

and diversity, on the basis of a shared ethic of humanity—that of the equal dignity of every human being. As is stated in the very first sentence of the Universal Declaration of Human Rights, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. It is also the key to the peaceful solution of minority problems.

People's Rights

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Globalization and the Right to Development

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The changes to the international system that have taken place since the break up of the Soviet Union have significantly altered the capacity of international law to protect and promote human rights. In particular, the increase in the speed and scale of trade and financial liberalization poses major challenges to international human rights law. Developments such as the Asian financial crisis, protests about the impact of the World Trade Organization (WTO), the controversy surrounding the negotiation of the Multilateral Agreement on Investment, the activities of the International Monetary Fund (IMF) and the World Bank and the re-emergence in many states of economic nationalism and protectionism have all contributed to putting globalization on trial.¹ Human rights activists and scholars argue that a focus on economic globalization, the power of transnational corporations and the effects of the activities of international economic institutions must be placed at the centre of campaigns to promote and protect human rights. This chapter considers the right to development in the context of economic globalization, in particular in light of the impact of trade and investment agreements and of the activities of international economic institutions.² The aim of the chapter is twofold: first, to assess the impact of economic globalization on the right to development and secondly, to consider the utility of the right to development as a means for resisting some of the more destructive effects of economic restructuring in the post-Cold War era.

Part I outlines the history of the emergence of the right to development in the late 1970s and 1980s, and gives a sense of the political and economic

¹ The representative of the International Confederation of Free Trade Unions at a round table on the WTO and Human Rights said that the Asian crisis had 'put globalization on trial'. See 'All Countries Bound by International Law to Take Human Rights With Them into the WTO', 2 *UDHR News* (15 May 1998).

² For analyses that focus on the use of unilateral rather than multilateral trade sanctions, including their use by the United States to coerce states into making concessions at the multilateral level, see C. Raghavan, *Recolonization: GATT, the Uruguay Round and the Third World* (1990), at 83–9; Drahos, 'Global Property Rights in Information: The story of TRIPS at the GATT', *Prometheus* (1995) 6; Alston, 'Labour Rights Provisions in International Trade Law: "Aggressive Unilateralism"?' 15 *Human Rights Quarterly* (1993) 1.

background to the emergence of that right. The right to development has become an increasingly important part of the United Nations (UN) human rights agenda, but as I will suggest, it has not been adopted with equal enthusiasm by the international economic institutions that affect 'development' in its broadest sense. Debates over the right to development at the intergovernmental level have for the large part remained polarized along a North/South axis, and I discuss in turn some of the ways in which that right has been deployed politically.

Part II outlines and explores the key features of the right to development, as established in the 1986 Declaration on the Right to Development.³ I focus on some of the features of the right that have attracted controversy, such as whether individuals or states are subjects or bearers of the right, whether the right to development trumps other human rights, and what is meant by 'development' in the context of the right. I point to aspects of the right that remain particularly useful, such as the emphasis on participation in development as the basis of the right and the focus on operation of the right at both the national and international levels. Part II also notes the ways in which different aspects of the right are emphasized by states according to their national interests.

Part III analyses the relationship between the right to development and the policies, projects and actions of the three international institutions that perhaps more than any others shape the development process in many states. Those institutions are the IMF, the World Bank and the WTO. I assess the extent to which the actions of those institutions are informed by a recognition of the right to development, or whether their activities in fact violate the right to development in particular and human rights obligations more generally. I should stress that I am not suggesting that those institutions somehow impose conditions on states in situations where governments or elites are not willing to accept such conditions. Very often, economic liberals or self-interested rulers in such states support and stand to benefit from IMF or World Bank programmes. I am interested, however, in testing the extent to which the right to development can be used as a tool to measure the effects of the activities of such institutions.

Finally, Part IV asks whether a focus on the right to development is a useful means of challenging the more destructive aspects of economic globalization. Can the right to development provide a framework to challenge the activities of international economic institutions? Should human rights scholars and activists, or states seeking to adopt alternative models of development, invest time, energy and resources into attempting to develop mechanisms for

³ Declaration on the Right to Development, adopted 4 December 1986, GA Res. 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc. A/41/53 (1987). The Declaration was adopted by a vote of 146 to 1 (the US), with 8 abstentions (including the GFR, Japan and the UK).

implementing the right to development? I feel some ambivalence about the utility of focusing on a right to development in the post-Soviet era, for reasons that I outline fully in the conclusion.

