

ARTICLES

IN SEARCH OF THE UNICORN: THE JURISPRUDENCE AND POLITICS OF THE RIGHT TO DEVELOPMENT*

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A philosopher is a person who goes into a dark room on a moonless night to look for a nonexistent black cat. A theologian comes out claiming to have found the cat. A human rights lawyer, after such an on-site visit, sends a communication to the Commission on Human Rights; and a member of the Commission leaves the room drafting a resolution on the treatment of black cats. This, in a nutshell, is uncomfortably close to the history of the so-called human right to development.

In the early seventies, the first intrepid investigators began to claim success in their searches. The initial sighter, the eminent jurist Keba M'Baye, was a distinguished member of the Commission on Human Rights which, not surprisingly, was soon discussing the right to development. Both the Commission and the General Assembly quickly passed resolutions proclaiming its existence. Today, there is near unanimity in both diplomatic and scholarly discussions that the human right to development not only exists but is of great importance.

Possessed of something of a philosophical temperament, I readily joined the quest but came up empty handed. I did, however, come upon the idea of turning on the light. The room, alas, proved empty. This article is a chronicle of my search for the right to development.

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I. THE BRIEF HISTORY OF THE RIGHT TO DEVELOPMENT

Fifteen years ago, a human right to development was completely unknown. Ten years ago, it had never been discussed in the UN. But in less than three years after its initial mention in the Commission on Human Rights in 1977, it had been proclaimed as a human right by the Commission, United Nations Educational, Scientific and Cultural Organization (UNESCO) and the General Assembly. Today, the Commission is at work on drafting a declaration on the right to development.

Keba M'Baye first broached the concept in his 1972 Inaugural Lecture to the International Institute of Human Rights in Strasbourg.¹ At the time, M'Baye admitted that introducing the idea involved considerable "temerity."² As late as 1978, in a revised version of his original paper, he still referred to the idea as "somewhat venturesome."³ Nonetheless, as Chairman of the Commission on Human Rights in 1977, he was instrumental in securing the first formal recognition of a human right to development with only the most cursory discussion.⁴ The Commission adopted Resolution 4 (XXX-III),⁵ which contains the first explicit mention of a right to development in a UN resolution. Paragraph 4 of Resolution 5 provides:

4. *Recommends* to the Economic and Social Council to invite the Secretary-General, in cooperation with UNESCO and the other competent specialized agencies, to undertake a study on the subject "The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Or-

1. M'Baye, *Le droit au developpement comme un droit de l'homme*, 5 REVUE DES DROITS DE L'HOMME [REV. DR. L'HOMME] 505 (1972). Cf. Salcedo, *El derecho al desarrollo como un derecho humano*, 25 REVISTA ESPANOLA DE DERECHO INTERNACIONAL [REV. ESP. D. INT.] 119 (1972). The only earlier reference I have been able to find in English or French is in an obscure document, *Les droits des peuples sous-developpe au developpement* issued by the Commission "Justice et Paix" d'Algerie. See Sanson, *Droits des peuples sous-developpes au developpement au droits des hommes et des communautes a etre soi, non seulement par soi, mais aussi par autres* in ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, COLLOQUE 1979, LE DROIT AU DEVELOPPEMENT AU PLAN INTERNATIONAL 204 ff. (R-J. Dupuy ed. 1980) [hereinafter cited as Dupuy].

2. M'Baye, *supra* note 1, at 505.

3. M'Baye, (paper delivered at the UNESCO Meeting of Experts on Human Rights, Human Needs and the Establishment of a New International Economic Order, in Paris, (June 19-23, 1978)), reprinted in UNESCO Doc. SS-78/CONF.630/8 at 1.

4. See U.N. Doc. E/CN.4/SR.1389, 1392-1398 (1977).

5. Commission on Human Rights, Report on the Thirty-Third Session, 62 U.N. ESCOR Supp. (No. 6), U.N. Doc. E/5927 (1978).

der and the fundamental human needs," and to make this study available for consideration by the Commission on Human Rights at its thirty-fifth session.

I quote this paragraph in full to underscore the peculiarly brusque yet oblique entry of the right to development into the UN human rights arena.

Prior to this resolution, such a right had never even been discussed in the UN system. The scholarly literature was similarly silent; other than M'Baye's article, I have been able to find no substantial scholarly discussion of the right to development in either English or French before 1979. The Commission, nonetheless, after almost no discussion, not only called for a study of the right (rather than simply an investigation of the possibility that it did exist or ought to be established), but felt itself competent to specify the appropriate conceptual context for such a study.

Except for suggestions that it required a somewhat more precise definition, virtually no one questioned the idea, and it moved through the usually labyrinthine UN system with incredible speed. In 1978 a right to development was proclaimed in two solemn declarations, the Declaration on the Preparation of Societies for Life in Peace, adopted as General Assembly Resolution 33/73, and the UNESCO Declaration on Race and Racial Prejudice.⁶ But it was in 1979 that the human right to development exploded into international prominence.

In early January, 1979, the Secretary-General's Report⁷ asked for in Resolution 4 (XXXIII) was issued. Even today, this remains the most thorough discussion of the sources and content of the human right to development.⁸ The Commission, in part on the basis of this Report, passed Resolution 5 (XXXV) in which it "reiterated" the existence of a human right to development, in effect taking its backhanded introduction of the concept two years earlier as a definitive proclamation.⁹ Also in 1979, the Hague Academy of Interna-

6. Adopted by the General Conference of UNESCO on Nov. 27, 1978.

7. The International Dimensions of the Right to Development as a Human Right in relation with other Human Rights based on International Cooperation, including the Right to Peace, taking into account the Requirements of the New International Economic Order and the Fundamental Human Needs, Report of the Secretary-General, U.N. Doc. E/CN.4/1334 (1979) [hereinafter cited as Secretary-General's Report].

8. This is less a compliment to the Secretary-General's Report, which is superficial and poorly reasoned, than a comment on the dismal lack of progress in the discussion and conceptualization of the right to development over the last half dozen years.

9. This oblique introduction of the concept is usually overlooked, or actively obscured. See, e.g., Hassan, *Solidarity Rights: Progressive Evolution of International Human Rights Law?*, N.Y.L. SCH. HUM. RTS. ANN. 51, 54 (1984), where it is argued, without the slightest basis,

tional Law held a Workshop on The Right to Development at the International Level.¹⁰ The General Assembly followed suit and recognized the right to development in Resolution 34/46 on November 23, 1979, again after only the most cursory discussion.¹¹

Since then, reiteration of the right to development has been an annual ritual in the Assembly.¹² The Commission has received follow-up studies on the regional and national dimensions of the right,¹³ and has also regularly reaffirmed its existence.¹⁴ In 1981, work began on a declaration in a special Working Group of Governmental Experts on the Right to Development.¹⁵ A small scholarly literature has begun to develop.¹⁶ The right to development has figured prominently in international seminars sponsored by UNESCO,¹⁷ the Division of Human Rights,¹⁸ and the International Commission of Jurists.¹⁹ It has been a subject of discussion at regular scholarly meetings.²⁰ It has even been included in one regional human rights instrument, the African (Banjul) Charter on Human and Peoples'

that the 1977 resolution recognized the right to development "as a major goal of the world community."

10. Dupuy, *supra* note 1.

11. See U.N. Doc. A/C.3/34/SR.24-30, 33-38, 41.

12. G.A. Res. 174, 35 U.N. GAOR (1980); G.A. Res. 133, 36 U.N. GAOR (1981); G.A. Res. 199, 37 U.N. GAOR (1982); G.A. Res. 124, 38 U.N. GAOR (1983); and the draft resolution adopted by the Third Committee on Nov. 30, 1984, U.N. Doc. A/C3/39/L36.

13. U.N. Doc. E/CN.4/1421 and U.N. Doc. E/CN.4/1488.

14. See, e.g., Res. 6 (XXXVI) and Res. 1983/15.

15. The Reports of the Working Group are available as U.N. Doc. E/CN.4/1489, U.N. Doc. E/CN.4/1983/11, and U.N. Doc. E/CN.4/1984/14. The report of the 1984 session will be officially issued later this year.

16. See, e.g., Dupuy, *supra* note 1; Development, Human Rights and the Rule of Law, Report of the Conference held in The Hague by the International Commission of Jurists (Apr. 27-May 1, 1981) [hereinafter cited as Int'l Comm'n of Jurists]; Espiell, *The Right to Development as a Human Right*, 16 TEX. INT'L L.J. 189 (1981); Mestdagh, *The Right to Development*, 28 NETH. INT'L L. REV. 30 (1981); Paul, *Introduction: Law, Socialism, and the Human Right to Development in Third World Countries*, 7 REV. OF SOCIALIST L. 235 (1981); Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981); Hassan, *supra* note 9; Donnelly, *The "Right to Development": How Not to Link Human Rights and Development*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (C. Welch & R. Meltzer ed. 1984).

17. UNESCO, Colloquium on the New Human Rights: The "Rights of Solidarity," in Mexico City (Aug. 12-15, 1980); see Final Report, UNESCO Doc. SS-80/CONF.806/4.

18. Seminar on the Effects of the Existing Unjust International Economic Order on the Economies of the Developing Countries and the Obstacle that this represents for the Implementation of Human Rights and Fundamental Freedoms, Geneva, Switzerland (June 30-July 11, 1980), *reprinted in* U.N. Doc. ST/HR/SER.A/8 (1980); Seminar on the Relations that Exist between Human Rights, Peace and Development, United Nations Headquarters, New York, N.Y. (Aug. 3-14, 1987), *reprinted in* U.N. Doc. ST/HR/SER.A/10 (1981).

19. Int'l Comm'n of Jurists, *supra* note 16.

20. For example, a panel was devoted to the right to development at the 23rd Annual

Rights.²¹

In virtually all of these contexts, a human right to development has been taken to be largely self-evident; at best, the superficial arguments of the Secretary-General's 1979 Report have been briefly rehashed. Even as careful a lawyer as Philip Alston was writing as early as 1981 that "as a general proposition in terms of international human rights law, the existence of a right to development is a *fait accompli*."²² While this assessment is widely shared in scholarly and diplomatic discussions,²³ I shall argue that it is completely unjustified. Careful examination of the alleged sources of the right to development reveals that it is almost entirely without basis: there are no solid grounds for claiming that there is a legal right to development, and even the moral arguments are largely baseless.

