# A DUTY TO NEGOTIATE IN GOOD FAITH AS PART OF THE DUTY TO COOPERATE TO ESTABLISH 'AN INTERNATIONAL LEGAL ORDER IN WHICH HUMAN RIGHTS CAN BE FULLY REALIZED': THE NEW FRONTIER OF THE RIGHT TO DEVELOPMENT

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**A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish 'An International Legal Order in which Human Rights can be Fully Realized': the New Frontier of the Right to Development**

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**Abstract**

*This chapter discusses the global obligations that are imposed under international human rights law, and contribute to the realization of the right to development. These obligations fall in three categories: they impose on States that they negotiate with other States on certain issues that call for collective action for the full realization of the right to development; that they comply with the right to development in participating as members in the life of international organisations; and that they implement, in good faith, decisions and recommendations emanating from international organisations of which the State concerned is a member. The chapter focuses on the first of these global obligations, which is also the most remarkable: imposing an obligation on a State to enter into any form of international agreement or to negotiate such an agreement, indeed, may seem to contradict the principle of State sovereignty -- one of the implications of which is that States cannot be forced to enter into agreements against their will. The chapter moves beyond this facile conclusion, however. Noting the many references international human rights law makes to duties of international cooperation, it explores the content of the duty of the State to seek, in good faith, to conclude an international agreement in order to contribute to the realization of the right to development. It argues that, far from being purely rhetorical, such a duty requires that the State put forward proposals, with a view to strengthening international cooperation, that are both sufficiently concrete and "reasonable", which means in particular that in the distribution of the burdens and benefits, such proposals should take into account the principle of common but differentiated responsibilities and respective capabilities.*

# A Duty to Negotiate in Good Faith as Part of the Duty to Cooperate to Establish 'An International Legal Order in which Human Rights can be Fully Realized': the New Frontier of the Right to Development

**Olivier De Schutter**

## Introduction

"Lasting progress towards the implementation of the right to development requires effective development policies at the national level, *as well as equitable economic relations and a favourable economic environment at the international level*".[1] When the diplomats participating in the World Conference on Human Rights convened in Vienna in June 1993 decided to include that statement in the Declaration and Programme of Action closing the conference, they were not entering new territory. Already in 1986, the Declaration on the Right to Development[2] defined corresponding States' obligations both at the national and at the international levels: in adopting the Declaration, States had accepted "the primary responsibility for the creation of *national and international* conditions favourable to the realization of the right to development";[3] and they had acknowledged that "Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures *at the national and international levels*".[4] In 2010, the High-Level Task Force established to make proposals on the implementation of the right to development concluded therefore that the right to development implied three levels of States' responsibility, including not only (i) States acting individually as they formulate national development policies and programmes affecting persons within their jurisdiction and (ii) States acting individually as they adopt and implement policies that affect persons not strictly within their jurisdiction, but also (iii) States *acting collectively* in global and regional partnerships.[5]

In the terminology of international human rights law,[6] such duties to "act collectively" correspond to *global* obligations: as actors in international relations, States should contribute to the establishment of bilateral, regional and global cooperation agreements, including for the setting up of international agencies, and they should exercise their rights within intergovernmental organizations, in accordance with the requirements of the right to development. This requires that States overcome the collective action problems that impede the establishment and maintenance of global public goods, by cooperating with each other. Article 3(3) of the Declaration on the Right to Development provides in this regard that "States have the *duty to co-operate with each other* in ensuring development and eliminating obstacles

[1] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993 (A/CONF.157/23 (12 July 1993)), and endorsed by General Assembly resolution 48/121 of 20 December 1993, para. 10.
[2] Declaration on the Right to Development, GA res A/RES/41/128, 4 December 1986, annex 41 UN GAOR Supplement. (no 53) 186, UN Doc A/RES/41/53 (1986) (hereafter "Declaration on the Right to Development").
[3] Declaration on the Right to Development, art. 3(1).
[4] Declaration on the Right to Development, art. 10.
[5] High-Level Task Force on the implementation of the right to development, right to development criteria and operational sub-criteria, A/HRC/15/WG.2/TF/2/Add.2 (8 March 2010), Annex.
[6] See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 8 (defining "extraterritorial obligations" as encompassing "(a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally"). The Maastricht Principles were adopted on 28 September 2011 by a range of human rights research institutes, independent academics, and mandate-holders of the Human Rights Council. They aim to contribute to the progressive development of international human rights law. See Olivier De Schutter, et al., "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171.

to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights". This is further clarified in Article 4, which stipulates a duty of all States "to take steps, individually *and collectively*, to formulate international development policies with a view to facilitating the full realization of the right to development", with "sustained action [being] required to promote more rapid development of developing countries". The Vienna Declaration and Programme of Action further confirms that "States should *cooperate with each other* in ensuring development and eliminating obstacles to development. The international community should promote effective international cooperation for the realization of the right to development and the elimination of obstacles to development".[7]

Thus, the fulfilment of human rights, and of the right to development in particular, requires collective action by States: a joint, coordinated effort to reshape the international environment in order to support the implementation of human rights at domestic level. The Charter of the United Nations itself provided in article 56 that "All Members pledge themselves to take *joint and separate action* in cooperation with the Organization..." to achieve the purposes of the Organisation as set out in Article 55 of the Charter, including: "... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[8] And the Universal Declaration on Human Rights refers in article 28 to the right of everyone to the establishment of a social and international order in which all the rights of the Universal Declaration of Human Rights can be realized.[9] The repeated pledges made by States to work together in order to realize the goals of the international community[10] is thus particularly relevant to the fulfilment of human rights.

This chapter is an attempt to clarify the scope of the duty to conclude new international agreements in order to contribute to full realization of human rights. Part I asks whether such a duty exists. It identifies the sources of the duty in human rights instruments and in the Declaration on the Right to Development, and it replaces the duty in the broader framework of general international law. But isn't the very idea suspicious? If indeed global obligations in the field of human rights include duties to seek to conclude *new* agreements, or to establish new international organisations tasked with the management of certain global public goods,[11] is this not a contradiction in terms? After all, if, as emphasized by the Permanent Court of International Justice in its very first case, "the right of entering into international engagements is an attribute of State sovereignty",[12] what could it possibly mean that there exists a *duty* to cooperate internationally, including by the conclusion of treaties? Part II seeks to provide an answer, by clarifying the distinction between the duty to negotiate in good faith for the attainment of certain objectives, and a duty to reach agreement. Part III offers a brief conclusion.

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[7] Vienna Declaration and Programme of Action, cited above fn. 1, para. 10.

[8] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945.