I THE EMERGENCE OF THE RIGHT TO DEVELOPMENT

In order to understand the right to development, it is necessary to know something of the political and economic context in which it was first envisaged. The emergence of a numerically dominant group of developing countries in the international arena as a result of decolonization led to the elevation of economic development issues to the top of the international agenda in various fora during the 1960s and 1970s.⁴ After the initial flush of independence, many former colonies became disillusioned with the international order, and with the agenda of various international economic and development organizations.⁵ While most states joined the IMF and the World Bank in the initial phase of decolonization, many soon became dissatisfied with the prescriptions of the Bretton Woods institutions.⁶ Many of those states took longer to join the General Agreement on Tariffs and Trade (GATT), and those who did received few benefits from the initial GATT rounds.⁷

Initially, states sought to address those problems through attempting to reform international economic institutions, with only limited success. Attempts to address development issues through the Economic and Social Council (ECOSOC) led to the formation of the United Nations Conference on Trade and Development (UNCTAD) as an organ of the General Assembly, where wider issues of international economic relationships were to be addressed. Efforts to have development issues addressed in an integrated way through the major international economic institutions, however, did not succeed. Attempts to reform the IMF, the World Bank and the GATT were remarkably unsuccessful.⁸

The 'reformist' phase involved attempts to seek minor amendments to the international economic system, with no fundamental challenges to that system. By the early 1970s, the reformist phase had given way to a 'restructuring'

⁴ Alston, 'Revitalising United Nations Work on Human Rights and Development', 18 *Melbourne University Law Review* (1991) 216, at 218.

⁵ Raghavan, *supra* n. 2, at 52.

⁶ *Ibid.* at 51.

⁷ *Ibid.*

⁸ While in 1964, special provisions on Trade and Development were added to Part IV of GATT, decolonized states still gained no real commitments. Part IV is expressed in the language of best endeavours, and was never translated into binding obligations. While decolonized states made some other minor gains in GATT, such as the acceptance of the generalized system of preferences, there were basically few amendments to a system that still excluded trade in agriculture, textile and tropical products from overall commitments to trade liberalization. *Ibid.*, at 52.

phase.⁹ Decolonized states determined that special treatment was not sufficient, and that it was necessary to change the asymmetry in international economic relations and systems in order for conditions to improve. The Declaration on the Establishment of a New International Economic Order and the Charter of Rights and Duties of States were adopted by the UN General Assembly in 1974 and 1975.¹⁰ UNCTAD took up a number of platform forms of the New International Economic Order, and at Nairobi in 1976 fashioned mandates for negotiating changes in the systems and rules relating to commodities, trade, shipping, money, finance and debt. Those commitments were taken up by some other UN agencies such as the International Labour Organization, the Food and Agricultural Organization and the World Health Organization, which began to convene conferences on those issues. The major international economic institutions of the IMF, the World Bank and the GATT, however, steadfastly ignored the call for a new international economic order.¹¹

The situation for states in the South worsened with the two oil price rises in 1973/4 and 1979, which led to a far more adversarial approach to economic relations by industrialized states, particularly the United States.¹² During the 1980s, economically powerful states increasingly resorted to multilateral institutions to further foreign policy goals in the economic and trade areas.¹³ The Reagan administration, for example, strongly influenced the approach of the IMF and the World Bank. From 1986 onwards the World Bank, under the Reagan appointee and former United States Republican Congressman, Barber Conable, began to attach conditions to structural adjustment or policy-based loans requiring privatization and trade and investment liberalization. In the human rights area, a related policy development of the Reagan administration was to deny that economic, social and cultural rights were human rights at all.¹⁴ Industrialized states, particularly the US, also sought to expand trade and financial liberalization through the GATT,

⁹ Ibid. at 53.

¹⁰ Declaration on the Establishment of a New Economic Order, adopted 1 May 1974, GA Res. 3201 (S-VI), 6 (SPECIAL) UN GAOR, 6th Spec. Sess. Supp. No. 1, at 3, UN Doc. A/9559 (1974), reprinted in 3 *ILM* (1974) 715; Charter of Economic Rights and Duties of States 1974, adopted 12 December 1974, GA Res. 3281, UN GAOR, 29 Sess., Supp. No. 31, at 50, UN Doc. A/9631 (1975), reprinted in 14 *ILM* (1975) 251.

¹¹ Raghavan, *supra* n. 2, at 54.

¹² T. Wheelwright, *Oil & World Politics: From Rockefeller to the Gulf War* (1991) 25.

¹³ Raghavan, *supra* n. 2, at 54-8.

¹⁴ Alston, 'The Shortcomings of a "Garfield the Cat" Approach to the Right to Development', 15 *California Western International Law Journal* (1985) 510, at 516 [hereinafter Alston, 'Garfield the Cat']; Alston, 'US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy', 84 *American Journal of International Law* (1990) 365, at 372-7 [hereinafter Alston, 'US Ratification'].

and since 1995 the WTO, in order to gain access to the markets, resources and labour of countries in Asia, Africa and now Eastern Europe.

It was against that background of a changing and contested international political order that the notion of a right to development emerged. The political and economic context which led to the push for the recognition of such a right may explain why, to Jack Donnelly's evident bemusement, the right to development 'moved through the usually labyrinthine United Nations system with incredible speed'.¹⁵ In the human rights field, the concerns of decolonized states were translated into demands for greater recognition of economic, social and cultural rights, international recognition that colonialism and neo-colonialism were gross violations of international and human rights law, and the push to recognize development cooperation as an obligation owed by former colonial powers, rather than as an act of charity.¹⁶

The notion of a right to development was first recognized in those terms by the UN Commission on Human Rights in 1977.¹⁷ In 1981, the debate on the right was institutionalized in the UN system, through the establishment of a Working Group of Government Experts on the Right to Development.¹⁸

¹⁵ Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', 15 *California Western International Law Journal* (1985) 473, at 475.

