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THE BURGEONING RIGHT TO DEVELOPMENT AND ITS APPLICATION IN THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION

SUMMARY: 1. Introduction. – 2. Main Legal Issues of the Right to Development. – 2.1 Nature and Content. – 2.1.1. Status in International Law. – 2.1.2. Individual or Collective Right? – 2.1.3. Normative Scope. – 2.1.4. Obligations Entailed. – 2.2. Application *Ratione Personae*. – 2.2.1. Right Holders. – 2.2.2. Duty Bearers. – 2.3. Interrelatedness with Other International Standards. – 2.3.1. The Right to Self-Determination. – 2.3.2. The Principle of Sustainable Development. – 3. Factors Warranting the Elaboration of the Right to Development in the European Human Rights System. – 3.1. Major Challenges. – 3.2. Legal Aspects. – 4. Concluding Remarks.

1. Introduction

Development is one of the most debated concepts in the international context¹. In its broadest sense, it consists in “the process in which someone or something grows or changes and becomes more advanced”². With regard to individuals, development has been described as a process which facilitates “the expansion of capabilities of persons to lead the kind of lives they value or have reasons to value”³. It is thus a wide, multidimensional and heterogeneous notion, which can be related in principle to several fields.

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¹ The concept of development was included in Article 55 of the Charter of the United Nations, which calls on the United Nations to promote, *inter alia*, “higher standards of living, full employment, and conditions of economic and social progress and development”. Article 22 of the 1948 Universal Declaration of Human Rights proclaims that everyone, as a member of society, is entitled to realization “of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Article 1 of the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution 2200A (XXI) of 16 December 1966, provides, *inter alia*, that “[all] peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

² *Cambridge Dictionary online*, Cambridge, 2022.

³ A. SEN, *Development as Freedom*, Oxford, 1999, at 24.

Development can be largely considered as a product of economic and political events of the post-World War II period⁴ and has undergone several stages of evolution ever since⁵. A legal dimension started being associated to the concept of development in the 1960s during the decolonization process, when the newly independent Algeria made the *right to development* (RTD) a militant ideology at the international level. The concept of RTD emerged indeed in the Third World, which “was anxious, through economic liberation, to put the finishing touches to its political emancipation”⁶. In light of its origin, the RTD was initially conceived as purely economic, inasmuch as it was meant to readjust the international economic relations, which had generated great unbalances throughout the colonial period⁷.

During the 1970s, resolution 4 (XXXIII) by the Commission on Human Rights was approved⁸, which implied the elaboration of the RTD⁹. A few years later, the RTD was for the first time codified in a legally binding instrument with its inclusion in the African Charter on Human and Peoples’ Rights of 28 June 1981¹⁰. The most important recognition of the RTD at the international level came with the adoption of the 1986 UN Declaration on the Right to Development¹¹ (DRTD), which defined it as an “inalienable human right”¹². Therein, the purely economic nature of the RTD advocated by the Third World countries gave finally the way to a wider and more complete notion, which, as is illustrated below, also encompassed a social, cultural, civil and political dimension.

After some years of apparent decline in which the RTD never pierced the veil of a solemn proclamation mostly devoid of any normative content¹³, scientific interest has recently revived thanks to the work of the UN Working Group on the Right to Development which, acting under a Human Rights’ Council mandate¹⁴ and moved by the concern that the RTD had not been “effectively operationalized”, felt the necessity to draft “a comprehensive

⁴ S.P. SUBEDI, *Declaration on the Right to Development*, United Nations Audiovisual Library of International Law.

⁵ One scholar identified three stages in the understanding of development, with particular regard to the UN system. In the 1960s, it was associated only with economic growth and increase in Gross National Production. In the 1970s, the focus of development shifted to human welfare. Finally, in the 1990s the concept of sustainable development emerged. See A. LINDROOS, *The Right to Development*, Helsinki, 1999, at 40.

⁶ M. BEDJAOU, *The Right to Development*, in M. BEDJAOU (ed.) *International Law: Achievements and Prospects*, Dordrecht/Boston/London, 1991, p. 1177 ff., at 1177.

⁷ On the origins of the RTD see, *inter alia*, the report of the Secretary-General, “The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs”, E/CN. 4/1334, 2 January 1979.

⁸ Resolution 4 (XXXIII), 21 February 1977 (adopted without a vote).

⁹ K. M'BAYE, *Le droit au développement comme droit de l'homme*, in *Revue des droits de l'homme*, 1972, p. 503 ff. It is indeed this Senegalese lawyer, former vice-president of the International Court of Justice (1988-1991), who has the intellectual authorship of this expression.

