



Dialogue on
Globalization

CONFERENCE REPORT
FES GENEVA

Avenues for the Legal Future of Right to Development

Parallel event to the 12th session of the
Human Rights Council

Geneva, 17 September 2009

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STIFTUNG

On Thursday, 17 September 2009 the Geneva Office of the Friedrich-Ebert-Stiftung (FES) invited to a panel discussion about the Legal Future of the Right to Development (RtD). Parallel to the 12th session of the Human Rights Council several experts resumed the current debate on the Right to Development and discussed future prospect on legal implementation.

The panel was composed of:

Moderator: Felix Kirchmeier, FES

Speakers:

Georges Abi-Saab, Professor at the HEID-Institute, Geneva

Nicolaas Schrijver, Member of the HLTF on RTD

Jean-Pierre Chaffour, Author of "The Power of Freedom"

Anna Gouwenberg, Leiden University, NL

Comments on the Approaches:

Stephen P. Marks, Chairman of the HLTF on RTD

The Right to Development itself has remained disputed since its inception in the early seventies. Even though it has been officially proclaimed in a declaration adopted by the United Nations as well as by the *African Charter on Human and Peoples' Rights*, the Right to Development still does not provide a clear outline.

The Preamble of the 1986 UN Declaration on the Right to Development states "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from." Thus it appears that the Right to Development is a rather complex and highly dynamic construct – conceived to accommodate the core of Human Rights and to provide rights and obligations for individuals as well as for groups.

Mainly there are two different approaches on the topic: While some experts argue towards a more precise concept of the Right to Development, containing exact definitions of the rights and obligations, others advocate the practical application or broach the issue of the Legal Future.

Also, from a historical background industrialized countries and developing countries have been constituting different claims on the issue; While the developing countries tend to accentuate the obligation of the industrialized countries to provide technical assistance and re-structure the international (economic) environment, the latter highlight the realization of all human rights in

process of sustainable development first and foremost on a national basis.

By setting up a panel with highly respected experts, the FES intended to contribute to the discussion regarding coverage, legal implementation and enforcement of the Right to Development and to further inform delegations when deciding next steps on this issue, e.g. the future mandate of the High-Level Task Force on the Implementation of the Right to Development.

The Panel was moderated by **Felix Kirchmeier, Program Officer for Human Rights at FES Geneva**, who first welcomed all the participants and introduced the speakers. He then gave a short outline on the work of the Friedrich Ebert Stiftung, highlighting the approach of the FES to dedicate itself to the practical implementation of the Right to Development on the one hand, while exploring legal avenues at the same time.

The first Speaker, **Georges Abi-Saab, Professor at the HEID-Institute in Geneva**, presented a short abstract of the genesis of the Right to Development and the understanding in terms of Human Rights. He referred to the outset when the Right do Development was looked upon from a normative perspective without taking into account the practical implementation. Drawing a bow in terms of a more comprehensive approach from the Teheran International Conference on Human Rights (1968) and the campaigns of the Non Aligned Movement (NAM) in the late 60s to the Prebisch-Singer-Thesis and the final emergence of diverse concepts in the 1986 declaration, Mr. Abi-Saab pointed out the two main concepts regarding the Right to Development: The

western approach on the one hand, seeking to establish the Right to Development as a right on a meta-level, including all human rights, and helping the international community to enforce compliance with those rights; And on the other hand, the developing countries which tend to define the Right to Development as an additional right relative to the industrialized countries, entailing mostly obligations for the international community. (“added value concept”)

Mr. Abi-Saab pointed out, that yet there is no common understanding, and that the declaration of 1986 is a compromise, which provides no additional means to enforce human rights. In his opinion, implementation must be discussed, but the central issue is that the overall picture of the Right to Development still remains unclear. So his proposal would be to go into detail and discuss the Right to Development with respect to specific topics, e.g. discrimination – and by doing so pushing the overall picture to come to the fore.

The next speaker **Nicolas Schrijver, Member of the HLTF on the Right to Development and Professor of Law at Leiden University (Netherlands)**, took a step forward to discuss legal instruments for implementing the Right to Development.

He asked how the RtD can be implemented in an optimal way. Different ways would be conceivable in his opinion to establish the Right to Development, not necessarily following chapter 7 of the un-charta, so e.g. by establishing customary international law, by making declarations (like in the case of the decolonization-process, or the rio-negotiations), or by drawing a convention respectively a treaty and last but not least by means of guidelines.

Mr. Schrijver then discussed the pros and cons of an implementation within the scope of a treaty and through guidelines. With reference to the treaty-option he raised the question on which level it might be realized, and how to monitor compliance with the terms of contract. He argued, that the time is not ripe yet for the treaty-option, because not only specific rights and obligations can not be defined yet, there is also a lack of support in the political sphere - so one must reckon that there will not be sufficient ratifications. As the main alternative, Mr.

