

First draft of an International Convention on the Right to Development

Daum, Isabel

Veröffentlichungsversion / Published Version
Stellungnahme / comment

Empfohlene Zitierung / Suggested Citation:

Daum, I. (2020). *First draft of an International Convention on the Right to Development*. (Stellungnahme / Deutsches Institut für Menschenrechte). Berlin: Deutsches Institut für Menschenrechte. <https://nbn-resolving.org/urn:nbn:de:0168-ssoar-81760-2>

Nutzungsbedingungen:

Dieser Text wird unter einer CC BY-NC-ND Lizenz (Namensnennung-Nicht-kommerziell-Keine Bearbeitung) zur Verfügung gestellt. Nähere Auskünfte zu den CC-Lizenzen finden Sie hier:
<https://creativecommons.org/licenses/by-nc-nd/4.0/deed.de>

Terms of use:

This document is made available under a CC BY-NC-ND Licence (Attribution-Non Commercial-NoDerivatives). For more information see:
<https://creativecommons.org/licenses/by-nc-nd/4.0>



Deutsches Institut
für Menschenrechte

Position Paper

First Draft of an International Convention on the Right to Development

October 2020

Content

1	Introduction	1
1.1	Overview	1
1.2	The draft convention's structure	1
1.3	General remarks	2
2	Overview of legal content	3
2.1	Scope of protection: entitled parties	3
2.2	Scope of protection: legal content	4
2.3	Duty-bearers and scope of obligations	5
	2.3.1 Duty-bearers	5
	2.3.2 Scope of obligations	6
2.4	Legal implications of violations	7
3	Further aspects	8
4	Outlook	9

1 Introduction

1.1 Overview

In October 2018, the UN Human Rights Council resolution A/HRC/RES/39/9 mandated the Open-ended Working Group on the Right to Development to begin discussions towards drafting an international convention on the right to development. The resolution called on the Chair of the Working Group to prepare a first draft. The first draft was to provide the basis for discussions at the 21st Session of the Working Group in 2020.

The resolution was adopted with 30 votes in favor, 12 against (mainly EU states) and 5 abstentions. As was the case in previous years, states from the Global South supported the resolution, while states from the Global North abstained or voted against it.

Subsequently, the 20th session of the Working Group saw a discussion on working methods and on the nature, structure, content, scope, institutional arrangements and procedures for monitoring compliance with the planned treaty.¹ The Chair of the Working Group, together with the UN High Commissioner for Human Rights, decided hereupon to set up a drafting group.² Following a round of commentary by recognized human rights legal scholars, the drafting group finalized the first draft (zero draft) in December 2019. This draft (A/HRC/WG.2/21/2/Add.1) has been available together with extensive commentaries since January 2020.³ The 21st session of the Working Group, scheduled for early May 2020, was postponed to early November 2020 due to the Covid-19 pandemic.⁴

All in all, not only the legal framework, but also the first round of negotiations' updated programme of work is very similar to proceedings towards a Legally Binding Instrument on Business and Human Rights (the so-called Treaty Process).⁵

1.2 The draft convention's structure

The draft contains five sections:

- Part I contains the convention's objectives, its general principles and definitions of terms used (Articles 1-3)
- Part II sets out the right to development, its relationship to other obligations under international law and determines right-holders (Articles 4-7)
- Part III focuses on obligations arising from the right to development and defines duty-bearers (Articles 8-23)

¹ <https://www.ohchr.org/EN/Issues/Development/Pages/PresentationsLBI20Session.aspx> (accessed 16.06.2020).

² Mihir Kanade (India) Chairman and rapporteur, Makane Moïse Mbengue (Senegal), Koen de Feyter (Belgium), Diane Desierto (Philippines) and Margarete May Macaulay (Jamaica). Mihir Kanade was assigned the task of preparing the first draft with detailed comments from the group.

³ The draft convention can be accessed online at: https://www.ohchr.org/Documents/Issues/Development/Session21/3_A_HRC_WG.2_21_2_AdvanceEditedVersion.pdf; Version with commentaries: https://www.ohchr.org/Documents/Issues/Development/Session21/4_A_HRC_WG.2_21_2_Add.1_RegisteredVersion.pdf (both accessed 16.06.2020). See for an analysis: Schrijver, Nico (2020), A new Convention on the human right to development: Putting the cart before the horse? In: Netherlands Quarterly of Human Rights 38 (2), pp. 84–93.

⁴ <https://www.ohchr.org/EN/Issues/Development/Pages/21stSession.aspx> (accessed 16.06.2020).

