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**THE CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF PRETORIA COMMENTARY ON THE DRAFT CONVENTION ON THE RIGHT TO DEVELOPMENT**

1. **Introduction**
2. The Center for Human Rights, Faculty of Law, University of Pretoria (the Centre), is pleased to submit this commentary on the Draft Convention on the Right to Development (the Draft Convention), to the Intergovernmental Open-ended Working Group on the Right to Development (the Working Group). The Centre is an internationally recognised university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing protection and respect for human rights, through education, research, and advocacy.
3. The Centre commends the work of the United Nations and its various organs on the critical milestones made towards clarifying the nature, content, scope and overall importance of the right to development, including the Human Rights Council ([Res. 39/9](https://undocs.org/A/HRC/RES/39/9)) emphasizing the urgent need to make the right to development a reality for everyone, [Res:41/128](https://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf) adopting the Declaration on the Right to Development 1986, [Human Rights Council Res: 4/4 of 30 March 2007](https://ap.ohchr.org/documents/alldocs.aspx?doc_id=13040) and [9/3 of 17 September 2008](https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.HRC.9.L.11.pdf), recalling all Commission on Human Rights resolutions on the right to development, [HRC resolution 42/23](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/292/60/PDF/G1929260.pdf?OpenElement) establishing the Expert Mechanism on the Right to Development and the Vienna Declaration and Programme of Action among others.
4. These critical milestones are well expounded on by the preamble of the current Draft Convention, adopting a logical flow to its paragraphs informed by the evolutive trajectory of the right to development leading up to the draft convention.[[1]](#footnote-1) It is also commendable to see a draft convention anchored within existing international legal instruments, including human rights treaties and relevant declarations and resolutions adopted by States. These references will go a long way to gain momentum and support from member States already parties and signatories to existing international human rights frameworks.[[2]](#footnote-2)
5. The swift progress made in elaborating the right to development and the existence of such a draft is a giant step towards the ultimate implementation and realisation of the right to development. The draft Convention is certainly an inspiring accomplishment and a commendable endeavour to pursue and clarify the nature, scope and content of the right to development in a legally binding manner. It will help in addressing the different weights ascribed by developed and developing countries on the different levels of obligations split across North-South lines.[[3]](#footnote-3)
6. The draft Convention has the long-desired effect of imposing legally binding obligations to promote the right to development beyond mere guidelines and declarations. Furthermore, any contestations and ambiguities that might exist in relation to the right to development have the potential to be cleared by a legally binding instrument—reaffirming commitments already made by state parties under existing regional and international human rights instruments and UN declarations, resolutions and recommendations including the UN Agenda 2030, the [African Union Agenda 2063](https://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf), and the African Charter on Human and Peoples Rights (ACHPR) among others.
7. The Centre further appreciates the language and text of the Draft Convention, with import from UN Agenda 2030 on sustainable development goals and other existing international human rights frameworks. It is important to recall that Agenda 2030 on sustainable development was informed by the UN Declaration on the Right to Development (the Declaration) and as such, the Centre fully confers that elaborating an effective framework on the right to development must be alive to the provisions of Agenda 2030 and is vital to the full realization of the sustainable development goals.
8. The 17 Sustainable Development Goals and 169 targets set a mission to “end poverty”, “protect the planet” and ensure “prosperity for all by 2030, all these are key areas for the realization of people centred development.There is a high degree of convergence between human rights protection and the 2030 Agenda for sustainable development, and such remains a key initiative in the realization of the right to development.