[9] GA Res. 217, UN GAOR, 3d sess., UN Doc. A/810 (1948) (Art. 28). The UDHR is generally considered today to have acquired the status of customary internaitonal law (see, *inter alia*, the Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968) (in which is was agreed unanimously that the Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for all members of the international community" (para. 2)).

[10] See, e.g., Millennium Declaration, General Assembly Resolution 55/2 (8 September 2000), para. 2 (in which the Heads of States and Governments recognized unanimously that: "... in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level").

[11] The notion of 'international organizations' is understood here, as under Article 2(1)(i) of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331) or under Article 2(1)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986 (A/CONF.129/15), as organizations set up by States in order to favor intergovernmental cooperation. In principle, the members of such international organizations are States, who conclude among themselves a treaty in order to establish the organization.

[12] *The S.S. "Wimbledon"*, PCIJ Series A/01, 17 August 1923, p. 25 (the Court in that case "decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, […] But the right of entering into international engagements is an attribute of State sovereignty").

## I. Is there a duty to cooperate by the conclusion of conventions?

### 1. The duty to cooperate in human rights instruments

It is common for human rights treaties to refer to a duty of international cooperation, and to include in the definition of such a duty the duty to seek to conclude agreements with other States. A duty to cooperate for the full realization of human rights is included, for instance, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[13] which requires States Parties to provide each other "the greatest measure of assistance in connection with criminal proceedings" relating to torture including "the supply of all evidence at their disposal necessary for the proceedings."[14] A comparable commitment is contained in the International Convention for the Protection of all Persons from Enforced Disappearance.[15] Similarly, the Convention on the Rights of Persons with Disabilities,[16] "recogniz[ing] the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention", commits States parties to "undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities".[17] The Convention on the Rights of Child[18] also provides that States Parties shall take measures for the implementation of the economic, social and cultural rights of the child, "where needed, within the framework of international co-operation",[19] leading the Committee on the Rights of the Child to note that "When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation."[20]

While some instruments refer simply to a duty of international assistance and cooperation without referring explicitly to the conclusion of new international agreements, others do provide such an explicit reference, where the conclusion of such agreements is seen as essential for the fulfilment of the aims of the convention. Thus for instance, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography,[21] provides that "States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. (...)".[22]

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[13] U.N.T.S., vol. 1465, p. 85. The Convention was adopted by GA Res. 39/46 of 10 December 1984, and it entered into force on 26 June 1987.

[14] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9 (1).

[15] U.N.T.S., vol. 2716, p. 3. The Convention was adopted by GA Res. 61/177 of 20 December 2006 and entered into force on 23 December 2010. Article 15 provides that “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.”

[16] U.N.T.S., vol. 2515, p. 3. The Convention was adopted by GA Res. 61/106 of 13 December 2006 and entered into force on 3 May 2008.

[17] Article 32(1).

[18] U.N.T.S., vol. 1577, p. 3. The Convention was adopted by GA Res. 44/49 of 20 November 1989 and entered into force on 2 September 1990.

[19] Art. 4.

[20] Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5), para. 5.

[21] Adopted and opened for signature, ratification and accession by GA Res. 54/263 of 25 May 2000.

[22] Art. 10(1). The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict**,** also adopted by General Assembly resolution A/RES/54/263 of 25 May 2000, provides for a duty of States parties to "cooperate in the implementation of the ... Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations" (art. 7(1)). It is less explicit, however, on the conclusion of new agreements to that effect.

The duty of international assistance and cooperation is given particular emphasis in the International Covenant on Economic, Social and Cultural Rights. Article 2(1) of the Covenant provides that the States parties to the Covenant undertake to "take steps, individually *and through international assistance and co-operation*, especially economic and technical", to the maximum of their available resources, "with a view to achieving progressively the full realization of the rights" recognized in the Covenant. The notion of international co-operation also is mentioned in relation to the right to an adequate standard of living in article 11(1) of the Covenant, according to which "States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". Under Part IV of the Covenant, which relates to the measures of implementation, two provisions relate to international assistance and co-operation. Article 22 states that the Economic and Social Council may bring to the attention of other UN bodies and agencies concerned with furnishing technical assistance any information arising out of the reports submitted by States under the Covenant which "may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". Article 23 specifies the different forms international action for the achievement of the rights recognized in the Covenant may take: such international action

> includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.[23]

It has thus become relatively routine for human rights instruments to impose on States parties that they conclude new international agreements (beyond the treaty itself they are parties to), in order to ensure that domestic efforts are supported by an enabling international framework. The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights[24] sought to codify this duty. Under the heading "Obligation to create an international enabling environment", they specify that "States must take deliberate, concrete and targeted steps, separately and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation"; the duty, the authors of the Maastricht Principles noted, includes "elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards".[25]

## 2. Beyond human rights instruments

While the examples above related to human rights instruments, similar illustrations of treaties imposing duties to negotiate new international agreements can be found in other areas.[26] Indeed, a duty to negotiate may even in the absence of a conventional basis to that effect. In general international law, an obligation to negotiate emerges in particular in situations where States are recognized to have conflicting rights, which can only be reconciled through a process of negotiation clarifying the respective rights and duties.[27] A duty to cooperate (whether this requires to enter into negotiations or not) may also emerge

[23] The implication is that, for instance, in order to comply with the right to food, "States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention *and consider the development of further international legal instruments to that end*" (Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999): The right to adequate food (art. 11) (E/C.121999/5) (1999), para. 36 (emphasis added)).
[24] Cited above, fn. 6.
[25] Principle 29, a).
[26] For instance, Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons provides that: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control" (Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature on 1 July 1968 (U.N.T.S., vol. 729, p. 161)).
[27] International Court of Justice, *Fisheries Jurisdiction Case*, 1974 I.C.J., p. 31 (negotiations are required between Iceland and Great Britain who both have legitimate fishing rights in certain maritime areas).

in situations where the effective protection of the rights of the individual require that States combine their efforts, as may occur in particular in situations of a transnational nature. The jurisprudence of the European Court of Human Rights provides some illustrations in this regard,[28] and it is on that same logic that the Committee on Economic, Social and Cultural Rights relies when it encourages States to cooperate in order to ensure that victims of human rights abuses involving transnational corporations operating in different jurisdictions have access to effective remedies: "Improved international cooperation", the Committee noted in its General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, "should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress. The Committee welcomes, in this regard, any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases".[29]