⁵ All reports on session proceedings and the different drafts are accessible online at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx> (accessed 16.06.2020).

- Part IV establishes a *sui generis* mechanism for the treaty's implementation (cf. Articles 24-26)
- Part V contains the standard final provisions (Articles 27-36).

1.3 General remarks

The draft convention's wording leans heavily towards the wording of the UN Declaration on the Right to Development (UN General Assembly Resolution 41/128 of 4 December 1986). The wording is also partly inspired by expert opinion as well as non-binding instruments that are still under discussion or have not yet been accorded a normative status. The preamble refers to the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (A/Res/73/165 of 2018), not yet universally acknowledged in international law. References also include the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) and the current draft of a Legally Binding Instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights.⁶

The draft convention often draws on innovative components of the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD),⁷ and on principles of international environmental law.⁸ The draft draws herewith on elements of framework conventions that typically focus on defining principles, rights and general obligations rather than the details - which can later be gradually developed by a Conference of States Parties. The draft provides for the establishment of a Conference of States Parties to facilitate the introduction of benchmarks or quantifiable development goals. Due to the necessity to adapt to new research findings, such a model is particularly common in international environmental law. Within the field of human rights, it is only the still relatively new CRPD that has established such a Conference of the States Parties.

The commentaries on the draft stipulate that the draft does not create any concepts, standards or obligations anew, since it predicates strongly on current instruments and in essence repeats or underscores existing obligations.⁹ The draft nonetheless still creates new obligations under international law. The transmission of rights and associated non-binding obligations into legally binding standards is indeed the main aim of the entire process. In Article 13 para. 4, for example, the draft reproduces word for word the Sustainable Development Goals (SDGs) 17.10, 10.1, 10.5, 10.6, 10.b, 17.6, 17.7 and 10.7, as found in the 2030 Agenda (A/Res/70/1).¹⁰ The state obligation to cooperate to create orderly, safe, regular and responsible migration as contained in

⁶ Regarding the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) See Commentary on Article 10 para. 1 onwards; for reference to the LBI, see Commentary on Article 11 para. 5.

⁷ Cf. commentary on Article 1 para. 2 and para. 5, commentary on Article 2 para. 1, commentary on Article 3 para. 1 et seq., commentary on Article 12 para. 2, commentary on Article 13 para. 3, commentary on Article 15 para. 2, commentary on Article 20 para. 1, commentary on Article 24 para. 2, commentary on Article 27 para. 1.

⁸ See, for example, the concept of "common concern of humankind" in para. 1 of the Preamble, which is otherwise only used in relation to biodiversity in the UN Convention on Biological Diversity (1992) and in relation to climate change in the UN Framework Convention on Climate Change (1992) and the Paris Convention (2015). Likewise, in Article 22 on sustainable development, recourse is made to the principle of intergenerational justice found in the Rio Declaration on Environment and Development (1992) and the Vienna Declaration and Programme of Action (1993). The concept of "common but differentiated responsibilities" found in the UN Framework Convention on Climate Change and the Paris Convention is also referred to in Article 15 para. 2 a).

⁹ See Commentaries, Introduction para. 2 as Schrijver (2020, p. 91) rightly points out, the strategic question arises here as to whether a new Convention is needed if it merely confirms existing rights and their subsequent state obligations.

¹⁰ Cf. commentary on Article 13 (6).

Article 13 para. 4 is likely to be a particularly controversial issue in forthcoming treaty negotiations. Likewise, Article 16 para. 2 (in accordance with SGD 5.5) calls upon states to secure equal opportunities and representation of women in leadership positions at all levels, including within legal entities (including private sector companies).¹¹ Last but not least, the use of terms such as “vulnerable states” in Article 25 para. 2 does not sit comfortably as a legal term.

With the current draft, the convention would have considerable impact on other areas of international law, particularly on the regulation of trade and investment (see Article 12 para. 2, clause 2; as well as Article 15 para. 2, clause 2; see below for more information on the precedence of convention provisions in the event of a conflict of law).

2 Overview of legal content

There has long been little (if any) consensus in debates on the right to development as regards right-holders and duty-bearers; as well as its precise legal content.