There are indeed vital relationships between human rights and development, which were overlooked in the fifties and sixties and even in the seventies; for example, "human rights" is never mentioned in the strategy adopted for the Third Development Decade.²⁴ The quite proper, even essential, desire to link human rights and development²⁵ clearly lies at the heart of the appeal of the idea of a human right to development.²⁶ It also helps to explain the lack of

Convention of the International Studies Association (USA), Cincinnati, Ohio, March 24-27, 1982.

21. June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 INT'L LEGAL MATERIALS 59 (1982).

22. Alston, *Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy*, in Int'l Comm'n of Jurists, *supra* note 16, at 106. But cf. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?* 29 NETH. INT'L L. REV. 307 (1982) [hereinafter *Third Generation*]; Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 612 (1984) [hereinafter *Conjuring up New Human Rights*].

23. See, e.g., U.N. Doc. E/CN.4/1489 at para. 10; U.N. Doc. A/C.3/38/SR.41 at para. 53 (Poland); U.N. Doc. A/C.3/37/SR.40 at para. 21 (India); U.N. Doc. E/CN.4/SR.1639 at para. 86 (Algeria); Zacklin, *The Right to Development at the International Level: Some Reflections on Its Sources, Content and Formulation*, in Dupuy, *supra* note 1, at 116; SS-80/CONF.806/4 at para. 22. The only major exceptions are Eide, *Maldevelopment and the "Right to Development": A Critical Note with a Constructive Intent*, in Dupuy, *supra* note 1, at 397. See generally Donnelly, *supra* note 16.

24. G.A. Res. 56, 35 U.N. GAOR (1980). Cf. Alston, *Human Rights and the New International Development Strategy*, 10 BULL. PEACE PROP. 281 (1979).

25. See Howard, *The "Full-Belly Thesis": Should Economic Rights Take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467 (1983); Donnelly, *Human Rights and Development: Complementary or Competing Concerns?*, 36 WORLD POL. 255 (1984); Goodin, *The Development-Rights Tradeoff: Some Unwarranted Economic Assumptions*, 1 UNIVERSAL HUM. RTS. 39 (1979); see also *supra* note 22.

26. See, e.g., Alston, *The Right to Development at the International Level*, in Dupuy, *supra* note 1, at 111; Abi-Saab, *The Legal Formulation of a Right to Development*, *id.* at 159; U.N. Doc. E/CN.4/SR.1483 at para. 57 (Theo. Van Boven); U.N. Doc. E/CN.4/SR.1614 at para.

criticism of the concept; who, after all, would object to linking human rights and development?

I will argue, however, that right to development is neither philosophically or legally justified nor a productive means to forge such a linkage. To return to my initial metaphor, the right to development is not merely a delusion of well-meaning optimists, but a dangerous delusion that feeds off of, distorts, and is likely to detract from the urgent need to bring together the struggles for human rights and development.

II. THE RIGHT TO DEVELOPMENT: AN OVERVIEW

Rights establish a special type of relationship between right-holders and duty-bearers with respect to rights-objects: A is entitled to *x* with respect to B, who stands under correlative obligation *y*. Analysis of a right thus requires, at minimum, specification of the *source* of the right, its *content* (or object), the *right-holder* (or active subject), the *duty-bearer* (or passive subject), and the right's *correlative obligations*.²⁷ Proponents of a human right to development have advanced a variety of accounts of all of these aspects of the alleged right.

The Secretary-General's Report argues that "there are a variety of ethical arguments which may be considered to support the existence, in ethical terms, of a right to development."²⁸ These include the fact that "development is the condition of all social life," the international duty of solidarity, the duty of reparation for colonial and neo-colonial exploitation, increasing moral interdependence, economic interdependence, and the cause of world peace, which is threatened by underdevelopment.²⁹

M'Baye advances a similar list of moral grounds for a right to development. He argues that development is demanded by justice and that its denial is not only an injustice but a provocation that

12 (Netherlands); U.N. Doc. E/CN.4/1983/SR.17 at para. 64 (Brazil); U.N. Doc. A/C.3/38/SR. 39 at para. 2 (Australia); U.N. Doc. E/CN.4/1984/SR.16 at para. 3 (India) and para. 49 (Canada).

27. For further development of such an analysis of rights, with special reference to human rights, see J. DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* chs. 1-3 (1985). Cf. Shue, *Rights in the Light of Duties*, in *HUMAN RIGHTS AND U.S. FOREIGN POLICY* (P. Brown & D. MacLean ed. 1978); H. SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY* (1980) [hereinafter cited as *BASIC RIGHTS*]; A. GEWIRTH, *REASON AND MORALITY* 63-68 (1978).

28. Secretary-General's Report, *supra* note 7, para. 54.

29. *Id.* paras. 40, 42, 54, 47, 48, 50-51.

threatens confrontation and violence.³⁰ Trade and investment give rise to reciprocal duties, as do ideological subjugation and the use of Third World strategic bases. Such obligations are strongly reinforced by the West's historical responsibility for colonialism, neo-colonialism and coercive underdevelopment.³¹ But "it is above all solidarity that should be invoked to justify the right to development."³²

The Secretary-General's Report also argues that "there is a very substantial body of principles . . . which demonstrate the existence of a human right to development in international law."³³ Among the more prominent international legal sources cited are: Articles 55 and 56 of the UN Charter; the Universal Declaration of Human Rights, especially Article 22 (the right to social security and to the realization "of the economic, social and cultural rights indispensable to [human] dignity and the free development of [the human] person") and Article 26(2) ("Education shall be directed to the full development of the human personality . . ."); Article 1 of both International Covenants on Human Rights (the right to self-determination); and the International Covenant on Economic, Social and Cultural Rights, especially Article 2(1) (the obligation to implement progressively the enumerated rights) and Article 11 ("the right of everyone to an adequate standard of living"). Reference is also made to specialized human rights conventions, such as those on *apartheid* and discrimination in education; regional instruments such as the European Social Charter and the American Declaration of the Rights of Man; the charters of specialized agencies, especially the Declaration of Philadelphia (1944), which was incorporated into the Constitution of the International Labor Organization; and resolutions of the General Assembly and other UN bodies, especially on such topics as development, self-determination, and the New International Economic Order. To these we can add the UNESCO Declaration on Race and Racial Prejudice, the Banjul Charter, and the resolutions of the Commission on Human Rights and the General Assembly since 1979 referred to above. Other authorities provide a very similar list of legal sources.³⁴

30. M'Baye, *supra* note 3, at 1, 5, 8.

31. *Id.* at 5-8.

32. *Id.* at 9, 13, 12.

33. Secretary-Generals Report, *supra* note 7, para. 78ff.

34. See, e.g., Haquani, *Le droit au developpement: fondements et sources*, in Dupuy, *supra* note 1, at 29-40; Mestdagh, *supra* note 16, at 34-46; Zacklin, *supra* note 23, at 117-118; U.N. Doc. E/CN.4/1489 at para. 21.

The preceding is by no means the full list. Others alleged sources include the right to life in peace, the progress of science and technology, the "dialectical correlation between sovereignty and equality," "present practical necessities," "the economic crisis," the law of nations, the League of Nations' Minorities System, international social justice, human unity, the responsibility to help one's fellow man, the need for development, the need for justice, and the principles of sovereignty, equality and nonintervention, not to mention the claim that it derives "spontaneously from present-day reality".³⁵

There is somewhat less volume and variety in accounts of the content of the right to development. Article 1(1) of the "technical consolidated text" of the draft Declaration on the Right to Development notes that "equality [of] opportunity [for development] is a prerogative of nations and of individuals within nations,"³⁶ a formulation that has been standard since General Assembly resolution 34/46 in 1979. Whatever the ambiguity of "equal opportunity," this does provide a fairly clear substantive core to the right to development. Working out from this core, the technical consolidated text stresses that the right to development implies "the full realization of the right of peoples to self-determination" and a new international economic order.³⁷ Given the conventional UN readings of the character of the current and new international economic orders, such changes clearly are implied by equality of opportunity for development.

In contrast to this relatively narrow reading, however, the right to development is at least as often presented as a comprehensive synthesis of many or even all previously recognized human rights. This tendency is very strong even in the technical consolidated text.

By virtue of the right to development, every human person, individually or collectively, has the right to participate in, contrib-

35. U.N. Doc. E/CN.4/1983/SR.19 at para. 21, 23 (Poland); U.N. Doc. E/CN.4/1982/SR.32 (Togo); U.N. Doc. E/CN.4/1982/SR.33 (Iraq); Haquani, *supra* note 34, at 27, 28, 31; U.N. Doc. E/CN.4/1984/SR.18 at para. 62 (Togo); Umbricht, *Right to Development*, in DUPUY, *supra* note 1, at 97-98; Alston, *supra* note 22, at 104; E/CN.4/SR.1488 at para. 19 (Senegal); U.N. Doc. E/CN.4/SR.1489 at para. 4 (Canada); E/CN.4/AC.34/WP.11 at 5; MacDermot, *Opening of Plenary Discussion*, in Int'l Comm'n of Jurists, *supra* note 16, at 27; Zacklin, *supra* note 23, at 117; UNESCO Doc. SS-80/CONF.806/4 at 26.

36. U.N. Doc. E/CN.4/1984/13 (Annex II) at 2. This document is only a basis for discussion within the Working Group and does not have the consensus of the Experts. However, it reflects what seems to be the majority view and is the closest thing to an authoritative draft text that has yet been publicly aired.

37. *Id.* arts. 1(3), 8.

ute to, and enjoy a peaceful international and national political, social and economic order, in which all universally recognized human rights and fundamental freedoms can be fully realized.

In a spirit of solidarity and regardless of the differences which exist between political, economic and social systems, States and the international community as a whole should focus on the creation of local, national and international conditions favorable to the promotion and protection of the rights set forth in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

All States should co-operate with a view to promoting, encouraging and strengthening the universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language and religion.³⁸

In diplomatic and scholarly discussions, the conception of the right to development as a synthesis of more traditional human rights clearly predominates.

