**Obligations under Articles 8 to 12 of the Revised Draft Convention**

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**Introduction**

Distinguished Chair Ambassador Akram, and Members of the Working Group:

At yesterday’s session, Professor Kanade aptly discussed the elements and components of Article 4 of the Revised Draft Convention as the cornerstone of the right to development. Before I begin my discussion of the obligations under Articles 8 to 12 of the Revised Draft Convention, it is important to emphasize that these elements and components of Article 4 are by no means unfamiliar to State. On the contrary, since the 1986 Declaration on the Right to Development, there has been **35 years** of practices – both treaty-based and in softer forms of international instruments, as well as in relevant international jurisprudence – that proceed from the baseline understanding of the right to development as established in the 1986 Declaration on the Right to Development in UN General Assembly Resolution 41/128 of 4 December 1986. To recall, a total of 146 States voted for the adoption of the 1986 Declaration through this General Assembly Resolution, with only one State voting against (the United States of America), and only 8 States abstaining (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden, and the United Kingdom). The language of the 1986 Declaration, therefore, which draws directly from provisions of the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, as indicated in the Preamble to the 1986 Declaration, is completely familiar and fully approved by language by the widest generality of States in the United Nations.

To this end, there should be no equivocation about the plain and obvious clarity of the language used in the 1986 Declaration, and which again defines the right to development in the Revised Draft Convention solely according to those well-established terms and language with 35 years of practice in the international system. The Preamble of the Revised Draft Convention tracks the importance of that practice, as well as the official legal recognition of the right to development in certain regional treaties such as the African Charter on Human and Peoples’ Rights, and its continuing usage by States and the explicit references that States have made to this right in subsequent international instruments issued within the United Nations as well as in regional systems. States themselves have been active in the evolution and practice of the right to development. Permit me, therefore, to break down the elements of the right to development under the Revised Draft Convention, which all wholly reflect the language used in the 1986 Declaration on the Right to Development. This is important to set out first, before I discuss the obligations laid out in Articles 8 to 12 of the Revised Draft Convention.

First, we recall that the 1986 Declaration on the Right to Development itself defines what development is in its second preambular paragraph:

Recognizing 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,

We have incorporated this definition and very slightly modified it according to many of your submissions, in the sixteenth preambular paragraph of the Revised Draft Convention, and in Article 4(2) of the Revised Draft Convention referring to the right of every human person and all peoples “to active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”

Second, we recall that Article 1(1) of the 1986 Declaration on the Right to Development itself defines what the right to development is:

“1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

Article 6(2) of the 1986 Declaration on the Right to Development then goes on to state:

“2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.”

Thus, when we examine the formulation of Article 4(1) of the Revised Draft Convention, we simply find the merger of both of the above provisions into a single paragraph that retains the full understanding of the right to development under the 1986 Declaration on the Right to Development:

“1. Every human person and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to, and enjoy civil, cultural, economic, political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.”

Under the above definition, drawing almost identically from Article 1(1) and Article 6(2) of the 1986 Declaration on the Right to Development, the right to development under Article 4(1) contains three major elements:

1. **The definition of rights-holders**: every human person and all peoples
2. **The legal entitlements**: participation in, contribution to, and enjoyment of civil, cultural, economic, political, and social development. The concept of development, as discussed yesterday, is defined in paragraphs 16 and 17 of the Revised Draft Convention, and I quote:

“Recognizing that development is a comprehensive civil, cultural, economic, environmental, political and social process that is aimed at the constant improvement of the well-being of the entire population and of all peoples and individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Acknowledging that development is understood not simply in terms of economic growth, but also as a means to widening people’s choices to achieve a more satisfactory intellectual, emotional, moral and spiritual existence rooted in the cultural identity and the cultural diversity of peoples”

1. **The linkages of the right to development to all other human rights and fundamental freedoms:** where the entitlements of the right-holders (to participation in, contribution to, and enjoyment of development) are indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms.

For purposes of a legally binding instrument, the above elements are more than sufficient, determinate, and concrete so as to enable States as well as rights-holder to identify the parameters of the right to development, and determine the appropriate implementation of the right to development, consistent with each of the above three elements.