¹⁰ African Charter on Human and Peoples’ Rights (African Charter), Article 22: “1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development”.

¹¹ Declaration on the Right to Development, GA Res 41/128, 4 December 1986, A/RES/41/128.

¹² *Ivi*, Preamble and Article 1.

¹³ See e.g. General Assembly, *An agenda for development*, Report of the Secretary-General, A/48/935, 6 May 1994, in which the Secretary General Boutros-Ghali began with the following words: “Development is a fundamental human right. Development is the most secure basis for peace”, but did not define the normative aspects of this right. *Ivi*, para. 4.

¹⁴ Human Rights Council Resolution 39/9, *The Right to Development*, 25 September 2018, A/HRC/39/L.12; Human Rights Council Resolution 42/23, *The Right to Development*, 20 September 2019, A/HRC/42/L.36.

and integral international convention to promote and secure the realization of the [RTD]¹⁵. This effort ultimately resulted in the adoption of a second revised version of a draft Convention on the Right to Development in November 2022 (hereinafter, draft Convention)¹⁶.

The present paper intends to explore the process of “positivization” of the RTD by focusing on its most controversial aspects under an international law perspective, with the ultimate goal to demonstrate its value in the European context. The paper is divided into two parts. In the first one, an overview of the main legal issues related to the concept of RTD is made, in order to understand the current status of this right under international human rights law. The second part, taking into account the questions emerged in the first part, attempts to demonstrate that the RTD, far from being a human right addressed only to the least developed countries in the world, is very much needed in the European context as well and should become an enforceable right in the next years.

2. Main Legal Issues of the Right to Development

The status of the RTD as an *independent* human right is today widely, if not universally, accepted¹⁷. Many international instruments of soft law¹⁸, especially during the 1990s, including numerous Resolutions by the UN General Assembly¹⁹, have indeed recognized the RTD. However, some legal aspects of this right remain disputed²⁰.

The focus in this contribution is on three main issues that, in our opinion, still pervade the concept of RTD and need to be addressed in the coming years²¹. First, its nature and content; second, its application *ratione personae*; third, its relationship with other international standards, with particular regard to the right to self-determination and the

¹⁵ Second revised text of the draft convention on the right to development, 30 November 2022, A/HRC/WG.2/24/2, Preamble; Second revised text of the draft convention on the right to development with commentaries (“the commentary”), 12 January 2023, A/HRC/WG.2/24/2/Add.1, Preamble. A first revised draft Convention and relative commentary were issued previously that year: see respectively Revised draft convention on the right to development (“first revised draft Convention”), 16 May 2022, A/HRC/WG.2/23/2 and Revised draft convention on the right to development with commentaries (“the first revised commentary”), 16 May 2022, A/HRC/WG.2/23/2/Add.1.

¹⁶ On the various steps leading to the adoption of a Convention on the RTD see K. DE FEYTER, *The Convention on the Right to Development: Drafting a New Global Human Rights Treaty*, in *La comunità internazionale*, vol. 77, 2022, p. 413 ff., in part. pp. 418-426.

¹⁷ R.G. TESHOME, *The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?*, in *Human Rights Law Review*, vol. 22, 2022, p. 1 ff., at 4.

¹⁸ See e.g. UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/2, at para. 10; Rio Declaration on Environment and Development, 12 August 1992, A/CONF.151/26 (Vol. 1); Principle 3; UN World Summit for Social Development, Copenhagen Declaration on Social Development, 14 March 1995, A/CONF.166/9.

¹⁹ Among the most recent see UN General Assembly, Resolution 74/152, 16 January 2020, A/RES/74/152; Resolution 73/166, 17 December 2018, A/RES/73/166; Resolution 72/167, 18 January 2018, A/RES/72/167; Resolution 64/172, 18 December 2009, A/RES/64/172.

²⁰ As it was observed, “the [RTD] has never ceased to be controversial among governments as among scholars and commentators”. See H.J. STEINER, P. ALSTON, R. GOODMAN (eds.), *International Human Rights in Context. Law, Politics, Morals*, Oxford, 2008, at 1445.

²¹ Other legal issues related to the RTD exist that are not dealt with in the present contribution, such as the role of IOs, the scope of the duty to cooperate, and the attribution of wrongful conducts.

principle of sustainable development. The analysis addresses these questions by primarily focusing on the draft Convention and, to a lesser extent, the DRTD, as well as on the main doctrinal interpretations and relevant case-law.

