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The Right to Development and State Responsibility

Can States be held to Account?

Nienke van der Have*

Abstract:

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

1. Introduction

In the 2010 case of the *Endorois v. Kenya*, a state was held responsible for violating the right to development (RTD) for the first time since the right was recognized.¹ 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.² The African Commission for 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.³ 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.⁴ Significantly less

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<http://www.iss.nl/fileadmin/ASSETS/iss/Documents/Academic_publications/Cheetah_Challenge_2012_vd_Have.pdf> last accessed: 8 April 2013. The author wants to thank Dr. Rosanne van Alebeek for her dedicated supervision and Prof. Yvonne Donders and Julie de Graaf for their comments on the original thesis.

¹ *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) para 22 and 297-8.

² *Ibid* para 2 and 269.

³ Jérémie Gilbert, ‘Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights’ (2011) 60 *ICLQ* 245, 265.

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); Arjun Sengupta, Archana Negi, Moushumi Basu, *Reflections on the Right to Development* (Sage Publications, 2005); Noel G Villaroman, ‘The Right to Development: Exploring

attention has been paid, however, to the question how to hold states responsible for breaches of obligations under the RTD. This chapter sets out to explore that question.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; 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.

2. The Right to Development

2.1 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 1960's. It was originally strongly linked with the concept of a New International Economic Order and intended to strengthen demands of greater north-south equality and beneficial economic arrangements for developing states.⁶ The RTD's evolution into a human right took place in the 1970's 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.⁷ 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 1986.⁸ 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.⁹ Several follow-up mechanisms have since been erected, such as an

the Legal Basis of a Supernorm' (2010) 22 *Fla JIL* 299; Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harv ILJ* 137.

⁵ Noralee Gibson, 'The Right to a Clean Environment' (1990) 54 *SaskLRev* 5, 9: Arguing that third generation human rights should be enforceable, otherwise they will only devalue the meaning of human rights; Annie Bird, 'Third State Responsibility for Human Rights Violations' 21(4) *EJIL* 883, 894, 898 and 900: Argues that human rights law should be complemented by the enforcement means of the general regime of state responsibility since its own enforcement regimes are often weak, inaccessible and ineffective.

⁶ Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 4) 300; Sengupta, Negi, Basu, *Reflections on the Right to Development* (n 4) 10.

⁷ Anja Lindroos, *The right to development* (Erik Castrén Institute of International Law and Human Rights, 1999) 5; 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; Christian Tomuschat, *Human rights: Between Idealism and Realism* (Oxford UP, 2003) 52.

⁸ 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 4).

⁹ *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) (Rio Declaration); *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

open-ended Intergovernmental Working Group on the RTD and an Independent Expert.¹⁰ But despite the contributions of 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.¹¹

2.2 Legal Status

The human right to development 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.¹² 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.¹³ Save Article 22 of the African Charter of Human and Peoples' Rights (ACHPR), the RTD does not have any explicit basis in treaty law.¹⁴ 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*.¹⁵

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.¹⁶ 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, eight abstentions and only one negative vote was cast by the United States. Moreover, 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

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).

¹⁰ 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/CN.4/1998/72; 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/CN.4/2004/7; 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.

¹¹ Oscar Schachter, 'Challenge to the Legal Mind', in: Subrata Roy Chowdhury, Erik MG Denters and Paul JIM de Waart, *The Right to Development in International Law* (Martinus Nijhoff, Dordrecht 1992) 27; Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n 4) 137.

¹² Albie Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (2000) 53 *SMU L Rev* 1381, 1383: 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.

¹³ *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: (i) treaties; (ii) customary law, and; (iii) general principles of law recognized by civilized nations

¹⁴ *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.

¹⁵ ICJ Statute (n 13) art 38(b); Ian Shaw, *International Law* (6th ed, Cambridge UP, 2008) 70.

¹⁶ Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford UP, 2007) 89.

be found in (implicit) references 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 1993.¹⁷

2.3 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.¹⁸ 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 entailing, among other things, that development is not merely a matter of enlarging a state's GNP.¹⁹ 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. These rights are construed as supporting the RTD in the sense that peoples cannot be coerced into disadvantageous (economic) relationships.²⁰ 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.²¹

A pragmatic approach to deconstructing the RTD's scope is to view it as containing an *internal* and *external* dimension.²² 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 even of the opinion that it only disrupts and devaluates the present system of human rights because it can easily be disregarded.²³

¹⁷ *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(3), art 55 and 56; Vienna Declaration (n 9) 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) art 2(1) and 11.