It is submitted that, in addition, a State may be duty-bound to negotiate with a view to reaching an international agreement in situations where, in the absence of a negotiation, that State would have to resort to unilateral measures in order to achieve certain results that the international community has defined as desirable. This is particularly relevant to understanding the potential implications of article 28 of the Universal Declaration of Human Rights, or of the duty of States to "*co-operate with each other* in ensuring development and eliminating obstacles to development", stipulated in article 3(3) of the Declaration on the right to development. Indeed, the establishment of an international environment enabling the full realization of the rights of the UDHR or implementing the right to development requires that States cooperate towards these goals. Yet, while assigning such objectives to the international community, the Universal Declaration on Human Rights and the Declaration on the Right to Development did not authorize States to act unilaterally in order to enforce the duty of another State to adopt measures at domestic level that shall contribute to these objectives, for instance by the adoption of discriminatory trade measures or of other forms of economic sanctions. Indeed, the Declaration on the Right to Development states explicitly that the realization of the right to development "requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations".[30] These principles in turn commit each State to "refrain in its international relations from the threat or use of force against the territorial integrity

[28] In the case of *Güzelyurtlu and Others v. Cyprus and Turkey*, a Chamber of the European Court of Human Rights noted, in the context of a murder which occurred in Cyprus and could only be effectively investigated (and the perpetrators prosecuted) with the cooperation of the Turkish authorities, that "Where there are cross-border elements to an incident of unlawful violence leading to loss of life, the fundamental importance of Article 2 requires that the authorities of the State to which the suspected perpetrators have fled and in which evidence of the offence could be located, of their own motion, take effective measures in that regard [...]. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of the Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens and, indeed, of any individuals within their jurisdiction" (Appl. no. 36925/07, judgment of 4 April 2017 (3rd section), referred to the Grand Chamber on 18 September 2017). In an inadmissibility decision of 10 August 2004 adopted in the case of *Kevin O'Loughlin and Others v. the United Kingdom* (Appl. no. 23274/04), which concerned the explosion of car bombs in the Republic of Ireland (in Dublin and Monaghan) on 17 May 1974 and the alleged failure of the authorities in Northern Ireland to effectively cooperate in the investigation, the Court had already remarked that "where suspected perpetrators of a bombing attack carried out elsewhere are known to be present within the jurisdiction of a Contracting State, and evidence of a criminal offence may be secured, the fundamental importance of Article 2 [of the European Convention on Human Rights, guaranteeing the right to life] requires that the authorities of that State of their own motion take effective measures in that regard. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens." The application was found inadmissible, however, due to the time-limit of six months having been exceeded.

[29] Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017): State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN doc. E/C.12/GC/24 (10 August 2017), para. 35. The Committee refers in this regard to the recommendation included in the report on accountability and access to remedy for victims of business-related human rights abuse, prepared by the Office of the United Nations High Commissioner for Human Rights at the request of the Human Rights Council (A/HRC/32/19). According to that report, States should “take steps, ... to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes”.

[30] Declaration on the Right to Development, cited above fn. 2, art. 3(2).

or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations", and not to "use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind", consistent with the "inalienable right" of each State "to choose its political, economic, social and cultural systems, without interference in any form by another State".[31] The right to development therefore does not justify the adoption of unilateral measures as a means to obtain from a State that it changes its course of conduct; quite to the contrary, the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations recalls that "States have the *duty to co-operate with one another*, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences" (emphasis added).[32] In the Declaration on the Right to Development, this is further echoed in article 6(1), which provides that "All States *should co-operate* with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion" (emphasis added).

By referring in article 3(2) to the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, the Declaration on the Right to Development therefore expresses a preference for multilateralism, and cautions against the adoption of unilateral measures by States to impose compliance with the right to development. In its various resolutions on unilateral coercive measures, the Human Rights Council has also emphasized the threat to human rights, including the right to development, that could result from the adoption of such measures, as well as the risk that multilateralism be circumvented by the most powerful States, who are best placed to impose their views by resorting to unilateral measures.[33] But there is a positive obligation implied in this condemnation of unilateral coercive measures: it is to cooperate in good faith in the search of solutions through multilateral approaches.

Such a duty to enter into negotiations in order to find solutions through multilateralism has been regularly affirmed in the new area of sustainable development. Principle 12 of the 1992 Rio Declaration on Environment and Development[34] expresses a strong encouragement for the search for solutions at the multilateral level:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global

[31] Declaration of Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (approved by General Assembly resolution 2625(XXV) of 24 October 1970). See also Guiding Principles on foreign debt and human rights, appended to the Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, to the twentieth session of the Human Rights Council (10 April 2011) (A/HRC/20/23), paras. 25-26 (referring in the context of States borrowing from foreign lenders, to "the sovereign and inalienable right [of States] to implement a process of national development independently and free from pressure, influence or interference from external actors, including other States and international financial institutions").

[32] Indeed, threatening a State with the denial of certain advantages in order to force the State to conclude an international agreement would constitute coercion in the meaning of article 52 of the Vienna Convention on the Law of Treaties. See the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties, Annex to the Final Act of the United Nations Conference on the Law of Treaties (First and Second sessions, 26 March – 24 May 1968 and 9 April – 22 May 1969) (A/CONF.39/26), p. 285 (which "condemns the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent").

[33] See, for instance, Resolution 34/13, Human rights and unilateral coercive measures (adopted on 24 March 2017 by a recorded vote of 32 to 14, with no abstentions); and Resolution 21/27, Human rights and unilateral coercive meaasures (adopted on 26 September 2014 by a recorded vote of 32 to 14, with two abstentions) (establishing the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on human rights).

[34] Adopted at the United Nations Conference on Environment and Development, Rio de Janeiro (Brazil), 3-14 June 1992 (A/CONF.151/26).

environmental problems should, as far as possible, be based on international consensus.

Similarly, paragraph 2.22(i) of Agenda 21, also adopted at the 1992 Earth Summit, provides:

> Governments should encourage GATT, UNCTAD and other relevant international and regional economic institutions to examine, in accordance with their respective mandates and competences, the following propositions and principles: …
> (i) Avoid unilateral action to deal with environmental challenges outside the jurisdiction of the importing country. Environmental measures addressing transborder problems should, as far as possible, be based on an international consensus.

If, on the one hand, the international community defines certain objectives as desirable, yet disapproves of States seeking to achieve such objectives by unilateral action, should it not follow that all States have a duty to at least *seek to arrive at a negotiated agreement*? The question is relevant for all situations where a particular objective can only be attained by States acting collectively, rather than by the adoption of measures at domestic level only. It is relevant, in other terms, for the creation and maintenance of global public goods -- goods which must be produced because of the interdependence of States, which requires them to act together to address a particular problem. The establishment of a social and international order in which all the rights of the Universal Declaration of Human Rights can be realized (to paraphrase article 28 of the UDHR) is, *par excellence*, such a global public good.