Turning now to the obligations under Articles 8 to 12. Permit me first to make an initial legal clarification on what it means to violate a right, as well as what it means to implement a right.

Violations or breaches of a right occur when the legal entitlements are not met, and State action results in or causes the failure to meet such legal entitlements of the rights-holders. Under international law, two elements must occur for such a breach to amount to an internationally wrongful act that will engage international responsibility. First, the primary norm (e.g. in this case, the right to development) must be shown to have been breached according to its elements. Second, the breach itself must be attributable to the State, under any of the norms of attribution under Articles 4 to 11 of the International Law Commission’s 2001 Articles on the Responsibility of States for Internationally Wrongful Acts. And third, even when international responsibility is engaged by a State breach, none of the usual international legal defenses (e.g. circumstances precluding wrongfulness, non-attribution, or inexistence of the breach of the primary norm) should be present. It is therefore a high legal threshold, at the outset, for proof of any international breach by a State.

Implementation of a right, however, pays particular attention to the nature of the right and the interaction of the State’s obligations in relation to the said right to yield the desired or expected conduct or behavior that implements the right. This is where the obligations of Articles 8 to 12 of the Revised Draft Convention are significant, precisely because they specifically map how the Revised Draft Convention contemplates the State’s implementation of the right. Thus, beyond the baseline responsibility set under Article 7 of the Revised Draft Convention for everyone to respect human rights under international law (also noting that international law itself differentiates between what the specific legal duties are for respecting such human rights for States, vis-à-vis non-State actors, such as individuals and groups, the private sector or businesses, international organizations, among others), the Revised Draft Convention makes explicit in Part III, Articles 8 to 12 what conduct is expected of States. Let me now turn to each of these provisions under the Revised Draft Convention. Before I discuss each of these provisions, may I invite all members of the Working Group to turn to pages 108 and 109 of the Commentaries to the Revised Draft Convention, which contain the track changes language indicating minimal revisions to the language contained in the 17 January 2020 Draft Convention. This should help facilitate our mutual discussion of these provisions.

**Article 8 General Obligations of States Parties**

Article 8 sets forth four General Obligations of States Parties, again reflecting language traceable to the 1986 Declaration on the Right to Development:

Article 8(1) reflects straightforward language from the 1986 Declaration, with certain innovations to reflect the evolution of international law and international human rights law**.** Specifically, this provision enumerates a non-comprehensive list of grounds of prohibited discrimination, originating from the ICCPR and the ICESCR, up to more recent international human rights treaties and specific evolutions in international jurisprudence set by the International Court of Justice.

“1. States Parties shall respect, protect and fulfill the right to development for all, without discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, nationality, statelessness, national, ethnic, or social origin, property, disability, birth, age or other status, in accordance with obligations set forth in the present Convention.”

The above triadic typology of “respect, protect, and fulfillment” of international human rights law is specifically seen in the evolution of the interpretation of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both by their respective treaty bodies (the Committee on Economic, Social and Cultural Rights and the Human Rights Committee) as well as in the jurisprudence of international and regional courts (such as the International Court of Justice, the Inter-American Court of Human Rights, and the European Court of Human Rights). The same typology is found in the language of subsequent international human rights treaties such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of Person of Disabilities, among others.

This provision attracted numerous suggestions as to the kinds of discrimination listed, specifically on the inclusion of “gender”, “gender identity” or “sexual orientation” as specific grounds of discrimination. The Expert Drafting Group saw that there was no consensus from all States on this specific ground, with many States and civil society organizations expressly objecting to the inclusion of these terms as grounds of discrimination. Due to the deeply contested nature of these proposed grounds, the Expert Drafting Group did not recommend their inclusion.

The Expert Drafting Group included the words “nationality” and “national, ethnic, or social origin” owing to the decision of the International Court of Justice in the case of *Qatar v. UAE* which drew a distinction between nationality and national origin in the interpretation of discrimination under the Convention on Elimination of Racial Discrimination. To avoid similar delineations in the future, the Expert Drafting Group put forward both terms in this Revised Draft Convention.