¹⁸ Declaration on the RTD (n 4) preamble.

¹⁹ Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36(27) *EPW* 2527, 2527-9; Todd Howland, 'Multi-State Responsibility for Extraterritorial Violations Economic Social and Cultural Rights' (2007) 35(3/4) *Den JILP* 389, 393: Adhering to fundamental human rights and striving towards their realization is not as inherent to development initiatives as one may tend to believe.

²⁰ Declaration on the RTD (n 4) preamble, art 1(2) and 5.

²¹ Declaration on the RTD (n 4) art 5; Report of the Global Consultation on the RTD 1991 (n 4) 27.

²² Salomon, *Global Responsibility for Human Rights* (n 16) 112-3.

²³ Gibson, 'The Right to a Clean Environment' (n 5) 17; A related form of criticism which both the RTD and other economic and social rights have had to endure 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, 'Social and Economic Rights: Can They Be Made Justiciable' (n 12) 1389-90; Hugo Stokke, 'What is Left of State Responsibility: Turning State Obligations into State Responsibility in the Field of Economic, Social and Cultural Rights' (Yearbook 2002) *Hum Rts in Dev* 37; Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 16(4) *Hum Rts Q* 693, 712: Certain countries, such as Canada, have been very successful in measuring the impact of policies

The *Endorois* case has been instrumental in offering more clarity with regard to the content of the RTD's internal dimension, 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.²⁴ There are certain requirements attached to the form of effective participation, which has to be based on active consultation, proper information and must be carried out through culturally appropriate means.²⁵ As such, the government must obtain a community's "free, prior and informed consent."²⁶ Further, the Commission reasoned that it is a violation of the RTD if a peoples' well-being decreases because of a development project, without offering "a form of reasonable equitable compensation."²⁷

2.4 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.²⁸ 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.²⁹ 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.³⁰ However, states acting nationally may also have obligations towards people who are affected by their national development programmes outside of their jurisdiction.³¹

States *acting internationally* are, above all, beseeched to cooperate for the removal of obstacles to and full realization of the RTD.³² This entails that states must 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".³³ Over time, the obligation to cooperate has found support in and may further shape the practice of a preferential treatment of developing states in international (economic) relations.³⁴ Obligations of states acting

on the realization of ESC rights.

²⁴ *Endorois* case (n 1) para 297-8.

²⁵ Gilbert, 'Indigenous Peoples' Human Rights in Africa' (n 3) 266; *Endorois* case (n 1) para 281-93.

²⁶ *Endorois* case (n 1) para 291.

²⁷ Ibid para 294-6.

²⁸ Tomuschat, *Human rights: Between Idealism and Realism* (n 7) 78; André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Concept Paper' (SHARES Series) ACIL Research Paper No 2011-07, 12-4.

²⁹ Declaration on the RTD (n 4) preamble and art 3(1).

³⁰ Ibid art 2 and 8; Report of the Global Consultation on the RTD 1991 (n 4) 44.

³¹ Declaration on the RTD (n 4) art 4: This is not, strictly speaking, part of the RTDs external dimension, but a situation in which an internal obligation has extraterritorial effect.

³² Declaration on the RTD (n 4) preamble, art 4, 10 and 3(3) jo UN Charter (n 17) art 1(3), art 55 and 56; Vienna Declaration (n 9) Point 10 in the Programme of Action; ICESCR (n 17) art 2(1) and 11.

³³ Vienna Declaration (n 9) para 10 and 12; Declaration on the RTD (n 4) art 4 and 10; Sengupta, 'Right to Development as a Human Right' (n 19) 2529.

³⁴ Isabella D Bunn, 'The Right To Development: Implications for International Economic Law' (2000) 15 *AUILR* 1425, 1448-9.

