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The UN Human Rights Council and the Right to Development Alan Brouder

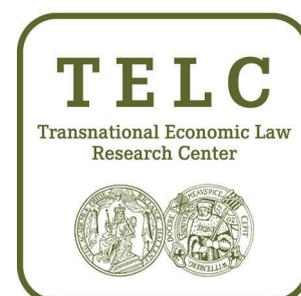
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Introduction

Advocates of the right to development may have some cause for optimism following the election of 47 states to the new UN Human Rights Council on 9 May 2006. Despite the election of China, Cuba, Pakistan, Saudi Arabia, and other states with poor human rights records, cautious optimism is warranted for three reasons. First, the new body replaces the much-criticized Commission on Human Rights and will occupy a more prominent place in the UN's hierarchy as a full subsidiary organ of the General Assembly. The Council will have a much broader mandate and wider powers than the Commission, and will have the potential to be more transparent and less susceptible to political manipulation. Second, the resolution establishing the Council (A/RES/60/251) explicitly refers to the right to development both in its preamble and in paragraph 4. The right to development is, in fact, the *only* right that is specifically referred to in the resolution. Its conspicuous presence provides evidence, perhaps, of a compromise in the text, but also indicates how it has evolved to occupy a central place in all discussions on human rights. Third, more than half of the newly elected members highlighted the importance of the right to development in the voluntary commit-

ments they made when announcing their candidacies for seats on the Council. States that stressed the importance of the right to development in the work of the Council included both developing and developed countries; five of the seven states elected from the 'Western Europe and Others' regional group were among them. Each of these reasons will be further examined following a brief overview of attempts by the Commission to promote the right to development.

The evolution of a right

Although assertions of a right to development can be traced back to the 1940s, claims to the right emerged with force in the 1970s in the context of a demand by Southern states for a New International Economic Order (NIEO). Many newly independent states, particularly in Africa, quickly discovered that their political independence was not necessarily accompanied by full economic independence. Many Southern states believed that their capacity to realise their right to self-determination was constrained by the structure of the international economic order and the power of external actors to exert control over their natural resources. In many respects, the call for a right to development was motivated by two emotions: anger at colonial exploitation, leading to a demand for reparations, and frustration at the realisation that not all states were sovereign equals as the UN Charter had de-

clared. While the *desire* for development held almost universal appeal, many Northern states resisted the assertion of a *right* to development, fearing that capitulation would lead to legally binding obligations to provide resources to developing countries. Many states, however, did not object solely for fear of inducing burdensome obligations; there was legitimate concern that the introduction of what Karel Vasak had called 'third generation rights' would in some way 'dilute' the legal and moral force of civil and political rights (the first generation) and economic, social, and cultural rights (the second). These 'solidarity' rights, which also included the right to peace, the right to a healthy environment, and the right to ownership of the common heritage of mankind, also presented some practical problems. Foremost among these was the assertion that these rights could be held by states; this seemed absurd, since the struggle for human rights had for centuries been a struggle by the people for protection against the excesses of the state in the case of civil and political rights, and a struggle to place positive obligations on the state in the case of economic, social, and cultural rights. These solidarity rights were also held to be rights of 'peoples,' a concept rejected by Western states in the context of the Cold War, who insisted that human rights could only apply to individuals.

Nevertheless, general agreement ex-

isted that levels of poverty around the world were unacceptable and that development was a pressing global concern. In 1977, five years after Senegalese jurist Keba M'Baye first explicitly outlined the existence of a right to development, the Commission on Human Rights adopted Resolution 4 (XXXIII), requesting the Secretary General to undertake a study on the international dimensions of the right. Two years later, the Commission confirmed the existence of the right (Resolution 5 (XXXV)) and the Secretary General submitted his report (E/CN.4/1334), contributing greatly to the analysis of the right. In addition to exploring the concept of development in the context of the right, the report demonstrated the existence of the right in international law by pointing to a wide range of legal norms and principles found in the UN Charter, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and a range of other conventions, declarations and resolutions.

Two years later, in 1981, the Commission established its first Working Group of Governmental Experts, whose remit was to study the scope and content of the right to development. The Working Group was hindered from the outset for two reasons. First, its members were nominated by the countries who held seats at the Commission, and thus found themselves locked into a

set of very carefully negotiated compromise positions. Second, the Working Group lacked interdisciplinary expertise; in the absence of expertise from the fields of law, economics, political science, sociology, and development studies, little progress could be expected in reaching consensus on the substantive content and scope of the right. However, discussions at the Commission on the reports by the Working Group continued and eventually led to the first General Assembly resolution declaring the right to development 'an inalienable human right' in 1982 (A/RES/37/199).