¹⁶ Alston, (*supra* n. 4), at 218-19. Eastern European states supported the right to development although, as Alston notes, that support was premised upon the assumptions that those states had never engaged in colonization, that centrally-planned economics provided the best method of guaranteeing economic, social and cultural rights, and that large scale aid was owed by colonizers rather than by industrial powers generally. Western states supported the obligation to cooperate with respect to development, but did not acknowledge that there was any duty to do so. Those states stressed that respect for civil and political rights was necessary for all human development. That group were not prepared to accept that a right to development could require any change in their own policies.

¹⁷ Commission resolution 4 (XXXIII) of 21 February 1977. The Commission there decided to pay special attention to consideration of the obstacles hindering the full realization of economic, social and cultural rights, particularly in developing countries, as well as of the actions taken at the national and international levels to secure the enjoyment of those rights. The Commission recognized the right to development as a human right, and recommended to the Economic and Social Council that it should invite the Secretary-General to undertake a study on the subject, 'The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs'.

¹⁸ Commission resolution 36 (XXXVII) of 11 March 1981. Upon the recommendation of that Working Group, the Commission on Human Rights in its resolution 1989/45 of 6 March 1989 invited the Secretary-General to organize a global consultation on the realization of the right to development as a human right. The Global Consultation on the Right to Development as a Human Right took place in Geneva from 8 to 12 January 1990. The Consultation reaffirmed that the right of individuals, groups and peoples to take decisions collectively, to choose their own representative organizations and to have freedom of democratic action, free from interference, was fundamental to democratic participation. The concept of participation was of central importance in the realization of the right to development. The Consultation also

The right was included in 1981 in Article 22 of the African Charter on Human and Peoples' Rights, otherwise known as the Banjul Charter.¹⁹ That article provides:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The right to development was subsequently enshrined in the 1986 Declaration on the Right to Development.²⁰ That Declaration sets out the substance of the right in some detail, and I will outline the key features of the Declaration in the next part of the chapter. The World Conference on Human Rights, held in Vienna in 1993, reaffirmed the right to development as established in the Declaration, as a universal and inalienable right and an integral part of fundamental human rights.²¹ In 1993, the Commission on Human Rights established a second working group on the right to development for a three-year period,²² and in 1996, the Commission reaffirmed the right and established an intergovernmental working group of experts on the right to development for a two-year period.²³ The right to development is regularly reaffirmed in resolutions of the General Assembly and of the Commission on Human Rights.

It is not possible to finish an introduction to the emergence of the right to development without some reference to the politics of that right. The

considered that development strategies oriented only towards economic growth and financial considerations had failed to a large extent to achieve social justice and that there was no one model for development applicable to all cultures and peoples. The UN should take the lead in the implementation of the Declaration on the Right to Development and set up mechanisms for ensuring the compatibility of all UN activities and programmes with the Declaration.

¹⁹ 'The African Charter on Human and Peoples' Rights, concluded at Banjul, 26 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5; reprinted in 21 *ILM* (1982) 59.

²⁰ Declaration on the Right to Development, adopted by the UN General Assembly, 4 December 1986, GA Res. 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc. A/41/53 (1987).

²¹ Article 10, Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 25 June 1993, UN Doc. A/CONF.157/24 (Part I), at 20-46 (1993), reprinted in 32 *ILM* (1993) 1661. See also Articles 11 and 12.

²² Commission resolution 1993/22. The working group was composed of 15 experts and had a mandate to identify obstacles to the implementation and realization of the Declaration on the Right to Development and to recommend ways and means towards the realization of the right to development by all states. The working group held five sessions from 1993-95.

²³ Commission resolution 1996/15, approved by the Economic and Social Council in its decision 1996/258. The intergovernmental working group was composed of 10 experts nominated by governments and appointed by the Chairman of the Commission, with the mandate to elaborate a strategy for the implementation and promotion of the right to development in its integrated and multidimensional aspects.

right to development has become something of a mantra for states seeking to justify the privileging of economic development over human rights and to legitimize repressive or authoritarian policies. The right is equally systematically resisted by industrialized states seeking to ensure that their corporations and investors are not constrained in their operations in the South. Yash Ghai notes that the right to development has been 'a matter of considerable contention internationally, with developing countries arraigned on the side supporting it, and most developed countries united in their opposition to it'.²⁴ What is striking about the political debate concerning the right to development is the absence of a sustained attempt at the intergovernmental level to develop and promote a strong, human-rights based, alternative to the repressive interpretation of the right to development that has been pushed by authoritarian regimes. While a more progressive reading of the right to development has been the focus of the scholarship of a small group of commentators, and is certainly available as an interpretation of the Declaration of the Right to Development and other resolutions, there has been a lack of political commitment or meaningful foreign policy support amongst industrialized states for an alternative approach to the right. Instead, many industrialized states seem to have been ready to leave the interpretation of the right to development to repressive leaders, and to use the resulting narrow and dangerous interpretation as a basis for rejecting the right out of hand.