2.1. *Nature and Content*

As far as the nature and content of the RTD are concerned, the main questions lie in ascertaining: a) Whether the RTD has become a legally binding right or it is (still) a mere political objective; b) Whether it is an individual or a collective right; c) What the RTD consists of; d) What kind of (international) obligations it entails.

2.1.1. *Status in International Law*

Dealing with the question of the nature of the RTD is complex. The doubtful legal validity of the RTD is confirmed in literature, where some writers consider it as a mere agreed objective that the international community has pledged to pursue²² while other scholars even consider it as belonging to *jus cogens* by reason of its incontrovertibility²³ or as a sort of super norm²⁴.

The first aspect to stress is that the RTD's (formal) legal bindingness may derive exclusively from conventional law, given that its customary nature is to be excluded at present. In light of this, the most obvious way to ascertain the legal status of the RTD is to rely on the nature of the instrument that proclaims it. Yet this is not sufficient. Even if the RTD were included in a binding convention, doubts could still arise as to its *legal efficiency*. The fact that the RTD – apart from Article 22 of the African Charter – is currently recognized only in soft-law instruments doesn't necessarily mean, at least in our perspective, that it is devoid of any legal significance or force at the universal level.

In this regard, the DRTD has no legally binding force, having only a hortatory character under general international law. Nonetheless, it is known that UN General Assembly resolutions, especially when voted by numerous Member States, are acts of soft-law that may provide the basis for the progressive development of the law or “codify” existing customary rules²⁵, besides representing particularly authoritative sources for the interpretation of international law. In this respect, the DRTD was adopted with the support of an overwhelming majority of 146 States, with only one State against²⁶ and eight abstentions²⁷. It can be thus inferred that the proclamation of the RTD at the international level had reached at that time a wide consensus, proving at least the *emergence* of a new right

²² C. TOMUSCHAT, *Human Rights. Between Idealism and Realism*, Oxford, 2014, at 154; J. WALDRON, *Liberal Rights. Collected Papers 1981-1991*, Cambridge, 1993, at 342. Both authors adopt this view for all the third generation rights.

²³ BEDJAOU, *The Right to Development*, cit., at 1193.

²⁴ N.G. VILLAROMAN, *The Right to Development: Exploring the Legal Basis of a Supernorm*, in *Florida Journal of International Law*, vol. 22, 2010, p. 299 ff.

²⁵ J. CRAWFORD, *Brownlie's Principles of Public International Law*, Oxford, 2019, at 39.

²⁶ The United States of America.

²⁷ Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom of Great Britain and Northern Ireland.

under international law. If, on the other hand, the draft Convention will enter into force, the RTD will be encapsulated in a legally binding instrument²⁸.

Besides its formal recognition, the efficiency of the right depends also on the accuracy and clarity of its prescriptive content. For example, the DRTD defines the RTD in the following terms:

The [RTD] is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized²⁹.

As noted in literature, in these terms the RTD appears not as a real binding right, but rather as a broad political objective of a purely programmatic nature³⁰. The definition of the RTD does not differ much from that in the draft Convention, which reads as follows:

Every individual and all peoples have the inalienable right to development, by virtue of which they are entitled to participate in, contribute to and enjoy civil, cultural, economic, environmental, political and social development that is indivisible from and interdependent and interrelated with all other human rights and fundamental freedoms³¹.

The wording of the draft Convention is conceptually and linguistically drawn from article 1(1) of the [DRTD] with only minor modifications “to adapt to the requirements of a legally binding instrument and to ensure that there is no room for any ambiguity in its construction”³². Also in this case, the content of the right remains to a certain extent vague and indefinite, lacking in particular a definition of the concept of development *per se*. In these terms, the RTD seems indeed a sort of (legal) *framework* to better interpret and define the content of other human rights.

However, unlike the DRTD, the draft Convention clarifies with a higher degree of precision what the obligations incumbent upon the States parties for the realization of the RTD are. Most importantly, it provides for an implementation mechanism by virtue of which compliance with the provisions of the draft Convention shall be facilitated, coordinated and assisted in a non-adversarial and non-punitive manner³³. Furthermore, a provision on the settlement of disputes is included, which foresees the referral to the International Court of Justice in the case of failure by way of negotiations³⁴. The elements just mentioned give the impression that with the draft Convention a “positivization” of the RTD is occurring and that, from a mere political goal and a moral imperative as enshrined in the DRTD, it is taking

²⁸ The Working Group on the Right to Development has mentioned several times that the draft Convention shall be a binding instrument. See e.g. the commentary, Introduction, para. 13, at 4.