## II. Is the duty to cooperate by the conclusion of conventions purely rhetorical?

Whether the duty to cooperate is made explicit (as it is in a number of human rights instruments, as noted above), or whether it is derived from the condemnation of unilateral measures to achieve ends that the international community has set for itself which require collective action by States, the next question that emerges is whether such commitments have any legal significance at all. What, exactly, can be expected from States imposed such obligations? Imposing an obligation on a State to enter into any form of international agreement or to negotiate such an agreement may seem both odd and impractical, since it can hardly be reconciled with the principle of State sovereignty -- one of the implications of which is that States cannot be forced to enter into agreements against their will.

### 1. The duty to negotiate in good faith and the duty to reach agreement

A most authoritative voice has dismissed as purely hortatory, rather than binding, provisions in international treaties that call on parties to negotiate further agreements. Such provisions, it has been written,

> are *pacta de contrahendo*, which cannot be enforced if the parties do not reach agreement. There is no way in which an agreement can be forced upon them and there is likewise no way in which they can be compelled to negotiate. The assertion that the duty to negotiate or to conclude an agreement implies a duty to negotiate in good faith is an empty one. Unless appropriate machinery has been set up, no court or other agency can determine whether a State has or has not negotiated in good faith and what the duty to negotiate in good faith requires. In the relations of States, a complaint that negotiations have not been carried on in good faith is mere rhetoric.[35]

This however conflates a duty to *negotiate in good faith*, with the duty to *reach an agreement*; yet, the former may be imposed without the latter necessarily following. The Permanent Court of International Justice established this distinction long ago.[36] It is again a distinction relied on by Judge Ch. De Visscher

[35] R.R. Baxter, "International Law 'In Her Infinite Variety'", *The International and Comparative Law Quarterly*, vol. 29, No. 4 (1980), pp. 549-566, at p. 552.
[36] Advisory Opinion No. 42, *Railway Traffic Between Lithuania and Poland*, 1931 P.C.I.J. (ser. A/B) No. 42, at p. 116 (about the duties following from a resolution of the Council of the League of Nations recommending that "the two governments [Polish and Lithuanian]... enter into direct negotiations as soon as possible" concerning the railway connections between the two

in his dissenting opinion to the Advisory Opinion delivered by the International Court of Justice on the *International status of South-West Africa*, where the question arose of the duty of the Union of South Africa, having received a mandate under the Mandates system established under the League of Nations, to enter into an agreement to join the Trusteeship system under the newly created Organisation of the United Nations: "the mandatory Power", Judge De Visccher wrote, "while remaining free to reject the particular terms of a proposed agreement, has the legal obligation to be ready to take part in negotiations and to conduct them in good faith with a view to concluding an agreement".[37]

The duty to negotiate in good faith, as opposed to the duty to reach an agreement, should be treated as an obligation of means: the State should deploy its best efforts to cooperate internationally with a view to finding such agreement. The responsibility of the State cannot be engaged merely due to its failure to arrive at an agreement. A State may however be accountable for its failure to seek, in good faith, to conclude new partnerships. Indeed, the precedents cited above in the field of sustainable development[38] were referred to by the Appellate Body of the World Trade Organisation when, in the *Shrimp/Turtle* dispute, it took the view that the requirement of non-discrimination under article XI:1 of the 1994 General Agreement on Tariffs and Trade prohibited the adoption of unilateral measures, unless such measures have been preceded by good faith attempts to reach an agreement with the trading partners on the adoption of common standards achieving the desired objective. The Appellate Body condemned in that case "...the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in *serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles*, before enforcing the import prohibition against the shrimp exports of those other Members".[39] The Appellate Body could of course not require that such agreement be reached: unilateral measures remain available to the WTO Members, as a last resort, should multilateralism fail. In its view however, it would not be acceptable for a Member to impose on other Members compliance with certain standards, without giving at least a fair chance for a joint approach to succeed.

The case illustrates that it is possible, in such a quasi-judicial context, to assess the "seriousness" of the efforts of a country to search for a negotiated solution to the issue at hand, by examining for instance the time and energy that went into searching for such a solution, the reasonableness of the offers made to the other parties, and so forth.[40] For the understanding of global obligations corresponding to the

countries); see also M.A. Rogoff, "The Obligation to Negotiate in International Law: Rules and Realities", *Michigan Journal of International Law*, vol. 16 (1994), pp. 141-185, at p. 148 (emphasizing the importance of distinguishing the obligation to negotiate from the obligation to conclude an agreement)

[37] *International status of South-West Africa*. Advisory Opinion, *I.C.J. Reports* 1950, p. 128, at p. 188.

[38] See above, text corresponding to fn. 34.

[39] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 (Report of the Appellate Body), para. 166. At issue in this case was Section 609 of Public Law 101-162, adopted by the United States in 1989. This provision required the imposition of an import ban on imports from countries where shrimp were harvested with technology that could adversely affect certain sea turtles, unless the countries concerned were certified by the President, on an annual basis, as having a regulatory programme governing the incidental taking of sea turtles in the course of harvesting comparable to that of the United States, or having an average rate of incidental taking of sea turtles comparable to that by United States vessels using turtle-excluding devices, or having a fishing environment such that there exists no threat of incidental taking of sea turtles in the course of such harvesting. Faced with this unilateral measure adopted by the United States, the Appellate Body regretted the failure of the United States to seek a negotiated solution. The resort to unilateral trade measures is condemned in the following terms: "... an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition under Section 609. It is relevant to observe that an import prohibition is, ordinarily, the heaviest "weapon" in a Member's armoury of trade measures. The record does not, however, show that serious efforts were made by the United States to negotiate similar agreements with any other country or group of countries before (and, as far as the record shows, after) Section 609 was enforced on a world-wide basis on 1 May 1996. Finally, the record also does not show that the appellant, the United States, *attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles* before imposing the import ban" (emphasis added) (para. 171).

[40] Michel Virally writes that "in assuming an obligation to negotiate, a State reserves the right to disagree -- and therefore the right to prevent a settlement -- on the sole condition that it acts in good faith", a condition, he adds, "which may be difficult to verify" (M. Virally, “Panorama du droit international contemporain: cours général de droit international public”, *Collected Courses of the Hague Academy of International Law*, 1983, Vol. 183, p. 240 ). It is argued here that this may be too pessimistic

realization of the right to development, this can be essential, since the right to development is, *inter alia*, about the duty to contribute to design solutions through bilateral or multilateral partnerships, including partnerships at regional level, that can lead towards shaping an international environment enabling development efforts deployed at domestic level.

