Development and Equity

An Interdisciplinary Exploration by Ten Scholars from Africa, Asia and Latin America

With a Foreword by Her Majesty Queen Máxima of the Netherlands

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CHAPTER 12

The Right to Development: Can States be Held Responsible?

Nienke van der Have[1]

Abstract

The right to development is still largely viewed as aspirational and not as a 'proper' legal right. This paper explores if and how a rights-based approach to development could ever be carried to its logical conclusion: holding states accountable for violations of the right to development. In conducting this exploration, a distinction is made between the internal and external dimension of the right. The paper demonstrates that finding a state responsible for breaches of the external dimension, which contains obligations of a state towards people outside its jurisdiction and obligations to cooperate with other states, would require a great deal of adjustment to the present framework of applicable international rules. Finally, the paper explores what role the concepts of inter-generational equity and common but differentiated responsibility could play in supporting such adjustments.

Introduction

In the 2010 case of *Endorois Welfare Council v. Kenya*, a state was held responsible for violating the right to development (RTD) for the first time since the right was recognized.[2] The case concerned an indigenous community, whose members were evicted from their ancestral lands because the lands were to be transformed into a game reserve.[3] The African Commission for

1 Runner-up in the Master's thesis competition. This chapter is based on her Master's thesis (van der Have 2011). The author wishes to thank Dr Rosanne van Alebeek for her supervision and dedication and Prof. Yvonne Donders and Julie de Graaf for their comments on the original thesis.

2 *Centre for Minority Rights Development* (*Kenya*) *and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, ACommHPR Communication 276/2003 (adopted May 2009, approved by the African Union January 2010) (*Endorois* case) paras. 22 and 297–8.

3 *Ibid.* paras. 2 and 269.

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Human and Peoples' Rights (African Commission) approached the question of responsibility as a "two-pronged test": whether the community concerned *participated effectively* in the process, and whether they *benefited* from the project (Gilbert 2011: 265). Kenya's treatment of the Endorois was found lacking on both accounts.

The decision sets an important precedent and marks the next step in the evolution of the RTD. Since the RTD was first formulated and adopted by the United Nations General Assembly (UNGA) in the 1986 Declaration on the Right to Development, its status, content and implementation have been extensively researched and discussed (Marks 2004; Sengupta *et al.* 2005; Villaroman 2010).[4] Significantly less attention has been paid, however, to the question of how to hold states responsible for breaches of obligations under the RTD. This paper sets out to explore this question (Gibson 1990: 9; Bird 2010: 894, 898, 900).[5] It is submitted that there are two distinct obstacles to holding states responsible for violations of the RTD: (i) lack of agreement on the scope and content of obligations under the RTD; and (ii) inadequacy of the traditional framework of state responsibility to deal with multiple responsible states. The research endeavours to formulate adjustments that would make the current legal framework more suitable for the purpose of holding states accountable for violations of the RTD. In doing so, the research will draw on and find inspiration in existing trends in human rights law and environmental law. As such, it seeks to contribute to the further acceptance of transforming aspirations into obligations and breaches into accountability.

The Right to Development

History

Some would argue that the RTD has always existed as a moral right. The term RTD was first coined by leaders of developing states pursuant to the decolonization process in the 1960s. It was originally strongly linked with the concept

4 Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986) UN Doc A/41/53 (Declaration on the RTD); *Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right*, Report of the Global Consultation on the RTD 1991 (HR/PUB/91/2) (United Nations Centre for Human Rights, 1991).

5 Gibson (1990) argues that third-generation human rights should be enforceable, otherwise they will only devaluate the meaning of human rights. Bird (2010) argues that human rights law should be complemented by the enforcement means of the general regime of state responsibility since the enforcement regimes of human rights treaties are often weak, inaccessible and ineffective.

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of a New International Economic Order and intended to strengthen demands for greater North–South equality and beneficial economic arrangements for developing states (Sengupta *et al.* 2005: 10; Villaroman 2010: 300). The RTD's evolution into a human right took place in the 1970s and commenced with a movement described as 'the structural approach'. This approach emanated from the appreciation that certain 'macro-conditions' were necessary for the realization of human rights, which could not be ensured from the 'micro-perspective' of individual human rights (Lindroos 1999: 5; Tomuschat 2003: 52).[6] A Working Group of Governmental Experts was established in 1981, whose work contributed greatly to the adoption of the Declaration on the RTD by the UNGA in 1986.[7] The RTD was later reaffirmed as an inalienable human right in several international instruments, the most important of which are the 1993 Vienna Declaration and Programme of Action, the 2000 Millennium Declaration and the 2005 World Summit Outcome Document.[8] Several follow-up mechanisms have since been erected, such as an open-ended Intergovernmental Working Group on the RTD and an Independent Expert.[9] But despite the contributions of

6 UNCHR Res 5 (XXXV) (2 March 1979) UN Doc A/RES/5(XXXV); *Proclamation of Tehran*, Final Act of the International Conference on Human Rights, Tehran (13 May 1968) UN Doc A/CONF32/41 at 3.

7 The Right to Development, UNCHR Res 36 (XXXVII) (11 March 1981) UN Doc A/RES/36(XXXVII); UNGA Res 37/199 (18 December 1982) UN Doc A/RES/37/199, para. 7; Declaration on the RTD (n. 3).

8 *Rio Declaration of Environment and Development and Agenda 21*, UN Conference on the Environment and Development (3–14 June 1992) A/CONF151/26 (Vol. I); *Vienna Declaration and Programme of Action*, UN World Conference on Human Rights (12 July 1993) A/CONF157/23 (Vienna Declaration) para. 10; Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2 (Millennium Declaration); *The Monterrey Consensus of the International Conference on Financing for Development*, International Conference on Financing for Development Monterrey, Mexico, 18–22 March 2002 (United Nations 2003); 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (2005 World Summit Outcome); Declaration on the Right of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc (A/RES/61/295).