9. Furthermore, the Human Rights Council has previously noted that eradicating poverty in all its forms and dimensions, including extreme poverty, is one of the critical elements in the promotion and realization of the right to development and is the greatest global challenge and an indispensable requirement for sustainable development. Similarly, the [African Union Agenda 2063](https://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf), also tailored around sustainable development, reaffirms the Rio principles of common, but differentiated responsibilities, the right to development and equity, mutual accountability and responsibility and policy space for nationally tailored policies and programmes on the continent.
10. As such, for the right to development to be realized, governments and other relevant stakeholders must, as noted in Article 6(1) of the UN Declaration, take steps to eliminate obstacles to development. This includes aiming to remove processes and mechanisms within the framework for development that disregard community voices and generate and consistently deepen inequalities—exacerbating abject poverty. There is a duty on states to create an enabling environment and an appropriate framework for sustainable and inclusive development.
11. Over the years, the Centre with other regional and international partners have been working—advocating for a human rights-based approach to development as a key pathway to ensure people centred and self-determined development. Generally, most development initiatives especially in the global South have been associated with increased cases of impoverishment, dispossession, environmental degradation, deepening inequality, corporate capture, and growing repression as common conditions faced by communities and people globally. These can be linked clearly to a dominant capitalist system—which prioritizes profits over people and the planet—and is intricately linked to structures of oppression, including patriarchy, racism and long histories of colonialism and imperialism.
12. These challenges have also been viewed as concerns by the Human Rights Council in [Res.42/23](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/292/60/PDF/G1929260.pdf?OpenElement) highlighting the increasing number of cases of human rights violations and abuses by transnational corporations and other business enterprises, underlining the need to ensure that appropriate protection, justice and remedies are provided to the victims of human rights violations and abuses resulting from the activities of those entities, and underscoring the fact that they must contribute to the means of implementation for the realization of the right to development.
13. These structures have been further heightened by skewed State-led development agendas that largely focus on creating conducive environments for private actors to do business without corresponding strengthened regulatory, standard setting and institutional frameworks that advance protection and respect for ‘peoples’ rights, free prior and informed consent and right to self-determined development.
14. Finally, in elaborating this legally binding instrument on the right to development, it is important that we take stock of the critical issues the COVID-19 crisis has exposed, from global social injustices, exacerbating intersecting and deep-rooted inequalities within countries that continue to affect access to vaccinations and economic recovery response measures. As noted by the United Nations High Commissioner for Human Rights, Michelle Bachelet, “Beyond the health emergency, COVID-19 is a profound human crisis, deeply rooted in discrimination and inequalities.”[[4]](#footnote-4) She further noted that the COVID-19 pandemic had shaken the 2030 Agenda “to its very core” and that at the heart of every story, every statistic, there was a human being – a person with inalienable rights, including to participate in, contribute to and enjoy her right to development.[[5]](#footnote-5) As such it is now more critical than ever, that the principles of solidarity and international cooperation be well enunciated in the convention for a more meaningful and effective instrument for the implementation and realization of the right to development for all. Solidarity goes to the soul of the right to development.[[6]](#footnote-6)
15. We therefore, call on States especially African States to meaningfully participate and support the negotiations for a strong legally binding instrument on the right to development, as a way of reiterating their political commitments to the process. We also call the States and the Working Group to take into serious consideration our comments and suggestions on the draft convention, which are critical to the realisation of the right to development in developing countries. This submission will reflect in large part what must be further strengthened in the draft Convention. In many parts, we draw upon comments made at the 3rd Session of the UN Expert Mechanism on the right to development and at the 21st session of the Intergovernmental Open-ended Working Group on the Right to Development.