It may be, however, that this polarization is shifting to some extent. A broader level of support for the right to development appears to have emerged at the 54th session of the Commission for Human Rights, held in April 1998. The General Assembly resolution on the right to development had affirmed that the inclusion of the Declaration on the Right to Development in the International Bill of Rights would be an appropriate means of celebrating the 50th anniversary of the Universal Declaration of Human Rights (UDHR).²⁵ At the 1998 session of the Commission on Human Rights, Colombia on behalf of the non-aligned movement put up a resolution that would have given effect to the General Assembly resolution, but subsequently withdrew the proposed resolution for lack of support. A different resolution on the right to development was then adopted by consensus by the Commission. That resolution recognized that the 50th anniversary of the UDHR provides an important opportunity to place all human rights at the top of the global agenda and, in this context, the right to development in particular. It welcomed the high priority devoted by the UN High Commissioner for

²⁴ Ghai, 'Human Rights and Governance: The Asia Debate', 15 *Australian Year Book of International Law* (1994) 1.

²⁵ General Assembly resolution 52/136; adopted 12 December 1997, UN Doc. A/RES/52/136 (1997) (adopted by a vote of 129 in favour, 12 against, 32 abstaining).

Human Rights to activities relating to the right to development, and urged her Office to continue to accord priority to the right to development. The resolution also provided for the establishment of a follow-up mechanism on implementation of the right to development. The Commission recommended to the Economic and Social Council the establishment of a three-year open-ended working group on the right to development, to meet after the next two sessions of the Commission on Human Rights.²⁶ In addition, the Commission recommended that the working group be supported by an independent expert.²⁷ While those recommendations are not as dramatic as including the right to development within the International Bill of Rights, they do appear to represent a less divided approach to promoting the right to development and economic, social and cultural rights.

Those moves have been paralleled by the Secretary-General's decision to mainstream human rights within all UN activities, including those in the development area.²⁸ The right to development forms a central part of those reforms to UN development programmes and funds. As part of that process of reform, a UN Development Group (UNDG) has been established which comprises the major UN development programmes and funds as well as departments and relevant entities.²⁹ The aim of the Group is to coordinate development policies and decision-making. At the regional and country levels, all UN programmes will be integrated within a UN Development Assistance Framework (UNDAF). Those reforms have included the establishment of a UNDG ad hoc working group on the right to development, which aims at developing a common approach for enhancing the human

²⁶ That working group would have a mandate to monitor and review progress made in the promotion and implementation of the right at the national and international levels, to review reports and other information submitted by states, UN agencies, other relevant international organizations and non-governmental organizations on the relationship between their activities and the right to development, and to provide a report to the Commission on Human Rights including advice to the Office of the High Commissioner for Human Rights on implementation of the right.

²⁷ Commission resolution 1998/72 of 22 April 1998 (recommending to the Economic and Social Council the establishment of a three-year open-ended working group on the right to development and the appointment of an independent expert with high competence in the right to development to present to each session of the working group a study on the current state of progress in the implementation of the right to development). See also Commission resolution 1998/24 of 17 April 1998 (resolving *inter alia* to appoint, for a three-year period, a special rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights, and urging governments, international organizations, international financial institutions, non-governmental organizations and the private sector to cooperate fully with the Special Rapporteur in the discharge of his or her mandate).

²⁸ Report of the Secretary-General on Renewing the United Nations: A Programme for Reform, A/51/950, issued on 14 July 1997, para. 78.

²⁹ *Ibid.*, para. 73.

rights dimension of development operations in the process of elaborating country-level development frameworks.³⁰

It is thus fair to say now that the right to development is not merely a dangerous 'delusion of well-meaning optimists', as Jack Donnelly could argue in 1985, but rather a secure part of the framework of international human rights at the turn of the century.³¹ Yet despite the support for the right to development in UN human rights and development fora, the right continues to be absent from the agenda of a number of the institutions that have a major effect on development and trade issues, namely the IMF, the World Bank and the WTO. Before turning to look at some of the activities of those institutions, I want first to outline some of the key features of that right, particularly as set out in the 1986 Declaration.

II KEY FEATURES OF THE RIGHT TO DEVELOPMENT

While I am not an advocate of plain meaning theories of textual interpretation, it is useful to return to the text of the Declaration on the Right to Development in order to move beyond what has become a sterile debate. As I have already noted, both governments seeking to use, and those seeking to discredit, the right to development have adopted a dangerous interpretation of its meaning. It has become accepted by many states and some commentators that the right to development is a right of states to pursue a narrow economic model of development over the human rights of the people of the state invoking the right. The right to development is presented as allowing states where necessary to put the interests of investors over the interests of other human beings. While the Declaration on the Right to Development does not provide all the answers to that problem, it certainly offers a different interpretation of the right. This Part looks at some of the key features of the Declaration that might be of use in developing a more productive jurisprudence on the right for the post-Cold War era.

³⁰ The creation of the ad hoc working group is one manifestation of the commitment of the Secretary-General to ensure that as part of that process of UN reform, human rights will be included as part of the mainstream of all UN activities. For a criticism of the focus of the UNDAF process on the right to development at the operational level, rather than proceeding upon the operational principles found in the core human rights treaties, see 'The incorporation of economic, social and cultural rights into the United Nations Development Assistance Framework (UNDAF) process', Comments adopted by the Committee on Economic, Social and Cultural Rights, 15 May 1998.