For most speakers, the right to development embodied all rights.³⁹

The view was expressed by many participants, that the right to development was a synthesis of already defined human rights.⁴⁰

The approach by which the right to development is viewed as a synthesis of a large number of human rights has found favor with a number of commentators.⁴¹

In the view of most experts, this right is a combination of existing rights recognized by the international community and contributing to the development of peoples and states.⁴²

Le droit au developpement integre les droits et libertes publiques.⁴³

The right to development comprises the full range of rights ensuring the satisfaction of the human being's many and varied needs.⁴⁴

38. *Id.* arts. 1(2), 5(1), 7(1). *Cf.* arts. 5(3), 9(1).

39. U.N. Doc. E/1981/25 at para. 117.

40. U.N. Doc. ST/HR/SER.A/8 at para. 72.

41. Secretary-General's Report, *supra* note 7, para. 65.

42. U.N. Doc. E/CN.4/1489 at para. 22. *Cf.* para. 30, 31.

43. M'Baye, *Le droit au developpement*, in Dupuy, *supra* note 1, at 73. *Compare* Abi-Saab, *supra* note 26, at 164; and Alston, *supra* note 22, at 104.

44. U.N. Doc. E/CN.4/1984/SR.18 at para. 105 (Byelorussian SSR). *Compare* U.N. Docs. E/CN.4/1984/SR.18 at para. 46 (Bangladesh), with E/CN.4/1983/SR.18 (Yugoslavia) and para. 74 (Italy); U.N. Doc. E/CN.4/1983/SR.19 at para. 21 (Poland); U.N. Doc. E/CN.4/1983/SR.20 at para. 43 (Algeria); U.N. Doc. E/CN.4/1982/SR.31 at para. 37 (Senegal); U.N. Doc. E/CN.4/1982/SR.32 at para. 47 (France); U.N. Doc. E/CN.4/SR.1486 at para. 5 (K. Vasak); U.N. Doc. E/CN.4/SR.1612 at para. 13 (France) and para. 63 (Brazil); U.N. Doc. E/CN.4/AC.34/WP.11 at 37. One commentator who rejects the synthesis interpretation argues that it "correlates to all other rights." U.N. Doc. E/CN.4/AC.34/WP.12 at paras. 4, 12.

This interpretation fits nicely with the tendency to trace the right to development back to virtually every major document on human rights or development from the last forty years.

Three major right-holders have been identified: individuals, peoples and States. It is also occasionally suggested that minorities have a right to development.⁴⁵ As we shall see below, however, there are considerable disagreements over whether the right is held by all three (or four) of these right-holders, or just one or two.

Developed countries (individually or collectively) and the international community as a whole usually are specified as the principal duty-bearers of the right to development. Many proponents of the right also see it as imposing duties on national governments in the developing countries, and a few see it as binding individuals as well.⁴⁶ Again, we shall see below that there is great controversy over the exact nature of the primary duty-bearers.

Discussion of the duties correlative to the right to development rarely moves beyond fairly general demands for the NIEO, although it is sometimes also argued that (unspecified but fundamental) structural change is also required at the national level. But in light of the lack of agreement or clarity as to the content, sources, right-holders and duty-bearers of the right to development, it is not surprising that correlative duties are only vaguely specified.

Given this almost bewildering diversity of views, the 1983 Report of the Commission on Human Rights presents a classic case of diplomatic understatement when it notes that "with respect to the nature of the right to development, a variety of views was expressed."⁴⁷ In what follows, I will argue that this "variety of views" arises not from any special difficulties in specifying the human right to development, but from the fact that no such right exists. As with any other nonexistent object, the reports of those who claim to have seen it cannot but be expected to show great diversity.

III. LEGAL SOURCES OF THE RIGHT TO DEVELOPMENT

The principal legal sources of the standards of the international human rights regime are the United Nations Charter, the Universal Declaration of Human Rights,⁴⁸ and the International Covenants on

45. Secretary-General's Report, *supra* note 7, para. 87-93. U.N. Doc. E/CN.4/AC.34/WP.11 at 28ff.

46. *Id.* at paras. 94-114.

47. U.N. Doc. E/1983/13 at para. 97.

48. G.A. Res. 217, U.N. Doc. A/810 (1948) at 71.

Human Rights,⁴⁹ often referred to collectively as the International Bill of Human Rights. If a right to development were enshrined in these documents, as is often claimed, it would indeed be firmly established as a human right in international law. In fact, however, it is not.

Occasional claims are made that the right to development is explicitly recognized in the International Bill of Human Rights. “‘The right to development’ . . . is already enscribed in filigree in the Charter of the United Nations.”⁵⁰ “The relationship between the right to development and the other human rights had already been stated in the Preamble of the United Nations Charter.”⁵¹ “Several of the individual rights in [the International Covenant on Economic, Social and Cultural Rights] appear, implicitly or explicitly, to be components of the human right to development.”⁵² In fact, a right to development is nowhere mentioned explicitly in the International Bill of Human Rights; the Charter lists no specific human rights, let alone a right to development, while the Universal Declaration⁵³ and the Covenants, like the Charter, treat development as a goal rather than a right.

Individual development is an object or consequence of respect for, and exercise of all human rights. For example, economic, social and cultural rights are recognized as “indispensable for [human] dignity and the free development of [human] personality,” while the aim of education — and by implication, the aim of all human rights — is “the full development of the human personality and the sense of its dignity.”⁵⁴ But not everything that is good or desirable, nor even everything that is the goal of the enjoyment of a right, is itself a right.

49. International Covenant on Economic, Social & Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

50. M'Baye, *Chairman's Opening Remarks*, in Int'l Comm'n of Jurists, *supra* note 16, at 7. Cf. U.N. Doc. E/CN.4/SR.1492 at para. 21 (Argentina), U.N. Doc. E/CN.4/SR.1612 at para. 15 (Brazil).

51. U.N. Doc. E/CN.4/1982/SR.32 at para. 2 (China). Compare U.N. Doc. E/CN.4/1982/SR.33 at para. 27 (Iraq), with U.N. Doc. E/CN.4/1982/SR.31 at para. 16 (Algeria).

52. Secretary General's Report, *supra* note 7, para. 60. Compare Haquani, *supra* note 34, at 32, with U.N. Doc. E/CN.4/1984/SR.16 at para. 55 (China) and U.N. Doc. E/CN.4/1982/SR.31 at para. 16 (Algeria). Since the right to development is never mentioned in the Covenant, it is simply impossible that any of the enumerated rights could be advanced explicitly as parts of the right to development. Such examples of blatant misrepresentation and wild exaggeration are unfortunately all too common in discussions of the right to development.

53. Two efforts to include something very much like a right to development in the Universal Declaration were unsuccessful. See Alston, *supra* note 22, at 100.

54. Universal Declaration, *supra* note 48, art. 22. International Covenant on Economic,

Therefore, these passages do not in themselves establish the right to development that some have claimed.⁵⁵ Suppose for example, that A establishes a trust fund for B, the purpose of which is to assure B's future financial security. B's right to the proceeds of the trust will in fact contribute to his financial security. B does not, however, *ipso facto* have a right to financial security.

Individual development is a likely (although not a necessary) consequence of respect for economic and social rights. In fact, *all* human rights, civil and political as well as economic, social and cultural, aim at the development of individual personality and the protection of inherent human dignity. For example, the Covenants present "inherent human dignity" as the source of the rights they enumerate, and the realization of this dignity clearly implies personal development. But this would seem to be precisely the reason that a right to development is *not* recognized: development is one of the primary objectives of all human rights, not a right in itself.

There are, however, two promising implicit sources of a right to development in the International Bill of Human Rights. Both Covenants include, as Article 1(1), a right to self-determination. "All peoples have a right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development." If the right to development means the right of peoples freely to pursue their development, then it can be plausibly argued to be implied by the Covenants' right to self-determination. However, such a right to development is without interest; it is already firmly established as the right to self-determination.

A substantially broader right to development, however, cannot be extracted from this right to self-determination. The right to self-determination recognized in the Covenants does not imply a right to live in a developing society;⁵⁶ it is explicitly only a right to *pursue* development. Neither does it imply an *individual* right to development; self-determination, again explicitly, is a right of peoples only. In no sense does it imply a right to be developed. Thus the claim that the right to development is simply the realization of the right to self-determination⁵⁷ is not based on the Covenants' understanding of self-

Social and Cultural Rights, *supra* note 49, art. 13(1). Cf. Universal Declaration of Human Rights, *supra* note 48, art. 26(2).

55. See, e.g., U.N. Doc. E/CN.4/1984/SR.18 at para. 47 (Bangladesh).

56. U.N. Doc. ST/HR/SER.A/10 at para. 91.

57. U.N. Doc. ST/HR/SER.A/8 at paras. 74, 131. Cf. U.N. Doc. E/CN.4/AC.34/WP.25 at para. 3.

determination.

It might also be argued that because development is necessary for self-determination, development is itself a human right. Such an argument, however, is fallacious. Since we will come across this form of argument again, let us look briefly at this "instrumental fallacy." Suppose that A holds mineral rights in certain oil-bearing properties. Suppose further that in order to enjoy these rights fully, she requires \$500,000 to begin pumping the oil. Clearly A does not have a right to \$500,000 just because she needs it to enjoy her rights. Suppose that B is in sure danger of imminent death unless he receives a liver transplant. Although B cannot enjoy his right to life without a liver transplant, that does not entail that he has a right to a liver transplant, let alone a right to have a suitable liver implanted should one become available. The same reasoning applies to the link between development and the right to self-determination. Even assuming that development is necessary for, rather than a consequence of, full enjoyment of the right to self-determination, it simply does not follow that peoples have a right to development.

Allowing such an argument to prevail would result in a proliferation of bizarre or misguided rights. Since the realization of human dignity is the objective of all human rights, it would imply a human right to dignity. While such a right has occasionally been advanced,⁵⁸ human dignity clearly is treated as the goal of all human rights rather than a right in itself. All human rights aim to prevent particular denials of human dignity. This does not, however, imply that there is a human right to dignity. Likewise, although the Universal Declaration holds that education "shall be directed to the full development of the human personality . . . [and] shall promote understanding, tolerance and friendship among all nations,"⁵⁹ a human right to understanding or to friendship among nations is of course silly, while a right to the full development of one's personality is absurdly overambitious.