Some of the key issues requiring stronger provisions include:

1. Incorporating mandatory elements of free, prior, and informed consent in all development projects
2. Strengthening provisions on the right to self-determination (self-determined development)
3. Mandatory human rights due diligence
4. Heightened solidarity and international cooperation
5. The primacy of human rights over trade and investment agreements
6. **Positive developments in the Draft Convention**
7. The centre commends the specific elements in the draft Convention, in comparison to the generality of the UN Declaration on the Right to Development. The specificity of the elements especially the general principles create strong provisions in the legally binding instrument critical to its effective implementation.
8. Individuals are very critical to the right to development and are entitled to take part in and co-regulate the development process. That the Preamble identifies the individual nature not just the collective nature of the right to development is thus important. It is an understanding that views the individual citizen not merely as a subject but also as an object of the right to development.
9. We welcome the fact that the draft convention builds on the UN Declaration on the Right to Development, 1986 (the declaration) and UN Agenda 2030 on sustainable development goals in both language and text.
10. We also welcome the elaboration of the general principle of self-determined development in Article 3(d) by Article 5, further cementing the significance of the right within the broader right to development discourse.The right to development cannot be achieved, at least to its full extent without territorial and economic self-determination—key areas in the developing world. Article 5(5) on resolute steps to prevent foreign domination and colonialism is also very significant for developing countries in Africa in pushing back on the increasing state capture of states by former colonial actors and their corporate arms especially in exploitative trade and investment deals and exploitation of natural resources in their former colonies.
11. As noted in the introduction, there is a high degree of convergence between human rights protection and the realization of the UN 2030 Agenda for sustainable development—which is greatly anchored within the right to development framework. As such, **Article 6** on the relationship with other human rights remains critical and is a commendable provision. Respect for human rights is a vital pre-requisite for human capital and sustainable development. Balancing human rights protection and pursuit of economic development remains a challenging issue in most of the developing world. Development initiatives have been greatly associated with forced evictions, land grabbing, displacement and deepened inequalities all exacerbating vulnerability and marginalization of many groups and communities. If the draft convention is to be effective, there is need for strong binding provisions that protect and safeguard the rights of marginalised groups such as women, persons living with disability, indigenous and ethnic minorities and the elderly among others in all development initiatives. This can be achieved through strong provisions in the draft Convention that advance **mandatory human rights due diligence** in all development projects. If well monitored and regulated, development can and should be seen as a synthesis and means to better enjoyment and realization of human rights.
12. Over the years, the power and influence of international organisations in state national development plans cannot be underestimated. The UNDP plays a critical role helping states achieve the sustainable development goals.Therefore, **Article 9** on the **General obligations of international organisations** is a commendable approach to articulate the role and extent to which international organisations impact the right to development.Noting the important role that international organizations continue to play on the human rights arena, it is applauded that the draft Convention recognizes this role by including international organizations as duty bearers together with State Parties. The duty of international cooperation under international human rights law is not only left up to States, but also to private actors and non-state actors who, beyond being rights holders, they also have a duty in the broader sphere of the right to development.
13. **Areas for improvement**

**The Preamble**

1. The Preamble is very extensive and elaborates clearly some elements of the right to development. It is very impressive in the recognition of the right to development as an absolute right of all people. An acknowledgment that the development is a comprehensive process as seen in the Preamble is encouraging. Furthermore, commendable is the acknowledgement in the very first paragraph, that realization of the right to development is a “common concern of humankind”, reinforcing the importance of the right to the entire international community.
2. Furthermore, the reference by the preamble to regional human rights instruments bears relevance. For the Centre, reference to the African Charter on Human and People’s Rights is significant as The African Charter is the only supra-national human rights instrument in the region that recognises the right to development as a legally binding and enforceable right. The African Charter included this right as a human right long before the adoption of the Declaration on the Right to Development by the General Assembly—which reinforces the importance of the right to development for the African people.

**Recommendation**

1. The Preamble should specifically affirm the **primacy of human rights** over trade, investment, environment and other development agreements. Accordingly, the Centre proposes a new paragraph in the Preamble that affirms the primacy of human rights obligations in relation to any conflicting provisions contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation agreements.[[7]](#footnote-7)
2. In the preamble, it would be key to acknowledge that **human rights defenders** face a particular risk when resisting development projects that impact their peoples, families and communities as well as taking into account the particular vulnerabilities and heightened risks of certain categories of human rights defenders including indigenous and environmental human rights defenders, human rights defenders working in natural resource rich rural areas and human rights defenders engaged in the protection of communal land.
3. As such we propose the addition of the following paragraph to the preamble: “Recognizing that human rights defenders are particularly targeted when challenging huge investment and development projects, taking into consideration particular vulnerabilities and heightened risks for certain groups of human rights defenders including women, indigenous and environmental human rights defenders, human rights defenders working in isolated and rural areas and human rights defenders engaged in the protection of land, and the obligation of States to protect human rights defenders against any harm.”