³¹ Donnelly, *supra* n. 15, at 478. The part of Donnelly's article devoted to showing that there is no source of the right to development in the international bill of rights is not now relevant, if it ever was. It is not possible to argue that human rights are necessarily limited to those enumerated in the international bill of rights. Donnelly himself recognized that even if there were no existing right to development, such a right could be created through the ordinary processes of law creation (at 489).

1. The Subject of the Right to Development

The first question to ask about the right to development is: to whom does the right to development attach? Donnelly argues that the major problem with the right to development is in determining who holds the right.³² The right-holder is not a physical person; an institutional person must exercise the right. Donnelly suggests that '[i]n the case of a right held by a people, or by society as a whole, the most plausible "person" to exercise the right is, unfortunately, the state'.³³ He argues that this represents a radical reconceptualization of human rights and an especially dangerous one. The state can simply claim to be exercising the right on behalf of the people, sometimes at the same time as infringing other human rights.³⁴ That is certainly a danger that is inherent in recourse to the right to development by some multinational corporations and by some Asian governments, who at times claim to be legitimately privileging the human right to development over civil and political rights.³⁵ Ghai, for example, has questioned the championing of the right to development by Asian governments. Ghai suggests that the support of the right by those governments is part of a broader agenda of establishing 'the primacy of economic development over human rights'.³⁶ Ghai argues that their support for the right to development must be understood in the context of a broader perspective, according to which '[i]t is implied that economic development may well require restrictions on human rights, both to provide a secure political framework in which it can be pursued and to remove obstacles in its way'.³⁷ Through the support for the right to development, 'Asian governments seek to promote the ideology of developmentalism which justifies repression at home and the evasion of responsibility abroad'.³⁸

That is not, however, the manner in which the right was formulated in the 1986 Declaration or subsequently. While the right to development is a collective right, the Declaration makes clear that the right must accrue not only to the community or to the collective, but also to the individual human person. Article 2(1) provides: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development.'

³² Donnelly, *supra* n. 15, at 498-9.

³³ *Ibid.*

³⁴ Cf. Bedjaoui, 'The Right to Development' in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991) 1177, at 1184 (arguing that the right to development 'is much more a right of the State or of the people, than a right of the individual, and it seems to me that it is better that way').

³⁵ It is interesting to note that few of those commentators who criticize collective rights comment upon the ease with which corporations, in reality collectivities of investors or capitalists, are granted rights, often in priority over the rights of so-called natural persons.

³⁶ Ghai, *supra* n. 24, at 9.

³⁷ *Ibid.*

³⁸ *Ibid.*, at 10.

The World Conference on Human Rights, in reconfirming the right to development in the Vienna Declaration, also stresses that 'the human person is the central subject of development'.³⁹

The Declaration on the Right to Development also refers to the right to development as a right of states. In Article 2(3), it provides that:

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

That formulation, however, makes clear that the state is a holder of the right to development as the agent 'of the entire population and of all individuals'. By implication, the right is exercisable by the state against those with the power to deny or constrain the capacity of the state to formulate national development policies that benefit the entire population and all individuals. As Philip Alston suggests, here the state acts as the 'medium through which the rights of individuals are able to be effectively asserted vis-à-vis the international community'.⁴⁰ Thus despite the concern of critics like Donnelly prior to the passing of the Declaration, and despite the claims of some state leaders since 1986, the right to development is not in my view a right of states, except where those states are asserting, as against the international community, their right to develop human rights-based development policies in the interests of their people.⁴¹

Critics of that aspect of the right to development argue that it moves away from the appropriate focus on the individual as the proper subject of human rights, to groups as subjects of rights.⁴² Donnelly, for example, argues that human rights should derive from the 'idea of innate personal dignity' rather than from notions of solidarity or community, dependent as such notions are upon relations among persons or groups.⁴³ He suggests that membership of a community or group is not necessarily an aspect of being human, and that thus collective human rights are not logically possible.⁴⁴ Many commentators, however, have argued that an 'excessively individualistic approach to

³⁹ Vienna Declaration, Art. 10.

⁴⁰ Alston, 'Garfield the Cat', *supra* n. 14, at 512.

⁴¹ For concerns about the right to development as a right of states, see Donnelly, *supra* n. 15, at 499, and the citations there of those who support that view.

⁴² *Ibid.*, at 492.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, at 493, 497. It seems to me that members of a dominant group or community are the only people capable of such a perspective. As critical commentators have shown, being human has never been a sufficient criterion for holding rights—instead, that privilege has depended on community membership of a dominant group, such as men, colonizers, property-owners or citizens. Conversely, exclusion from the category of rights-holder has also been a function of belonging to a particular group, such as women, colonized peoples or slaves. See further Orford, 'Liberty, Equality, Pornography: The Bodies of Women and Human Rights Discourse', 3 *Australian Feminist Law Journal* (1994) 72.

human rights' is not productive, and that, as Alston points out, collective rights are 'reflective of the extent to which we live in communities and to which our fate as individuals is bound up with the fate of the others in whose social context we find ourselves'.⁴⁵ Where members of a group or community suffer disadvantage, oppression or exploitation as a result of membership of that group or community, the case is even stronger for the proposition that such group members should be able to exercise collective rights against more powerful groups or communities responsible for exploitation or domination.⁴⁶

2. The Human Right to Participate in Development

A second feature of the right to development as formulated in the Declaration is the emphasis on participation as the basis of the right. In its first article, the Declaration states that by virtue of their inalienable human right to development, 'every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development'. Thus each human person and all peoples are entitled to participate in all forms of development, and equally to enjoy the benefits of that development.