Simply because A requires *x* to enjoy right *r* does not entail that A has a right to *x*. It may be desirable that A have a right to *x*. Justice or morality may even demand that A ought to have a right to *x*. Nonetheless, the instrumental necessity of *x* for the enjoyment of A's right *r* simply does not establish that A has a right to *x*.

The second promising implicit source of a right to development is Article 28 of the Universal Declaration: "Everyone is entitled to a

58. E.g., U.N. Doc. E/CN.4/1982/SR.32 at para. 25 (Pakistan).

59. Universal Declaration, *supra* note 48, art. 26(2).

social and International order in which the rights and freedoms set forth in this declaration can be fully realized.” If development is essential to such an order, then it might be argued that a right to development is implied by Article 28.⁶⁰ One might even argue that this is precisely the sort of elaboration anticipated by this elastic clause.

The Universal Declaration, although initially passed as a resolution of the General Assembly, and thus a recommendation only, has over the last thirty years been almost universally accepted by States. While practice often falls far short of the Declaration’s standards, virtually all States accept those standards as legally binding (although not enforceable by international action). Therefore, let us accept that the Universal Declaration does have the force of customary international law.

Unlike most other provisions of the Declaration, however, Article 28 was not confirmed by a parallel provision in the Covenants, which were drafted precisely to give the force of treaty law to the standards of the Universal Declaration. This absence of a passage equivalent to Article 28 is most plausibly interpreted as representing its tacit renunciation. Such an interpretation is particularly powerful in light of the fact that the absence of a provision parallel to the Declaration’s Article 17—“Everyone has the right to own property alone as well as in association with others”—often *is* taken as implying the international renunciation of a human right to private property. If this is so, then the argument ought to hold for Article 28 as well. This is a particularly troublesome argument because many of the strongest proponents of the right to development reject a right to private property.⁶¹

More substantively, one might question whether “development” falls under the notion of a social and international order referred to in Article 28. “Development” suggest a process or result; the process of development or the condition of being developed. “Order,” by contrast, implies a set of principles, rules, practices or institutions; neither a process nor a result but a structure. Article 28, therefore, is most plausibly interpreted as prohibiting *structures* that deny oppor-

60. Technical Consolidated Text, Draft Declaration on the Right to Development, *supra* note 36; the Text includes a reference to Article 28 of the Universal Declaration as its second preambulatory paragraph, immediately following the more or less obligatory reference to the general provisions of the UN Charter, and prior to the reference to the Covenants.

61. Conversely, critics of the right to development who also are strong defenders of a human right to private property cannot avail themselves of this argument against the right to development.

tunities or resources for the realization of civil, political, economic, social or cultural human rights. To get a right to development out of this would require showing that development is impossible or positively denied by current national or international structures. Clearly such an argument, while often made, is most contentious. Fortunately, we need not address its substance here in order to determine whether there is (rather than ought to be) a legal (rather than moral) right to development.

There must be a broad, nearly universal consensus on a derived right to development before it can be accepted as a part of (customary) international law. Such consensus clearly does not exist. While it is widely accepted that the current international economic order presents impediments to development, it is by no means agreed that it precludes or denies development—and a few States even deny the existence of serious structural impediments of any sort. Furthermore, even if there were such a consensus, Article 28 would seem to imply only a right to the removal of such impediments to development—at most a right to a new international economic order—not a right to *development*.

Suppose, though, that Article 28 *were* to be taken to imply a human right to development. What would that right look like? It would be an *individual* right, and only an individual right; a right of persons, not peoples, and certainly not States. It would be a right to the enjoyment of traditional human rights, not a substantively new right. It would be as much a civil and political as an economic and social right—Article 28 refers to *all* human rights—and would be held equally against one's national government and the international community. In other words, if Article 28 of the Universal Declaration is the source of the right to development, it rules out most standard contemporary interpretations of that right, as we shall see in greater detail below.

Continuing our review of alleged legal sources, we find that other provisions of the International Bill of Human Rights are unquestionably inadequate as a source of a legal right to development. For example, Article 22 of the Universal Declaration provides for the “realization, through national effort and international cooperation and in accordance with the organization and resources of each [S]tate” of basic economic, social and cultural rights. This implies at most a right to a fair share of available resources, not a right to devel-

opment.⁶² Any attempt to derive a right to development from such passages would involve recourse to the instrumental fallacy. Likewise, the right to an adequate standard of living either results in a right to development that is of no interest (because it adds nothing to the right to an adequate standard of living) or yields a right to development only through the instrumental fallacy.

Sources of a legal right to development outside of the International Bill of Human Rights reveal a variety of inadequacies. None have the near universal acceptance of the Universal Declaration and the Covenants. Many, such as General Assembly resolutions and UNESCO declarations, have no clear law-creating force. Others, such as the Banjul Charter and the American Declaration of the Rights of Man, are only of regional significance. In any case, a right to development is rarely mentioned explicitly, while the suggested derivations of an implicit right are tortured. For example, the claim that the prohibition of calculated denial of the full development of racial groups found in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*⁶³ implies a general human right to development⁶⁴ is ludicrous; *apartheid* involves the systematic and conscious denial of human rights and development for nonwhites, but rejection of the practice of *apartheid* in no way implies a universal human right to development.

I do not want to suggest that there are not occasional passages that might be very loosely read to point towards something that might look vaguely like a human right to development. The strongest such passage is from the 1944 Declaration of Philadelphia, incorporated into the constitution of the International Labor Organization as an Annex: "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."⁶⁵ This principle, however, is a very tenuous source for a legal right to development, even within the context of the ILO. The ILO Constitution is not ordinarily thought of as creating human rights, and nothing even vaguely resembling such a "right" has been recognized in the organization's *explicit* human rights standard-setting through conventions and recommendations.

62. Cf. International Covenant on Economic and Social Rights, *supra* note 48, art. 2.

63. G.A. Res. 3608, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

64. Secretary-General's Report, *supra* note 7, para. 64. Cf. paras. 67, 70, 71 for similar arguments based on documents prohibiting discrimination against children, women and the mentally retarded.

65. Annex to the Constitution of the International Labor Organization, Principle II(a).

Furthermore, it simply is implausible to argue that a right which is not recognized in the central international texts explicitly directed to human rights is somehow recognized in international law by virtue of such an ambiguous reference in the ILO Constitution.

Development certainly is, and should be, an important topic in international law. But a *law of development* is a far cry from a *right to development*.⁶⁶ It simply is not the case that all forms of legal regulation bestow substantive rights—let alone *human* rights. For example, there are international laws of nationality, recognition and fisheries, but they do not imply (human) rights to nationality, recognition or fisheries. Some topics receive legal regulation that involves parallel rights, and others do not.

Therefore, arguments that a right to development has emerged or is emerging out of a law of development must show that the major conceptual gap between “There is a law of *x*” and “There is a right *x*” has been or is being bridged. This would require showing that the form taken by the law of development includes legal recognition of a human right to development. Arguments of this sort, however, simply have not provided the necessary evidence.⁶⁷ Of course, none of this implies that a (new) human right to development *should not* be created through the ordinary processes of law creation, an argument that rests largely on the moral case for a right to development. But if arguments for a *moral* right to development fail, then the case for creating a new legal right would seem to be fatally weakened.

IV. MORAL SOURCES OF A RIGHT TO DEVELOPMENT

While a sizeable number of commentators do allow that its current legal status is debateable, and even that the right to development is more inchoate than established,⁶⁸ virtually everyone seems to believe that the moral arguments for a human right to development are compelling. I shall argue, however, that even the moral case is largely baseless.

The most common moral argument infers a right to development from a moral concern for, or obligation to contribute to, development.⁶⁹ Such arguments, however, confuse one particular sphere

66. Cf. M'Baye, *supra* note 43, at 73; Mestdag, *supra* note 16, at 35; Espiell, *supra* note 16, at 190, 192; Marks, *supra* note 16, at 442.

67. See, e.g., Marks, *supra* note 16, at 442ff.

68. See, e.g., Alston, *supra* note 22, at 99, 104-106.

69. See, e.g., Secretary-General's Report, *supra* note 7, paras. 40-42 and the passages cited therein.

of morality—rights, special entitlements—with moral righteousness in general. Not all moral “oughts” are grounded in or give rise to rights: one does not *have a right* to everything that it is or would *be right* for one to do or possess; we do not *have* rights, in the strict and strong sense of titles and claims, to everything that is right.⁷⁰

In a just world, underdevelopment would not be permitted; morality and justice do demand development. But this alone does not establish, or even strongly suggest, a moral *right* to development, any more than a law of development suggests a legal right to development. Demonstrating a moral or legal obligation will not establish a parallel right; many obligations, including many very important obligations, simply are not connected with rights.⁷¹

This distinction—between rights and righteousness, having a right and being right, entitlement and obligation—is of great conceptual importance. *Having* a right to *x* means not merely that it is or would be good, right, just or desirable to enjoy *x*, but that one is specially entitled to *x*, is owed *x*, has *x* as one's due.⁷² Furthermore, this entitlement justifies right-holders in making claims with the special force of rights, a force that in ordinary circumstances “trumps” other considerations.⁷³ A right-holder is not merely a passive beneficiary of someone else's obligation, but an active participant in a relationship that he in large measure controls.⁷⁴

This special force and control is why it is so important to establish a right to development: its advocates want to be able to press stronger claims for development assistance and new forms of international cooperation, and they want to be able to play a more active, even controlling role in such cooperation. But grounding the right to development on the general moral righteousness of development

70. This conceptual error — namely, confusing rights and obligations — is widespread in contemporary discussions of human rights. For an examination, in greater detail and in quite different contexts, see Donnelly, *Natural Law and Right in Aquinas' Political Thought*, 33 W. POL. Q. 520 (1980); Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 Am. Pol. Sci. Rev. 303 (1982); DONNELLY, *supra* note 27. Compare also Golding, *The Concept of Rights: An Historical Sketch*, in BIOETHICS AND HUMAN RIGHTS (E. Bandman & B. Bandman ed. 1978); Melden, *Are There Welfare Rights?* in INCOME SUPPORT: CONCEPTUAL AND POLICY ISSUES (P. Brown, C. Johnson, & P. Vernier ed. 1981).