2.1 Scope of protection: entitled parties

With regard to right-holders, it is particularly controversial whether the concept of “peoples” in Article 1 para. 1 of the Declaration on the Right to Development (“every human person and all peoples”) allows for states to also invoke the right to development and make claims for aid or assistance from other states. Although the term “peoples” is used in the Declaration it makes later clear that the “human person” is the main subject of development (see Article 2 para. 1 and para. 13 of the Declaration’s Preamble). It is now however accepted that the right to development covers both individual and collective protection.¹²

Articles 55 and 56 of the UN Charter are often read as implicitly establishing an obligation of international aid and assistance from industrialized to developing countries.¹³ Drawing on this, the draft convention formulates in Article 13 the states’ duty to cooperate in order to create an enabling environment for the right to development. Many developing¹⁴ or Non-Aligned states assume this to mean that states have a claim to international aid and assistance. Industrialized countries argue, however, that only individuals or groups of individuals (indigenous peoples), not states, should be able to derive rights from the right to development. With the exception of indigenous peoples (who are right-holders both collectively and as individuals), human rights are essentially seen as individual rights. States can therefore only gain obligations, not rights, from human rights. An obligation of mutual assistance between states, which would in practice mean industrialized countries assisting developing countries financially, is consistently rejected by industrialized countries.

The current draft convention follows the position of developing or Non-Aligned states and **extends the scope of beneficiaries to peoples and thus states**. In contrast to

¹¹ Cf. Commentary on Article 16 para. 3.

¹² See also Commentary on Article 4 para. 3.

¹³ See Commentary on Article 13 para. 2.

¹⁴ The draft convention uses the terms “developed” and “developing states/countries”, but does not define these categories.

Article 2 para. 1 of the Declaration on the Right to Development,¹⁵ Article 1, Article 4 and the Preamble (para. 21) of the draft place “every human person and all peoples” as the key subjects of development processes and as such as right-holders.¹⁶ The commentary on the draft also makes it undoubtedly clear that legal persons do not count as right-holders,¹⁷ a point already implied by the wording (“human person”).

The entitlement of developing countries' to benefits vis-à-vis other states is concretized with the draft convention's recognition of the particular disadvantages developing countries and so-called 'vulnerable states' face (see Article 15 para. 2). These challenges are to be dealt with through special measures and through the duty to cooperate, as set out in Article 13 (see below).

Under the draft convention, natural persons, groups of individuals (such as indigenous peoples) and states are thus entitled to claim the right to development.

2.2 Scope of protection: legal content

Article 4 of the draft convention defines the right to development. Article 4 para. 1 is strongly oriented towards the wording of Article 1 para. 1 of the UN Declaration on the Right to Development.¹⁸ Article 4 para. 2 stipulates that “all persons and peoples have the right to active, free and meaningful participation in development”. It herewith establishes (like Article 3) a principle of the human rights-based approach to development.¹⁹ Thus far, the principle of participation in development could only be derived from the procedural requirements for human rights implementation and from Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

The draft does not however define the term "development". The commentary justifies the absence of a definition by arguing that a general definition would contradict the core nature of development, namely that development is shaped by people in the exercising of their rights and as such varies greatly depending on context. What development means lies in this case entirely with the right-holders.²⁰ Paragraph 4 of the draft's preamble simply contains a description of development as a process, and essentially corresponds with the wording in the preamble of the Declaration on the Rights to Development (para. 16).

How the right to development relates to other human rights has always been a matter of great controversy in the legal field. One view holds the right to development to be a "meta right",²¹ or a "synthesis right",²² that transcends all other human rights. In contrast, others see the right to development as an independent "vector right" that

¹⁵ Cf. commentary on Article 3 para. 5 and commentary on Article 3 para. 21 of the Preamble.

¹⁶ The term "human person" may seem somewhat unusual compared to terms used in other human rights treaties. In contrast, these treaties speak of "any person", "anyone" or "human being" (cf. e.g. Article 6 of the International Covenant on Civil and Political Rights). The term originates from the Declaration on the Right to Development (Article 1 para.1, Article 2 para.1 and the preamble) and its use in this draft convention is as such fitting.

¹⁷ Commentary on Article 2 para. 3.

¹⁸ Cf. commentary on Article 4 para.1.

¹⁹ UNSDG Human Rights Working Group (2003): The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies, p. 2.

²⁰ Commentary on para. 4 of the preamble para. 2.

²¹ Donnelly, Jack (1985), In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development, In: California Western International Law Journal 15 (3), pp. 473-509.