9 High Commissioner for the promotion and protection of all human rights, UNGA Res 48/141 (20 December 1993) UN Doc A/48/141; New branch for the promotion and protection of the RTD under the Office of the High Commissioner on Human Rights, UNGA Res 50/214 (29 February 1996) UN Doc A/50/214, para. 37; UNCHR Res 1998/72 (22 April 1998) UN Doc E/CN4/1998/72; ECOSOC Decision 1998/269 (30 July 1998): The Economic and Social Council erected an open-ended Intergovernmental Working Group on the RTD and an Independent Expert was appointed; UNCHR Res 2004/7 (13 April 2004) UN Doc E/CN4/2004/7; ECOSOC decision 2004/249 (22 July 2004): Within the framework of the Working Group, a high-level task force on the implementation of the RTD was created.

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these bodies, as well as academics, to the enhanced understanding of the RTD, its recognition has not induced any notable improvement in state behaviour or the conditions in developing states (Schachter 1992: 27; Marks 2004: 137).

Legal Status

The human RTD has been categorized in legal doctrine as a 'third-generation right' or 'solidarity right', together with such rights as the right to peace and the right to a clean environment (Sachs 2000: 1383).[10] Even though the RTD has been advanced at the global level as an inalienable human right, it is still debated whether the RTD is positive international law.[11] Aside from Article 22 of the African Charter of Human and Peoples' Rights (ACHPR), the RTD does not have any explicit basis in treaty law.[12] The Declaration on the RTD was adopted by a UNGA resolution, which is not a legally binding instrument. It can, however, be a powerful instrument of soft law. Furthermore, the Declaration may have sparked the development of (certain elements of) the RTD into customary international law, which is based on state practice and *opinio juris* (Shaw 2008: 70).[13]

UNGA resolutions and declarations are often a source of new customary rules. There are several factors which can predict if and how fast a resolution may be accepted into custom, such as the use of mandatory language, the voting pattern with which it was adopted and the follow-up mechanisms erected to further its implementation (Salomon 2007: 89). Applying these indicators to the RTD, it is arguable that the right is well on its way to becoming customary law. Notably, the Declaration on the RTD was adopted by the UNGA with 146 votes in favour, 8 abstentions and only 1 negative vote, the latter cast by the US. Also, quite a number of follow-up mechanisms are continually striving towards the right's further clarification and implementation. To strengthen claims as to its customary status, support can be found in (implicit) references

10 Classic freedom rights (also called civil and political rights) are generally seen as first-generation, and welfare rights (also called economic and social rights) as second-generation, human rights.

11 *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art. 38: The three accepted sources of positive international law as evidenced by art. 38 are the following: (i) treaties; (ii) customary law; and (iii) general principles of law recognized by civilized nations.

12 *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 ILM 58 (ACHPR) art. 22.

13 ICJ Statute (n. 10) art. 38(b).

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in the UN Charter, the ICCPR and ICESCR and the many confirmations of the RTD in other important instruments such as the Vienna Declaration in 1993.[14]

Content

The object of the RTD can be described as realizing the goal of "a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully realized" through a process of development.[15] As such, the RTD is best described as a right to a particular process of development. This process has to live up to certain standards, including one whereby development is not merely a matter of enlarging a state's GNP (Sengupta 2001: 2527–9; Howland 2007: 393).[16] Of special importance are the Declaration's provisions referring to equality of access to resources, transparency and participation in decision-making processes and a fair distribution of benefits. The Declaration also contains several references to the right of sovereignty over natural wealth and resources and the right to self-determination. They support the RTD in the sense that peoples cannot be coerced into disadvantageous (economic) relationships.[17] Another important element is the priority afforded to ending massive and flagrant violations of human rights, since they bar the process of development and negate people's right to participate.[18]

A pragmatic approach to deconstructing the RTD's scope is to view it as containing an *internal* and *external* dimension (Salomon 2007: 112–3). The internal dimension consists of obligations that states owe towards people within their jurisdiction to facilitate and regulate the process of development. The external dimension consists of obligations of states towards peoples outside their jurisdiction and the obligation of all states to cooperate for the realization of the RTD. The external dimension is the most innovative aspect of the RTD and is what marks it as a solidarity right. The exact content of rights and obligations under the RTD is still somewhat obscure. This has led critics to dismiss it as not being a *proper* human right and labelling it 'a right to everything'. Some are

14 *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art. 1(3), arts. 55 and 56; Vienna Declaration (n. 7) Point 10 in the Programme of Action; *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) arts. 2(1) and 11.

15 Declaration on the RTD (n. 3) preamble.

16 Howland points out that adhering to fundamental human rights and striving towards their realization is not as inherent to development initiatives as one might tend to believe.

17 Declaration on the RTD (n. 3) preamble, arts. 1(2) and 5.

18 Declaration on the RTD (n. 3) art. 5; Report of the Global Consultation on the RTD 1991 (n. 3) 27.

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even of the opinion that it only disrupts and devaluates the present system of human rights because it can easily be disregarded (Gibson 1990: 17).[19]

The *Endorois* case has been instrumental in offering more clarity with regard to the content of the RTD, as it applies to indigenous communities who are affected by national development projects. The African Commission found violations of the RTD based on the lack of effective participation of the Endorois in the decision-making process surrounding their eviction and the fact that they did not benefit from the project carried out on their ancestral lands.[20] There are certain requirements attached to the form of effective participation, which has to be based on active consultation and proper information and must to be carried out through culturally appropriate means (Gilbert 2011: 266).[21] As such, the government must obtain a community's "free, prior and informed consent".[22] Further, the Commission reasoned that it is a violation of the RTD if a peoples' well-being decreases because of a development project without being offered "a form of reasonable equitable compensation".[23]

Duty-Bearers

An important characteristic of solidarity rights is the understanding that the goal can only be realized through *collective* state action. Solidarity rights are therefore at least partly based on collective state obligations (Tomuschat 2003: 78). From a textual analysis of the Declaration, it is clear that the "primary responsibility for the creation of national and international conditions favourable to the realization of the [RTD]" lies with states.[24] A distinction is made between states acting nationally and states acting internationally. States *acting nationally* have certain obligations towards people within their jurisdiction to facilitate and manage the process of development described in the Declaration.[25] However, a state acting nationally may also have obligations

19 A related form of criticism which both the RTD and other economic and social rights have had to undergo is that they are non-justiciable due to their vague and political nature. For discussions of this topic, see CESCR, *General Comment 9: The domestic application of the Covenant* (3 December 1998) UN Doc E/C12/1998/24, para. 10; Sachs (2000: 1389–90); Stokke (2002); Robertson (1994: 712). Certain countries, such as Canada, have been very successful in measuring the impact of policies on the realization of ESC rights.