**Article 1: Object and Purpose**

1. The Centre suggests that a meaningful articulation of the right to development requires obliteration of the barriers to the right. In this sense poverty eradication, colonialization, neo-colonialization, racism should be at the centre of the right to development and the text should reflect that. An important aspect for the right to development is to address the development or economic inequalities faced globally. While the preamble reaffirms that poverty presents a serious obstacle to the realisation of the right to development, this provision on the object of the treaty does not clearly articulate that. The right should be geared towards ending poverty, better competition law frameworks for multinational companies especially in developing countries to warrant better living conditions. While economic growth is a necessary element of the right, it is not sufficient. There is a need for free decision-making social policy changes within the right expounded by principle of right to self- determined development and broader human rights-based approach to development.

**Recommendation**

1. **Article 1** should be strengthened to reflect the suggested issues. The article should read; The object and purpose of the present Convention is to promote and ensure the full, equal and meaningful enjoyment of the right to development by every human person and all peoples everywhere, and to guarantee its effective operationalization and full implementation at the national and international levels, through inter alia eradication of the barriers to the right including poverty, inequality, colonialism, Imperialism, cultural and traditional norms inconsistent with international human rights standards
2. Similarly, there is more clarity needed in **Article 1** on whether ‘peoples’ also includes States. While the fact that a human person is the main subject of the right to development, are juristic persons or States subjects and objects of the rights as well or are they just duty bearers—because where there are mentioned, there are mentioned with specificity but not necessarily so in this provision.
3. The issue of Scope of the right is also missing in the draft Convention. Whereasresolution 39/9, of the Human Rights Council mentions the need to elaborate a legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument, the draft convention does not have a specific provision on the same. Whereas the scope could be read within Article 4 on the Right to Development,it is suggested that in the absence of a definition, the content and scope of the right to development be clarified in at least one of the provisions in the text. It is important that the content and scope of the convention specifically covers the right to self-determined development.

**Article 3 – General Principles**

1. The Centre appreciates the importance of the article 3 laying out important principles for the realisation of the right to development including, human person and people centred development, human rights based approaches to development, self-determined development, sustainable development and international solidarity among others.
2. In terms of **Article 3,** the Centre applauds the originality of the inclusion of a specific article on general principles in a human rights treaty. The inclusion of **3(c)** is important in recognising that development laws must incorporate a human-rights based approach, one of the guiding principles of the UN sustainable cooperation framework. A human rights-based approach to development empowers right holders to understand and claim their right. It also increases the ability of duty bearers to fulfil these human rights obligations. In this way, accountability and access to remedy are improved in case these rights are violated. It is also very important and impressive that the draft recognises the individual’s right to development, **3(i)** and not follow the collective right approach by a lot of other documents.

**Free Prior and Informed Consent**

1. In International human rights law, information is a precondition for the exercise and enjoyment of many rights. The right is guaranteed under Article 19 of the International Covenant on Civil and Political Rights and other relevant human rights instruments.[[8]](#footnote-8) Information is essential to guarantee the rights to participation and self-determination—both key principles in the realization of the right to development. In the context of development projects, access to adequate, timely, relevant information at all stages of a project is essential to truly guarantee free prior and informed consent (FPIC) of communities affected by development projects and to ensure they can meaningfully participate in making decisions about development projects that affect their way of life and livelihood (self-determined development). Whereas the preamble and Article 4 (2) of the draft convention provide for free and meaningful participation in development, this needs to be strengthened to specifically provide for respect for FPIC principles in all development projects especially as they affect indigenous people, ethnic minorities and other communities affected by development.
2. On the application of FPIC the African Commission for example has issued a positive decision on behalf of indigenous persons. In [Endorois decision](https://www.achpr.org/sessions/descions?id=193), the African Commission underscored that in circumstances where projects will have a “major impact” on indigenous communities, there is a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions. Such elements of FPIC should be included in this provision. In obtaining FPIC, a State must comply with the requirements of the minimum duty to consult by consulting in good faith; at an early stage; on an on-going basis, in a culturally appropriate way and with an agreement-reaching mind-set.
3. Respect for FPIC can be achieved by requiring States Parties to ensure that the consultation of indigenous peoples and other ethnic minorities is aimed at consensus building rather than majority win—to ensure social cohesion and sustainable development. As provided for in the Declaration, FPIC is a key component in the right to development and broader principle around the right to self-determination. It would be a missed opportunity for this Convention not to make reference to the concept of FPIC which has been well articulated in the African Commission decision in the Endorois case—a key jurisprudence as the first case world-wide to find a violation of the right to development.