²² See Nuscheler, Franz (2012). "Recht auf Entwicklung": Ein "universelles Menschenrecht" ohne universelle Geltung. In v. Schorlemer, Sabine (ed.), Praxishandbuch UNO, pp. 305-317.

runs through all human rights.²³ The draft convention attempts to circumvent this unresolved debate. In Article 4 para.1, the draft deviates slightly from the wording of the Declaration on the Right to Development: “Every human person and all peoples have the inalienable right to development by virtue of which they are entitled to participate in, contribute to and enjoy economic, social, cultural, civil and political development that is consistent with and based on all other human rights and fundamental freedoms.”²⁴ The phrasing “based on all other human rights” is intended to underscore the right to development as an independent right, while Article 6 (“relationship with other human rights”) clarifies the indivisible relationship of the right to development with rights established under other human rights covenants.²⁵

2.3 Duty-bearers and scope of obligations

2.3.1 Duty-bearers

According to Article 8 and further parts of the draft, the respective **Ratifying States** are subject to the full scope of obligations and are indisputably the **principal duty-bearers**.

Although the accompanying commentary stresses that the draft reaffirms already existing obligations of international organizations and legal entities (such as business enterprises), Article 7 creates a general **duty for everyone to respect the right to development**.²⁶ Whether natural and legal entities are obliged to respect human rights remains a highly controversial topic within international law. Drawing on Article 5 para. 1 of the International Covenant on Social and Political Rights and the International Covenant on Economic, Cultural and Social Rights,²⁷ the draft presents this obligation as a given. But the draft deviates strongly from these provisions with the wording chosen in Article 7 clause 2: “State Parties agree that all human and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development”.

The draft herewith creates an obligation for **legal entities** (such as business enterprises) to respect the right to development. But such an obligation of legal entities to respect human rights does not yet exist in international law (see the above-mentioned negotiations around a Legally Binding Instrument on Business and Human Rights). To date, such an obligation has only been incorporated into non-binding instruments.²⁸

Article 9 details this obligation specifically for **international organizations** as a **duty to refrain from aiding and abetting breaches of another State’s obligations under the right to development**. In view of facilitating more harmonious

²³ UN Commission on Human Rights, Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, E/CN.4/2001/WG.18/2, para. 9-10. For a concise summary, see Oduwole, Olajumoke (2014), International Law and the Right to Development: A Pragmatic Approach for Africa’, Inaugural lecture as Professor, International Institute of Social Studies, Den Haag, 2014, S. 4-7.

²⁴ Compare in contrast the Declaration on the Right to Development Art. 1 para. 1 “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

²⁵ Ibid.

²⁶ See Commentaries, Introduction para. 6 and Commentary on Article 7 para. 10

²⁷ Cf. commentary on Article 7 para. 5.

²⁸ See Oduwole (2014), op. cit. S. 3, 8.

interpretations of convention norms, Article 23 also sets out an **obligation to promote human rights for the UN and its specialized agencies**.

Consequently, not only states, but **all natural and legal entities (including business enterprises and international organizations), peoples and groups** are **duty-bearers** under this draft.

Article 29 of the draft enables **international organizations** to become State Parties. Following Article 44 of the CRPD, this also includes regional integration organizations such as the EU.²⁹ The question arises here as to whether the obligation to cooperate contained in Article 13 sets out a duty for the community of states as a whole (see below). The reference in Article 26 to a possible breach of this obligation by States that are not parties to the agreement, as well as the wording in Article 7 ("States" instead of "States Parties"), points towards it being a duty of the community of states as a whole. According to Article 26 of the Vienna Convention on the Law of Treaties, however, an international agreement can only impose obligations on ratifying parties. According to Article 34 of the Vienna Convention, a treaty does not create obligations or rights for third states without their consent. Such an obligation would also stand contrary to the principle of state sovereignty and would thus be inadmissible under international law.³⁰ **The international community of states as a whole can as such not be subject to obligations under the proposed convention.**

2.3.2 Scope of obligations

The draft distinguishes - unlike other human rights treaties - between the obligations of states towards right-holders and the obligations that states hold towards each other.

2.3.2.1 State obligations towards right-holders

The draft adopts the **High-level Task Force on the Right to Development's criteria**, which defines **state obligations on three levels**: a) in national policies within individual state jurisdiction, b) in policies affecting persons outside the state's jurisdiction c) in global and regional partnerships.³¹

Interestingly, the **scope of obligations is structured along the** duty to respect, duty to protect, duty to fulfil, originally developed by the Committee on Economic, Social and Cultural Rights, and widely used in General Comments even by other treaty bodies.³² The draft explicitly references these obligations (cf. Article 8 para. 1: "State Parties undertake to respect, protect and fulfil the right to development..."), and structures three articles as such (Article 10 - Obligation to respect, Article 11 - Obligation to protect, Article 12 - Obligation to fulfil).