20 *Endorois* case (n. 1) paras. 297–8.

21 *Ibid.* paras. 281–93.

22 *Ibid.* case (n. 1) para 291.

23 *Ibid.* paras. 294–6.

24 Declaration on the RTD (n. 3) preamble and art. 3(1).

25 *Ibid.* arts. 2 and 8; Report of the Global Consultation on the RTD 1991 (n. 3) 44.

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towards people outside their jurisdiction who are affected by the state's national development programmes.[26]

States *acting internationally* are, above all, urged to cooperate in the removal of obstacles to and full realization of the RTD.[27] This requires that states cooperate in an effective manner in formulating international development policies, complementing the efforts of developing states as well as actualizing "equitable economic relations and a favourable economic environment at the international level" (Sengupta 2001).[28] Over time, the obligation to cooperate has already shaped the practice of a preferential treatment of developing states in international (economic) relations (Bunn 2000: 1448–9). Obligations of states acting internationally correspond with the RTD's external dimension. Although not literally advanced by the Declaration, these obligations in the external dimension are considered to include forms of cooperation in the framework of international organizations (IOs).[29]

The RTD and State Responsibility

It is a general principle of international law that each attributable breach of an international obligation results in state responsibility.[30] Human rights treaties usually give expression to this principle in *lex specialis* enforcement regimes.[31] Since the RTD has been recognized only in the ACHPR, there is but

26 Declaration on the RTD (n. 3) art. 4: This is not, strictly speaking, part of the RTD's external dimension, but a situation in which an internal obligation has extraterritorial effect.

27 Declaration on the RTD (n. 3) preamble, arts. 4, 10 and 3(3), UN Charter (n. 13) art. 1(3), arts. 55 and 56; Vienna Declaration (n. 7) Point 10 in the Programme of Action; ICESCR (n. 13) arts. 2(1) and 11.

28 Vienna Declaration (n. 7) paras. 10 and 12; Declaration on the RTD (n. 3) arts. 4 and 10.

29 To what extent these obligations can actually bind IOs, as such, is a matter for further development of the law: Report of the Global Consultation on the RTD 1991 (n. 3) 25; Development for All in a Globalizing World, UNGA Res S-24/2 (Copenhagen +5, special session, 1 July 2000) UN Doc A/RES/S-24/2, paras. 39, 93, 132(b) 134, 149(b) (Copenhagen +5). In a follow-up resolution of the Copenhagen World Summit in 1995, the GA appealed directly to the World Bank and the International Monetary Fund to take due regard of the "objectives and policy approaches" of the UN.

30 *Factory at Chorzów* (*Germany v Poland*) (Jurisdiction) [1927] PCIJ Rep Series A, No. 9, 21.

31 Both at universal and regional level, for example: *Optional Protocol to the International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force March 23 1976) 999 UNTS 302; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December 2008, not yet in force) UN Doc A/63/435; ACHPR (n. 11) arts. 47 and 55.

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one *lex specialis* enforcement regime available. Based on this treaty, individuals, groups, peoples and states have the opportunity to communicate a claim of a violation of the RTD to the African Commission.[32] The Commission can make legally non-binding pronouncements on state responsibility, as it did in the *Endorois* case. Other than that, there are no *lex specialis* regimes under which claims based on a violation of the RTD can be brought, so we must necessarily rely on the general regime of state responsibility. This general regime of secondary norms, as laid down in the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), remains of importance in complementing treaty regimes and regulating the enforcement of customary human rights norms (Caron 2002; Bird 2010: 884, 900).[33]

Scholars have generally shied away from exploring how state responsibility could come into play for breaches of the RTD (Lindroos 1999: 9). To a certain extent this is understandable, since the RTD's status is still debated and many of its obligations remain unclear. After all, legal enforcement requires an even higher degree of acceptance of the primary norm than implementation. Yet, 25 years after the adoption of the Declaration, the efforts to implement the RTD have still not brought about any notable changes. Therefore, it is time to start exploring other options to influence state behaviour with the object of inducing compliance with the RTD (Robertson 1994: 693).[34] It is in this context that the analysis of the enforcement of the RTD through the rules on state responsibility will be undertaken.

The RTD was born from the appreciation that global concerns would have to be addressed by states *collectively* for individual rights to be realized. As such, the external dimension is inextricably linked with the RTD's core content. However, in the external dimension, meeting the requirements for state

32 ACHPR (n. 11) arts. 22, 47–53 and 55–59.

33 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, UN GAOR Supplement No. 10, UN Doc A/56/10 chpIVE1 (Articles on State Responsibility); The Articles have gained much authority and largely reflect customary law, even though they were never adopted in the form of a binding international agreement. There are scholars who view human rights as a self-contained regime. They promote treaty exclusivity and disapprove of having recourse to extra-conventional means of enforcement. This limits the options to enforce human rights. See for instance Alston 1988: 11, who sees the separation of human rights law from international law 'proper' as one of the greatest deficiencies in current institutional and academic approaches to human rights law.