71. On the correlation of rights and duties, see Donnelly, *How Are Rights and Duties Correlative?*, 16 J. VALUE INQ. 287 (1982); for a more direct application to human rights, see DONNELLY, *supra* note 27, at 309-310.

72. See DONNELLY, *supra* note 27, at ch. 1.

73. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 90 (1977). Cf. DONNELLY, *supra* note 27, at 5, 12, 20-22, 56, 81.

74. See DONNELLY, *supra* note 27, at 11-12, 51-55.

strips it of its special force as a right. Collapsing rights, in the sense in which one *has* a right, with mere righteousness (morality, what is right), is a self-defeating strategy which emasculates the alleged "right" and provides no additional force to claims for development.

This confusion between rights and righteousness is surprisingly widespread in the discussion of the right to development. It is perhaps understandable that a semi-popular book entitled "*The Right to Development*" in fact never discusses such a right, but instead mounts an argument for development assistance on general moral and religious grounds.⁷⁵ More surprising, however, and entirely without justification, is the repetition of the same conceptual error in scholarly legal literature, most blatantly in articles that include the right to development in their title but never once mention such a right in the text.⁷⁶ The logical gap between obligations (or morality) and rights (a special type of moral practice) is a major one, which far too many arguments for a right to development do not even attempt to bridge.

The argument from solidarity, which is often advanced as the single most important moral argument for a right to development,⁷⁷ is merely a variant on this basic conceptual error of confusing rights and duties. "Solidarity, the fundamental principles of sharing and helping those who are unable to help themselves,"⁷⁸ reflects the special bonds between members of a community, which establish reciprocal obligations of assistance owed by each member to any other member in special need. At the international level, "solidarity" refers to the obligations arising from membership in the cosmopolitan moral community; "the brotherhood of man," in another idiom. While solidarity may establish strong moral obligations to assist the underdeveloped, it does not establish a *right to* assistance, let alone a right to *development*. "The innate responsibility to help one's fellow men"⁷⁹ establishes at most a moral obligation to act to promote development, not a right to development.

The attempt to base a right to development on the principle of solidarity is part of a major new approach to human rights questions. Along with other alleged new rights, such as human rights to peace, to a healthy environment, and to share in the fruits of the exploita-

75. G. DUNNE, *THE RIGHT TO DEVELOPMENT* (1974).

76. See, e.g., Yusuf, *Differential Treatment as a Dimension of the Right to Development*, in Dupuy, *supra* note 1; Trivedi, *Human Rights, Right to Development and the New International Economic Order — Perspectives and Proposals*, in Int'l Comm'n of Jurists, *supra* note 16.

77. See, e.g., M'Baye, *supra* note 3, at 9.

78. Secretary-General's Report, *supra* note 7, para. 42.

79. U.N. Doc. E/CN.4/SR.1489 at para. 4 (Canada).

tion of the common natural heritage of mankind, the right to development is often presented as one of the "third generation" of human rights, a conceptualization initially developed by Karel Vasak.⁸⁰ Just as the "first generation" of civil and political rights (based on the idea of "liberty" and providing protection against State violations of the person) was supplemented by a "second generation" of economic and social rights (based on "equality" and guaranteeing positive access to essential social and economic goods, services and opportunities), so now a "third generation" of solidarity rights, (based on "fraternity" and requiring new forms of international cooperation) is argued to be required in order to overcome the international inequality that has frustrated the realization of the first two generations of rights, particularly in the Third World.

The metaphor of generations, however, is a most troubling one. Biological generations beget, and therefore, must precede, one another. Such a reading of the metaphor would suggest that first generation civil and political rights must be established before economic and social rights, which themselves must precede solidarity rights. This reading flies in the face of the widely accepted notion of the interdependence and synergistic interaction of all human rights. The other standard use of "generations" is a technological one: a new generation of technology replaces, and renders obsolete, the preceding generation. Again, the metaphor denies the interdependence of all human rights. It also suggests that solidarity rights ought to *replace* already established civil, political, economic and social rights, the preceding "generations" that will be rendered obsolete by these new rights. This reading is even more dangerous to human rights.

Furthermore, however we read the metaphor of generations, solidarity cannot logically serve as a source of *human* rights, as they have ordinarily been understood. Human rights, as the Covenants put it, "derive from the inherent dignity of the human person." Civil, political, economic, social and cultural rights all clearly arise from the idea of innate personal dignity.⁸¹ Solidarity, however, is a

80. See, e.g., Vasak, *A 30 Year Struggle*, UNESCO COURIER 29 (Nov. 1977); M'Baye, *supra* note 43, at 88; U.N. Doc. ST/HR/SER.A/8 at para. 91; U.N. Doc. E/CN.4/1982/SR.31 at para. 18 (Algeria); U.N. Doc. E/CN.4/SR.1483 at para. 55 (Theo. Van Boven); U.N. Doc. E/CN.4/Sub.2/1983/24 at para. 125. The claim that solidarity rights have been referred to since 1776 and 1789 (UNESCO Doc. SS-80/CONF.806/6 para. 36) is completely without basis, and a striking example of the rhetorical overexuberance (or outright misrepresentation) unfortunately characteristic of so many recent discussions.

81. For more detail on this argument, see Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391 (1982).

relation among persons or groups. Any rights that might arise would be quite different kinds of rights; even if we were to allow that solidarity gave rise to rights, they would not be *human* rights.

To have a human right, one need be nothing other than a human being, nor do anything other than be born human. In the human rights tradition, the very fact that one is a human person entails the possession of basic rights; to be human is to have human rights.⁸² Solidarity, however, is based on membership in a particular community. At the international level, that community happens to have roughly the same membership as the group of human beings who have human rights. This, however, is only a contingent fact; it is logically and phenomenologically quite possible to be a human being, and thus possessed of human rights, without perceiving oneself or being considered by others to be a member of the international community, and thus a beneficiary of rights or duties of solidarity. Even if we allow that the same people hold both kinds of rights, the rights remain quite different in source and standing.

The third generation of solidarity rights simply are not, and logically cannot be, *human* rights—unless “human rights” is now to be taken to mean something other than it has always meant. If they are a “third generation,” they cannot rest on the principle of solidarity, while if they are “solidarity rights,” they cannot be human rights. In other words, we have in these alleged new rights not merely a difference in substance, analogous to the difference in substance between civil and political and economic and social rights, but a radical qualitative difference in types of rights. (A similar qualitative difference would exist if we were to allow that mere righteousness gave rise to parallel rights; such rights, whatever else they might be, would not be *human* rights.)

Other moral arguments are no more successful. Interdependence, both economic and moral, is often advanced as a source of the right to development.⁸³ Interdependence, which implies a cooperative joint undertaking, is likely to involve contractual or quasi-contractual rights (particularly rights establishing and assuring an equitable distribution of mutual gains). Such undertakings, however, do not give rise to broad, general moral rights—let alone human rights. Even if the current international economic order distributes the mutual benefits of international economic interdependence un-

82. Compare DONNELLY, *supra* note 27, at ch. 3.

83. See, e.g., Secretary-General's Report, *supra* note 7, paras. 47, 48; U.N. Doc. E/CN.4/1489 at para. 47.

fairly, this suggests only a (moral) right to a fair share of the proceeds, not a right to development, and certainly not a human right of any sort.

Another set of arguments rests on the instrumental value of development, particularly the threat to international peace and security posed by underdevelopment. "The desire to safeguard peace is another justification of the right to development." "The interests of world stability and the pursuit of a lasting peace require universal respect for the right to development."⁸⁴ Here we have further instances of the instrumental fallacy.

That development would be conducive to peace is a fortunate fact—assuming that it is a fact, and that development would not simply increase the destructiveness of war. It says nothing, however, about the existence of a (human) right to development; at best, it merely suggests that development has additional instrumental value. Much the same can be said of the argument that "because of its multitudinous effects and its central character, the question of development could jeopardize human rights as a whole."⁸⁵ Again we have a fortunate fact, and an additional reason to seek development, but no further argument for a right to development.

As was the case with legal sources, the alleged moral sources establish not that there is, or even should be, a moral right to development, but only that development has considerable moral significance—a point that has never been in question. Just as development is an important subject in international law, it is a most important topic in international morality. But reemphasizing the moral importance of development in no way implies that there is, or ought to be, a (human) right to development.

V. SUBJECTS OF THE RIGHT TO DEVELOPMENT

In examining other dimensions of the alleged right to development, we again find a diversity of interpretations that borders on confusion. In the case of the subjects of the right to development—that is, the right-holders and duty-bearers—we find that major interpretations actually threaten human rights.

If human rights arise from the inherent dignity of the human

84. M'Baye, *supra* note 3, at 8; Secretary-General's Report, *supra* note 7, para. 51.

85. U.N. Doc. E/CN.4/SR.1612 at para. 71 (Yugoslavia). Compare Secretary-General's Report, *supra* note 7, para. 43 with U.N. Doc. E/CN.4/1982/SR.30 at para. 67 (Ethiopia). For a similar argument attempting to establish rights to peace and to a healthy environment, see UNESCO Doc. SS-80/CONF.806/4 at para. 14.

person—are the rights one has simply as a human being—then it would seem undeniable that the human right to development, assuming that it exists, is an individual right. This, however, has been denied by several commentators. For example, Abi-Saab argues that it is “very difficult, impossible,” to conceive of a general individual right to development. Therefore, it must be viewed as a collective right.⁸⁶ Sanson, even more explicitly, refers to the right to development as “the analog, for peoples, of human rights, for individuals.”⁸⁷ Such an argument is a frequent feature of diplomatic discussions: “the main thrust of the right to development is collective and dynamic, emphasizing the struggles of peoples, nations and States for the elimination of obstacles which impede development;” it is “a collective right of sovereign States or of peoples fighting for their independence;” “a profoundly human right which goes beyond mere individual rights.”⁸⁸ This interpretation is even left open by the consolidated technical text of the Draft Declaration, which in Article 1 proclaims that “the right to development is an inalienable human right of every person, individually *or* in entities established pursuant to the right of association, and of other groups, including peoples.”⁸⁹

More commonly, the right to development is argued to be both, and more or less equally, an individual and a collective right.⁹⁰ An intermediate position of sorts holds that is *primarily* a collective right.⁹¹ In contrast to this apparent consensus that the right to development is (at least partially) a collective right,⁹² I want to challenge the very idea of collective human rights and argue that the human right to development, assuming it to exist, must be primarily, if not exclusively, an individual right.