**2. Two versions of the duty to negotiate in good faith**

Widely diverging views coexist, however, as to the extent of this obligation of means. At one end of the spectrum, the duty to negotiate could be given the narrowest of meanings, and constitute little else than a requirement that, before resorting to unilateral measures or to litigation, a State provide a clear indication of its intention to address an issue, thus providing other States an opportunity to come up with proposals that might lead to a negotiated settlement. The interpretation by the International Court of Justice of the compromissory clause of of Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides an example. That clause suggests that the ICJ should only play a subsidiary role in the settlement of disputes related to the interpretation or application of the ICERD, where such a dispute "is not settled by negotiation or by the procedures expressly provided for in this Convention [which includes a provision on inter-State communications filed with the Committee on the Elimination of Racial Discrimination]".[41] In the Case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Russia questioned the jurisdiction of the International Court of Justice because, it asserted, "there has never been the slightest negotiation between the Parties on the interpretation or application of the Convention on the elimination of racial discrimination".[42] The Court rejected the argument. While acknowledging that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the Respondent Party, discussions on issues that would fall under CERD",[43] it noted that

> such issues have been raised in bilateral contacts between the Parties, and, [...] these issues have manifestly not been resolved by negotiation prior to the filing of the Application; [...] in several representations to the United Nations Security Council in the days before the filing of the Application, those same issues were raised by Georgia and commented upon by the Russian Federation; [...] therefore the Russian Federation was made aware of Georgia's position in that regard; and [...] the fact that CERD has not been specifically mentioned in a bilateral or multilateral context is not an obstacle to the seisin of the Court on the basis of Article 22 of the Convention.[44]

At the other end of the spectrum, attempts have been made to define the specific duties that are implied by a general obligation to negotiate "in good faith". In the recent Case concerning the Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) presented to the International Court of Justice, Bolivia claimed that Chile had in fact committed to negotiate "in order to reach an agreement granting Bolivia a fully sovereign access" to the Pacific Ocean -- an access essential to Bolivia, which suffers important negative consequences from its situation as a landlocked country. Intervening on behalf of Bolivia, Mr Vaughan Lowe submitted during the hearings that

> the duty to negotiate under international law entails, at a minimum, the following specific obligations:

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a view. Certain criteria can be identified, allowing to assess the seriousness with which a State enters into a process of negotiation.

[41] The full text of article 22 ICERD reads: "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

[42] *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 353, at para. 102.

[43] Id., para. 114.

[44] Id., para. 115.

> *(a)* First, the duty to receive communications and proposals put forward by another State concerning the adjustment of any matters of serious concern to that State.
> *(b)* Second, the duty to consider any such communications or proposals, taking into account the interests of the other State.
> *(c)* Third, the duty to participate, in a considered and reasoned manner, in official meetings to discuss such communications and proposals, if invited to do so.
> *(d)* Fourth, the duty to look for ways of overcoming any problems that stand in the way of resolution of the matter.
> All this in good faith and in a timely manner.[45]

Chile, Mr Lowe continued, "must engage with the issue, and actively consider what steps it might take to resolve the problem, even if that requires contemplating a shift from its previously declared position. It must give serious, informed and timely consideration to the substance of any proposal or communication put forward in good faith by Bolivia and give a response that engages in a reasoned manner with the substance of the proposal or communication".[46]

Although this does go much further than the vague duty to make the other Party aware of one's position in order to give a chance for negotiations to commence (as in the Case concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, referred to above), it still is distinct from any duty to reach an agreement, let alone to achieve a particular outcome. In its judgment of 1 October 2018, the Court carefully distinguishes in this regard the duty to *negotiate in good faith* from a duty to *agree*:

> 86. While States are free to resort to negotiations or put an end to them, they may agree to be bound by an obligation to negotiate. In that case, States are required under international law to enter into negotiations and to pursue them in good faith. As the Court recalled in the *North Sea Continental Shelf* cases, States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification" (*I.C.J. Reports 1969*, p. 47, para. 85). Each of them "should pay reasonable regard to the interests of the other" (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 685, para. 132).
> 87. Negotiations between States may lead to an agreement that settles their dispute, but, generally, as the Court observed quoting the Advisory Opinion on *Railway Traffic between Lithuania and Poland (P.C.I.J., Series A/B No. 42*, p. 116), "an obligation to negotiate does not imply an obligation to reach an agreement" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 68, para. 150). When setting forth an obligation to negotiate, the parties may, as they did for instance in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, establish an "obligation to achieve a precise result" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 264, para. 99). Bolivia's submissions could be understood as referring to an obligation with a similar character.
> 88. As the Court observed in its Judgment on the preliminary objection, "Bolivia does not ask the Court to declare that it has a right to sovereign access to the sea" (*I.C.J. Reports 2015 (II)*, p. 605, para. 33). What Bolivia claims in its submissions is that Chile is under an obligation to negotiate "in order to reach an agreement granting Bolivia a fully sovereign access" (*ibid.*, para. 35).
> 89. In its Judgment on Chile's preliminary objection, the Court determined "that the subject-matter of the dispute is whether Chile is obligated to negotiate in good faith Bolivia's sovereign access to the Pacific Ocean" (*ibid.*, para. 34). As the Court observed, this alleged obligation does not include a commitment to reach an agreement on the subject-matter of the dispute.

It is worth emphasizing that the duty to negotiate in good faith remains an obligation of means, distinct from a duty to reach an agreement (which would be an obligation of result), even where the objective

[45] CR 2018/6, pp. 59-60, para. 9.
[46] Id., para. 12.

of the negotiation is clearly defined -- in the case of the Bolivia-Chile dispute, to ensure sovereign access of Bolivia to the Pacific Ocean. Where such an objective is agreed on by the parties, the negotiation shall serve to identify the means through which it shall be attained, including the allocation of the burden between the parties, the timelines, and so forth. It may well be that, in the end, no agreement shall be reached. This does not imply that it shall not be possible for a court or a quasi-judicial body to assess whether a State has negotiated "in good faith", in other terms: that is not refused to reconsider its initial positions in the light of proposals made by other parties; that, in formulating its proposals, it has paid "reasonable regard" to the interests of the other parties; and that, where the objectives of the negotiation are agreed, it has worked constructively towards the attainment of such objectives by putting forward proposals (or answering to proposals from the other parties) that contribute to this end.

## III. What implications follow from a duty to cooperate in the negotiation of conventions supporting the right to development?