34 Robertson points out that most human beings are now completely dependent on organized society.

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responsibility is much more complicated than in the internal dimension. This is related to the two obstacles mentioned in the Introduction: (i) lack of agreement on the scope and content of obligations under the RTD; and (ii) inadequacy of the traditional framework of state responsibility to deal with multiple responsible states. Therefore, the rest of this paper will focus mainly on how state responsibility could arise for a violation of the RTD's external dimension. The two obstacles will be discussed in the context of the two requirements for state responsibility: finding a breach and attribution. Owing to space constraints, this paper will not address the matter of invocation, i.e. which actors would be entitled to bring a claim of state responsibility.[35]

Finding a Breach

The first obstacle relates largely to primary obligations under the RTD. When determining whether an international obligation has been breached, much depends on the content of the primary obligation at issue.[36] As the Declaration does not offer much guidance with respect to the content of obligations or exact duty-bearers, especially in the external dimension, one of the greatest challenges in conceiving a framework of accountability will be the acceptance of binding and enforceable state obligations. The history of failed attempts at concrete implementation measures illustrates that there is, so far, a certain resistance of states towards the types of obligations this would imply. Furthermore, obligations under the RTD's external dimension are often of an

35 This issue is taken up in the original Master's thesis. It is commonly accepted that the responsibility of a state for a breach of international law is of an objective nature, meaning that it does not depend upon the claim of another state or individual and exists as soon as there is an attributable breach of an international obligation. Nevertheless, having a formal entitlement to invoke state responsibility grants access to the scheme of norms allowing for subsequent claims of cessation, reparation and other forms of redress. As such, it is of great importance in granting international law its coercive nature. See: ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Yearbook of the ILC 2001, Vol II, UN Doc A/CN4/SERA/2001/Add1 (Commentary to the Articles on State Responsibility) Commentary to Part II, para. 2; See also Villaroman 2010: 305–9 and 323 suggesting that the RTD would be more effective when viewed as applicable in the horizontal relationship between states, because this is the only way the obligations to cooperate and assist in the external dimension could be effectively enforced.

36 Articles on State Responsibility (n. 32) art. 2(b); ILC, Second Report on State Responsibility by Special Rapporteur, Mr. James Crawford, March 1999, UN Doc A/CN4/498, para. 3: "In determining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules."

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imperfect nature, meaning that they do not offer any guidance on how these obligations are distributed among states. These characteristics taken together give rise to much insecurity and currently make it extremely difficult to find a breach of the RTD's external dimension.

Transnational State Obligations

Human rights treaties traditionally function on a jurisdictional basis in the vertical relationship between states and people over whom the states have a certain authority or control (Milanovic 2011).[37] That the status and content of obligations under the external dimension are still unclear can at least partly be ascribed to the fact that transnational and collective state obligations are not yet considered fully acceptable by all states.[38] To some degree, these types of obligations require a re-conceptualization of the existing framework of human rights, which has traditionally been most active in the relationship between a state and its citizens. In recent years, however, state practice in the area of human rights law displays an increasingly progressive attitude towards transnational state obligations (Howland 2007: 402–7; de Schutter *et al.* 2012).[39] Looking at the RTD's external dimension on the basis of the *respect, protect and fulfil* distinctions, it will be illustrated what type of transnational obligations it could entail (Shue 1996: 52).[40]

First of all, it has been suggested that the body of human rights law, as such, creates certain transnational obligations to respect, such as an obligation introduced by Thomas Pogge to stop imposing the "unjust global institutional order" (Pogge 2005: 5; Salomon 2007: 192). This is based on the view that the current inequitable world order in itself violates fundamental human rights norms, because it deprives human beings of their "proportional resource share" and "avoidably and foreseeably" maintains large-scale human rights deficits (Pogge

37 Most human rights instruments, with exception of the ICESCR, contain a jurisdiction clause limiting the effect of the instrument to territories or people over whom a state has authority or effective control.

38 The term 'transnational obligations' is used as a catch-all phrase to describe extraterritorial human rights obligations, including those that are not necessarily accrued on the basis of a jurisdictional link. The latter are sometimes also referred to as global obligations.

39 See for example: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro*) (Merits) [2007] ICJ Rep 2 (*Genocide* case).

40 Most human rights do not give rise to one single correlative duty, but rather to the intertwined duties to respect, protect and fulfil. This typology has made it possible to distinguish an enforceable dimension in many rights traditionally seen as requiring positive state obligations.

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2005: 3–5). Margot Salomon has supplemented this theory, proposing that since obligations have already been violated on a global scale, states even have "an obligation to remedy that violation and prevent its continuation" (Salomon 2007: 192–3). These theories highlight the paradox between the perceived non-derogable nature of certain human rights and a global reality which in itself ensures violations of such rights. The theories put forward by Pogge and Salomon are not commonly accepted as a basis for legal obligations, as they are very broad and unspecific while at the same time suggesting a complete overhaul of the current world order. The RTD fills a niche by offering a much-needed but more moderate framework to address the paradox. An example of an obligation to respect under the external dimension would be the obligation not to impose unbeneficial trade agreements on developing states under the threat of withdrawing technical or financial aid (Villaroman 2010: 316).

Second, a popular vehicle for the promotion of transnational obligations under international human rights law is the advancement of transnational obligations to protect (Hakimi 2010: 354–76).[41] This gained impetus especially with the debates surrounding the responsibility to protect (RtoP).[42] Building on the notion of sovereignty as responsibility, the RtoP offers a basis for the international community to step in if a state itself is "unwilling or unable" to protect its population from grave human rights violations. It was recently expressly applied when the UN Security Council authorized military intervention in Libya.[43] The duty to protect individuals against "business-related human rights harm" may become, and arguably already is, an element of the progressive development of international law (Bunn 2000: 1457).[44] This duty could also be an important obligation to protect under the RTD's external

41 Hakimi suggests that a generalized framework for "state bystander responsibility" should be introduced to assess when a state has an obligation to "protect against third-party harm".

42 See generally: ICISS, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001); 2005 World Summit Outcome (n. 7) para. 138: The R2P is not yet considered *lex lata* and practice has been muddled after the intervention in Libya by the inaction of the UNSC in relation to the on-going crisis in Syria.

43 UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970(2011) and UNSC Res 1973/2011 (17 March 2011) UN Doc S/RES/1973(2011).

44 Declaration on the RTD (n. 3) art. 3; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UNCHR Res 2003/12 (26 August 2003) UN Doc E/CN4/Sub2/2003/12/Rev2, H17; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of Special Representative John Ruggie (21 March 2011) UN Doc A/HRC/17/31, A1 and B7.

