

Comments on the second revised draft of the draft convention on the right to development (A/HR/WG.2/24/2)

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German Institute
for Human Rights

Position Paper

Comments on the second revised draft of the draft convention on the right to development (A/HR/WG.2/24/2)

May 2023

The German Institute for Human Rights had already commented on the first draft of the Convention on the Right to Development in October 2020¹ and would like to take this opportunity to share comments on the second revised text of the draft convention. This paper contains seven general remarks. Comments and proposed changes to the second revised text of the draft convention will be shared separately.

1. **Development is sustainable development, that should be fully reflected in the definition of the right to development:** There is an increasing understanding of the linkages between (and interdependence of) the economic, social, and environmental aspects in the context of sustainable development. Further, environmental problems linked to climate change, the loss of biodiversity and the pollution of the natural habitats on the planet are accelerating. Mankind has also increase its collective knowledge of the boundaries of our natural environment and planet and of the areas, in which these boundaries were already crossed. Hence, it would be recommendable to ensure that the right to development includes the dimension of intra- and inter-generational accountability through the integration of sustainable development, an issue on which the UN Committee on Economic, Social and Cultural Rights (CESCR) is currently drafting a general comment. Therefore, we propose to combine Arts. 4 and 23 of the current draft, or to place them in a sequence.
2. **The right to development** is defined as a right of every individual and of peoples in access to policies that allow the realization of their right to take part in all dimensions of development in national and international policies. However, this national dimension is currently covered in the second revised text only in parts and could feature more prominently in the draft text.

Core of the idea that every individual has the right to “enjoy civil, cultural economic, environmental, political and social development” is the ***obligation for the State to create a national enabling environment*** that allows each individual to enjoy such access to an all-encompassing development. The draft’s description of the State obligation at the domestic level is not clear and not detailed enough to cover this necessary action for an enabling environment. Thus, the individual and with this the core of the human rights dimension of the right to development is, therefore, not comprehensively spelt out.

The draft contains in different articles elements of that individual right to development; for example, in Art. 15 (1) or Art. 16. The text should either be more explicit in covering this individual dimension as the core of the right to development as a human right, or it should refer to other human rights treaties, which do cover such detailed description, particularly the International Covenant on Economic, Social and Cultural Rights (ICESCR). Subparagraphs of several articles in the draft convention address the creation of an enabling environment to realize the right to development on the national level, such as Art. 10 (a) on the „obligation to respect“, Art. 11 on the „obligation to protect“ and Art. 12 (2) on the „obligation to fulfil“. Art. 12 (2) on the obligation to fulfil contains references to

¹ German Institute for Human Rights (2020): Position Paper: First Draft of an International Convention on the Right to Development, October 2020, https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Stellungnahmen/Position_Paper_First_Draft_of_an_International_Convention_on_the_Right_to_Development.pdf

some of those human rights that are relevant for the domestic realisation of the right to development in its individual dimension: „equality of opportunity,... for all individuals and peoples in their access to basic resources, education, health services, food housing, employment and social services and protection, and in the fair distribution of income, and shall carry out appropriate economic and social reforms with a view to eradicating all social injustices”. The text refers here to rights that are all covered in the ICESCR.

Recommendation: There are numerous objective links between this key dimension of the right to development to the full realisation of the ICESCR. Ensuring coherent jurisprudence and integrity of international human rights law, therefore, would make it recommendable that the convention on the right to development should ideally become an optional protocol to the ICESCR, both in its national and international dimensions. The individual dimension of the right to development – the creation of a national enabling development – could be taken up in the review of States Parties through the respective treaty body, the UN Committee on Economic, Social and Cultural Rights (CESCR). The text of this new optional protocol to the ICESCR would also focus on the real strength of the current draft, namely provisions on the obligations of States to cooperate internationally; for instance, Art. 13 on the duty to cooperate, Art. 15 (2), Arts. 19 and 20, as well as Art. 22.

3. Furthermore, the obligations of States at the national level to create a national supportive environment for the right to development is not systematically addressed in the draft convention, but only appears sporadically. Further, the draft convention mixes States' obligations pertaining to the national level and those pertaining to the international level. The draft is strong in defending the right of States to protect their national environment against influences from outside, such as from other States, from trade policy etc. However, **the text would clearly benefit if it separated obligations that relate to what States have to do on the national level and what states have to do on the international level.**
4. The current draft does not address the question of any potential **problems/ collisions between an individual's right to development and the right of peoples to development.** Both rights are always mentioned in the same context, even though conflicts might arise between them; for example, when it comes to national minorities etc. It would be recommendable that the text covers these issues in a dedicated article.
5. **A key and strong part of the draft and its strong point is the description of the international dimension of the right to development:** the duty to cooperate, international and cross-border activities (e.g. in Art. 13 on the duty to cooperate, in Art. 15 (2), Arts. 19 and 20, as well as Art. 22). These paragraphs and subparagraphs should be combined as core elements of this convention. They describe what is needed in form of **an international enabling environment** to foster the realization of the right to development for all everywhere.