The Declaration qualifies the legitimacy of state development policies by reference to participation. Article 2(3) provides that:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis [inter alia] of their active, free and meaningful participation in development.

The Declaration thus stresses that for such a right to be enjoyed by individuals, it must be on the basis of a free, active and meaningful participation in and enjoyment of the benefits of development. Article 8 states further that '[e]ffective measures should be undertaken to ensure women have an active role in the development process'.

The right to development can thus be characterized as a 'participatory right'.⁴⁷ A human rights perspective gives 'participation' a meaning that is different from participation in a managerial sense. As the Human Rights Council of Australia argues, participation as a right means that people should have control over the direction of the development process, rather than simply being

⁴⁵ Alston, 'Garfield the Cat', supra n. 14, at 526.

⁴⁶ For an argument in favour of collective rights for groups who suffer disadvantage due to membership of that group, see N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998), at 34-45.

⁴⁷ Günther, 'Participation and Accountability: Two Aspects of the Internal and International Dimension of the Right to Development' *Third World Legal Studies* (1992) 55, at 57.

consulted about projects or policies that have already been decided upon.⁴⁸ Participation in a human rights sense means having the power to direct or to exercise authoritative influence over the development process, rather than simply being consulted about pre-determined results. According to the Human Rights Council:

Participation understood as control cannot easily be confused with 'involved', 'consulted', 'empowered' or even 'ownership'. To ask who has control, authority, direction over a particular aspect of the development program is a much tougher question than to ask who is involved or empowered by it. It also leads to significantly more meaningful answers.⁴⁹

Implicit in this aspect of the right to development is the recognition that peoples have the right to determine their model of development. Mohammed Bedjaoui suggests that the right to development can thus be seen as incorporating the notion of economic and social self-determination.⁵⁰ According to Bedjaoui, the right to development itself flows from the right to self-determination:

There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize *at the same time* a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination.⁵¹

According to this interpretation, the most important aspect of the right to development is thus 'the right of each people to choose freely its economic and social system without outside interference or constraint of any kind, and to determine, with equal freedom, its own model of development'.⁵²

3. Equitable and Fair Access to Benefits

The Declaration focuses on the right to equal access to the benefits of development. Article 8, for example, provides that states should 'ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.' Article 2(3) provides that states have the right and the duty to formulate appropriate national development policies that aim at the fair distribution of the benefits resulting from development.

⁴⁸ Human Rights Council of Australia Inc., *The Rights Way to Development: A Human Rights Approach to Development Assistance* (1995) 118-21.

⁴⁹ *Ibid.*, at 120.

⁵⁰ *Ibid.*, at 1188.

⁵¹ Bedjaoui, supra n. 34, at 1184.

⁵² *Ibid.*

The importance of equitable access to the benefits of development is reaffirmed in the Vienna Declaration. Article 11 extends the notion of equitable access to the benefits of development to embrace the notion of intergenerational equity. It states that 'the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'.

4. The Relationship between the Right to Development and Other Rights

The Declaration on the Right to Development makes clear that priority should *not* be given to the right to development over other human rights. Instead, it confirms the indivisibility of rights. Article 1 states that the right to development involves the realization of human rights and fundamental freedoms, and implies the full realization of the right of peoples to self-determination. The Declaration stresses that all human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.⁵³ All aspects of the right to development itself are indivisible and interdependent, and each should be considered in the context of the whole.⁵⁴ According to Article 9(2), nothing in the Declaration should be construed as contrary to the purposes and principles of the UN or as in violation of the rights set out in the UDHR and human rights covenants. The indivisibility principle was strongly reaffirmed in the Vienna Declaration. Article 10 states that '[w]hile development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights'.

Donnelly criticizes what he sees as the tendency to treat the right to development as a 'synthesis of more traditional human rights'.⁵⁵ Similarly, Ghai has argued that the right to development 'takes attention away from specific rights, for example, speech, assembly, social welfare, to an ambiguous portmanteau right to development, for which in the nature of Third World affairs, the State must take the responsibility in defining and implementing it'.⁵⁶ I would argue, however, that the focus on the indivisibility of rights is an important aspect of the right to development for two reasons. First, it is important to stress that the right to development does not justify the violation of other human rights, particularly in light of attempts by some governments and multinational corporations to use the right to development as an

excuse to deny rights such as the right to freedom of association, freedom of expression or the right to political participation. That argument has no basis in the framework of the Declaration. No state can use the Declaration as authority for the argument that other human rights can be put on hold or violated while development is achieved. Similarly, international organizations are too often ready to treat human rights as if they were secondary to the economic goal of development as measured only by growth, debt repayment, foreign investment and economic liberalization, as I will discuss in more detail later. The Right to Development makes clear that development cannot be treated as a priority that justifies the infringement of human rights.