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dimension. In any case, transnational obligations to protect lead to a system in which flagrant human rights violations are more effectively addressed. They therefore fit the priority afforded by the RTD to removing grave human rights violations as obstacles to the development process.[45]

Third, in addition to the primary responsibility of states for the fulfilment of economic and social rights within their own territories, it has been proposed that third states have "secondary obligations" to fulfil if the home state is unable to do so (Salomon 2007: 191). In support of this obligation to "support to fulfil", scholars largely refer to the ICESCR, which obliges states to devote "the maximum of… available resources" to the realization of economic and social rights through "assistance and cooperation" without being restrained by a jurisdictional clause (Vandenhole 2005: 3; Salomon 2007: 75–7).[46] In spite of the convincing interpretation, transnational obligations to support to fulfil have not yet been embraced by states. Most developed states are afraid of great resource implications and of being forced to undermine their own interests. A balance must be struck between acceptable transnational obligations to fulfil, which can foster the process of development while still allowing states to protect their self-interest. To reach this objective, transnational state obligations to fulfil will first have to become more refined (Vandenhole 2005: 4–9).[47] A step has recently been taken in the right direction with the publication of a commentary to the Maastricht Principles on the Extraterritorial Application of Economic, Social and Cultural Rights (de Schutter *et al.* 2012: 1145–59).

Burden-Sharing

Much criticism on the RTD is directed at the difficulties involved in identifying the exact holders of obligations in the external dimension. The criticism is powered by the coherence principle, which conveys that entitlements cannot be proper rights if they are not complemented by "agency-specific" duties. It would go too far to support the assumption that a lack of agency-specific duties means that a right does not exist (Weiss 2002: 800–1).[48] A more conducive approach in the context of the RTD is that of "imperfect obligations" as proposed by Kant, asserting that "the claim [attached to a right] can be

45 Declaration on the RTD (n. 3) art. 5.

46 ICESCR (n. 13) art. 2(1).

47 "… States parties to the Covenant may be rather reluctant to accept the idea of legally binding third state obligations as long as their scope has not been further clarified."

48 According to Weiss, the coherence principle has lost much of its importance in light of the rise of an international community in which many obligations no longer fit the straightjacket of traditional bilateralism.

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generally addressed to all those who are in a position to help" (Sen 1999: 230). However, the criticism does have merit when viewed in the context of finding a breach under the secondary rules of state responsibility. It will quite simply be impossible to find a breach if it cannot be ascertained what a state is required to do in the first place. If violations of the RTD's external dimension are ever to translate into state responsibility, it will therefore be necessary to satisfy the need for agency-specific obligations (Gosselin 2006: 38). This means that the RTD must be complemented by a *burden-sharing mechanism* which can distribute collective obligations to specific states (Salomon 2007: 186–7).

Another reason to address the issue of burden-sharing is that the threshold for finding a breach based on omission is generally higher than for a breach based on conduct, and it may even require the establishment of a causal link between the omission and the damage.[49] In the grand scheme of things, obligations requiring positive state action are quite central to the RTD's realization, and therefore it will usually be breached through omission (Sengupta 2002: 857). Establishing a causal link between the persistence of grave inequality in the world and the omission of one or several states would be extremely difficult, since the damage is likely to be rather distant from the cause and the intermediate processes are not properly understood. If a burden-sharing mechanism were to be introduced, on the basis of which it would become possible to ascertain what the scope of obligations of any given state is with regard to a certain situation, this would undercut difficulties related to establishing a causal link after a breach has taken place. The last section of this paper will take up the issue of a burden-sharing mechanism.

Multiple Attribution and Shared State Responsibility

Finally, there is a lacuna in the secondary rules of state responsibility in regard to *multiple attribution* of violations to several states.[50] The ILC has taken a traditional approach towards the distribution of responsibility over several wrongdoing states, basing it on the principle of independent responsibility. This means that a state is only responsible for its own actions constituting a

49 Causality is not a general precondition for state responsibility; however, in cases of a breach through omission, it will sometimes need to be established. See generally: Gattini (2007: 703, 709) and Salomon (2007: 187–9).

50 Articles on State Responsibility (n. 32) art. 4(1): Attribution is the link between an act of an individual and responsibility of the state, since a state is a hypothetical entity and cannot act on its own account. An act can only be attributed to the state if it was carried out by individuals for whose acts the state carries some form of responsibility, such as state organs.

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separate wrongful act, irrespective of the responsibility of other states.[51] It seems a somewhat outdated approach in light of the increased intensity of state cooperation and the rise of collective state obligations, which may be breached by several states simultaneously. States will likely be more willing to cooperate under primary obligations if they have a guarantee that they will not have to bear the full consequences of wrongful acts which are partly attributable to other states under secondary rules.

Chapter IV of the Articles on State Responsibility contains several legal constructions which deal with instances when the primary weight of the wrongful act lies with one state but the act was committed with the help of another. On the basis of these constructions, a controlling or assisting state may be held responsible for acts which were technically carried out by another state. Articles 17 and 18 provide that a state can be held responsible for directing and controlling the wrongful acts carried out by another state or coercing another state into committing a wrongful act. However, Article 17 is applicable only in exceptional situations, where a dominant state has both direction and control over the wrongful conduct.[52] The threshold for coercion, contained in Article 18, is even higher.[53] What remains is the doctrine of complicity, embodied by Article 16, which deals with situations in which one state assists another state in the commission of a wrongful act.[54] However, one of the requirements of complicity is that the state must have the intention of facilitating the wrongful act, which excludes cases of "deliberative indifference".[55] If two or more states are responsible for one "factually indivisible wrongful act", for instance by acting through a shared organ, it is unclear how responsibility is allocated and the burden of reparation distributed (Nollkaemper & Jacobs 2011: 35).[56]

In domestic legal systems, many different types of rules dealing with the allocation of responsibility among several wrongdoers exist. These rules usually distinguish between different degrees of contributory conduct to the same

51 Articles on State Responsibility (n. 32) Chapter I.

52 Articles on State Responsibility (n. 32) arts. 17 and 18; Commentary to the Articles on State Responsibility (n. 34); Commentary to Article 17, para. 6.