Recommendation: To establish and to strengthen the inherent link to the domestic dimension (the national enabling environment) we propose to develop this planned convention as an optional protocol to the ICESCR.

The ICESCR recognizes the need of international cooperation already in Art. 2.1.² The new optional protocol (on the right to development) would deliberately be more explicit what States shall do when acting abroad and when acting jointly on the international level, in order to make sure that the implementation of the Covenant will contribute at the same time to the realization of the right to development.

This is best exemplified in Art. 13 of the draft, which is strong in describing the different elements of the duty to cooperate through joint and separate action to achieve the full realization of all human rights (under paragraph 1) and particularly, by elaborating on key economic, social and cultural rights, such as poverty eradication, a higher standard of living, and full and productive employment. Paragraph 2 covers measures of international solidarity, with references to all levels of international obligations to respect (para. 2 (a) and (c)), to protect (para. 2 (b)) and to fulfil (para. 2 (d)). Art. 13 also refers to the importance of financing for development (under paragraph 3) and to the elements needed for an enabling international environment for the right to development (under paragraph 4). All these elements of the duty to cooperate are essential.

6. It would also be helpful, if a more comprehensive description of the **obligations of States when acting abroad or internationally** would be taken up in the convention / optional protocol. The ICESCR has already developed such an understanding in its recent General Comments, such as General comment No. 24 (2017) on State obligations in the context of business activities and General comment No. 26 (2022) on Land and Economic, Social and Cultural Rights. The term “extraterritorial obligations” has been used by the CESCR Committee and other experts to characterize this dimension of obligations. Whatever terminology is chosen, it would be useful if the text of the Convention would be explicit in describing the obligations for international cooperation and solidarity– as specific State obligations to respect, protect and support in fulfilment for their international cooperation and assistance work. Art. 3 of the draft describes in detail the elements of a „human rights-based development“. Additionally, the text of the draft convention already covers such international obligations in different parts. The obligation to respect is contained in Art. 10 (b), (c), (d). Art. 13 addresses the duty to cooperate in a detailed. Art. 15 (2) describes the common but differentiated responsibilities and capabilities of least developed countries based on different national circumstances for trade policies, investment and finance.

² Article 2 (1) „Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.“

7. If the convention was adopted as an Optional Protocol to the International Covenant of Economic, Social and Cultural Human Rights:

- This would allow to link the right to development at the national level with the full realization of economic, social and cultural rights, and it would strengthen the individual dimension of the right to development. By doing so, it should exclude non-normative and too general provisions of the current draft. The CESCR Committee would be invited to develop a standard procedure to systematically integrate the individual dimension of the right to development into its work.
- The CESCR Committee is already giving high attention to Art. 2.1 (ICESCR) on „international cooperation and assistance“, in order to support the implementation of this international dimension of economic, social and cultural rights. It also monitors that policies of international cooperation and assistance themselves do not negatively impact the implementation of the Covenant rights. An Optional Protocol would enable the CESCR Committee to raise more detailed questions on the duty to cooperate, international solidarity and an enabling international environment in its constructive dialogues with States Parties.
- Adopting the convention as an optional protocol to ICESCR would help to enrich the work of the CESCR Committee and of the UN human rights system on the right to development and the obligation of international cooperation and assistance (Art. 2.1 ICESCR), as well as to fulfil the task set out in the draft text „to comment on situations in which (rights holders’) right to development has been adversely affected by the failure of States to comply with their duty to cooperate ...“ (art. 27 (3)(c) of the draft convention). The proposed implementation mechanism for the convention on the right to development (Art. 27) is already constructed with a mandate „to facilitate, coordinate and assist, in a non-adversarial and non-punitive manner, the implementation and promotion of compliance.“ Such a mechanism of independent experts could be set up that meets regularly. It could, in collaboration with some members of the CESCR Committee, pursue the function described in Art. 27 (3), including the „adoption of general comments and recommendations to assists in the interpretation and implementation of the provisions of the present convention“ (Art 27 (3) (a)). The optional protocol would avoid the creation of a duplicative body by setting up such an implementation mechanism as an expert body assisting the CESCR Committee by bringing together 2-3 experts with a background of trade law and IFIs expertise with some existing members of the CESCR Committee.
- Art. 25 describes the role of the conference of States Parties. These roles and functions could also be maintained for the States Parties under the Optional Protocol. They could meet from time to time in form of such a conference of States Parties to the OP.

Overall, this proposed setting would allow to integrate the right to development as an integral part into the existing United Nations human rights protection system. This is would also be more in line with the treaty body strengthening process and GA resolution 68/268 of 2014 that lays our modalities for enhancing synergy within the existing human rights accountability framework, rather than proliferating new instruments and duplicating existing ones.

Imprint

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