Secondly, the stress on the indivisibility of rights will remain necessary as long as states continue to treat economic, social and cultural rights as a lesser form of human rights.⁵⁷ In the context of a human rights approach to development, it continues to be important to argue that human rights are indivisible, and that economic ends do not justify exploitative means. As Bedjaoui argues:

There is no universality of human rights without the development of all human beings. The development of individuals and peoples, and of all individuals and of all peoples, is the fundamental precondition for the effective realization of such universality.⁵⁸

5. Against Whom is the Right to Development Exercisable?

International human rights law has traditionally been conceived of as a means of constraining one form of power, that exercised by the state. The international human rights law system that developed after 1945 treats the state as the principal threat to the freedom of the individual, human dignity and human well-being. The human rights enshrined in the UDHR and in later international covenants are designed to restrain the ability of the state to infringe the liberty of the citizen, to guarantee the participation of all citizens in government, and to ensure that the state promotes the economic, social and cultural rights of all those living within its borders.

The focus of the Declaration is broader. It recognizes that actors other than states can be responsible both for protecting human rights, and for human rights violations. The Declaration sets out a number of parties against whom the right is exercisable. First, it provides that states have an obligation to respect and promote the right to development. States must ensure that 'national development policies aim at the constant improvement of the well-being of the

⁵³ Article 6(2).

⁵⁴ Article 9(1).

⁵⁵ Donnelly, *supra* n. 15, at 481.

⁵⁶ Ghai, *supra* n. 24, at 10.

⁵⁷ That opposition began in earnest with the Reagan administration. See the discussion in Alston, 'US Ratification', *supra* n. 14.

⁵⁸ Bedjaoui, *supra* n. 34, at 1199.

entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom'.⁵⁹ The obligation to formulate appropriate and equitable national development policies is expressed both as a duty of states, presumably towards their own peoples, and as a right of states, presumably towards outside actors.⁶⁰ The notion that states have a right *and* a duty to formulate appropriate national development policies focused on participation and equitable sharing of the benefits of development is one that I will return to in considering the activities of international economic institutions.

Under the Declaration, states have the responsibility for the creation of not only national, but also international, conditions favourable to the realization of the right to development.⁶¹ States must 'take steps to *eliminate obstacles* to development resulting from the failure to observe civil and political rights, as well as economic, social and cultural rights'.⁶² While the Declaration does not explicitly address the extent to which international organizations bear responsibility for assisting states in protecting and promoting the right to development, a number of Articles can be read as applying to states acting as members of international organizations. For example, Article 3(3) provides that:

States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should fulfil their rights and duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest, and cooperation among all states, as well as to encourage the observance and realization of human rights.

Article 4(1) provides that:

States have the duty individually *and collectively* to formulate international development policies with a view to facilitating the full realization of the right to development.

Article 4(2) states that effective international cooperation is essential in providing developing countries with the appropriate means and facilities to foster comprehensive development. Each of those Articles can be interpreted as requiring states to act to further the right to development as members of international economic institutions.

Finally, the Declaration also treats human beings as having individual and collective responsibility for development. Article 2(2) provides that individuals should 'promote and protect an appropriate political, social and economic order for development'. The Declaration there foreshadows calls such as those by the Commission on Global Governance in 1995 for recognition

⁵⁹ Article 2(3).

⁶⁰ See also Article 8, which provides that states must undertake 'at the national level all necessary measures for the realization of the right to development'.

⁶¹ Article 3(1).

⁶² Article 6(3).

that 'governments are only one source of threats to human rights' and that 'all citizens . . . should accept that obligation to recognize and help promote the rights of others'.⁶³

The extension of the obligation to protect the right to development to actors other than states is not, however, without its critics. Donnelly, for example, argues that according to traditional conceptions of human rights, such rights are held primarily against the state. For him, human rights 'are essentially instruments to protect the individual against the state or to assure that the state guarantees to each individual certain minimum goods, services and opportunities'.⁶⁴ Donnelly criticizes the focus of the right to development on violators other than states, arguing that this shift functions as a means of avoiding state responsibility for human rights violations. The emergence of the right to development is part of a trend in which repressive regimes attempt 'to shift attention from particular rights to general issues, and from the primary role of the state as a violator of human rights to external forces that also contribute to human rights violations'.⁶⁵ According to Donnelly, it is essential that we do 'not lose sight of the fact that most human rights violations are directly perpetrated on people by the governments of their own countries. Discussions of the right to development, however, seem to have the effect, and perhaps even the intent, of obscuring this central point'.⁶⁶ Thus Donnelly suggests that the right to development lends itself 'to use as an excuse not to act on human rights now'.⁶⁷ Yash Ghai is also critical of this aspect of the right to development, arguing that it is an attempt to 'provide an alternative framework for the international discourse on human rights'.⁶⁸ According to Ghai, the right to development 'shifts the focus from domestic arenas (where most violations of rights take place) to the international'.⁶⁹

Such arguments seem persuasive at first glance. The danger that Donnelly foresaw in the use of the right to development as an excuse for avoiding human rights responsibilities has certainly eventuated in some instances. Some repressive governments and their supporters amongst multinational corporations have argued that the right to development must be achieved before human rights considerations can be addressed. States might appear to be, as Donnelly argues, the principal violators of human rights, due to the power that they exercise over the destinies and lives of their people. States would be the only actors capable of violating human rights if states had the sovereign power to determine the economic, social and cultural conditions in which people live, to make policy-decisions that shape access to resources and services and to determine the nature of constitutional and governmental

⁶³ Cited in H. Steiner and P. Alston, *International Human Rights Law in Context: Law, Politics and Morals* (1996), at 488.