In order to determine the **scope of a state's obligation to respect the right to development**, the draft largely draws on the **wording of the Maastricht Principles** on Extraterritorial State Obligations in the area of Economic, Social and Cultural Rights (2011).³³ However, the Maastricht Principles were drawn up in the absence of specific clauses in the ICESCR to determine the nature and scope of extraterritorial

²⁹ See Commentaries, Introduction para. 10.

³⁰ Cf. Kirchmeier, Felix (2006): The Right to Development – where do we stand? FES Occasional Papers, No. 23/July 2006, S. 13.

³¹ A/HRC/15/WG.2/TF/2/add.2/para. 16. See also Commentaries, Introduction para. 6.

³² Commentary on Article 8 para. 2-4.

³³ Cf. Commentary on Article 7 para. 1.

state obligations in the area of economic, social and cultural rights. Since a state's responsibility to respect the right to development (as laid down in the draft) also of course applies within their territory, the alignment with the Maastricht Principles does not sit entirely comfortably here and requires relevant adjustments.

The detailed outlining (and as such delimitation) of the scope of the different dimensions of the right to development is not only beneficial from a human rights perspective. The scope appears comparatively limited: The scope of the state's duty to protect under Article 11, for example, is limited to acts within its territory and acts of nationals or legal persons domiciled within its territory.

It should also be emphasized that with regard to provisions on the establishment of transnational corporations within the territory, draft Article 11 uses wording from the 2019 UN draft instrument regulating the activities of transnational corporations and other business enterprises in the field of human rights (LBI, *Revised Draft* of 2019).³⁴ The term "substantial business interest", which originates from US case law and is used in the draft, remains however particularly disputed;³⁵ in the August 2020 draft this language has been amended.³⁶

2.3.2.2 Intergovernmental, mutual obligations

The state's **obligation to cooperate** as set out in Article 13 is central to the draft. This obligation does not apply vis-a-vis right-holders, but rather to other states.

The **obligation to cooperate** in Article 13 para. 2 (parts b) to e)), ensures, among other things, an **obligation to align all international legal instruments and their implementation with the right to development** requirements and thus comprehensively implicates other areas of international law. For, as the commentaries points out, this provision obliges states to ensure that collective action in areas such as the environment, trade, finance, investment and development cooperation does not conflict with the full realization of the right to development for all.³⁷

Article 13 para. 2 (e), also necessitates the **mobilization of** technical, technological, financial, infrastructural and other **necessary resources** to enable states with limited access to such resources to fulfil their obligations under this convention.

2.4 Legal implications of violations

The proposed ***sui generis* monitoring mechanism** is unique in that Article 24 and Article 26 create two bodies - the **Conference of the States Parties (COSP)** and an **Implementation Mechanism comprising experts**.³⁸ **This expert body is conceived as a subcommittee of the COSP rather than as an independent treaty body**.³⁹ In contrast, the CRPD (Article 40) provides for a Conference of States Parties as well as

³⁴ See Article 7 of the Revised Draft (footnote5), as well as commentary on Article 11 para. 5.

³⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

³⁶ 2nd Revised Draft for the LBI, Article 1 para. 4, see https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf (accessed 16.09.2020).

³⁷ Commentary on Article 13 para. 4.

³⁸ See Commentaries, Introduction para. 7.

³⁹ See Commentary on Article 25 para. 1.

a traditional treaty body (Article 34) which with reference to the Optional Protocol to the CRPD is entrusted with receiving individual complaints.

The monitoring and implementation mechanism provided for in the draft thus departs from previously established human rights monitoring mechanisms. The commentary justifies this by the need to avoid duplication with existing committees and reporting duties, a very valid concern given the current financial crisis at the UN.⁴⁰

The Conference of States Parties is to be held annually as part of the Sessions of the Working Group on the Right to Development (Article 24 para. 6). Both the Conference of the States Parties and the body of experts are to address obstacles that states face in realizing the right to development, including challenges emanating from the conduct of other states or international organizations, whether they are parties to the convention or not. The draft convention's commentaries describe the addition of this information as "significant value-added" over existing mechanisms.⁴¹

The draft does not however provide for a traditional individual complaints procedure.⁴² Article 25 of the draft nonetheless allows the Conference of States Parties to adopt Optional Protocols, which as such provides the opportunity to establish an individual complaints procedure at a later date.

Forthcoming negotiations will be particularly heated around the **body of experts' mandate to review and comment on right-holders' claims that their right to development has been adversely affected** by States' (including those who are not party to the Convention) failure to comply with their duty to cooperate (see Article 26 para. 3, part (c)).