It is occasionally argued that all individual rights are derived

86. Abi-Saab, *supra* note 26, at 163-164.

87. Sanson, *supra* note 1, at 1985 (translation provided).

88. U.N. Doc. E/CN.4/1983/SR.17 at para. 60, 65 (Brazil); U.N. Doc. E/CN.4/1982/SR.31 at para. 1 (Byelorussian SSR); U.N. Doc. E/CN.4/1983/SR.17 at para. 14 (Mozambique). Compare U.N. Doc. E/CN.4/1984/SR.17 at para. 70 (USSR).

89. U.N. Doc. E/CN.4/1984/13 (Annex II) (emphasis added).

90. See, e.g., M'Baye, *supra* note 43, at 74-75; Alston, *supra* note 22, at 108; Tardu, *supra* note 1, at 269; U.N. Doc. A/37/PV.111 at 21 (Singapore) and 47-48 (Morocco); U.N. Doc. E/CN.4/1984/SR.16 at para. 58 (China); U.N. Doc. E/CN.4/1982/SR.17 at para. 30 (France); U.N. Doc. E/CN.4/1983/SR.18 at para. 6 (Australia); U.N. Doc. E/CN.4/1984/SR.18 at para. 47 (Bangladesh); U.N. Doc. E/CN.4/1983/SR.18 at para. 46 (Yugoslavia).

91. See, e.g., U.N. Doc. E/CN.4/1983/SR.19 at para. 14 (Finland); U.N. Doc. E/CN.4/1489 at para. 16; U.N. Doc. E/CN.4/AC.34/WP.25 at para. 10; U.N. Doc. E/CN.4/SR.1486 at para. 5 (K. Vasak).

92. Dupuy, *supra* note 1, at 267.

from collective rights.⁹³ The more common view among advocates of collective rights, however, is that some human rights are primarily individual, while others, including the right to development, are primarily, or at least equally, collective. For example, Ambassador Koh clearly struck a chord in the General Assembly when he argued that "human rights have both a collective and an individual aspect," and that while some countries give "greater emphasis to civil and political rights and the individual aspect," and others give "greater emphasis to social and economic rights and to the collective aspect," what was needed was balanced emphasis and strong international support for both.⁹⁴ In fact, however, all the rights of the International Bill of Human Rights, with one exception, are entirely individual rights.

Realization of the right to development certainly would require substantial collective action. Likewise, the full realization of economic and social rights requires collective action. The same, however, is true of most civil and political rights. For example, rights to popular participation in government and to a nationality include society and the state in their very formulation, while freedoms of speech, press, religion and assembly can no more be fully realized in the absence of collective social action than can rights to education or social security.

All human rights require collective action if they are to be fully realized for all. This understanding is explicit as far back as the social contract theorists who first formulated the modern idea of human rights, and who saw society and the state largely as instruments for the full realization of the natural rights of man.⁹⁵ The fact that collective action is required to realize a right in no way suggests that the right is a collective right.

Even the economic and social rights recognized in the International Bill of Human Rights are individual rights—entirely individual rights. Social security, work, rest and leisure, an adequate standard of living, education and the like are rights of individuals, individual claims against social resources; they are no more held collectively than are civil and political rights. Economic and social human rights (which must be clearly distinguished from economic

93. See, e.g., U.N. Doc. A/C.3/38/SR.41 at para. 57 (Cuba).

94. U.N. Doc. A/37/PV.111 at 21.

95. See, e.g., Locke, *Second Treatise*, in TWO TREATISES OF GOVERNMENT para. 95; (P. Laslett ed. 1967); T. PAINE, THE COLLECTED WRITINGS OF THOMAS PAINE 1, 5, 276-277 (P. Foner ed. 1945); DONNELLY, *supra* note 27, at 69-73.

and social goods and services) regulate the pattern of distribution of certain collective resources and opportunities by assuring to all individuals a minimum share of selected goods, services and opportunities.

If these rights are to be realized, there must be social resources available to distribute. The same is true, however, for most civil and political rights. No human rights are secure—not even civil rights are likely to be securely maintained—in the absence of collective action and social and political exertion, which will always involve at least opportunity costs, and usually substantial direct costs as well.⁹⁶

The sole exception to the rule of individual human rights is the right to self-determination, recognized in Article 1 of both Covenants as a right of *peoples*. Clearly this is the model relied on by advocates of a collective human right to development. But while a plausible defense of such a collective human right can be mounted, I want to suggest that the notion is at best dubious.

If human rights derive from the inherent dignity of the human person, collective human rights are logically possible only if we see social membership as an inherent part of human personality, *and* if we argue that as part of a nation or people, persons hold human rights substantively different from, and in no way reducible to, individual human rights. This last proposition is extremely controversial. While I cannot here attempt to refute it decisively, let me suggest that conceptually, morally, and politically as well, it is fraught with difficulties.

The very concept of human rights, as it has heretofore been understood, rests on a view of the individual person as separate from, and endowed with inalienable rights held primarily in relation to, society, and especially the state. Furthermore, within the area defined by these rights, the individual is superior to society in the sense that ordinarily, in cases of conflict between individual human rights and social goals or interests, individual rights must prevail.⁹⁷ The idea of collective *human* rights represents a major, and at best confusing, conceptual deviation.

I do not want to challenge the idea of collective rights *per se* or

96. Compare Shue, *supra* note 27, with BASIC RIGHTS, *supra* note 27, at ch. 2. To argue that the social aspect of human rights made all human rights collective rights would be still another variant on the instrumental fallacy.

97. For a more detailed exposition of this understanding of human rights, see DONNELLY, *supra* note 27, at chs. 2, 5; Howard & Donnelly, *Human Rights, Human Dignity and Political Regimes: Liberal and Illiberal Societies and the Standard of Human Rights* (paper presented to the 26th Annual Convention of the International Studies Association (Mar. 1985)).

even the notion of peoples' rights; groups, including nations, can and do hold a variety of rights. But these are not *human* rights as that term is ordinarily understood. If for no other reason than clarity and precision, in order to help to preserve the conceptual integrity of the much abused idea of human rights, I would suggest that we ought to follow the conceptualization of the Banjul Charter, which is explicitly a declaration of human *and* peoples' rights.⁹⁸ Whatever their relative importance, (individual) human rights and (collective) peoples' rights, as well as other group rights, are very different kinds of rights, and therefore should be kept distinct.⁹⁹

It is rarely denied that there are legitimate social limits on the exercise of all individual rights. Society does have certain rights, or at least responsibilities, that legitimately constrain the exercise of many human rights; a properly ordered society must balance individual rights (against society) with individual duties (to society) and social responsibilities to the community at large. Thus the Universal Declaration, after concluding its enumeration of rights, explicitly notes (in Article 29) the existence and importance of individual duties.

Human rights, however, refer to but one side of this balance between individual rights and social duties. While human rights may have to be weighed against social needs, they should not be confused or conflated with them. It makes no more sense to try to conceive of individual duties as collective human rights than it does to try to reduce all social duties to obligations correlative to individual human rights. While both rights and duties are important, they cannot be reduced to one another; rights are rights and duties are duties, and while they are often correlated, they are quite different. In any case, the real danger today is not an overemphasis on individual human rights, which in most countries are only tenuously protected, but rather conceptual obfuscation resulting in an overemphasis on social duties, which can only ease the task of repressive regimes.

A further problem with collective human rights is determining who is to exercise the right; the right-holder is not a physical person, and thus an institutional "person" must exercise it. In the case of a right held by a people, or by society as a whole, the most plausible

98. Compare A. ROBERTSON, HUMAN RIGHTS IN THE WORLD 196 (2d ed. 1982). I would also argue that the right to self-determination ought to be placed in this category of peoples' rights.

99. Compare U.N. Doc. A/C.3/36/SR.49 at para. 50 (Finland) with U.N. Doc. A/C.3/37/SR.39 at para. 28 (Sweden).

“person” to exercise the right is, unfortunately, the state. Again this represents a radical reconceptualization of human rights—and an especially dangerous one. All traditional human rights, both civil and political and economic, social and cultural, are rights held primarily *against* the state; whether the duties correlative to these rights require forbearance, protection or positive assistance, the state is the principal duty-bearer. Human rights are essentially instruments to protect the individual against the state or to assure that the state guarantees to each individual certain minimum goods, services and opportunities. Other legal, moral and social principles or practices aim to protect the legitimate interests of society in instances of conflict between the individual and the community. To confuse the two seriously risks undermining the protections provided by human rights.

Indeed, the very idea of a human right held by the state is incoherent. Even if we allow that it is plausible to view individuals as possessed of special human rights in their capacity as members of a nation/people, there is no such parallel membership of (all) persons in the state that would justify a human right of states. The very term “human rights of states” involves a logical contradiction.

In the case of the human right to development, however, it is regularly argued that the state is a holder of the right, a view advanced not only by the Soviet bloc States,¹⁰⁰ who tend to see all human rights as contingent grants to individuals by the state,¹⁰¹ but also by a variety of Third World States,¹⁰² the Director of the Division of Human Rights,¹⁰³ and academic commentators as well.¹⁰⁴ The danger here is that the state is thereby placed in a position to use *its* “human rights” to deny the human rights of individuals, while still plausibly claiming to be pursuing human rights. “Human

100. See, e.g., U.N. Doc. E/CN.4/1984/SR.16 at para. 83 (Ukrainian SSR); U.N. Doc. E/CN.4/1983/SR.20 at para. 52 (Byelorussian SSR); U.N. Doc. E/CN.4/AC.39/5. Cf. Graefrath, *The Right to Development in a World-Wide Debate*, 1 GDR COMM. HUMAN RIGHTS BULL. 11-13 (1982); U.N. Doc. E/CN.4/1489 at para. 17; U.N. Doc. ST/HR/SER.A/8 at para. 64. One delegate has even referred to the right to development as a “natural right of all States.” U.N. Doc. E/CN.4/1984/SR.18 at para. 103 (Poland) (emphasis added).