The Working Group was requested to continue its deliberations with the goal of producing a draft declaration for consideration by the General Assembly. In 1986, the Declaration on the Right to Development was adopted by a vote of 146 to 1 with 8 abstentions (A/RES/41/128). While the adoption of the Declaration was a significant breakthrough in achieving recognition of the right, the text inevitably contained a certain amount of ambiguity, reflecting the difficulty in achieving consensus on the content and scope of application of the right. Inherent problems in the make-up of the Working Group and the politicization of the Commission prevented any real progress in further clarifying the substance of the right. In 1989, the Commission requested the Secretary General to hold a global consultation on the realization of the right to development

that would involve a wide range of participants and experts from a variety of disciplines. The outcome of the consultation (E/CN.4/1990/9/REV.1), which took place in Geneva in January 1990, contributed significantly in identifying obstacles to the realization of the right, and in providing indicators for measuring progress in its realization. However, the momentum was quickly lost and there was little progress over the next three years.

In 1993, the Commission established a new Working Group. Again, the members were not independent, but nominated by the states that held seats on the Commission. While the second Working Group proved as ineffectual as the first, progress was achieved elsewhere. At the UN World Conference on Human Rights in Vienna in 1993, member states finally agreed that the right to development is 'a universal and inalienable right and an integral part of fundamental human rights' (Vienna Declaration and Programme of Action, A/CONF.157/23, Part I, para. 10). Declaring the right an integral part of fundamental human rights was seen as a major landmark in the evolution of the right. Fundamental rights are those which cannot be reduced or broken down into constituent parts, and which are essential for human development. Thus, it could no longer be argued that the right was merely an umbrella right, encapsulating a long list of existing rights.

Unfortunately, the Working Group failed to build on the Vienna consensus and in 1996 the Commission decided to establish a new Intergovernmental Group of Experts with a two-year mandate. This third Working Group put forward a global strategy for the promotion and implementation of the right to development. Building on its work, the Commission finally established an open-ended Working Group in 1998. For the first time, the Group was to be supported by an Independent Expert on the right to development. The new Working Group made substantial progress in narrowing the differences of opinion between Northern and Southern states on their roles and responsibilities in realizing the right to development. It made further practical suggestions on a follow-up mechanism to provide greater policy coherence, coordination, and cooperation in the national and international development policy environment, and received extremely valuable input and support from the Independent Expert, Mr Arjun Sen Gupta, over the next six years. In 2004, the Independent Expert was replaced by a High-Level Task Force, made up of five independent experts and the participation of representatives from UNDP, UNICEF, UNCTAD, IMF, the World Bank, and the WTO. The Task Force had submitted two reports to the Working Group by the time the decision was taken at the UN World Summit in September 2005 to abolish the Commission.

A Better Body

The extremely slow progress in achieving consensus on the right to development was not only a result of differences between Northern and Southern states. The institutional weaknesses of the Commission also played a role in delaying implementation of mechanisms to realize the right. Although the Commission had appointed four Working Groups, one Independent Expert, and a High-Level Task Force, as well as sponsoring dozens of resolutions, global consultations, and reports from the High Commissioner for Human Rights and the Secretary General, it had still not presented a draft legal document of a binding nature on the right by 2006, despite having requested the Sub Commission on the Promotion and Protection of Human Rights to do so in 2003. It was clear that major institutional reform was required.

The Human Rights Council will begin its first meeting in Geneva on 19 June 2006, three days after the Commission on Human Rights is abolished. The resolution establishing the Council states that the new body will 'assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and complaint procedure' (A/RES/60/251, para. 6). As the principal hu-

man rights organ in the international system, the new Council will assume overall responsibility for the promotion of human rights, and will thus serve as the principal forum for dialogue on thematic issues on all human rights, including the right to development. The Council is expected to make recommendations to the General Assembly for the further development of international law in the field of human rights (para. 5(c)). It is likely that the first legal instruments to be considered by the General Assembly on the recommendation of the Council will be the draft Declaration on the Rights of Indigenous Peoples and the draft Convention on Enforced Disappearances. Current discussions on the the rights of the disabled and the rights of the elderly may result in draft treaties presented to the General Assembly for consideration soon after. However, it is quite possible that a draft treaty on the right to development could be presented to the General Assembly within a few years.