If there exists a duty to negotiate in good faith with a view to the conclusion of agreements (or to the revision of existing agreements) in support of the implementation of the right to development, which criteria should be taken into account in order to assess compliance with such a duty? It is submitted that, in order to make such an assessment, it shall be required to consider: first, whether they have put forward proposals, with a view to strengthening international cooperation, that are sufficiently concrete, or have responded to proposals made by others; and second, whether such proposals or counter-proposals have a reasonable chance of attracting support.

### 1. The procedural requirement to negotiate

The first requirement is of a procedural kind. It is that States do not remain passive, but make concrete steps towards reaching an international agreement -- minimally, by responding in a timely fashion to the proposals made by other parties. Under the International Covenant on Economic, Social and Cultural Rights, States are expected to take steps towards the progressive realization of the rights recognized in the Covenant that are "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[47] A similar requirement could be imposed, at the level of global obligations, as regards the duty to put forward proposals that could move towards an international environment supporting efforts at domestic level at achieving the right to development. Thus, though this obligation is procedural in nature, it is not simply a *pro forma* obligation to be open to discussions or to acknowledge receipt of proposals filed by other parties: rather, to borrow from the language of the *Graeco-German* Arbitration, the engagement should be "meaningful".[48]

### 2. The substantive requirement to put forward reasonable proposals

The second requirement concerns the substance of the negotiation position taken. The proposals States put forward in negotiation fora should be reasonably tailored to attain the objectives pursued. Though there exists no clear consensus on precise benchmarks in this regard, it may be suggested that this requires assessing the potential impacts of the proposals put forward in order to examine:

a) whether such proposals shall enable the States to whom such proposals are addressed to respect, protect and fulfil human rights, consistent with their international obligations;

b) whether they shall benefit, as a matter of priority, the most marginalized groups within the

[47] Committee on Economic, Social and Cultural Rights, General Comment No 3 (1990): The Nature of States Parties' Obligations (art. 2(1)) (E/1991/23), para 2.

[48] In this case, in which Greece argued that Germany was under an obligation under Article 19 of the 1953 Agreement on German External Debts (333 United Nations, *Treaty Series*, p. 3) to enter into negotiations to settle certain outstanding claims, the Arbitral Tribunal explained that "To be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though ... an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made" (Graeco-German Arbitration (1972), 91 R.I.A.A., p. 57). The duty, the Tribunal stated, is to "negotiate, bargain, and in good faith attempt to reach a result acceptable to both parties" (id., p. 56).

States concerned; and

c) whether, in the distribution of the burdens and benefits, such proposals take into account the principle of common but differentiated responsibilities and respective capabilities.

Thus, the reasonableness of a proposal for a new international agreement may be assessed on the basis of three criteria. The first criterion is that the agreement should not make it more difficult, or impossible, for the States concerned to comply with their duties to respect, protect and fulfil human rights. This follows from the principle of *pacta sunt servanda*,[49] as well as from the axiomatic rule according to which States may not escape preexisting treaty-based commitments by the conclusion, with other parties, of another treaty covering the same subject, whose provisions would in some way conflict with the earlier treaty: the posterior treaty could not be invoked against the parties to the earlier treaty, for whom it is a *res inter alios acta*.[50] Indeed, even if it were suggested that all States parties to a human rights treaty be involved in negotiations on a new agreement reducing these pre-existing obligations, the status of human rights norms as norms that cannot be derogated from by mutual agreement because of their peremptory character would prohibit such an agreement from entering into force;[51] if it were to be signed and ratified by the States concerned, it would have to considered as null and void.[52] Such an agreement, in any event, would have to be treated as incompatible with Article 103 of the UN Charter, and thus inapplicable.[53]

The second criterion on the basis of which the reasonableness of a proposal may be assessed is by asking whether, if accepted, the proposal would contribute to the reduction of inequalities. The prohibition of

[49] Vienna Convention on the Law of Treaties (opened for signature on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 8 ILM 679)**,** art. 26.

[50] Vienna Convention on the Law of Treaties, cited above fn. 49, art. 30 (‘Application of successive treaties relating to the same subject-matter’) (see, specifically, Article 30 § 4, b)). As explained by Special Rapporteur Fitzmaurice : "Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting" (G. Fitzmaurice, ‘Third Report’, *ILC Yearbook* (1958), vol. II, p. 43). For further discussions of the rule, see in particular Ch. Rousseau, ‘De la compatibilité des normes juridiques contradictoires dans l’ordre international’, *Revue générale de droit international public*, vol. 39 (1932), pp. 133-192; E.W. Vierdag, ‘The Time of the Conclusion of a Multilateral Treaty : Article 30 of the Vienna Conveniotn on the Law of Treaties and Related Provisions’, *British Yearbook of International Law*, vol. 59 (1988) pp. 92-111; W. Czaplinski and G.M. Danilenko, ‘Conflict of Norms in International Law’, *Netherlands International Law Review*, vol. 21 (1990) pp. 12-28; J. B. Mus, ‘Conflicts Between Treaties in International Law’, *Netherlands International Law Review*, vol. 29 (1998), pp. 208-232.

[51] Vienna Convention on the Law of Treaties, cited above fn. 49, art. 53 (defining a peremptory norm of international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"). Disagreements persist as to whether the full list of human rights recognized in the International Bill of Rights have the status of *jus cogens*, however (see, for instance, Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford Univ. Press, 2012)). The debate is not new: fifty years ago, Judge Tanaka was already suggesting in his dissenting opinion in the *South West Africa* case that human rights law belonged to the *jus cogens*, which is imperative, as opposed to the *jus dispositivum*, that States could freely dispose of: "If we can introduce in the international field a category of law, namely jus cogens, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to jus dispositivum, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the jus cogens" (Judge Tanaka, dissenting opinion in the *South West Africa* Case (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment [1966] ICJ Rep 298). The issue of peremptory norms of general international law (*jus cogens*) is currently under examination within the International Law Commission, with a view to contributing to the codification and progressive development of the topic.

[52] Vienna Convention on the Law of Treaties, cited above fn. 49, art. 64.

[53] Whereas a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear ; however, as a result of article 103 of the UN Charter, it shall not be applied to the extent of such an incompatibility : see P.-M. Dupuy, "L’unité de l’ordre juridique international. Cours général de droit international public", *Recueil des cours*, t. 297 (2002), p. 305 ; and see also the Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, A/CN.4/L.702, 18 July 2006, para. 41 : "(*a*) A rule conflicting with a norm of *jus cogens* becomes thereby *ipso facto* void; (*b*) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict". Comp. Jean Combacau, ‘Logique de la validité contre logique d’opposabilité dans la Convention de Vienne sur le droit des traités’, in *Mélanges M. Virally* (Paris, Pedone, 1991), pp. 195-203.

discrimination is a core obligation of States both under the UN Charter and under international human rights law. Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. Any proposal for an international agreement that would entail discrimination thus defined would not pass the reasonableness test. But human rights law goes further. It also prohibits any action or omission that disproportionately affects members of a particular group, in the absence of a reasonable and objective justification, thus constituting *de facto* discrimination.[54] Thus, proposed international agreements should be assessed in order to ensure that they shall not have such impacts. Such agreements may, however, provide for differential treatment benefiting certain categories of the population facing systemic disadvantage. Indeed, in order to eliminate *de facto* discrimination, States may be under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportionate means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved.