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).³⁵

3. 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.³⁶ Human rights treaties usually give expression to this principle in *lex specialis* enforcement regimes.³⁷ Since the RTD has only been recognized in the ACHPR, there is but 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.³⁸ 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 could be brought, so we necessarily have to 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.³⁹

Scholars have generally shied away from exploring how state responsibility could come into play for breaches of the RTD.⁴⁰ 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, twenty-five 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

³⁵ 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 4) 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, para 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.

³⁶ *Factory at Chorzów (Germany v Poland)* (Jurisdiction) [1927] PCIJ Rep Series A, No 9, 21.

³⁷ 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 14) art 47 and 55.

³⁸ ACHPR (n 14) art 22, 47-53 and 55-59.

³⁹ 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); David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *AJIL* 857: 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; Bird, 'Third State Responsibility for Human Rights Violations' (n 5) 884 and 900: There are also 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, 'Making Space for New Human Rights: The Case of the Right to Development' (n 23) 11: 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.

⁴⁰ Lindroos, *The right to development* (n 7) 9.

compliance with the RTD.⁴¹ 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 responsibility is much more complicated. 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; ii) Inadequacy of the traditional framework of state responsibility to deal with multiple responsible states. Therefore, the rest of this chapter 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. Due to space constraints, this paper will not address the matter of invocation, meaning which actors would be entitled to bring a claim of state responsibility.⁴²

3.1 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.⁴³ 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, as of yet, 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 imperfect nature, meaning that they do not offer any guidance as to 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.

⁴¹ Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (n 23) 693: Pointing out that most human beings are now completely dependent on organized society.

⁴² This issue is taken up in the original master thesis (n *): 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/CN.4/SER.A/2001/Add.1 (Commentary to the Articles on State Responsibility) Commentary to Part II, para 2; Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 305-9 and 323: It has been suggested that the RTD would be more effective when viewed as applicable in the horizontal relationship between states, because that is the only way the obligations to cooperate and assist in the external dimension could effectively be enforced.

⁴³ Articles on State Responsibility (n 39) art 2(b); ILC, Second Report on State Responsibility by Special Rapporteur, Mr. James Crawford, March 1999, UN Doc A/CN.4/498, 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."

3.1.1 Transnational State Obligations

Human rights treaties traditionally function on a jurisdictional basis in the vertical relationship between states and people over whom they have a certain authority or control.⁴⁴ 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.⁴⁵ 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.⁴⁶ Looking at the RTD's external dimension on the basis of the well-known *respect, protect and fulfil* – distinction, will illustrate what type of transnational obligations it could entail.⁴⁷

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”.⁴⁸ It 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.⁴⁹ 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”.⁵⁰ 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 forwarded 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 steps into 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.⁵¹

⁴⁴ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford UP, 2011): Most human rights instruments, with the notable exception of the ICESCR, contain a jurisdiction clause limiting the effect of the instrument to territories or people over which a state has authority or effective control.

⁴⁵ 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.

⁴⁶ 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*); Howland, 'Multi-State Responsibility for Extraterritorial Violations Economic Social and Cultural Rights' (n 19) 402-7; Olivier de Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) *HRQ* 1084–1169.

⁴⁷ Henry Shue, *Basic Rights* (2nd edn, Princeton UP, 1996) 52: 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 helped distinguish an enforceable dimension in many economic social and cultural rights.

⁴⁸ Thomas Pogge, 'World Poverty and Human Rights' (2005) 19(1) *EIA* 1, 5; Salomon, *Global Responsibility for Human Rights* (n 16) 192.

⁴⁹ Pogge, 'World Poverty and Human Rights' (n 48) 3-5.

⁵⁰ Salomon, *Global Responsibility for Human Rights* (n 16) 192-3.

⁵¹ Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 316: “One obvious

Second, a popular vehicle for the promotion of transnational obligations under international human rights law is the advancement of transnational obligations to protect.⁵² This gained impetus especially with the debates surrounding the responsibility to protect (RtoP).⁵³ 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.⁵⁴ 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.⁵⁵ The latter could be an important obligation to protect under the RTD's external dimension as well. 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.⁵⁶

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.⁵⁷ 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.⁵⁸ 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.⁵⁹ A step has

violation of the right to economic self-determination is "economic coercion;"

⁵² Hakimi, Monica, 'State Bystander Responsibility' (2010) 21(2) *EJIL* 341, 344, 354-76: 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."