Other proposals sought to introduce other specific grounds of discrimination, as well as to delete the phrase “other status”. The Expert Drafting Group did not recommend these proposals, since they were either not yet settled under existing international human rights law (whether in international human rights treaties or as recognized customary international law in international jurisprudence), or would whittle down the protections of existing international human rights law.

Article 8(2) (e.g. “States Parties shall cooperate with each other in ensuring development and eliminating obstacles to development, encouraging full observance and realization of all human rights.”) then reflects the language of Article 6(1) of the 1986 Declaration (e.g. “All States should cooperate with a view to promoting, encouraging, and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction…”) as well as Article 6(3) of the 1986 Declaration (e.g. “States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.”). There were various proposals on this front, such as to include the private sector as a duty-bearer, detailing the duty to cooperate, or grounding human rights as defined in national constitutions. The Expert Drafting Group did not recommend these proposals, since they would either whittle down the scope of the duty to cooperate in ensuring development and eliminating obstacles to development, or they would relocate the duty of States to other parties, or would narrow down international human rights law only according to what is indicated in national constitutions which are themselves highly variable across jurisdictions.

Article 8(3) (e.g. “States Parties shall ensure that public authorities and institutions at all levels act in conformity with the present Convention.”) draws from Article 12(3) of the 17 January 2020 Draft Convention, and is substantively aligned with Article 10 of the 1986 Declaration (e.g. “Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.”). The Expert Drafting Group notes that this is a new provision in both the 17 January 2020 Draft Convention and the present Revised Draft Convention, and recommends its inclusion pursuant to the general obligations of all States in Article 8. There were no proposals to modify this provision.

Article 8(4) attracted several proposals. The provision draws from Article 2(3) of the 1986 Declaration (e.g. “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 benefits resulting therefrom.”) Article 8(4) states, in turn:

“4. States Parties recognize that each State has the right, on behalf of its peoples, and also the duty to formulate, adopt, and implement appropriate national development laws, policies and practices in conformity with the right to development and aimed at its full realization. To that end, States Parties undertake to refrain from nullifying or impairing, including in matters relating to cooperation, aid, assistance, trade or investment, the exercise of the right and discharge of the duty of every State Party to determine its own national development priorities and to implement them in a manner consistent with the provisions of the present Convention and international law.”

Proposals focused on the second sentence of this provision, either seeking to expand the scope of States Parties’ undertaking to refrain from nullifying or impairing, or seeking to narrow such scope. Where the expansion pertained to the duty to cooperate, the Expert Drafting Group did not recommend such proposals in light of the elaborated duty to cooperate in Article 13 of the Revised Draft Convention. Finally, the Expert Drafting Group agreed with the recommendation to include the words “and international law” at the end of the second sentence of this paragraph so as to appropriately qualify and differentiate the nature of the determination and implementation of national development priorities of States according to both the Convention and existing international law.

**Article 9 of the Revised Draft Convention**

Article 9 refers to the general obligations of international organizations in its title, but its substance clearly reflects what States Parties agree on as to those obligations of international obligations. The legal evaluation of this provision, therefore, turns on what States Parties agree are general obligations of international organizations to refrain from certain conduct, and less so about what would be directly imposed on international organizations as a result of international law.

“Without prejudice to the general duty contained in article 7, States Parties agree that international organizations also have the obligation to refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach any obligation that the State or the latter organization may have with regard to the right to development.”

Proposals sought to expand this paragraph towards the direction of direct imposition of obligations on international organizations when they adopt decisions. The Expert Drafting Group noted that the determination of the existence of such legal obligations pertaining to international organizations is a matter of international law, whether as found in the constitutive documents of international organizations or actual treaties to which such international organizations are parties. That is not the remit of this provision under the Revised Draft Convention, which by and large focuses mainly on what States Parties to this convention agree to be general obligations to refrain from conduct on the part of said international organizations. The operative verb in this provision is ”agree”, and such agreement pertains only to the States Parties in this convention.