Schrijver considers guidelines: Using the examples of the ILO recommendations and the OECD guidelines for Multinational Enterprises he argued for a step-by-step implementation of the Right to Development; After establishing criteria, guidelines must be constructed which could be

slowly upgraded afterwards in the direction of a convention.

The author of “The Power of Freedom”, Jean-Pierre Chaffour, was next to present his point of view. He focussed on the interdependency between human rights and development in terms of freedom, and raised the question what actually drives development; He argued, that – apart from the human rights issue - a general framework is needed, most of all including the rule of law and an efficient government, to attract investors.

Mr. Chaffour highlighted the importance of economic freedom and property rights as a crucial factor within the development process of countries and pointed out the lack of consistency within the Right to Development concept, as negative rights respectively rights of freedom are not in the focus of the international community. He also stated that the cost performance ratio for positive rights tends to be poor, as the costs tend to be high.

From his point of view, the Right to Development based upon negative rights would automatically lead to an increasing compliance with human rights, as countries would experience economic wealth.

Mr. Chaffour also stated, that there still would be the need for international institutions to monitor compliance.

As it was also discussed by Mr. Schrijver, **Anna Gouwenberg from the Leiden University of the Netherlands** stressed the advantages of guidelines compared to conventions.

As an important advantage of guidelines, she emphasized the ability to also address non-governmental actors. Furthermore, in her opinion focusing on guidelines would mean to focus on the practical implementation.

Citing the OECD guidelines for Multinational Enterprises as an example - which provide special guidance for stakeholders – she pointed out another strategic advantage of the guideline-option. Also, Ms. Gouwenberg revealed that a widespread political support for guidelines would be more likely.

In contrast to the guideline-option, a convention would require a legal definition of the Right to Development, defining clear responsibilities. This might also bring up a potential conflict with other human rights. With guidelines, the need for monitoring mechanisms would be stronger than today, and negotiations could go on in parallel. However, once a convention is ratified, its rules would be easier to enforce as it is binding law, Ms. Gouwenberg added.

After the panelists all had presented their individual perspective on the topic, Harvard

Professor **Stephen Marks, Chairman of the High-Level-Task-Force for the Right to Development**, made additional comments, addressing the panelists.

With reference to Mr. Abi-Saab, he demanded a “clarity factor” regarding the criteria for a comprehensive approach towards the Right to Development.

He also argued that the question concerning a definition of the Right to Development cannot be bypassed, and that by doing so one evokes a total refusal of the countries, which want clear concepts. Mr. Marks sees a great frustration especially in the developing countries, which are pushed towards peace and disarmament, but unavailingly call attention to a lack of comprehensibility and coherence at the current state of the Right to Development.

Towards Mr. Schrijver and Ms. Gouwenberg, Mr. Marks stated that one must stay open to whatever tools might work, and consider different instruments. Even the option to establish a treaty body without a treaty could advance standard-setting, and standards could be promoted by anybody.

Also, he welcomed the chance to build up a dialogue with the Bretton-Woods-Institutions, as Mr. Chaffour intended with his book on “The Power of Freedom”. Mr. Marks agreed with the importance of the concept of freedom presented by Mr. Chaffour, but also challenged the fact that positive rights violate negative rights, as all sorts of rights generate costs in an economical sense. He argued, that a utilitarian concept of freedom might not be the right answer to contribute to a progress in terms of the Right to Development.

In the following **discussion round**, Mr. Chaffour responded to Mr. Marks, stating that it was not at all about the costs, but about the essence of rights – positive rights which are more expensive shall definitely be protected by the state, while focussing on the negative rights may stimulate the debate and lead to new results. According to Mr. Chaffour, one must

seriously take into account the importance of economic freedom, being the key to sustainable development.

In the further discussion, the question was raised whether the colonial history of the developing countries and its retroactivity should be introduced into the discussion about the Right to Development. In this regard, Mr. Abi-Saab advocated separate attendance – He emphasized the colonial heritage as a factor of great importance regarding the development process of countries, but advised against using the topic as a pretext to avoid a rational discussion in terms of a structural (comprehensive) change. Referring to another question of the audience in respect of treaty vs. guidelines, Mr. Abi-Saab argued that above all, treaties have to be worth the paper they are written on. A discussion about legal binding instruments might also be misused to flee a serious, substantial discussion. Mr. Abi-Saab once again stressed the argument, that concrete concepts are needed, and therefore a substantial discussion shall be put to the foreground.

This position was challenged by another participant of the discussion round, who warned to become to obsessed by the issue of clarity. According to his opinion, the normative content of the Right to Development is explicit enough; Referring to other cases in the past (“right to family”, “right to privacy”) the participant stated that a potential conflict between rivaling rights in theory usually becomes less important once the new right is established in practice. The core idea is to balance the different rights.

Another participant referred to the UN-Millennium Goals, which can be allocated to a specific individual right each, like e.g. the Right to Education, and the Right to Health. The parallel was drawn, that a Development without the enhancement of individual rights is hardly imaginable.

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