101. See DONNELLY, *supra* note 27, at 309-311.

102. See, e.g., U.N. Doc. E/CN.4/1984/SR.18 at para. 64 (Togo); U.N. Doc. E/CN.4/1983/SR.17 at para. 65 (Brazil); U.N. Doc. E/CN.4/1983/SR.19 at para. 76 (Colombia). Cf. U.N. Doc. E/CN.4/1983/SR.18 at para. 46 (Yugoslavia).

103. U.N. Doc. E/CN.4/SR.1483 at para. 58 (Theo. Van Boven).

104. See, e.g., Haquani, *supra* note 34, at 31; Sanson, *supra* note 1, at 195; de Waart, *An Outlook for the Future: Embedding Development in a Right Under International Law*, E/CN.4/AC.34/WP.12 para. 5, 21, 24.

rights" are thus transformed into but another mechanism of political tyranny and social oppression.

Most proponents of the state as a holder of the right to development also argue that it is held by peoples as well (and usually individuals too); for example, Sanson argues that internally the right to development is primarily "a right of the people against the state."¹⁰⁵ It might be suggested that this at least reduces the danger, if not the incoherence, of recognizing a State's right to development. Unfortunately, however, besides the difficulty of imagining what such a right would imply (a right to the growth of bureaucracy or the development of the state's coercive powers, perhaps?) or conceiving how and by whom such a right could be exercised (in contrast to pursuing development nationally through the exercise of traditional human rights), our experience with the right to self-determination, the only internationally recognized collective human right, suggests otherwise.

The right to self-determination usually is interpreted as a right to be free from alien political domination (roughly, a right to decolonization), and a right of States (and peoples under colonial domination) against foreign economic control or coercion. In no standard interpretation is it viewed as a right of peoples or subnational groups against "their own" sovereign States. This is the way any collective right is likely to be interpreted today; given the current state of international law and politics, it is hard to imagine a collective right to development obtaining a meaningful national dimension in practice.

It might also be suggested that the dangers of a right to development of States could be greatly reduced if the right were restricted to a right of States in international relations, "a right of the State . . . against other States and the international community."¹⁰⁶ As such, however, it is clearly no longer a human right (even if we were to allow that States are potential holders of human rights). Even if it is desirable to establish a right of States to development in international law, this says nothing about a human right to development.

Who are left, then, as possible holders of the right to development, assuming that such a right exists? Individuals. Certainly there is no conceptual problem in recognizing individuals as holders of a new human right to development. There are, however, difficulties in

105. Sanson, *supra* note 1, at 195 (translation provided).

106. *Id.* at 195 (translation provided).

specifying the substance of an individual right to development.¹⁰⁷

VI. THE SUBSTANCE OF THE RIGHT TO DEVELOPMENT

In its broadest, and most defensible understanding, the right to development is a right to pursue full personal development along all major dimensions of human life. If all human rights aim at the further development of the human person, then a right to full personal development can stand as a summary of traditional rights. It also might be argued that it stresses the organic interconnections between separate human rights—both civil and political and economic, social and cultural—which are but pieces of the broader struggle for full, autonomous personal development, the ultimate aim of all human rights. For example, Alston presents the right to development as “a synthesis of existing rights, informed and given an extra dimension by the emergence of a growing international consensus on a variety of development objectives” and “a means by which to reinforce the importance of existing rights and to emphasize the interdependence and indivisibility” of civil, political, economic, social and cultural rights.¹⁰⁸

As noted above, however, we must carefully distinguish between a human right to *pursue* development, to strive for self-actualization in conditions of dignity, and a human right to *be* developed. The latter is extravagant and even dangerous; one does not have a right to be a fully developed person simply because one is a human being. A right to pursue personal development is on its face at least substantively plausible. But does it serve any real purpose?

Alston, addressing the charge that a synthetic right to development is superfluous, argues that it has at least psychological significance. “In addition it serves to highlight the need to create a new international order, in social and cultural as much as in economic terms, to accompany the achievement of a new national order through improved respect for human rights.” Furthermore, he ar-

107. As noted above, discussions of duty-bearers of the right to development are particularly underdeveloped. This is largely a function of lack of clarity in specifying the holders and substance of the right, which implicitly provide a large part of the specification of the right's passive subjects. For example, if the right of development is primarily a right of States, it would be held primarily in relation to other States, while as a right of peoples it would be held against States (one's own or others), and perhaps even individuals as well. If we accept the arguments above against interpreting the human right to development as a right of States or peoples, the right to development, as an individual human right, creates obligations primarily for one's own government.

108. Alston, *supra* note 22, at 102, 107.

gues, it puts established rights in a new light; for example, revealing the right to food to be not just a right to escape starvation or malnourishment, but a right to enough food to permit the pursuit of full personal development.¹⁰⁹ These sorts of conceptual changes lie behind the claim that the synthesis represented by the right to development is greater than the sum of its parts.¹¹⁰

Even granting that this is true, however, we cannot ignore the danger that a stress on the whole will divert attention from the parts; that is from internationally recognized civil, political, economic, social and cultural human rights. Discussion of the right to development as "the synthesis of all human rights"¹¹¹ shifts the focus from particular rights to the package as a whole. This is most likely to lead not to a broader and more comprehensive view but rather an increasing detachment from the realities of implementation in particular cases; that is, it is likely to obscure the central fact that progress in realizing the whole must be achieved by hard work in implementing the "parts," the separate civil, political, economic, social and cultural rights already recognized internationally. Similarly, the shift in focus from national to international questions—most discussions stress the international dimensions of the right to development in contrast to the primarily national focus of traditional human rights¹¹²—is likely to be used to divert attention from systematic national violations of human rights, and even to absolve Third World governments of their responsibility for human rights violations.¹¹³

Such attempts to shift attention from particular rights to general issues, and from the primary role of the state as a violator of human rights to external forces that also contribute to human rights violations, are regular strategies of repressive regimes seeking to justify

109. *Id.* at 107-108.

110. *See, e.g.,* U.N. Doc. ST/HR/SER.A/8 at para. 72; U.N. Doc. E/CN.4/Sub.2/477 at para. 95; Espiell, *supra* note 16, at 205; U.N. Doc. E/CN.4/1421 at para. 15(b).

111. Espiell, *supra* note 16, at 205. *Compare* Mestdagh, *supra* note 16, at 47, 49, 53; U.N. Doc. E/CN.4/SR.1612 at para. 77 (Algeria); U.N. Doc. E/CN.4/SR.1486 at para. 5 (K. Vasak).

112. *Compare* M'Baye, *supra* note 43, at 77; Dupuy, *supra* note 1; Int'l Comm'n of Jurists, *supra* note 16; U.N. Doc. E/CN.4/1489 at para. 39. The only significant exceptions are U.N. Doc. E/CN.4/1421 and U.N. Doc. E/CN.4/1488, the (largely neglected) followups to the Secretary-General's original study.

113. For example, M'Baye explicitly argues that rapacious Third World elites, which are a major source of human rights violations, are simply an effect of international induced underdevelopment. M'Baye, *supra* note 43, at 85. *Compare* U.N. Doc. E/CN.4/SR.1393 (Yugoslavia). Thus I would argue that Alston is simply mistaken in claiming that the right to development represents a break with the tendency to attribute human rights problems to external factors. *See* Alston, *supra* note 22, at 110.

their behavior in human rights terms. We can see this, for example, in the priority in the UN's human rights work mandated by the General Assembly for massive and flagrant violations arising from *apartheid*, racial discrimination, colonialism and neo-colonialism,¹¹⁴ and the vociferous, although ultimately unsuccessful attacks on a recent resolution which provided a more balanced place for individual rights and the national dimensions of human rights violations, while still emphasizing international impediments and collective rights.¹¹⁵

The context of international law lies not only in changes in the world and the character of States, but also in the way in which international law (and related moral arguments) will be used by States to pursue their own purposes—and it is here that the greatest dangers of a right to development lie. If we could be sure that the right would be interpreted as at least primarily a right of the individual to pursue full personal development, there would be little reason for concern; at worst it would be a vague but relatively innocuous right. But we have already seen the strong tendency to interpret it as a collective right, with the attendant conceptual and political dangers. Furthermore, there are similar dangers in several standard interpretations of its substance. As a result, while the right to development “should enhance the commitment of Governments to the promotion and protection of human rights,”¹¹⁶ in practice the reverse is more likely to be the case.

For example, one standard interpretation presents the right to development as primarily or exclusively an economic right, a right “parallel, on the economic level, to self-determination on the political plane.”¹¹⁷ It is regularly referred to as “the right to economic and social development;” “the right of the individual to an equal share in the benefits of economic and social development;” “the right to an adequate standard of living;” or simply “economic and social rights,

114. G.A. Res. 130, 32 U.N. GAOR (1977).

115. G.A. Res. 200, 37 U.N. GAOR (1982). The debate on the resolution can be found in U.N. Doc. A/C.3/37/SR.49, 60 and U.N. Doc. A/37/PV.111. Opponents of this resolution went so far as to introduce amendments in plenary session and to provoke a vigorous debate in plenary, an extremely rare occurrence in a body that, especially in the area of human rights, usually functions as nothing more than a rubber stamp for committee decisions.

116. U.N. Doc. E/CN.4/SR.1614 at para. 61 (Australia).

117. Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order. Report of the Secretary-General. Addendum: ANALYTICAL STUDY PREPARED BY UNITAR, U.N. Doc. A/39/504/Add.1 (Oct. 23, 1984) at para. 212. Compare U.N. Doc. E/CN.4/Sub.2/1983/24 at para. 128; M'Baye, *supra* note 43, at 75; Sanson, *supra* note 1, at 195.

or the right to development.”¹¹⁸ Even within the Commission on Human Rights, the right to development is discussed under an agenda item devoted entirely to economic and social rights: “Question of the realization in all countries of the economic, social and cultural rights contained in the [International Bill of Human Rights] and study of the special problems which the developing countries face in their efforts to achieve these rights, including (a) problems relating to the right to enjoy an adequate standard of living, the right to development; (b) the effects of the existing unjust international economic order on the economies of the developing countries, and the obstacles that this represents for the implementation of human rights and fundamental freedoms.”