⁵³ See generally: ICISS, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) (ICISS Report); 2005 World Summit Outcome (n 9) 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.

⁵⁴ 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).

⁵⁵ Declaration on the RTD (n 4) art 3; Bunn, 'The Right To Development: Implications for International Economic Law' (n 35) 1457; 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/CN.4/Sub.2/2003/12/Rev.2, 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.

⁵⁶ Declaration on the RTD (n 4) art 5.

⁵⁷ Salomon, *Global Responsibility for Human Rights* (n 16) 191.

⁵⁸ Ibid 75-7; ICESCR (n 17) art 2(1); Wouter Vandenhoe, *A Partnership for Development: International Human Rights Law as an Assessment Instrument*, Submission to the UN High-Level Task Force on the RTD for its 2nd session, November 2005, 3, para 4.

⁵⁹ Vandenhoe, *A Partnership for Development: International Human Rights Law as an Assessment Instrument* (n 58) 4-9 para 7 and 19: "[...] 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."

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.⁶⁰

3.1.2 Burden-sharing

Much criticism on the RTD is directed at the difficulties implied 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.⁶¹ A more conducive approach in the context of the RTD is that of “imperfect obligations” as proposed by Kant, forwarding that “the claim [attached to a right] can be generally addressed to all those who are in a position to help”.⁶² However, the criticism does have merit when viewed in the context of implementation and enforcement of the RTD. It will quite simply be impossible to find a breach under the secondary rules of state responsibility if it cannot be attained 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.⁶³ This ultimately means that the RTD must be complemented by a *burden-sharing mechanism* which can distribute collective obligations to specific states.⁶⁴

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 may even require the establishment of a causal link between the omission and the damage.⁶⁵ 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.⁶⁶ 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 undercuts difficulties related to establishing a causal link after a breach has taken place. The last section of this chapter will take up the issue of a burden-sharing mechanism.

⁶⁰ De Schutter, Eide, Khalfan, Orellana, Salomon, Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights’ (n 46) 1145-59.

⁶¹ Edith Brown Weiss, ‘Invoking State Responsibility in the Twenty-First Century’ (2002) 96(4) *AJIL* 798, 800-1: 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 straight jacket of traditional bilateralism.

⁶² Amartya Sen, *Development as Freedom* (Oxford UP, 1999) 230.

⁶³ Abigail Gosselin, ‘Global Poverty and Responsibility: Identifying Duty-Bearers of Human Rights’ (2006) 8(1) *Human Rts Rev* 35, 38.

⁶⁴ Salomon, *Global Responsibility for Human Rights* (n 16) 186-7.

⁶⁵ Causality is not a general precondition for state responsibility, however, in case of a breach through omission it will sometimes need to be established. See generally: Andrea Gattini, ‘Breach of the Obligation to Prevent and Reparation Thereof in the ICJ’s Genocide Judgment’ (2007) 18(4) *EJIL* 695, 703 and 709; Salomon, *Global Responsibility for Human Rights* (n 16) 187-9

⁶⁶ Arjun Sengupta, ‘On the Theory and Practice of the Right to Development’ (2002) 24(4) *HRQ* 837, 857.

3.2 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 as leading to shared state responsibility.⁶⁷ 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 entails that a state is only responsible for its own actions constituting a separate wrongful act, irrespective of the responsibility of other states.⁶⁸ It seems a somewhat outdated approach in light of the increased intensity of state cooperation and rise of collective state obligations, which may be breached by several states simultaneously. Importantly, 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 where the primary weight of the wrongful act lies with one state, but 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. Article 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 only applicable in exceptional situations where a dominant state has both direction and control over the wrongful conduct.⁶⁹ The threshold for coercion, contained in Article 18, is even higher.⁷⁰ 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.⁷¹ 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”.⁷² 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.⁷³

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

⁶⁷ Articles on State Responsibility (n 39) 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.

⁶⁸ Articles on State Responsibility (n 39) Chapter I.

⁶⁹ Articles on State Responsibility (n 39) art 17 and 18; Commentary to the Articles on State Responsibility (n 42) Commentary to Article 17, para 6.

⁷⁰ Ibid Commentary to Article 18.

⁷¹ Articles on State Responsibility (n 39) art 16.