**Article 10 Obligation to respect**

States Parties shall refrain from conduct, whether expressed through law, policy or practice, that:

(a) Nullifies or impairs the enjoyment and exercise of the right to development;

(b) Impairs the ability of another State or an international organization to comply with that State’s or that international organization’s obligations with regard to the right to development;

(c) Aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, another State or an international organization to breach that State’s or that international organization’s obligations with regard to the right to development;

(d) Causes an international organization of which it is a member to commit an act that, if committed by the State Party, would constitute a breach of its obligation under the present Convention, and does so to circumvent that obligation by taking advantage of the fact that the international organization has competence in relation to its subject matter.

This provision elaborates the steps to be taken under Article 10 of the 1986 Declaration. This provision also attracted various proposals, either for more detailed elaboration, broader contextualization, or narrowing of the obligations therein. The Expert Drafting Group maintained much of the language here, noting in the Commentaries to the 17 January 2020 Draft Convention that the language of “nullifies” and “impairs” are found in international human rights treaties, and much of the structure of subparagraph (c) draws directly from Articles 16-18 of the International Law Commission’s 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts and the counterpart provisions in Articles 58-60 of the International Law Commission’s 2011 Draft Articles on the Responsibility of International Organizations. There were no comments to subparagraph (d).

**Article 11 Obligation to protect**

States Parties shall adopt and enforce all necessary, appropriate and reasonable measures, including administrative, legislative, investigative, judicial, diplomatic or others, to ensure that human or legal persons, peoples, groups, or any other State or agents that the State is in a position to regulate do not nullify or impair the enjoyment and exercise of the right to development within or outside their territories when:

(a) Such conduct originates from or occurs on the territory of the State Party;

(b) The human or legal person has the nationality of the State Party;

(c) The State Party has the requisite legal duty under either domestic or international law to supervise, regulate or otherwise exercise oversight of the conduct of the legal person engaging in business activities, including those of a transnational character.

This provision elicited proposals to delete or clarify the words “or outside their territories”. The Expert Drafting Group submits that this is consistent with the 1986 Declaration, specifically, the Article 10 duty to take steps to implement the right to development at the international levels, the Article 4(1) duty to take steps individually and collectively to formulate international development policies, and the Article 3(1) primary responsibility of States for the creation of national and international conditions favourable to the realization of the right to development. The Commentaries to the 17 January 2020 Draft Convention further state other international legal sources for this provision.

The Expert Drafting Group heavily reformulated this provision to address concerns raised in many submissions of States and other respondents. Most importantly, the obligation to protect here is carefully qualified or circumscribed by applicable law and is not a blanket rule. The States Parties’ obligation to adopt and enforce all necessary, appropriate, and reasonable measures – including over persons, groups, or entities that the State is in a position to regulate – is based on the requisite legal duty of the State under either domestic or international law to supervise, regulate, or otherwise exercise oversight of the conduct in question. There would have to be a clear showing, therefore, of what that requisite legal duty of the State is under either domestic or international law.

**Article 12 Obligation to fulfil**

1. Each State Party shall take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the right to development, without prejudice to its obligations to respect and protect the right to development contained in articles 10 and 11 of the present Convention or to those obligations contained in the present Convention that are of immediate effect. States Parties may take such measures through any appropriate means, in particular through the adoption of legislative measures.
2. To this end, each State Party shall take all necessary measures at the national level, and shall ensure, inter alia, equality of opportunity for all human persons and peoples in their access to basic resources, education, health services, food, housing and employment, and in the fair distribution of income, and shall carry out appropriate economic and social reforms with a view to eradicating all social injustices.

These provisions again pertain to Article 10 as well as Article 8(1) of the 1986 Declaration. Expert Drafting Group noted various proposals to expand and elaborate further these provisions. The second paragraph of this article reflects the Expert Drafting Group’s agreement with the proposal to draw language directly from Article 8(1) of the 1986 Declaration. The Expert Drafting Group largely maintained the language of Article 12(1), noting the proposals to elaborate the content of this provision, because its formulation was sufficiently broad to accommodate all of the textual proposals raised in the submissions.

Thank you and I now yield the floor and welcome any questions or observations.