Another uncommon feature is the draft convention's inclusion of a separate paragraph on the **settlement of disputes between parties to the convention** with respect to the convention's interpretation and implementation. This paragraph also explicitly refers disputes to dispute settlement procedures before the International Court of Justice (ICJ) (cf. Article 33). Herewith, the draft convention assumes the existence of an agreement between disputing parties and requires under international law relevant state declarations accepting the jurisdiction of the ICJ.

3 Further aspects

In terms of human rights, it seems problematic that the draft convention (in Article 16) remains committed to an older understanding of gender equality, and thus Article 8 **does not explicitly list the prohibition of discrimination based on sexual orientation and gender identity**. In view of the fact that Article 16 already lists special measures to promote women and girls, the clauses on special and remedial measures for vulnerable groups in Article 15 completely lack a gender reference. As a result, women and girls, let alone transgender and intersex people, do not benefit from

⁴⁰ Commentaries, Introduction para. 8. On the impact of the financial crisis at the UN on the work of the treaty bodies, see <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24621&LangID=E> (accessed 16.09.2020).

⁴¹ Commentaries, Introduction para. 9.

⁴² See Commentaries, Introduction para. 9.

these special measures. The vulnerability of **human rights activists** is also not mentioned in Article 15 and is as such also not covered by special measures.

The principles of harmonious interpretation of the convention set out in Article 23 para. 1 correspond to a large extent with the provisions set out in Article 46 of the ICCPR and Article 24 of the ICESCR. Article 23 para. 2, on the other hand, provides for the **precedence of the Convention on the Right to Development where convention provisions conflict with other international agreements**. The draft thus grants the convention precedence over other rights and obligations that contravene the object and purpose of the convention. This is the case even with a stipulation in the same paragraph that the creation of a hierarchy of norms is not intended. The wording is partly taken from the somewhat narrower provision in Article 4 para. 1 of the Nagoya Protocol to the UN Convention on Biological Diversity.⁴³ Although such a provision would be useful, particularly in the case of conflicting trade and investment agreements, a similar provision (namely the "supremacy clause") of the draft UN Treaty on Business and Human Rights has triggered fierce disputes that have as yet not been settled.

4 Outlook

It is not possible to predict how consultations and negotiations will transpire in November 2020. So far, only a few states, very few NGOs and no National Human Rights Institutions have participated. Compared to participation in the discussions of the High-Level Task Force on the Right to Development⁴⁴, a regrettable loss of interest can be observed.

Several options for the further political process are discussed in the literature. Schrijver (2020) suggests two possibilities if no progress is made in the coming rounds of negotiations: 1) A reformulation of the Declaration on the Right to Development; and 2) the adoption of either an Optional Protocol or a General Comment on Development, in cooperation with existing treaty bodies, especially with the Committee on Economic, Social and Cultural Rights.⁴⁵ Alternatively, and because of the close connection of the right to development with the 2030 Agenda and the SDGs, a follow-up process to the 2030 Agenda or to individual goals (for example, goal 17) could build on the legal framework provided by the right to development. Even before the adoption of the current draft (and the SDGs), Oduwole (2014) advocated that further development of the right to development should be geared towards the negative obligations of states, i.e., that it should specify what states must refrain from doing in order to not impair the right to development within and outside their territory.⁴⁶

⁴³ Cf. commentary on Article 23 para. 4.

⁴⁴ See submissions to the Task Force until 2015: <https://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForceWrittenContributions.aspx> (accessed 16.06.2020).

⁴⁵ Schrijver (2020), op. cit., pp. 91-92.

⁴⁶ Oduwole (2014), op. cit., p. 3.

Imprint

German Institute for Human Rights
Zimmerstrasse 26/27, 10969 Berlin
Phone: 030 25 93 59-0
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de

CONTACT: Dr. Anna Würth; AUTHOR: Isabel Daum

LICENSE: Creative Commons (CC BY-NC-ND 4.0)
<https://creativecommons.org/licenses/by-nc-nd/4.0/deed.de>
October 2020

The Institute

The German Institute for Human Rights is the independent national human rights institution in Germany. It is accredited according to the Paris Principles of the United Nations (A status). The Institute's tasks include policy advice, human rights education, information and documentation, application-oriented research on human rights issues and cooperation with international organizations. The Institute is financed by the German Federal Parliament. It is also responsible for monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established monitoring mechanisms for these purposes.