**Recommendations**

1. On **Article 4 The Right to Development,** there is a need for textual improvements to consider the aspirations of inter alia African individuals and communities on issues such as FPIC, access to remedy and gender issues. Article 4(2), should make provision for full elements of free, prior and informed consent (FPIC) as laid out in the United Nations Permanent Forum on Indigenous Issues (UNPFII).[[9]](#footnote-9)
2. The participation called for must not only be ‘active, free and meaningful’, but also informed through prior consultation. Participation must be emphasised to have the goal of consent. Without such consent, nothing goes forward. The right to consent or not thereto must be emphasised. The provision must also emphasise what participation entails.

**Extra-territorial Obligations (ETOs)**

1. Beyond the international solidarity principle and the duty to cooperate, the draft convention should reiterate the extraterritorial obligations of States. Whereas, **Article 13** on the **Duty to cooperate** is vital in that the right to development can only be actualised through meaningful international and regional cooperation. The draft emphasizes the vital significance of international co-operation by highlighting that the states have a duty to co-operate with each other in ensuring development and eliminating obstacles to development, to promote universal respect for and observance of all human rights and fundamental freedoms.

**Recommendation**

1. This duty needs to be strengthened beyond mere voluntary undertakings, highlighting Extraterritorial obligations especially in circumstances where development actors are transnational. The duty should also extend to addressing the vice of illicit financial flows and tax haven as a way of addressing the rampant economic flight that greatly affects developing countries capacity to realise domestic driven sustainable development

**Mandatory Human Rights Due Diligence (mHRDD)**

1. **Article 19** on Impact Assessments is very important as it is preventative of any abuses and violations that may arise in implementation of the right. It helps in strengthening respect for the general principles.However, the Centre notes that there are various elements around impact assessments that should be considered in text in the draft Convention as a means of strengthening the article and ensure effective implementation. This will help in addressing the obligation of States and other private actors to prevent human rights abuses and violations associated with development.

**Recommendation**

1. **Article 19** in the draft Convention should be clear and specific requiring mandatory human rights due diligence (mHRDD) in all development projects (. The article should clarify on the role of States, international organisations and other private actors in conducting mHRDD and human rights, social and environmental impact assessments. We proposea new sub article calling on “States Parties and international organisations shall take all necessary steps, particularly through human rights, social and environmental impact assessments, to respect and protect human rights in all development initiatives and plans.”
2. Secondly, "States parties shall ensure that any decision-making processes or actions regarding national development plans shall be in accordance with their human rights obligations and shall take all necessary steps to ensure that such decisions and actions do not contribute, cause, or be directly linked to human rights abuses and violations in the course of development.”

**The Primacy of Human Rights**

1. The Centre appreciates Article 6 on relationship with other human rights. This article provides for strong commitments to ensure the legally binding instrument is consistent with existing international law human rights standards, principles and instruments. Whereas it places the right to development as “an integral part of human rights and to be realized in conformity with the full range of civil, cultural, economic, political, and social rights”, it is important that the provision is strengthened to ensure that all investment, trade and development agreements shall be compatible with and not undermine international human rights standards and obligations.