The third criterion is that the agreement put forward takes into account the principle of common but differentiated responsibilities and respective capabilities. This principle originally emerged in international economic law to justify positive discrimination in favor of developing countries: as an illustration, the Second UNCTAD conference expressed itself in favour of "the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth of these countries".[55] It then penetrated international environmental law, inspiring the 1987 Montréal Protocol on Substances that Deplete the Ozone Layer to the 1985 Vienna Convention for the Protection of the Ozone Layer.[56] Principle 7 of the Rio Declaration describes it as follows:

> States should co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

As illustrated by the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity, the first examples of the implementation of the principle of common but differentiated responsibilities agreed on in Rio,[57] this principle requires that the allocation of

[54] Human Rights Committee, General Comment No. 18 : Non-discrimination (thirty-seventh session, 1989) ; Committee on Economic, Social and Cultural Rights, General Comment No. 20 : Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) (E/C.12/GC/20).

[55] Resolution 21 (ii) adopted at the Second United Nations Conference on Trade and Development (1968). This commitment resulted, in particular, in the adoption of decisions granting waivers from the most-favored nation principle under the General Agreement on Tariffs and Trade, allowing for General Systems of Preferences to be set up in order to accelerate the integration of developing countries in international trade: see Decision relating to the establishment of generalized, non-reciprocal and non-discriminatory preferences beneficial to the developing countries, Decision L/3545 (25 June 1971) GATT B.I.S.D. (18th Supp) at 24 (1972); Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision L/4903 (28 November 1979) GATT B.I.S.D. (26th Supp) at 203 (1980) (providing that "contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties").

[56] U.N.T.S., vol. 1522, p. 3, in force since 1 Jan. 1989. In the Preamble of the Montréal Protocol, the Parties acknowledge that "special provision is required to meet the needs of developing countries, including the provision of additional financial resources and access to relevant technologies, bearing in mind that the magnitude of funds necessary is predictable, and the funds can be expected to make a substantial difference in the world's ability to address the scientifically established problem of ozone depletion and its harmful effects"; see also art. 5 (providing for specific treatment of developing countries).

[57] United Nations Framework Convention on Climate Change (1992, in force on 21 March 1994 (U.N.T.S., vol. 1771, p. 107; 31 ILM 851 (1992)), art. 3 (States parties should act "on the basis of equity and in accordance with their common but

responsibilities between States should take into account both each State's contribution to the issue to be addressed through international cooperation,[58] and each State's ability to contribute to addressing that issue (capabilities, as measures by financial resources and technologies).[59] In its New Delhi Declaration of Principles of International Law relating to Sustainable Development, adopted at the 70th Conference of the ILA held in New Delhi on 2-6 April 2002, the ILA described the principle thus:

> 3.1. States and other relevant actors have common but differentiated responsibilities. All States are under a duty to co-operate in the achievement of global sustainable development and the protection of the environment. International organizations, corporations (including in particular transnational corporations), non-governmental organizations and civil society should co-operate in and contribute to this global partnership. Corporations have also responsibilities pursuant to the polluter-pays principle.
> 3.2. Differentiation of responsibilities, whilst principally based on the contribution that a State has made to the emergence of environmental problems, must also take into account the economic and developmental situation of the State, in accordance with paragraph 3.3.
> 3.3. The special needs and interests of developing countries and of countries with economies in transition, with particular regard to least developed countries and those affected adversely by environmental, social and developmental considerations, should be recognized.
> 3.4. Developed countries bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption and in contributing to capacity-building in developing countries, inter alia by providing financial assistance and access to environmentally sound technology. In particular, developed countries should play a leading role and assume primary responsibility in matters of relevance to sustainable development.

At the World Summit on Sustainable Development held in Johannesburg in August-September 2002, at which the implementation of the Agenda 21 and the Rio Declaration on Environment and Development was discussed, Heads of State and governments pledged to take "concrete actions and measures at all levels and to enhancing international cooperation, taking into account the Rio principles, including, inter alia, the principle of common but differentiated responsibilities as set out in principle 7 of the Rio Declaration on Environment and Development".[60] The principle of common but differentiated responsibilities also appears in the 2030 Development Agenda, particularly in targets 10.a and 12.1 of the Sustainable Development Goals, and in the Addis Ababa Action Agenda of the Third International Conference on Finance for Development.[61]

Perhaps the chief obstacle to the operationalization of the principle of common but differentiated responsibilities -- allowing the principle to guide international negotiations and to assess the

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differentiated responsibilities and respective capabilities"); Convention on Biological Diversity (1992, in force on 29 December 1993 (*United Nations Treaty Series*, vol. 1760, p. 79)), art. 20(4) ("The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties"). The principle of common but differentiated responsibilities has now grown into a general principle of international environmental law: see Philippe Cullet, *Differential Treatment in International Environmental Law* (Alderschot, Ashgate, 2003); L. Rajamani, *Differential treatment in International Environmental Law* (New York: Oxford University Press, 2006); Tuula Honkonen, *The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements* (Kluwer Law International, 2009).

[58] In international environmental law, this may be seen as a manifestation of the polluter-pays principle. See the International Law Association New Delhi Declaration on Principles of International Law relating to Sustainable Development, adopted at the seventieth conference of the International Law Association (ILA resolution 3/2002, annex as published in UN doc. A/57/329), principle 3.

[59] These two dimensions, which are respectively looking backward and looking forward, shall often converge: an inequitable trading system, for instance, shall often be the result of past unfair trading practices, and the partner having benefited most shall have greater capacities to remedy the resulting imbalances.

[60] See paragraphs 2 and 81 of the 2002 Plan of Implementation adopted at the Johannesburg Summit.

[61] Adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015. See in paraticular paragraph 59.

reasonableness of proposals and counter-proposals presented in negotiation fora -- is that there exists no unanimous agreement on how countries should be classified in order to implement the principle. The category of "developing countries" -- leaving aside even its implicit but highly contestable suggestion that there would exists a single pathway to development, one "script" that all countries should follow -- is hardly helpful to identify the countries' differentiated responsibilities. Today, the group of 159 "developing countries", categorized as such by the United Nations, is widely heterogenous: they include countries whose situations, trajectories and prospects differ widely, leading the World Bank to reject the use of this category since the 2016 edition of its *World Development Report*.