As well as holding the primary responsibility for the promotion of human rights, the Council is mandated to contribute to the prevention of human rights violations and to respond promptly to human rights emergencies (para. 5(f)). The Council will also promote the mainstreaming and effective coordination of human rights within the UN system (para. 3), promote human rights education and provide advisory services, technical assistance,

and capacity-building to Member States (para. 5(a)), and undertake a universal periodic review of the fulfilment by each state of its human rights obligations and commitments (para. 5 (e)).

Unlike its predecessor, the Council will meet regularly throughout the year, holding a minimum of three sessions for a total duration of no less than ten weeks, and will be able to hold special sessions at the request of Council members (para. 10). Members will serve for a period of three years and are not eligible for immediate re-election after two consecutive terms (para. 7). In order to ensure smooth transition between members, the terms of membership for the Council's first members will be staggered, with states serving either one, two, or three years initially (see Annex 1). Significantly, membership in the Council can be suspended by a two-thirds majority in the General Assembly if a member is deemed to have committed gross and systematic violations of human rights.

The status of the Council will be reviewed within its first five years and it may be elevated to the position of a principal organ of the UN, placing it on a par with the Security Council, the General Assembly, the Economic and Social Council (ECOSOC), the International Court of Justice, and the UN Secretariat. Having such a powerful organ would provide the most optimal conditions under which consensus

could be built on codifying the right to development in a legally-binding treaty for adoption by the General Assembly.

Reference to the Right

The resolution establishing the Council explicitly refers to the right to development. The last paragraph of the preamble reaffirms ‘the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development’. Similarly, paragraph 4 stresses that ‘the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’.

Such explicit reference to the right to development reflects its central position in contemporary discussions of human rights. In the past ten to fifteen years, global summits, conferences, resolutions, and declarations have increasingly recognized the connection between human rights, development, and peace and security; it is now widely accepted that none of these elements can exist in the absence of the other two. In order to achieve these in the context

of globalisation and changing patterns of governance, two key issues arise: the need for a conducive environment at the national, international, and global levels, and the importance of ensuring a participatory process at all levels, through which these goals might be achieved. In essence, the demand for the realization of the right to development is a demand for the realization of these two issues. The right to development is thus not merely a ‘new’ or ‘additional’ or ‘umbrella’ right; it is an attempt to articulate the most fundamental requirements necessary to achieve the most important goals of humanity.

While there is broad agreement on these two general issues, there is much less consensus on what might constitute a ‘conducive environment’. At the national level there is little controversy over what is required: good governance, the rule of law, and democratic participation of all sectors of society in the design and implementation of development strategies. During his tenure, the Independent Expert reiterated that the right to development is a right to a particular *process* of development, both as a means to an end and as an end in itself. Thus the very act of participation goes some way towards realizing the right.

At the international and global levels, however, disagreement remains as to the exact nature of states’ obligations towards each other. In order to create a conducive environment

towards realizing the right at these levels, developing countries argue that major reforms need to be made in the composition and functions of international organizations, especially the Bretton Woods institutions. In addition, it is argued that wealthier states would have to make legally-binding financial commitments to poorer states. The wealthier states are naturally reluctant to relinquish their powerful positions in the international organisations, and many are opposed to making any legal commitments on development financing, especially in light of a lack of consensus on the causes of economic growth in different parts of the world.

For these reasons, many wealthier states are content to acknowledge that a right to development exists, but take pains to ensure that even non-binding international agreements do not impose or imply specific obligations on them. Indeed, some states continue to assert that the right to development is little more than an umbrella right, reflecting the obligation of states at the national level to ensure the realization of all civil, political, economic, social, and cultural rights. Thus, it is not surprising that in order to reach a compromise on the text of resolutions at the General Assembly, ambiguities are inserted that provide hope for future agreement by advocates of the right, and security for those who fear the imposition of obligations. This is hardly a revelation – almost 250

years ago the Swiss jurist and philosopher Emmerich de Vattel wrote that ‘men designedly throw obscurity and ambiguity into their treaties, in order to be provided with a pretense for eluding them upon occasion’ (The Law of Nations, 1758). The General Assembly resolution establishing the Human Rights Council is no exception. It is carefully worded to avoid prematurely according the right a specific status. Indeed, it appears that the drafters of the resolution consciously inserted grammatical errors to ensure syntactic ambiguity. Consider the following from the preamble: ‘...with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development’. The positioning of the phrase ‘including the right to development’ presents an obvious problem: where exactly is it included? Is it included within ‘all human rights,’ or is it included in ‘civil, political, economic, social and cultural rights’? The latter set is a list, and should thus be preceded by a colon. However, to do so without making any other changes to the text would be to assert that the right to development is included within the list of civil, political, economic, social and cultural rights. If this was the case, specific reference to the right would seem redundant. If the list had been clearly separated from the main clause in the text by the use of a dash before and after the list, or if the word ‘and’ was inserted instead of ‘including,’ then the right