53 *Ibid.* Commentary to Article 18.

54 Articles on State Responsibility (n. 32) art. 16.

55 *Ibid.* Even if a state is found to be complicit, both states are still held independently responsible for their own wrongful acts. See also Gibney *et al.* (1999: 293–4). Commenting on the threshold of complicity, the authors state that a large gap exists in which states can go unpunished for the facilitation of human rights violations in other states, even with the knowledge that they are being committed.

56 Separate Opinion Judge Simma in *Oil Platforms Case* (*Islamic Republic of Iran v USA*) (Merits) [2003] ICJ Rep 324, para. 78.

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wrongful act on the basis of fault, negligence or the strength of the respective causal relationships (Brownlie 1983: 95; Howland 2007: 398).[57] For many reasons, this is an extremely complex task on the level of state conduct. It involves seeking for intentions behind the actions of state agents and untangling extremely complicated causal relationships, and it requires a great amount of research into each case (Bederman 1990: 335). However, if it is to some degree possible to measure individual states' contributions to a wrong, apportionment of international state responsibility based on a "comparative fault analysis" has not yet completely been ruled out of the realm of possibilities (Caron 1998: 163). It has been argued that this may do more justice to the possibility of achieving a result through cooperative action (Gattini 2007: 708).

At the moment, the only method of dealing with attribution in cases of shared wrongful acts which has some basis in international law is that of joint and several liability.[58] This principle entails injured states being able to invoke responsibility and require full reparation from every one of the states that contributed to the damage. The advantage from the victim's viewpoint is that he or she is spared the difficult task of proving how much each state contributed to the wrongful act. However, there are so far no set procedures through which one state contributing to the wrong can acquire compensation from the other contributing states if it were indeed to make full reparation to the victim(s) (Noyes & Smith 1988).[59] The system would have to be further developed to avoid the state which is the first to be faced with a claim being left disproportionately burdened and facing the problem of distributing the burden of reparation between itself and other wrongdoing states.

In light of the tradition of independent responsibility, it will prove an immense challenge to offer an alternative framework that reflects the shared nature of obligations under primary rules. However, in a world where universal rights are no longer merely aspirational and law cannot be defined by state borders, it is of the utmost importance to complement this development by a set of secondary principles which indeed offers equitable solutions in cases of violations. It must therefore be kept in mind that law must develop on the basis of equity and not on the basis of simplicity, however daunting or complex a task that may be (Brownlie 1983: 99; Howland 2007: 408). In this case,

57 Note that state responsibility is objective and does not require fault.

58 Separate Opinion Judge Simma in *Oil Platforms* case (n. 55) paras. 64–78; *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (Preliminary Objections) [1992] ICJ Rep 240 (*Nauru* case) para. 48.

59 Separate Opinion Judge Simma in *Oil Platforms* case (n. 55) para. 78; *Nauru* case (n. 57) para. 48.

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equitable solutions could be reached by adapting the global framework or, for instance, by developing a *lex specialis* regime of accountability for this particular field of law.

Exploring the Outlines of a More Welcoming Framework

To truly influence state behaviour, it would be a great step forward to be able to hold states accountable for non-observance of obligations in the external dimension of the RTD. In an attempt to offer a stronger basis for the proposed changes, an innovative approach will be taken by exploring how the principles of inter-generational equity and common but differentiated responsibility could contribute to the acceptance and guided development of some of the necessary changes identified above. Inter-generational equity, which promotes a sense of fairness among generations, could reinforce the RTD as a rule of international law (Francioni 2007; Weiss 2008). Common but differentiated responsibility could see to the problem of identifying duty-bearers and the scope of their obligations by effectuating burden-sharing among states (Hey 2008: 1). These principles are most developed in the context of environmental law, which is more experienced in transforming responsibility for global concerns into legal obligations and ensuring accountability when these obligations are breached (Bratspies & Miller 2006: 227).[60]

Inter-Generational Equity

Equity is the embodiment of a general notion of "what is fair and reasonable in the administration of justice" (Francioni 2007: 1, 3, 26). It is a rather diffuse concept and its use is sometimes associated with a certain degree of arbitrariness. Nevertheless, it can be a useful tool to correct or complement otherwise unjust outcomes of legal reasoning. It is not a formal source of law, but has been marked as an "element in the progressive development of the law" (Francioni 2007: 26).[61] Equity may have a role in adjusting general rules to specific cases, filling gaps or being a catalyst or guiding force of changing custom. It has been observed to be of paramount importance at this "time when international law

60 Doing research outside a particular field of law and drawing conclusions based on analogies is a recognized method of expanding and refining legal frameworks. See Brownlie (1983: 92): "[T]here are certain areas in which the framework of concepts and general principles must be derived from a more sophisticated matrix than the casual exchanges of diplomacy. State responsibility provides the most important example of this type of case."

61 ICJ Statute (n. 10) art. 38.

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has ceased to be a system of negative obligations of pure coexistence among States and has become a much more complex system of positive obligations whose nuances in content and scope can often to be captured by a proper use of equity and equitable principles" (Francioni 2007: 19, 26).

A concept closely related to the principle of equity is that of inter-generational equity, which has gained recognition mainly in environmental law. It is the expression of a notion of fairness among generations and "has been invoked in international law as a basis upon which to provide standards for allocating and sharing resources and for distributing the burdens of caring for resources" (Weiss 2008: 1–3, 7, 12, 27).[62] Essentially, the principle is the basis of duties held by current generations towards future generations and has been recognized as a quickly developing principle of international law (Weiss 1990: 10). The principle has never been explicitly applied in the case law of the International Court of Justice (ICJ); however, it has been alluded to in several concurring and dissenting opinions in an appeal to the Court to "pay due recognition to the rights of future generations" in its decisions.[63] There is a conceptual link between *inter*-generational equity and *intra*-generational equity, the latter referring to equity between people of the same generation. The concept of inter-generational equity is seen as encompassing intra-generational equity, because the poor who cannot provide for their basic needs today cannot be expected to adhere to their inter-generational obligations towards future generations (Weiss 2008: 11). Therefore, the inequitable distribution of wealth and resources in the intra-generational situation needs to be addressed before inter-generational rights can be fully secured. It is important to note that reference has been made to human rights and development in instruments dedicated to inter-generational equity; thus, the link between these sets of principles has already been acknowledged.[64]

62 Inter-generational equity in environmental law has a forward-looking perspective and can be seen as the legal voice of future generations.

