.* (note 21); A-I. Motoc and the Tebtebba Foundation, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the UN Working Group on Indigenous Populations*, UN Doc. E/CN.4/Sub.2/AC.4/2004/4.

¹⁵⁶ UNDP Policy Note, *UNDP and Indigenous Peoples: A Policy of Engagement*, UNDP, August 2001, p. 8.

¹⁵⁷ DRD, Article 1(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.' See also DRD, preambular para. 6 and Article 5(1).

¹⁵⁸ See *the Millennium Development Goals: Helping or Harming Minorities*, Working Paper by Minority Rights Group International to the 11th session of the UN Working Group on Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2005/WP.4.

During the deliberations of the Task Force the point was made that human rights in fact remain poorly understood among development practitioners and among the people responsible for international policies that so greatly impact on human rights.¹⁵⁹ Insofar as human rights are appreciated by senior staff at the multilateral institutions they tend to focus on civil and political elements and not economic, social and cultural rights, an approach dismissive of the obligations undertaken by the 150 States parties to the International Covenant on Economic Social and Cultural Rights,¹⁶⁰ and inconsistent with the right to development that considers all rights holistically. The Task Force might consider recommending the placement of independent human rights experts and advisors within the multilateral institutions, and generally advocating for systems of human rights education and oversight where the awareness and expertise does not exist internally, or exists in a limited way.

In some ways though, there is the sense that a paradigm shift is taking place. As human rights makes its way up the broader international agenda the Task Force has an increased responsibility to determine what specifically it can offer given its novel composition. Of the international financial institutions, the World Bank in particular with its focus on equity and an increasing commitment in some of its quarters to push for explicitly linking its work to human rights,¹⁶¹ demonstrates a certain convergence in thinking with human rights advocates. It might be timely for the Task Force to look in some detail at strengthening human rights in the work of the World Bank.¹⁶²

The Working Group called on the OHCHR ‘to bring the conclusions and the recommendations of the [first session of the] High-Level Task Force and the Working Group to the attention of relevant international institutions, including the World Bank, IMF, WTO, the UN Conference on Trade and Development, the UN Development Programme and other United Nations agencies and programmes, as well as other regional organisations and actors, at the highest policy-making level. The OHCHR is further requested to solicit their participation, at a suitable level, in the deliberations of the Task Force’.¹⁶³ As important as this request is to having the recommendations of the Task Force inform the work of multilateral finance, development and trade organisations, it needs to be considered against the preference of certain States to keep human rights discussions within the UN and not

¹⁵⁹ The IMF representative also remarked that the Fund had no particular mandate in the area of human rights.

¹⁶⁰ At November 2004 there were 150 State parties to the ICESCR. For a list of international and regional conventions and declarations on economic, social and cultural rights, see Salomon, M.E. (ed.), *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples*, MRG, London, 2005.

¹⁶¹ See Wolfensohn, J., *Note from the President of the World Bank to the Joint Ministerial Development Committee of the Board of Governors of the Bank and the Fund*, 12 April 2005, DC2005-0005, para. 49.

¹⁶² The Task Force might consider looking into the World Bank’s incorporation of human rights criteria for the allocation of resources, and of human rights criteria for the determination of public expenditure priorities within poverty reduction strategy programmes. It might also consider following-up on the work being done by the Committee on Economic, Social and Cultural Rights in pressing States parties as members of the World Bank and IMF to do all they can to ensure that the policies and decisions of those organisations are in conformity with the obligations of States parties to the Covenant. See Hunt, *loc.cit.* (note 95), p. 139, at pp. 148-149.

¹⁶³ *Report of the Working Group, op.cit.* (note 5), para. 54(m).

be enabled in any direct way to influence the machinations of international finance and trade.¹⁶⁴

A similar observation was provided by the High-Level Panel on Threats, Challenges and Change which addressed UN reform. While making important recommendations aimed at integrating human rights concerns and global economics under a restructured Economic and Social Council¹⁶⁵ it had also to concede that: ‘...decision-making on international economic matters, particularly in the areas of finance and trade, has long left the United Nations and no amount of institutional reform will bring it back’.¹⁶⁶ In light of this chasm that exists between the centres of power related to human rights decision-making and the substance and direction of economic globalisation, the establishment of the Task Force represents a step forward in integrating the language and objectives of human rights with those of contemporary international economics. To further these objectives, the MLIs might be requested to report to the Task Force session on what they have done to advance the recommendations within their own organisations and what obstacles they may have confronted in the process. State representatives from various ministries and to other multilateral institutions (*i.e.*: from outside their missions to the UN) might be invited to attend the public meetings of the Task Force. It might also consider recommending ‘full membership’ of the international financial institutions and the WTO in the Task Force on par with the human rights members, thereby raising the level of their engagement and solidifying their contribution and ownership of the process, outcomes and follow-up.