This reading, particularly when the right to development is presented as a synthesis of all human rights, is part of a distressing tendency to subordinate civil and political rights to economic and social rights and national dimensions of human rights violations to international dimensions.¹¹⁹ (Reduced to a right to an adequate standard of living, it encompasses not even the full range of economic and social rights.) This can easily transform human rights concerns related to development into little more than an additional device to obtain economic concessions from the North, as is clear in the types of links drawn between the right to development and the New International Economic Order. While it cannot be denied that the structure of international economic relations presents serious impediments to the realization of human rights, especially economic and social rights, it is a gross, one-sided distortion to argue that the NIEO represents the “blueprint of the right to development.”¹²⁰

Even more troubling is the tendency to reduce the right to development to a mere tool in the struggle for a new international economic order, turning the end (human rights) into a means (to achieve the NIEO), and vice versa.

The right to development [is] a composite right which, in encompassing a number of already recognized rights, enhance[s] their value and [makes] them a true force for the establishment of the

118. U.N. Doc. A/C.3/37/SR.39 at para. 15 (Brazil) and para. 27 (Sweden); U.N. Doc. E/CN.4/1982/SR.33 at para. 6, 10 (Nigeria); U.N. Doc. E/CN.4/1984/SR.16 at para. 7 (India). Compare U.N. Doc. E/CN.4/SR.1612 at para. 14 (France); U.N. Doc. E/CN.4/SR.1488 at para. 14 (Senegal).

119. For an extreme and explicitly polemical version of this interpretation of UN human rights doctrine, see Donnelly, *Recent Trends in UN Human Rights Activity: Description and Polemic*, 35 INT'L ORG. 633 (1981). But compare Alston, *The Alleged Demise of Political Human Rights at the UN: A Reply to Donnelly*, 37 INT'L ORG. 537 (1983).

120. Abi-Saab, *supra* note 25, at 167.

new international economic order.¹²¹

The question of the right to development has been raised by the developing countries in order to challenge the existing unjust international economic order.¹²²

The reason for subscribing to the concept of the right to development is . . . to mobilize international solidarity within the context of the new international economic and social order.¹²³

Any consideration of solidarity rights must . . . give priority to the study and promotion of a new international economic order.¹²⁴

The explicit consecration of this right is linked to the very future of the "new international economic order."¹²⁵

Even when the NIEO is presented as a means to realize human rights, discussion usually overlooks the fact that success in achieving a new international economic order would not necessarily assure progress in implementing human rights. Simply increasing the goods and services available to Third World countries or within Southern economies—which is all that the NIEO seeks to do—will increase the enjoyment of human rights only if these resources are equitably distributed, which is largely a matter of domestic politics. There is a huge gap between providing economic and social *goods* in the aggregate and assuring the enjoyment of economic and social *rights*, which requires guaranteeing the entitlement of all to certain shares of available social resources. Unless the gains of the NIEO are passed on to the masses—and figures on income distribution in the Third World clearly indicate that they are not likely to be passed on—even the enjoyment of economic and social rights will not improve. We should also note that the connection between development, the NIEO and civil and political rights is even more tenuous.

National governments are the major violators of human rights, and thus must be the main target of human rights action. Even in the more limited area of human rights and development, national governments must substantially alter, even radically rethink, their development strategies if human rights concerns are to be adequately addressed. There is much that can and needs to be done about human rights at the national level, regardless of the success or failure

121. U.N. Doc. E/CN.4/SR.1486 at para. 5 (K. Vasak). Compare U.N. Doc. E/CN.4/SR.1492 at para. 21 (Argentina); U.N. Doc. E/CN.4/1983/SR.17 at para. 13 (Mozambique); U.N. Doc. E/CN.4/Sub.2/459 at para. 69.

122. U.N. Doc. E/CN.4/1983/SR.19 at para. 45 (China).

123. UNESCO Doc. SS-80/CONF.806/6 at para. 33.

124. *Id.* para. 14.

125. UNESCO Doc. SS-80/CONF.806/4 at para. 22.

of efforts to establish the NIEO. It is at this level that Third World States that are sincere about improving the enjoyment of human rights have the greatest power and opportunity for positive action. We must not lose sight of the fact that most human rights violations are directly perpetrated on people by the governments of their own countries. Discussions of the right to development, however, seem to have the effect, and perhaps even the intent, of obscuring this central point.

The political dangers of subordinating human rights are especially great when development or the NIEO appear as *preconditions* for the realization of human rights, or when the right to development itself is presented as a precondition to the enjoyment of traditional human rights.¹²⁶ Since satisfaction of these preconditions is a long way off, such arguments readily lend themselves to claims that Third World regimes ought not be held to international human rights standards. As preconditions multiply,¹²⁷ we reach a situation where it appears as if the world would need to be "transformed into an earthly paradise"¹²⁸ before human rights could be realized.

The right to development and its preconditions thus lend themselves to use as an excuse not to act on human rights now. This, I would argue, is the central contemporary political fact about the right to development. Logically, the right to development need not be interpreted in this way. Unfortunately, it is almost certainly utopian to expect that it won't. The readily defensible argument that international structures and external forces share a part of the responsibility for failures to implement human rights in the Third World is too easily transformed into an argument that removes the responsibility for human rights violations from repressive regimes.

The right to development, therefore, in its substance as in other aspects, is subject to both relatively defensible and entirely undefensible interpretations. The problem is that the defensible interpretation, as an individual right to full personal development in all areas of human life, is rather innocuous, while the indefensible interpreta-

126. For such arguments see U.N. Doc. E/CN.4/1984/SR.18 at para. 68 (Togo); U.N. Doc. E/CN.4/SR.1491 at para. 40 (Brazil); Abi-Saab, *supra* note 26, at 171, 172. Compare also U.N. Doc. A/C.3/37/SR.39 at para. 28 (Sweden).

127. For example, the right to peace is often advanced as a precondition to the right to development or to human rights generally. See, e.g., U.N. Doc. E/CN.4/AC.34/WP.25 at para. 2; U.N. Doc. A/C.3/37/SR.39 at para. 29 (GDR); and U.N. Doc. E/CN.4/SR.1490 at para. 43 (USSR).

128. U.N. Doc. E/CN.4/1984/SR.17 at para. 81 (Italy).

tions are quite dangerous. In other words, the dangers posed by the right to development far outweigh its benefits.

It is easy to exaggerate the practical importance of international doctrine. Nonetheless, the codification of the right to development that is emerging in the UN probably will at least marginally hinder the pursuit of human rights and certainly will provide still one more excuse for States to fail to implement human rights in their development plans and in other aspects of national politics—but this time, in the very name of human rights. This is at least perverse, and if we take doctrine seriously, a genuine tragedy.

One final rescue effort should be considered; namely, the claim that I have merely shown existing arguments for the right to development to be inadequate and standard interpretations to be dangerous. The implication of such an argument, of course, is that sound justifications and defensible interpretation are possible and will be formulated. Therefore, we should not abandon the idea of a human right to development. Such an argument, however, is both implausible and disingenuous.

In this article, I have reviewed virtually the entire scholarly literature and the whole of the diplomatic discussion of the right to development. I find it incomprehensible that scholars and jurists, or even serious diplomats, would resort to the sort of weak and obviously flawed arguments that are the staple of these discussions if better arguments were available. My only conclusion is that misguided optimists and cynical opportunists alike have been caught up in the pleasing rhetoric of the right to development.

It is time to step back and see what's really there — or isn't. It's time to stop repeating that there *might* be a right to development (and then take this as proof that there is such a right), and confront the failure to establish even a vaguely plausible case that there is such a right. In five years, the discussion has not advanced in any significant way. I would suggest that it is time to admit that it is not going to advance. The problem is not human fallibility, our inability to muster the possible arguments needed to justify this right, but rather the fact that a human right to development is incapable of justification.

The burden of proof lies firmly on those who claim that such a right exists. Proponents of the right to development have utterly failed to discharge this burden. It is a well-known fact of logic that a universal negative existential proposition cannot be conclusively proved; it is no more possible to demonstrate beyond *all* doubt that

there is no right to development than it is to show that no purple polka-dotted elephants exist. (It's always possible that we've failed to look some place or consider a particular argument.) But just as we can show, through the accepted canons of science and common sense, that there is not a purple polka-dotted elephant here and now, we can show—and in this article I believe that I have shown—through the established procedures of legal and moral argument, that there is not, here and now, a moral or legal right to development.

To anyone who would argue otherwise, my response is simple. Show me. Only one good argument is needed to refute my case, which thus ought to stand as an attractive challenge to proponents of the right to development. Nonetheless, I do make the claim: there is no right to development.

VII. CONCLUSION: A MYTHICAL POSTSCRIPT

We can conclude, as we started, with a metaphor—but this time with the metaphor of the title of this paper, the unicorn. The right to development often appears, like the unicorn, as the embodiment of goodness and purity. As one diplomat rather sarcastically remarked last year, realization of the right to development is often presented as if it would involve “peace, domestic and international, and . . . the realization of all the purposes and principles of the United Nations.”¹²⁹ But when we look at what advocates of the right to development have brought forward, we find little more than a run-down horse with a plastic horn glued to its head—or rather, a series of pretenders, one more ludicrous and mishappen than the next.

If this were a children's book, or if we could leave things at the level of myth, we could perhaps just not look too carefully, and agree that yes, what we have here is that rarest and most precious of beasts. But we are dealing with charlatans, who would use their hoax to defraud innocent and well-meaning people. The right to development is not just a charming delusion, but a threat to human rights, and a particularly insidious threat because it plays upon our fondest hopes and best desires, and diverts attention from more productive ways of linking human rights and development.

The search—for black cats, unicorns, whatever the creature—perhaps began as a noble one. In the end, however, we found not merely nothing, but worse. Mythic beasts—and equally unreal

129. U.N. Doc. E/CN.4/1984/SR.17 at para. 81 (Italy). *Compare* U.N. Doc. E/CN.4/AC.34/WP.11 at 10 (“The right to development has inherent the guarantee of the fundamental human values in society.”).

rights—are perhaps best left alone, for when they are conjured into existence, the results may, as in the case of the right to development, be frightening, and nothing like what we naively imagined when we set out on the quest.