63 Dissenting opinion of Judge Weeremantry in the Nuclear Weapons Advisory Opinion, cited in Weiss 2008, paras. 26–7.

64 Several international declarations and conference outcomes refer to 'future generations' or 'the children of the world', in the context of human rights. See for example: 2005 World Summit Outcome (n. 7) principle 12; Copenhagen +5 (n. 28) Annex I Political Declaration; Millennium Declaration (n. 7) principle 2; UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generations (adopted on 12 November 1997) 29th session GC, art. 10 (1): "The present generations should ensure the conditions of equitable, sustainable and universal socio-economic development of future generations, both in its individual and collective dimensions, in particular through a fair and prudent use of available resources for the purpose of combating poverty."

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The principle of inter-generational equity corresponds with the RTD on two levels. First, the RTD was designed to address the current inequity in the intra-generational situation. Second, developing states still suffer from the major setback in development which was brought about during the period of colonization and slavery which preceded the current world order (Pogge 2002: 209). The ensuing claim which has been put forward by many developing states is that they are entitled to a beneficial treatment or even a completely restructured economic order (Salomon 2007: 187). However, it is practically impossible to disentangle exactly what rights and entitlements present-day generations have towards past generations and how this translates into intra-generational equity today (Pogge 2002: 209).[65] Nevertheless, the extended application of the principle of inter-generational equity to (solidarity) rights could serve the same purpose as equity in general international law. It could be used as a basis for the weighing of interests in particular cases, complement the law where lacunae exist, and, most importantly, form the catalyst for or guide the development of new customary rules of law. As such, the principle can offer strong support to claims for beneficial treatment and arrangements under international (economic) law, as it has done for developing states under *lex specialis* regimes of environmental law. Therefore, inter-generational equity may be able to play a positive role in supporting the contents of the RTD and guiding its further crystallization.[66]

Common but Differentiated Responsibility

As noted, one of the greatest challenges to the implementation and enforcement of the RTD's external dimension is the difficulty involved in identifying duty-bearers. The RTD covers a complicated causal relationship between state conduct, the persistence of poverty and intra-generational inequity. Even though a close causal nexus is not a general precondition for state responsibility, it will play a role with regard to the distribution of primary responsibility (Vandenhole 2005: 4–9).[67] In practice, some states will have a greater capacity to influence the development process than others in a particular case, and this should be reflected in a burden-sharing mechanism. The principle of *common*

65 Pogge recognizes that it would be unworkable to impose "restitutive responsibility" on "affluent descendants of those who took part in [past] crimes".

66 Declaration on the RTD (n. 3) art. 3.

67 "It is submitted that the third state obligations [under the ICESCR] of particular states will vary according to the degree of causality between their policies and actions and the non-realization of Covenant rights in other countries."

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but differentiated responsibility may be able to offer a great deal of guidance in this regard (Hey 2008: 18).

At the heart of this principle lies the notion that there are certain shared concerns that can be effectively addressed only if all states cooperate in the pursuance of a *common* goal. At the same time, the obligations are distributed on a *differentiated* basis as an acknowledgement of the fact that some states' historical contribution to the problem is greater or that they cannot be required to contribute equally based on their socio-economic situation. Like the principle of inter-generational equity, common but differentiated responsibility is applied mainly in environmental law. It is the legal embodiment of the argument put forward by developing states that it would be unfair to expect them to reduce their polluting activities to the same extent as developed states (Hey 2008: 19). Notably, the principle illustrates a departure from the strict adherence to the consequences of the formal equality of states. The differentiation is included in multilateral environmental agreements in a variety of ways. For instance, developing states can be granted grace periods or have lower substantive obligations, or a treaty can include provisions requiring developed states to assist developing states in complying with their obligations through financial or technical means (Hey 2008: 7).

The analogy with the RTD is self-evident, since development is both one of the main reasons for differentiation and a ground upon which its implementation is based. States which are relatively more developed can contribute more to the realization of collective obligations (Hey 2008: 19).[68] Furthermore, common but differentiated responsibility also recognizes the common interest in realizing the comprehensive goal of a collective obligation. This accords with the concept of solidarity rights. On a side-note, it must be mentioned that reaching an economic and social order in which all human rights can be fully realized is not fully comparable to securing a sustainable use of the environment. The latter is certain to affect, on a more or less equal footing, every state and offers a greater incentive for wealthier states to take action on a differentiated basis, since the alternative will likely give rise to even greater costs. In the case of the RTD, however, wealthier states can quite easily subtract themselves from the negative consequences of not reaching its goal. Nevertheless, the international community of states have already lent their support to the RTD, which at least "gives rise to reasonable expectations that states will fulfil their requisite duties" (Salomon 2007: 92).

68 It has even been argued that applying the principle to environmental law is inefficient, since then the principle cannot ensure the optimal achievement for either development or the environment. See Stone (2004: 294).

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When seen in the context of the principle of inter-generational equity, discussed above, the application of common but differentiated responsibility recognizes that "historical actions affect the allocation and timing of responsibilities owed to present and future generations" (Weiss 2008: 17). As such, the application *translates* inter-generational equity to the intra-generational level (Hey 2008: 5). In more practical terms, this means that wealthier states may have stronger obligations to assist developing states than vice versa. One could argue that human rights instruments already provide for a distribution of responsibility based on common but differentiated responsibility, without calling the principle by its name. For instance, the rights under the ICESCR are qualified by the general formulation that they should be fulfilled to "the maximum [of a states'] available resources".[69] International cooperation is seen as part of a state's resources (Alston & Quinn 1987: 178). Another example can be found in the *Genocide* case, where the ICJ replaced the traditional concept of jurisdiction as a basis for primary responsibility with the notion of a state's "capacity to effectively influence" (Gattini 2007: 700).[70] This was held to be dependent upon several factors formulated in an open-ended fashion, such as the "geographical distance" from a state.[71] Likewise, it has been proposed that the scope of transnational obligations to protect should be determined based on two main criteria: the relationship with the abuser, and the severity of the harm (Hakimi 2010: 364).[72] These grounds upon which a state acquires obligations all involve a certain degree of differentiation.