to development would have been included within 'all human rights' but would have remained distinct from the listed rights. This would have been an acknowledgement that the right to development is not merely an umbrella right, encompassing all civil, political, economic, social, and cultural rights, but that it is a unique right of itself and refers as much to the process and level of participation in development as the right to enjoy its outcomes.

There can be no doubt that the ambiguity is intentional, as it occurs in precisely the same manner in the French, Spanish, Chinese, and Arabic versions of the text. Only the Russian text uses a dash instead of a comma after 'all human rights'. While we can only speculate as to whether this was an administrative error by the UN's Russian translators, the text as it stands would suggest that the right to development is included in the list of civil, political, economic, social, and cultural rights. This, of course, is the opposite of the consensus that is building. While it is the Human Rights Council that will have to resolve the final status of the right, along with its content and scope of application, the ambiguity and inconsistency in the resolution serve as a sharp reminder that the fears and objections of some states are still very much alive.

Voluntary Commitments

While some Northern states con-

tinue to resist acceptance of the international dimensions of the right to development, others have softened their positions over the years. States that put themselves forward as candidates for election to the Council were invited to submit voluntary commitments, outlining their record on human rights promotion and protection, and highlighting what they perceived to be the most important issues for the new Council to address. While it is no surprise that many developing countries made reference to the right to development in their submissions, it is encouraging to see that many Northern states also highlighted the importance of addressing the issue. Indeed, some Northern states were more forceful in asserting the importance of the right than many developing countries. While it could be speculated that they did this in order to garner votes from the developing countries, an examination of the voting results reveals no evidence of a correlation between commitments made on the right to development and the number of votes received in any of the regional groupings (see Annex 2).

Of the 26 states that were not elected to the Council, only 17 provided written voluntary commitments prior to the election. Of these, seven states made specific reference to the right to development in their submissions (see Annex 3).

The majority of the countries that made reference to the right did so

by simply reiterating the preamble of the resolution establishing the Council, i.e. they stressed the importance of promoting all human rights, civil, political, economic, social, and cultural, including the right to development. Some countries went further by singling out the right to development as being of particular importance. These included Algeria, Bangladesh, Cameroon, Cuba, France, Senegal, and South Africa. However, an examination of these texts reveals quite different interpretations of what the right to development means to each country. For example, while the French submission states that 'France attaches particular importance to the realization of the right to development,' it tries to prove this by pointing to its extensive development cooperation programmes around the world. Supporting development initiatives, however, is not the same as supporting the realization of the right to development. Similarly, many countries highlighted the importance of a rights-based approach to development. Again, this is separate and distinct from the right to development. While the Moroccans made a distinction between civil, political, economic, social, and cultural rights on the one hand, and the right to development on the other as a distinct and separate right, the South Africans proposed the drafting of protocols to the ICCPR and ICESCR for the purpose of 'placing the right to development on par with all other rights enumerated in these docu-

ments'. Meanwhile the Dutch submission suggests that the right to development is contained within the smaller sub-set of economic and social rights.

Conclusion

Developments surrounding the establishment of the Human Rights Council and the election of its first members reveal that the right to development is beginning to occupy a central place in all discussions of human rights. Specific reference to the right in the resolution establishing the Council, and the fact that twenty-four of its elected members made reference to it in their voluntary submissions provide clear signals that the right to development will be high on the agenda of the new body. The Council also has the potential to be more transparent, more dynamic, more effective, and less politicized than the Commission. If this turns out to be the case, it is possible that further progress on the right to development could happen at a much quicker pace than in the past.

However, optimism must be tempered by the realization that progress is often illusory; while there has been widespread agreement that the right to development is a fundamental human right, there is still no consensus on the content, status, and scope of application of the right. As the voluntary commitments show, the right still widely misunderstood and is regularly in-

terpreted in entirely different ways.