⁷² Ibid: Even if a state is found to be complicit, both states are still held independently responsible for their own wrongful acts.; Mark Gibney, Katarina Tomasevski, Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harv Hum Rts J* 267, 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.

⁷³ Separate Opinion Judge Simma in *Oil Platforms Case (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Rep 324, para 78; Nollkaemper and Jacobs, SHARES Concept paper, 35 onwards.

fault, negligence or the strength of the respective causal relationships.⁷⁴ For many reasons, this is an extremely complex task on the level of state conduct. It implies seeking for intentions behind the actions of state agents, untangling extremely complicated causal relationships and it requires a great amount of research into each case.⁷⁵ 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.⁷⁶ It has been argued that this may do more justice to the possibility of achieving a result through cooperative action.⁷⁷

At the moment, the only method to deal with factually indivisible wrongful acts caused by multiple contributing states which has some basis in international law, is that of joint and several liability.⁷⁸ This principle entails that injured states can 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 not yet any set procedures through which a state can acquire compensation from the other contributing states after it has made full reparation to the victim(s).⁷⁹ The system would have to be further developed to avoid that the state which is the first to be faced with a claim is left with 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 case of violations. It must thereby 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 it may be.⁸⁰ In this case, 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.

⁷⁴ Howland, 'Multi-State Responsibility for Extraterritorial Violations Economic Social and Cultural Rights' (n 19) 398; Ian Brownlie, *State Responsibility* (Clarendon Press, 1983) 95: Note that state responsibility is objective and does not require fault.

⁷⁵ David J Bederman, 'Contributory Fault and State Responsibility' (1990) 30(2) *VaJIL* 335, 335: "Special problems arise when analogies from private domestic law are used in the adjudication of international law."

⁷⁶ David D Caron, 'The Basis of Responsibility: Attribution and Other Trans-Substantive Rules' in Richard B. Lillich and Daniel B. Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Transnational Publishers, Irvington-on-Hudson, New York 1998) 109, 163.

⁷⁷ Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 65) 708.

⁷⁸ Separate Opinion Judge Simma in *Oil Platforms* case (n 73) paras 64-78; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 (*Nauru* case) para 48.

⁷⁹ Separate Opinion Judge Simma in *Oil Platforms* case (n 73) para 78; *Nauru* case (n 78) para 48; John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13(2) *Yale J Int'l L* 225: "Given [the] lack of attention to multiple state responsibility, it is not surprising that the issue of reparation in such cases has received even less attention."

⁸⁰ Howland, 'Multi-State Responsibility for Extraterritorial Violations Economic Social and Cultural Rights' (n 19) 408; Brownlie, *State Responsibility* (n 74) 99, referring to the reasoning on imputability in the *Corfu Channel* case: "The Judgment of the Court remains a valuable reminder of the need to avoid generalizing principles and simplistic polarities in the sphere of State responsibility."

4. 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 intergenerational equity and common but differentiated responsibility could contribute to the acceptance and guided development of some of the necessary changes identified above. Intergenerational equity, which promotes a sense of fairness among generations, could reinforce the RTD as a rule of international law.⁸¹ 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.⁸² These principles are most developed in the context of environmental law, which is more experienced in transposing responsibility for global concerns into legal obligations and ensuring accountability when these obligations are breached.⁸³

4.1 Intergenerational Equity

Equity is the embodiment of a general notion of “what is fair and reasonable in the administration of justice”.⁸⁴ 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”.⁸⁵ 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 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”.⁸⁶

A concept closely related to the principle of equity is that of intergenerational 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”.⁸⁷ Essentially, the principle is the basis of duties held by current

⁸¹ Francesco Francioni, 'Equity in International Law' (Apr 2007) MPEPIL, para 1; Edith Brown Weiss, 'Intergenerational Equity' (Nov 2008) MPEPIL.

⁸² Ellen Hey, 'Common but Differentiated Responsibilities' (Nov 2008) MPEPIL, para 1.

⁸³ Rebecca M Bratspies and Russel A Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge UP, 2006) 227; Doing research outside a particular field of law and drawing conclusions based on analogies is a recognized method of expanding legal frameworks. See: Brownlie, *State Responsibility* (n 74) 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.”