Common but differentiated responsibility could have profound impact at the level of concrete and binding obligations. The indicators to determine whether states have an obligation and what the scope of that obligation is could be partially distilled from practice and partially developed through research. These indicators will be different for different types of obligations, such as obligations to respect, protect and fulfil.[73] Whereas obligations to respect and protect are likely to be dependent upon the level of control over or strength of (political) links with the people concerned, the obligation to

69 ICESCR (n. 13) art. 2.

70 *Genocide* case (n. 38) para. 430.

71 *Ibid.* para. 430. Other factors were the "legal position" towards, and "strength of political [and other] links" with, the state and its people.

72 According to Hakimi's framework, the first criterion is fulfilled if a state "substantially enabl[es] the violation", based on the relationship with the abuser or sometimes with the victim. The second criterion is fulfilled in cases of serious physical or psychological harm, or if the harm affects people because they belong to a vulnerable group.

73 CESCR, *General Comment 3: The Nature of States Parties Obligations* (Art. 2 par. 1 of the Covenant) UN Doc 14/12/90, para. 14.

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fulfil will be more dependent upon a state's available resources. In the case of the RTD, collective obligations to fulfil could be based on a states' "capacity to assist" other states in the development process (de Schutter *et al.* 2012: 1149). The capacity to assist could be determined on the basis of indicators such as an approximation of a state's contribution to the emergence of the inequitable intra-generational situation and the state's relative wealth and power in the international community of states (Salomon 2007: 193).[74] Undoubtedly, the status and content of the obligations under the RTD will have to further crystallize before a proper differentiation can take place. However, once binding obligations are deemed to exist, a differentiated distribution will allow them to become agency-specific while still upholding the central elements of cooperation and equity inherent to the RTD. Finally, common but differentiated responsibility would also have a role to play at the level of secondary rules by supporting findings of shared state responsibility based on a comparative fault analysis. The scope of a contributing state's responsibility would then depend at least partly on the scope of the obligations distributed to it. As such, the principle would have direct consequences for the allocation of responsibility under primary as well as secondary norms.

Conclusion

By approaching the RTD through the lens of state responsibility, it became clear that the current framework of state responsibility and the primary norm itself are both not entirely suitable to ensure accountability for breaches of the RTD, especially with regard to obligations in its external dimension. A process of re-conceptualization of either one or both of these frameworks will have to take place before legal responsibility for the global challenge of development can be properly distributed and violations attributed. It has been demonstrated that certain existing legal theories and trends in international law could support the necessary re-conceptualization. However, none of them are ideal and together they do not yet cover all important aspects of an accountability framework for the RTD. Nevertheless, the shortcomings of the current framework and alternatives explored above do shed some light on the barriers that will need to be overcome to provide a more fostering environment for this

74 The indicators distinguished by Salomon are as follows: (i) The contribution that a state made to the emergence of the problem; (ii) Its relative power at the international level; (iii) Whether it is in a position to assist; and (iv) The states that benefit the most from the existing distribution of global wealth.

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fragile right. In overcoming these barriers, guidance can be sought in the principles of inter-generational equity and common but differentiated responsibility. These principles recognize the broader set of circumstances contributing to the need for a RTD while at the same time offering an equitable and realistic basis for its implementation and ultimately its enforcement.

With regard to the above lessons, the paper will end with two propositions for ways forward. The first proposition adheres to what is most likely to happen, namely the gradual attainment of certain obligations under the RTD of the status of customary international law. The RTD would then be construed as a framework right with a subset of customary due diligence obligations (Koivurova 2007). These obligations could be distributed on the basis of the application of the principle of common but differentiated responsibility by analogy. As such, imperfect obligations addressed at all those states in a position to assist are made more concrete and agency-specific. The second proposition offers great potential but also requires great commitment and making use of maturing insight, namely the development of a *lex specialis* regime for the RTD based on the adoption of a treaty. The principle of common but differentiated responsibility could then be integrated into the treaty mechanism. The Working Group has already developed indicators to assess the contribution of global development partnerships towards the realization of the RTD, and these indicators are seen as a potential basis for concrete and binding state obligations.[75] Alternatively, the regime could even merge the human rights approach with existing development goals (Alston 2004: 4).[76] The latter proposition also opens up the possibility of establishing a specialized supervisory body.

However, neither of these propositions will lead to a fair system of accountability for breaches of the RTD without a complementary shift in the regime of state responsibility or the erection of a *lex specialis* regime of accountability. Most importantly, shared responsibility of states under primary norms should

75 Consolidation of Findings of the High-Level Task Force on the Implementation of the Right to Development, Report on its Sixth Session (25 March 2010) UN Doc A/HRC/15/WG2/TF/2, Add1&2; Resolution on the Right to Development, UNHRC Res 15/25 (7 October 2010) UN Doc A/HRC/15/25, para. 3(h): "That the Working Group shall take appropriate steps to ensure respect for and practical application of the above-mentioned standards . . . and evolve into a basis for consideration of an international legal standard of a *binding nature* through a collaborative process of engagement."

76 "Human rights advocates need to prioritize, stop expecting a paradigm shift, and tailor their prescriptions more carefully."

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be translatable into shared responsibility under secondary norms.[77] In an integrated international community of states where common concerns can be addressed only through cooperation, state responsibility cannot be left lagging behind with a bilateral focus.

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77 For a research initiative dealing with issues of shared responsibility under international law led by André Nollkaemper, visit: http://www.sharesproject.nl/homepage [accessed 4 February 2013].

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