**Recommendation**

1. We propose a sub article that provides; Any existing national development plan and strategies and other trade and investment agreements, including regional or sub-regional agreements, on issues relevant to this Convention shall be reviewed, adapted and implemented in compliance with and in a manner that does not undermine their obligations under this Convention as well as other relevant international human rights principles, standards and instruments.
2. Secondly, States and other development partners shall before entering into and signing any development plan, undertake mandatory human rights due diligence specifically human rights, social, environment and sustainability impact assessments prior to implementing any development project to assess and mitigate direct and potential impact on peoples.

**Solidarity and the Duty to Cooperate**

1. The Centre appreciates the provisions under Article 3 (g) on international solidarity and Article 13 on the duty to cooperate, both reinforcing provisions in Article 2 (1) of the International Covenant on Economic Social and Cultural Rights and Article 21 (3) of the African Charter on Human and Peoples Rights calling for international assistance and cooperation.

**Recommendation**

1. We recommend adding in the preamble, Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all, without discrimination on any grounds that are prohibited by international human rights law.
2. Similarly, the draft convention would benefit from a sub article on the impact of illicit financial flows on the right to development which remains a huge challenge in the developing world especially Africa—denting its capacity to develop. There is need for heightened solidarity, assistance and international cooperation and to address the global problem of illicit financial flows.

**Remedial Mechanisms**

1. Article 15 on Special or remedial measures lacks a very relevant reference to specific vulnerable groups like gender, sex and on other categories like status. Human rights defenders are also not mentioned in this article, yet remain more vulnerable to abuse and violation in the course of development especially during their human rights and advocacy work with affected peoples. It is critical that special measures cover vulnerable groups and human rights defenders.

**Recommendation**

1. We recommend that the Article is revised to encompass vulnerable groups. The article should read; ‘State parties recognize that **human rights defenders and activists** and certain human persons, groups and peoples, owing to their age, disability, marginalization, vulnerability, indigeneity, **gender, sex and/or** minority status may require special or remedial measures to accelerate or achieve de facto equality in their enjoyment to the right to development.’
2. **Conclusion**
3. All in all, the Centre again extends its appreciation to the Working Group on the progress made towards elaborating a legally binding instrument on the right to development. The Centre will continue participating and supporting the process to ensure that we have in place an instrument that is strong enough to address key impediments people centred development. To this end, we shall continue engaging with the Working Group and State parties to ensure that throughout the text of the draft Convention, general principles as laid out in Article 3 are imbued in the language of the all Articles of the Convention.

1. Commentary to the Draft Convention [↑](#footnote-ref-1)
2. *Id.,* [↑](#footnote-ref-2)
3. B. Ibhawoh, “The Right to development: Politics and Polemics of Power and Resistance,” Human Rights Quarterly, 331 (2011), pp76-104. [↑](#footnote-ref-3)
4. Michelle Bachelet, “COVID-19 and the Right to Development: We Are All in This Together”,  
   45th Session of the Human Rights Council Biennial Panel discussion on the Right to Development,

   , <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=26254&LangID=E>. [↑](#footnote-ref-4)
5. Id., [↑](#footnote-ref-5)
6. Id., [↑](#footnote-ref-6)
7. See: Vienna Convention on the Law of Treaties (VCLT) 30(3): “When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”, and see also, United Nations’ Guiding Principles on Business and Human Rights (UNGPs), Principle 9. Available at: http://www.ohchr.org/Documents/Publications/ GuidingPrinciplesBusinessHR\_EN.pdf. See also Principle 10 regarding the position of States when acting as members of multilateral institutions that deal with business-related issues. See also Principle 11, 23, and 31. [↑](#footnote-ref-7)
8. See for instance the Convention on the Rights of the Child (Article 13); American Convention on Human Rights (Article 13); Convention on the Rights of Persons with Disabilities; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 13); Convention on the Elimination of All Forms of Discrimination against Women (Articles 10, 14 and 16). [↑](#footnote-ref-8)
9. See: <https://www.uncclearn.org/wp-content/uploads/library/un-redd05.pdf> and see: Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005. [↑](#footnote-ref-9)