⁸⁴ Francioni, 'Equity in International Law' (n 81) para 1, 3 and 26.

⁸⁵ Ibid para 26; ICJ Statute (n 13) art 38.

⁸⁶ Francioni, 'Equity in International Law' (n 81) para 19 and 26.

⁸⁷ Weiss, 'Intergenerational Equity' (n 81) para 1-3, 7, 12 and 27: Intergenerational equity in environmental law has a forward looking perspective and can be seen as the legal voice of future generations. The duties entail ensuring resources of “comparable options and quality” and “non-discriminatory access” for future generations.

generations towards future generations and has been recognized as a quickly developing principle of international law.⁸⁸ 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.⁸⁹ There is a conceptual link between *intergenerational* equity and *intragenerational* equity, the latter referring to equity between people of the same generation. The concept of intergenerational equity is seen as encompassing intragenerational equity, because the poor who cannot provide in their basic needs today cannot be expected to adhere to their intergenerational obligations towards future generations.⁹⁰ Therefore, the inequitable distribution of wealth and resources in the intragenerational situation needs to be addressed before intergenerational rights can be fully secured. It is important to note that reference has been made to human rights and development in instruments dedicated to intergenerational equity, thus the link between these sets of principles has already been acknowledged.⁹¹

The principle of intergenerational equity corresponds with the RTD on two levels. First, the RTD was designed to address the current inequity in the intragenerational 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.⁹² The ensuing claim which has been forwarded by many developing states is that they are entitled to a beneficial treatment or even a completely restructured economic order.⁹³ However, it is practically impossible to disentangle exactly what rights and entitlements present-day generations have towards past generations and how this translates into intragenerational equity today.⁹⁴ Nevertheless, the extended application of the principle of intergenerational 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 lacunas 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.

⁸⁸ Edith Brown Weiss, 'In Fairness to Future Generations' (1990) 32(3) *Environment* 6, 10.

⁸⁹ Dissenting opinion of Judge Weeramantry in the Nuclear Weapons Advisory Opinion, cited in Weiss, 'Intergenerational Equity' (n 81) para 26-7.

⁹⁰ Weiss, 'Intergenerational Equity' (n 81) para 11: Whether intragenerational equity exists as a separate principle is unclear.

⁹¹ Several international declarations and conference outcomes refer to 'future generations' or 'the children of the world' in the context of human rights. See e.g.: 2005 World Summit Outcome (n 9) principle 12; Copenhagen +5 (n 93) Annex I Political Declaration; Millennium Declaration (n 9) 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”

⁹² Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2002) 209.

⁹³ Salomon, *Global Responsibility for Human Rights* (n 16) 187: These entitlements would be based on a myriad of violations of the rights of certain parts of previous generations, some possibly still continuing.

⁹⁴ Pogge, *World Poverty and Human Rights* (n 92) 209: Recognizes that it would be unworkable to impose “restitutive responsibility” on “affluent descendants of those who took part in [past] crimes.”

Therefore, intergenerational equity may be able to play a positive role in supporting the content of the RTD and guiding its further crystallization.⁹⁵

4.2 Common but Differentiated Responsibility

As said, one of the greatest challenges to the implementation and enforcement of the RTD's external dimension is the difficulty implied in identifying duty-bearers. The RTD covers a complicated causal relationship between state conduct, the persistence of poverty and intragenerational 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.⁹⁶ 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 but differentiated responsibility* may be able to offer a great deal of guidance in this regard.⁹⁷

At the heart of this principle lies the notion that there are certain shared concerns that can only be effectively addressed 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 intergenerational equity, common but differentiated responsibility is applied mainly in environmental law.⁹⁸ 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, 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.⁹⁹

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.¹⁰⁰ Furthermore, common but differentiated responsibility also recognizes the common interest in realizing the comprehensive goal of a collective obligation. This suits the concept of solidarity rights. On a side-note, it must be mentioned that reaching an economic

⁹⁵ Declaration on the RTD (n 4) art 3.

⁹⁶ Commentary to the Articles on State Responsibility (n 42) Commentary to Chapter II, para 4; Vandenhoe, *A Partnership for Development: International Human Rights Law as an Assessment Instrument* (n 58) 4-9 para 7 and 19: "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."