If the Task Force is to make any substantial contribution to guiding the implementation of the right to development it must address, both in its attendance and in the content of its deliberations and recommendations, the structural inequalities and impediments that inhibit the realisation of the right to development. These could include, the structure and functions of existing arrangements for the governance of the institutional economic order; the democratic deficit in relation to the influence of multinational corporations on global governance; the exclusion of human rights standards and oversight in international finance and trade; the existing hierarchy among international legal

¹⁶⁴ At the 4th session of the Working Group on the Right to Development in 2003 Japan remarked that: ‘there is a need to revamp IFIs now that it is 50 years later but these are not human rights issues; we can’t have human rights tamper with economic issues’. South Africa responded noting that: ‘To say there is no relationship between economics, trade and human rights is a bold statement which we disagree with as does NAM’. (notes on file with author). See further the reference by the 2005 Working Group as to the point that some of its recommendations ‘relate to activities of other organizations...’ *Report of the Working Group, op.cit.* (note 5), para. 54.

¹⁶⁵ UN Doc. A/59/565 (2004), para. 278 suggests ECOSOC becomes ‘...a regular venue for engaging the development community at the highest level, in effect transforming itself into a “development cooperation forum”’. This recommendation was endorsed by the Secretary-General in his report to the forthcoming 59th session of the General Assembly at which the topic of UN reform will be considered. ‘[The Economic and Social Council] should serve as a high-level development co-operation forum, reviewing trends in international development cooperation, promoting greater coherence among the development activities of different actors and strengthening the links between the normative and operational work of the United Nations’. Report of the UN Secretary-General, *op.cit.* (note 38), paras. 8(d)(ii), pp. 171-180. See also *Report of the High-Level Task Force, op.cit.* (note 8), para. 27.

¹⁶⁶ UN Doc. A/59/565 (2004), para. 274.

regimes;¹⁶⁷ and the overarching requirement of accountable States and institutions. In addressing these concerns the Task Force should also be made fully aware of complementary initiatives taking place outside of the UN in the areas under its consideration and the appropriate NGOs, think tanks and scholars should be invited to contribute to its work, and to assist in formulating a road map to guide its future endeavours.

The international system of finance and trade is a direct reflection of the will of the member States that govern and influence the multilateral institutions – the same States that have undertaken human rights obligations under international human rights treaties and that may advocate for their defence within the UN. As we work towards integrating human rights into development, finance and trade, we cannot overlook the methods by which this tentatively shared vision within the Task Force will be given effect in the corridors of power. The consequences of this institutional divide on the fulfillment of the right to development might be taken up when the Task Force considers indicators for evaluating international cooperation at its next session,¹⁶⁸ since these indicators will have little worth if they are not connected to instruments of change that may be employed towards concrete action in furthering human rights.

This article will conclude where it began, noting that a particular value of this Task Force is in the creation of a space for dialogue and in its effort to find common ways of moving forward among people who come to these issues with different priorities and starting points. Despite some meaningful exchanges and recommendations pervasive and fundamental concerns remain. Giving effect to human rights obligations at the international level remains insufficient and incremental, yet while there is enough food to feed everyone on the planet, 1 in 3 (640 million) children in developing countries are malnourished.¹⁶⁹ Ten percent of the world's health resources service the needs of 90 percent of the world population.¹⁷⁰ A third of the children in developing countries live without adequate shelter.¹⁷¹ There is inadequate progress on addressing the structural imbalance of our world order and the real calculations and responsibilities of our global interdependence.

While the Task Force and its various contributors are likely to agree that there are links between the economic, environmental, social and structural aspects of development, the real value of the Task Force will be not purely in establishing the necessary condition of finding a common starting point and the terms and tools with which to give it meaning. The achievements of the Task Force on the Right to Development will be determined by whether it meets the sufficient condition of setting in motion the operationalisation of its methodology.

¹⁶⁷ See, for example, Dawkins, K., *The Hierarchy of International Law: A Hierarchy Of Values?*, Briefing note, Institute for Agriculture and Trade Policy, Minneapolis, 2005.

¹⁶⁸ *Report of the High-Level Task Force, op.cit.* (note 8), para. 50; *Report of the Working Group, op.cit.* (note 5), para. 54(i).

¹⁶⁹ *Removing Obstacles to Healthy Development*, World Health Organization Report on Infectious Diseases, WHO, Geneva, 1999.

¹⁷⁰ 'An aspirin for Juelly is no longer good enough', *Financial Times*, 25 January 2005.

¹⁷¹ *The State of the World's Children 2005*, UNICEF, New York, 2004.