⁶⁴ Donnelly, *supra* n. 15, at 499.

⁶⁵ *Ibid.*, at 502.

⁶⁷ *Ibid.*

⁶⁸ Ghai, *supra* n. 24, at 10.

⁶⁶ *Ibid.*, at 506.

⁶⁹ *Ibid.*

systems, in addition to having a monopoly over the legitimate use of force within a given territory.

States, however, are no longer sovereign in that way, if they ever were.⁷⁰ Economic globalization has made the fictitious nature of state sovereignty apparent to all but the most myopic observer of international relations and international law.⁷¹ The arguments of critics like Donnelly fail to address situations where individuals or peoples do not need protection only or even primarily against the state, but also from other powerful states, transnational corporations (TNCs) or international institutions. Nor do such arguments address situations where actors other than states make decisions about the provision of goods, services and opportunities, and thus about the protection of economic, social and cultural rights. In many cases in the globalized economy, other states, international organizations or foreign investors will be in a position to deny or effect those protections or guarantees. Thus the focus on the human rights obligations of states at the international as well as the national level is an important element of the right to development, and one that I will return to in analysing the activities of international economic institutions.

6. What is Meant by 'Development' in the Right to Development?

The final element of the right that I want to consider is the meaning it gives to the notion of 'development'. As many of you will be aware, the meaning of development is a highly contested area, and the subject of much political activism and scholarship.⁷² The notion of what is meant by development is one I will return to at the end of the chapter, when I come to consider the utility of the right to development in the post-Cold War era. I want simply to note here

⁷⁰ That is not to say that states are weakened through economic restructuring. Indeed, certain areas of state activity must be strengthened in order to provide secure and stable conditions for foreign investment. Instead, many aspects of what we once understood as *sovereignty* are now vested, not with 'the people' however understood, but with economic experts. For the argument that states never were sovereign in that sense, and that state sovereignty has always been a fiction, see Orford, 'The Uses of Sovereignty in the New Imperial Order', 6 *Australian Feminist Law Journal* (1996) 63.

⁷¹ For the argument that some international lawyers continue to be obsessed with technical rules related to subjects and doctrines that are no longer relevant in the rapidly shifting conditions of the late twentieth century, see Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalisation', 8 *European Journal of International Law* (1997) 435.

⁷² For an introduction to criticisms about the dominant models of development, see W. Sachs (ed.), *Global Ecology: A New Arena of Political Conflict* (1993); V. Shiva (ed.), *Close to Home: Women Reconnect Ecology, Health and Development Worldwide* (1994); R. Braidotti et al., *Women, the Environment and Sustainable Development: Towards a Theoretical Synthesis* (1993); R. Chambers, *Poverty and Livelihoods: Whose Reality Counts?* (1995); D.C. Korten, *When Corporations Rule the World* (1995).

that the Declaration supports a fairly flexible but nonetheless people-centred approach to what is meant by development. Alston argues that the Declaration is 'unusually open-ended and indeterminate', and that this is the 'inevitable result of the conflicting interests and perspectives of its drafters' and 'the range and complexity of the interests which it sought to address'.⁷³ Rather than being seen as weakness, Alston argues that this should be welcomed as a strength that enables the concept to evolve with the times and to be interpreted and applied with a 'degree of flexibility that is indispensable in such an area'.⁷⁴

Other commentators have been less than impressed with the approach to development enshrined in the Declaration. Hilary Charlesworth, for example, has argued that it is a highly contested, purely economic model of development upon which the right to development is based. According to Charlesworth:

While the formulation of the right to development does not rest on a simple economic model of development, and includes within it a synthesis of all recognized human rights, redress of economic inequality is at its heart. An assumption of the international law of development is that underdevelopment is caused by a failure to meet the model of a capitalist economy. Development means industrialization and westernization.⁷⁵

Despite some fluidity, the meaning of development in the Declaration includes as already mentioned the right to participation in determining the model of development, control over the process of development, and equitable access to enjoyment of the benefits of development. The Declaration also recognizes in the preamble that 'development is a comprehensive economic, social, cultural and political process which arises at the constant improvement of the well-being of the entire population'. As we will see, these features of the right to development provide a very different model from that imposed through economic restructuring and by international economic institutions.

III ECONOMIC RESTRUCTURING AND THE RIGHT TO DEVELOPMENT

Having looked at the key features of the right to development, I want now to consider the extent to which the project of economic globalization has been informed by the right to development. In particular, this Part examines whether the right has informed the policies, projects and actions of international economic institutions or whether, on the contrary, the actions of

⁷³ Alston, *supra* n. 4, at 221.

⁷⁴ *Ibid.*

⁷⁵ Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law', 12 *Australian Year Book of International Law* (1992) 190, at 196-7.