The new Council will have two major challenges with respect to the right to development. It will first have to build consensus on the international dimensions of the right, soliciting agreement on what needs to be achieved at the international and global levels. Secondly, it will need to work hard to mainstream human rights in all United Nations bodies. For more than half a century, a rigid separation has existed in the UN system between the work of the human rights organs and that of the development and financial agencies; this must change if the right to development is ever to be transformed from a poorly-understood and abstract idea into a tangible mechanism for the improvement of people's lives.

The first task of the Council with respect to the right will be to review the status and mandate of the Working Group and its High-Level Task Force. Paragraph 6 of the resolution establishing the Council requires the new body to complete all its reviews, improvements, and rationalizations of the Commission's mandates, mechanisms, functions, and responsibilities within one year after the holding of its first session. The structures and processes for moving forward on the right to development should thus become clear by June 2007.

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Annex 1: Length of terms for the first members of the Council

One Year	Two Years	Three Years
Algeria	Brazil	Azerbaijan
Argentina	France	Bangladesh
Bahrain	Gabon	Cameroon
Czech Republic	Ghana	Canada
Ecuador	Guatemala	China
Finland	Japan	Cuba
India	Mali	Djibouti
Indonesia	Pakistan	Germany
Morocco	Peru	Jordan
Netherlands	Republic of Korea	Malaysia
Philippines	Romania	Mauritius
Poland	Sri Lanka	Mexico
South Africa	Ukraine	Nigeria
Tunisia	United Kingdom	Russia
	Zambia	Saudi Arabia
		Senegal
		Switzerland
		Uruguay

Annex 2. States elected to the Human Rights Council, by number of votes and whether they made specific reference to the right to development in their voluntary commitments

Elected State	Number of Votes	Commitment on RTD
African Group (13 seats)		
Ghana	183	No
Zambia	182	No
Senegal	181	Yes
South Africa	179	Yes
Mali	178	No
Mauritius	178	No
Morocco	178	Yes
Gabon	175	No
Djibouti	172	No
Cameroon	171	Yes
Tunisia	171	No
Nigeria	169	Yes
Algeria	168	Yes
Asian Group (13 seats)		
India	173	Yes
Indonesia	165	Yes
Bangladesh	160	Yes
Japan	158	No
Malaysia	158	No
Pakistan	149	Yes
Republic of Korea	148	No
China	146	No
Jordan	137	No
Philippines	136	Yes
Bahrain	134	No
Saudi Arabia	126	No
Sri Lanka	123	No

Eastern European Group (6 seats)		
Russia	137	Yes
Poland	108	No
Czech Republic	105	No
Ukraine	91 (1 st Rd.), 109 (2 nd Rd.)	Yes
Azerbaijan	95 (1 st Rd.), 103 (2 nd Rd.)	Yes
Romania	89 (1 st Rd.), 95 (2 nd Rd.), 98 (3 rd Rd.)	No
Latin American and Caribbean Group (8 seats)		
Brazil	165	Yes
Argentina	158	No
Mexico	154	No
Peru	145	Yes
Guatemala	142	Yes
Uruguay	141	Yes
Cuba	135	Yes
Ecuador	128	No
Western Europe and Others Group (7 seats)		
Germany	154	Yes
France	150	Yes
United Kingdom	148	No
Switzerland	140	Yes
Netherlands	137	Yes
Finland	133	Yes
Canada	130	No

Annex 3. States not elected to the Human Rights Council, by number of votes and whether they made specific reference to the right to development in their voluntary commitments

Non-Elected State	Number of Votes	Commitment on RTD
African Group		
Kenya	9	No written submission
Tanzania	1	No written submission
Madagascar	1	No written submission
Egypt	1	No written submission
Asian Group		
Thailand	120	Yes
Lebanon	112	No
Kyrgyzstan	88	Yes
Iran	58	No
Iraq	52	No
Qatar	1	No written submission
Maldives	1	No written submission
Eastern European Group		
Slovenia	91 (1 st Rd.), 88 (2 nd Rd.), 80 (3 rd Rd.)	No
Armenia	70	Yes
Latvia	50	Yes
Hungary	79 (1 st Rd.), 48 (2 nd Rd.)	No
Georgia	35	No
Albania	31	No
Serbia and Montenegro	1	No written submission
Latin American and Caribbean Group		
Nicaragua	119	No
Venezuela	101	Yes
Costa Rica	6	No written submission
Honduras	3	No written submission
Colombia	1	No written submission
Western Europe and Others Group		
Portugal	122	No
Greece	117	Yes
Spain	1	No written submission