Other classifications are barely more helpful, however. The World Bank classifies countries as "low-income", "lower middle income", "upper middle income" and "high-income", on the basis of their GNI per capita, using a three year average exchange rate to avoid the classification being influenced by short-term changes in currency values.[62] However, though for most countries there is a strong correlation between GNI per capita and social indicators,[63] GNI per capita remains a crude proxy to assess the level of development of a country. It does not, for instance, take into account adequately the activity in the informal sector or the non-monetary segments of the economy. Nor does it reflect fully the nature of the challenges certain countries may be facing: small island developing States and landlocked developing countries, for instance, face specific constraints due to their geography, which may have to be taken into account, although such constraints may not be reflected in their position on a GNI per capita ranking; similarly, poor countries with a high level of debt face challenges of their own, which were recognized when a separate category of "heavily indebted poor countries" eligible for special assistance from the International Monetary Fund and the World Bank was defined when the HIPC initiative was launched in 1996. Finally, a separate classification is based on the list of Least-Developed Countries (LDCs). This list is decided upon by the United Nations Economic and Social Council and, ultimately, by the General Assembly, on the basis of recommendations made by the Committee for Development Policy, using a set of criteria including per capita GNI, a human assets index and an economic vulnerability index.[64]

These various approaches were each designed for specific purposes and in specific institutional settings, and they are more or less well suited to those ends. But they appear insufficient to capture the full spectrum of conditions that countries face. Classifying countries in "groups", separated by more or less arbitrarily defined boundaries, may not be the most justifiable approach. Instead, taking into account the principle of common but differentiated responsibilities and respective capabilities for the implementation of the right to development may require to identify for each country (i) the contribution that it has made in the past to the emergence of environmental problems and, more generally, of unsustainable forms of growth, (ii) the capacity of each country to contribute to the right to development, based on the resources (natural, financial, technological and human) that it could mobilize to that effect, and (iii) the constraints (including geographical constraints, the debt burden and the lack of diversification of the economy) the country faces. The classification of countries on the basis of these criteria could be regularly updated, ideally on an annual basis, in order to arrive at a shared understanding of which efforts can be expected from each State, where the burden of realizing the right to development should be shared between countries. Proposals to improve the international social and economic order should be assessed on the basis of whether they take account the respective responsibilities of countries, on the basis of this set of criteria.

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[62] The classification is published on http://data.worldbank.org and is revised once a year on July 1st, at the start of the World Bank fiscal year. For instance, for the current 2018 fiscal year, low-income economies are those with a GNI per capita of $1,005 or less in 2016; lower middle-income economies are those with a GNI per capita between $1,006 and $3,955; upper middle-income economies are those with a GNI per capita between $3,956 and $12,235; high-income economies are those with a GNI per capita of $12,236 or more. See https://datahelpdesk.worldbank.org/knowledgebase/articles/906519

[63] See N. Fantom and U. Serajuddin, *The World Bank's classification of countries by income* (Policy Research Working Paper WPS7528) (World Bank: Washington, D.C., 2016) (available on: http://documents.worldbank.org/curated/en/408581467988942234/pdf/WPS7528.pdf).

[64] See *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures* (United Nations publication, Sales No. E.07.II.A.9). Available from: http://www.un.org/esa/analysis/devplan/cdppublications/2008cdphandbook.pdf

## III. Conclusion

Human rights instruments include numerous references to the duty of international cooperation, *inter alia* by the conclusion of new international agreements; and the duty is key to the implementation of the right to development proclaimed by the UN General Assembly. Yet, it remains until now an "imperfect" obligation: it remains formulated at a highly general level, and its content is still vague and contested, making the obligation unenforceable unless and until it is further clarified.[65] This paper has sought to propose a way forward. It emphasized the distinction between the duty to negotiate in good faith with a view to reaching an agreement, and the duty to agree. The former is an obligation of means; that is not to say that it is empty, or that it cannot be objectively assessed. Three criteria, it has been suggested, could be relied upon to guide the evaluation of the reasonableness of the positions adopted by a State in negotiation fora in which new instruments are proposed to implement the right to development. First, a proposal should only be deemed reasonable if it supports, rather than impedes, the realization of human rights at domestic level. Second, it should contribute to the reduction of inequalities and focus on the most vulnerable and marginalized groups of the population. Third, finally, the distribution of the burden between countries should take into account the principle of common but differentiated responsibilities and respective capabilities. Any proposal that cannot be justified in the light of these three conditions should be considered with caution, since it gives rise to the suspicion that the proposal is put forward merely to preserve the State's reputation, rather than to contribute, constructively, to the progress of human rights in general, and of the right to development in particular.

Almost seventy years ago, in his dissenting opinion the Advisory Opinion delivered by the International Court of Justice on the International status of South-West Africa, Judge Charles De Visscher remarked that: "The obligation to be ready to negotiate with a view to concluding an agreement represented the minimum of international co-operation without which the entire régime contemplated and regulated by the Charter would have been frustrated. In this connexion one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice." The closing sentences of his dissenting opinion could be ours now, simply by replacing the reference to article 76 of the UN Charter (outlining the basic objectives of the Trusteeship System) by a reference to article 55 (referring to the objectives of international economic and social co-operation). It would read:

> Under article 55 of the Charter, the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", as a means to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". In recognizing their obligations to be ready to negotiate with a view to concluding new agreements for the realization of human rights and for the implementation of the right to development, all States, without thereby jeopardizing their freedom to accept or refuse the terms of such an agreement, co-operate in a particularly important field in the attainment of the highest objectives of the United Nations.[66]

[65] The notion of "imperfect obligations", though originally derived from Kant, is inspired here by Amartya K. Sen, 'Rights and Capabilities', in A. K. Sen (ed.), *Resources, Values and Development* (Oxford: Blackwell, 1984), at 310-315; Amartya K. Sen, *The Idea of Justice* (Cambridge, Harvard University Press, 2009) 360.

[66] The actual quote is the following: "Under Article 76 of the Charter, "the basic objectives of the Trusteeship System" conform to "the purposes of the United Nations laid down in Article 1 of the present Charter". In recognizing its obligation to be ready to negotiate with a view to concluding a Trusteeship Agreement, a mandatory Power, without thereby jeopardizing its freedom to accept or refuse the terms of such an Agreement, co-operates in a particularly important field in the attainment of the highest objectives of the United Nations".