⁹⁷ Hey, 'Common but Differentiated Responsibilities' (n 82) para 18: "[I]n terms of general international law the concept of common but differentiated responsibilities is most likely to qualify as a principle of international environmental policy or soft law".

⁹⁸ Ibid para 19: It is the legal embodiment of the argument forwarded by developing states that it would be unfair to expect them to reduce their polluting activities to the same extent as developed states.

⁹⁹ Ibid para 7.

¹⁰⁰ Ibid para 19; 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: Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) *AJIL* 276, 294.

and social order in which all human rights can be fully realized is not entirely comparable to securing a sustainable use of the environment. The latter is sure to affect every state on more or less equal footing 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. While in the case of the RTD, 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”.¹⁰¹

When seen in the context of the principle of intergenerational 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”.¹⁰² As such, it *translates* intergenerational equity to the intragenerational level.¹⁰³ In more practical terms, this entails 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 formula that they should be fulfilled to “the maximum [of a states'] available resources”.¹⁰⁴ International cooperation is seen as part of a state’s resources.¹⁰⁵ 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”.¹⁰⁶ This was held to be dependent upon several factors formulated in an open-ended fashion, such as the “geographical distance” towards a state.¹⁰⁷ 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.¹⁰⁸ These (proposed) 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 when states have an obligation and what the scope of that obligation is could partially be distilled from practice and partially be developed through research. These indicators will be different for different types of obligations, such as obligations to respect, protect and fulfil.¹⁰⁹ Whereas obligations to respect

¹⁰¹ Salomon, *Global Responsibility for Human Rights* (n 16) 92.

¹⁰² Weiss, 'Intergenerational Equity' (n 81) para 17.

¹⁰³ Hey, 'Common but Differentiated Responsibilities' (n 82) para 5.

¹⁰⁴ ICESCR (n 17) art 2.

¹⁰⁵ Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Hum Rts Q* 156, 178.

¹⁰⁶ *Genocide case* (n 46) para 430; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 65) 700.

¹⁰⁷ *Genocide case* (n 46) para 430: Other factors were the “legal position” towards and “strength of political [and other] links” with the state and its people.

¹⁰⁸ Hakimi, 'State Bystander Responsibility' (n 52) 364: 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 case of serious physical or psychological harm or if the harm affects people because they belong to a vulnerable group.

¹⁰⁹ CESCR, *General Comment 3: The Nature of States Parties Obligations* (Art 2 par 1 of the Covenant) UN Doc 14/12/90, para 14.

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 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.¹¹⁰ 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 intragenerational situation and its relative wealth and power in the international community of states.¹¹¹ 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 at least partly depend 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.

5. 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 fragile right. In overcoming these barriers, guidance can be sought in the principles of intergenerational 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, this 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. These obligations could be distributed on the basis of the application of

¹¹⁰ De Schutter, Eide, Khalfan, Orellana, Salomon, Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (n 46) 1149.

¹¹¹ Salomon, *Global Responsibility for Human Rights* (n 16) 193: The indicators distinguished by Salomon are: (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; (iv) The states that benefit the most from the existing distribution of global wealth.

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.¹¹² Alternatively, the regime could even merge the human rights approach with existing development goals.¹¹³ 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 creation of a *lex specialis* regime of accountability. Most importantly, shared responsibility of states under primary norms should be translatable into shared responsibility under secondary norms.¹¹⁴ In an integrated international community of states where common concerns can only be addressed through cooperation, state responsibility cannot be left lagging behind with such a strong bilateral focus.

¹¹² 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.”

¹¹³ Philip Alston, *A Human Rights Perspective on the Millennium Development Goals* (Paper prepared by Special Adviser on the MDG goals Philip Alston as a contribution to the work of the Millennium Project Task Force on Poverty and Economic Development, 2004) available at: <<http://www.ohchr.org/EN/Issues/Development/Pages/HLTFSession2nd.aspx>>4: “Human rights advocates need to prioritize, stop expecting a paradigm shift, and tailor their prescriptions more carefully.”

¹¹⁴ For a research initiative dealing with issues of shared responsibility under international law led by André Nollkaemper, visit: <<http://www.sharesproject.nl/homepage>> last accessed 20 December 2012.