

Presentation by Dr. Mihir Kanade\* for the Regional Consultations on the Right to Development, Panama, 11-12 October, 2018

A very good morning to all the respected participants in this regional consultation on the right to development. My apologies for being unable to be present, but I would like to thank the Special Rapporteur, Mr. Saad Alfaragi, and the OHCHR for giving me the opportunity to make this presentation. I have been asked to provide a brief overview of the international and regional legal framework for the Right to Development, and introduce its relevance to the implementation of the Sustainable Development Goals and more broadly, the 2030 Agenda.

As we are aware, the ambition and scale of the new agenda around which almost all development work worldwide will likely gravitate until 2030 is unprecedented. However, it is equally clear that any global agenda of this nature cannot be implemented successfully unless the appropriate framework is adopted – a framework which is not only compatible with human rights standards and principles, but one which does not view implementation of the SDGs merely as charity or generosity bestowed upon human beings. Such an essential framework is encapsulated in the 1986 United Nations Declaration on the Right to Development which provides the normative foundation for development to be considered as a human right of all individuals and peoples the world over.

The 1986 Declaration was adopted in a very specific context. In the 1960s and 70s, when the decolonization process was in full swing in Africa, Asia and the Caribbean, many of the newly independent countries realized that they were born into an international economic order which they had neither created nor had a say in the creation of. Their disillusionment fuelled by arguments that the economic order and institutions of global governance were skewed in favour of the developed countries led to the famous 1974 UN Resolution on the Establishment of a New International Economic Order. This gave the necessary push at the global level to crystalizing the idea of the Right to Development. In 1981, a Working Group of Government Experts was established for developing the RtD, however, the same year, the African countries which were drafting their regional human rights Convention, the Banjul Charter, incorporated the RtD as a guaranteed right of all peoples and a binding obligation on States in its Art. 22. With one major continent having done so, the rest of the world could no more ignore it, leading ultimately to the adoption of the 1986 Declaration on the RtD. It was a contested resolution at the time, with 146 countries voting in favour, 8 countries abstaining, and only the US opposing. However, since then, the RtD has been reaffirmed in a series of Declarations and Resolutions, including in the Rio Declaration of 1992 and the Vienna Declaration and Programme of Action of 1993 where it was unanimously agreed by all States that “The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations”. The Millennium Declaration of 2000, the Resolution establishing the Human Rights Council in 2006, the UN Declaration on Rights of Indigenous Persons of 2007, the Addis Ababa Action Agenda of 2015, the 2030 Agenda, amongst a host of other instruments, have reiterated the RtD. Indeed, many scholars have argued that the RtD today represents customary international law, although the opposite view also prevails. Very recently,

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in the September 2018 session of the Human Rights Council, a Resolution was passed to work towards a binding treaty on the RtD, the task for which has been assigned to the Intergovernmental Working Group on the RtD.

In the regional context of the Americas, although the RtD is not specifically mentioned in the regional instruments, there are nevertheless strong legal reasons to read the RtD into the regional system for protection of human rights.

For instance, the Charter of the Organization of American States of 1948, in Art. 33 details the concept, rights and duties of *integral development*, the overall purpose of which should be the “establishment of a more just economic and social order that will make possible and contribute to the fulfilment of the individual”. In Art. 31 and 32, it further recognizes that Integral development is the common and joint responsibility of Member States, preferably through multilateral organizations. In particular, Art. 32 stipulates that Cooperation among States in this regard “should include the economic, social, educational, cultural, scientific and technological fields, support the achievement of national objectives of the Member States, and respect the priorities established by each country in its development plans, without political ties or conditions.

Similarly, the American Convention on Human Rights of 1969, in Article 26 entitled “Progressive Development” requires States Parties to undertake adoption of measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter”.

Although both the OAS Charter and the American Convention were adopted prior to the 1986 Declaration on the RtD, as I shall point out presently, the attributes of integral development and progressive development enshrined in the regional instruments mirror the articulation of the RtD in the 1986 Declaration. Considering that all countries of the OAS, except the US, voted in favour of the 1986 Declaration, and all countries including the US voted in subsequent declarations and resolutions reaffirming the RtD, there is a sound legal argument to make that the provisions of the OAS Charter and the American Convention I have referred to, must be interpreted in sync with the 1986 Declaration. In other words, the 1986 Declaration provides the shape, colour, and texture to the principles of integral development and progressive development incorporated in the regional instruments of the Americas.

Let us now look at how development has been understood in the 1986 Declaration. The Preamble states that “development is 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”. Firstly, this definition of development as a human right focuses not only on the outcome of a development project, but also on the process by which it is undertaken. Secondly, it frowns upon the notion that development can be equated merely with economic growth. It is holistic and aims at the constant improvement of well-being. In other words, in 1986 itself, the DRTD had articulated development in the same fashion that welfare economists such as Amartya Sen did in the following decade. Thirdly, the definition focuses on well-being of the entire population and of all individuals. Now, in the 2030 Agenda, essentially this same idea has been renamed as the

“leaving no one behind” principle. Fourthly, this definition highlights the importance of participation of all stakeholders in the development process. Finally, it also bases itself on fair distribution of benefits resulting therefrom. An essential corollary of this equity principle has been articulated in the 2030 Agenda now as the principle of ‘reaching the furthest behind the first’.

Let us now briefly look at eight key features of the DRTD:

1. RtD is recognized as an inalienable self-standing human right. It is both an individual right as well as a collective right. Development, and indeed, Sustainable Development, are thus not just privileges enjoyed by human beings individually and collectively, nor are they just subjects of charity or generosity.
2. Operationalizing the RtD involves respecting, protecting and fulfilling all other human rights — civil, political, economic, social, and cultural —along with generating the resources of growth such as GDP, technology etc. This means that although the RtD is not a meta right, given the very nature of development, it cannot be achieved when there are violations of other human rights. For instance, if a water pipeline project in a rural area is undertaken, the State may argue that it is intended to fulfil the right to water and the RtD. However, if the pipeline project comes at the cost of forcibly taking lands of poor farmers without adequate compensation or rehabilitation, then their right to livelihood or property might be affected. In such cases, the RtD cannot be deemed to have been fulfilled because one set of human rights is being promoted at the cost of some other. No such trade-off is permitted under the RtD. It is this holistic approach of the RtD which requires taking along all human rights, that makes it particularly valuable. As a good practice, operationalizing the RtD means that before, during and after any development project, a human rights impact assessment must be conducted. Without such assessment, it is impossible to be aware of even the existence of such trade-offs between different sets of rights.
3. The RtD requires focusing not only on outcomes which are sought to be achieved as a result of a development plan (the “what” question), but also on the process by which those outcomes are achieved (the “how” question). For instance, an essential element of the RtD is participation of stakeholders. Three years ago, I led a UPEACE project with support from the Dutch Cooperation Agency, ICCO, for training business corporations on mainstreaming human rights in their corporate activities. An essential component of the UN Guiding Principles on Business and Human Rights endorsed by the HRC in 2011 is encouraging companies to set up operational level grievance mechanisms. Among all the 75 odd companies we trained in Panama, Nicaragua, and Costa Rica, as part of this project, including several multinationals, the most successful have been the ones where even the design of the operational level grievance mechanisms along with its implementation were done conjointly with the local municipality and an NGO representing interests of the local populations around the areas of corporate activity. When those who are likely to raise concerns about human rights impacts of projects are not included in the process, and their participation is not ensured, failure is the most likely result.

4. Human beings are individually and collectively the right-holders of the RtD against their States as well as other States. The Declaration is emphatic in its understanding of development as being people-centred and recognizes that the principal right holders are human beings, individually and collectively.
5. The Declaration also stipulates that States are additionally the right-holders of the RtD against other States, but it is vitally important to understand that when States exercise such a right against another State or the international community as a whole, they are doing so as agents of their citizens. States certainly cannot exercise the right against their own citizens, for instance by claiming that a dam project is needed to fulfil the RtD when the local population does not consider it as their development need and is against it. Citizens continue to remain the primary right-holders and the main determinants of what development means to them and what their own priorities.
6. The duty-bearers of the RtD are States, individually and collectively, including through international organisations. This duty is towards their own citizens as well as towards other States and their citizens.
7. The RtD imposes an obligation on States, individually and collectively, to create conditions favourable to its realisation, and refrain from making policies which undermine its realisation. States would, therefore, be failing in their obligations if their actions or the policies they support lead to creation of conditions unfavourable to the realisation of the RtD in any other country. These include the whole gamut of policies supported by States at international organizations, for instance, imposition of conditionalities on loans offered by the International Monetary Fund (IMF), the World Bank (WB), or the Inter-American Development Bank, where such conditionalities may be adverse to the realization of the RtD in the recipient country. Latin American countries have faced many such instances.
8. Most importantly, the RtD imposes a duty on States with respect to international cooperation to achieve the RtD. This duty of international cooperation is, in fact, only a reiteration of the same obligation inherent in the UN Charter. As such, development ought not to be seen as a charity or generosity. This is, unfortunately, a common element of most development projects in the region that are funded by development organizations. Let me give you an example. An embassy in Costa Rica of one of the major donor countries administers funds as part of its development cooperation and invites applications from local organizations. However, the calls for applications by the donor country already contains a list of themes for which prospective projects are to be prioritized. These priority areas are obviously based on the interests of the donor country and not of the local recipients. When the donor country decides development priorities for local organizations under the guise of international cooperation, and when recipients are unable to determine their own priorities for which they need international cooperation, an essential element of the RtD is violated. Such policies also run counter to the Addis Ababa Action Agenda, which is part and parcel of the 2030 Agenda. In contrast, we have examples of good practices. UPEACE, in partnership with the UNHCR and Costa Rican government, administers a unique pilot project whereby persons predetermined as refugees from the Northern Triangle and already assured asylum in third countries are brought to our campus in Costa Rica to receive training

on self-reliance, so that when they arrive in their host countries, they can live with dignity and not rely on social welfare by the host State. Hundreds of them spend between 3 to 6 months at UPEACE, and live with the local Costa Rican community around the university campus. When we designed the project, we made it a point to incorporate all principles and elements of the RtD. This included ensuring that the donors of the project do not insist on their notions of what training is necessary, but the refugees themselves determine what they need. When priorities of the beneficiaries are at the forefront rather than predominantly those of the donors, the results are overwhelmingly more successful.

Now, in the era of the SDGs, the RtD has gained renewed significance. To my mind, the RtD and sustainable development should be seen essentially as the same concepts in different incarnations. The RtD gives proper shape, colour and texture to the SDGs by purposely stressing on the right and duty aspects of sustainable development. By insisting that development is a human right which has clearly identified duty-bearers, the RtD hammers down the point that the only way development can be sustainable is if it is itself treated as a right and not as a charity, and if it encompasses all human rights as equally important and ensures that no human right is undermined. As such, the SDGs should be seen as an expression by States of their intention individually and collectively to fulfil their obligations under the DRTD. In other words, and to conclude, the RtD is nothing but the human rights avatar of the SDGs; and the SDGs are nothing but a policy expression and plan of action for operationalizing the RtD.

I hope that my presentation has provided a useful contribution to these regional consultations. I wish you all a very fruitful couple of days of discussions.