²⁹ DRTD, Article 1(1).

³⁰ R. PISILLO MAZZESCHI, *International Human Rights Law. Theory and Practice*, Cham, 2021, at 486. But the author admits that the non-mandatory character of the RTD should be downsized when considering relevant African case-law, which provided the RTD with a certain normative content. Ivi, at 489.

³¹ Draft Convention, Article 4(1).

³² The commentary, Article 4, lett. B, para. 2, at 56.

³³ Draft Convention, Article 27(1).

³⁴ Ivi, Article 35.

on the traits of a legally binding right³⁵. However, much of its legal force also depends on the amount of litigation that it will generate among States parties and on the consequent possible case-law addressing future disputes.

2.1.2. *Individual or Collective Right?*

As it is known, the predominant individualistic character of human rights, strongly influenced by a Western approach, has over time given the way to a series of collective human rights, with the aim to extend the scope of human rights to certain communities, or groups of persons, such as peoples, minorities and indigenous groups³⁶. The emergence of these rights, that according to some descriptive categorization may be labelled as human rights of the “third generation” or “solidarity rights”³⁷, was especially due to the impact of the concept of human rights in developing countries.

This is the case of the RTD that, as mentioned before, originated in Third World countries as a purely economic driver. However, it is not easy to establish the individualistic or collective character of the RTD in rigid terms. If one looks at the DRTD, it would appear evident from the wording that the RTD is *both* an individual and collective right, being its holders “[...] every human person *and* all peoples”³⁸. The same can be said for the draft Convention, which stresses that “[e]very individual *and* all peoples have the inalienable right to development”³⁹.

The solution reached in the DRTD and essentially replicated in the draft Convention appears as a compromise between two different views: that of the Global North States, who believed that human rights, including the RTD, are all individual rights, on the one hand, and that of the Global South States, who argued that the RTD is a collective right in nature, on the other⁴⁰. The particular dual nature of the RTD both as an individual and a collective right is confirmed by the UN Working Group that stressed that “[i]t is well-settled that the [RTD] is both an individual right and a collective right”⁴¹ and that “[h]uman beings, individually and collectively, always remain the right-holders of [RTD]”⁴². The question of the individualistic or collective nature of the RTD is clearly connected to that of its holders, that will be analyzed further on⁴³.

2.1.3. *Normative Scope*

The content of the RTD is something far from being clearly defined under legal terms. Several questions arise in this regard: What is development? What degree of

³⁵ U. VILLANI, *Il diritto allo sviluppo: diritto umano e dei popoli*, in ID., *A tutti i membri della famiglia umana. Per il 60° anniversario della Dichiarazione universale*, Milano, 2008, at 142.

³⁶ PISILLO MAZZESCHI, *International Human Rights Law*, cit., at 473.

³⁷ See in particular K. VASAK, *Les différentes catégories des droits de l'homme*, in A. LAPEYRE, F. DE TINGUY, K. VASAK (eds.), *Les Dimensions Universelles des Droits de l'Homme*, Vol. I, Brussels, 1990, p. 297 ff. Vasak, UNESCO's legal advisor and distinguished human rights scholar, was indeed the first to introduce the idea of three generations of human rights in an article written for the UNESCO Courier in November 1977.

³⁸ DRTD, Article 1 (emphasis added).

³⁹ Draft Convention, Article 4, para. 1 (emphasis added).

⁴⁰ LINDROOS, *The Right to Development*, cit., at 30.

⁴¹ The commentary, Article 4, lett. B, para. 3, at 56.

⁴² *Ivi*, Article 8, lett. B, para. 1, at 81. See also United Nations Human Rights, Office of the High Commissioner, “Frequently Asked Questions on the Right to Development”, Fact Sheet no. 37, 2016, at 2.

⁴³ Sub, § 2.2.1.

development is required to abide by relevant standards? What kind of development shall be achieved? How can it be measured? Can a “core norm” be identified? At the time of writing, these questions still remain largely unanswered. One must admit that defining with sufficient level of accuracy and precision the RTD is extremely difficult. First, the concept of “development” is *per se* very wide so that a degree of approximation is almost inevitable⁴⁴. Second, establishing what the right to a so broad and interpretable concept entails is necessarily fraught with pitfalls as well.

Notwithstanding this, the work of the Human Rights Council contributed to shed light on some of those problems. As shown earlier, Article 4 of the draft Convention, mirroring the DRTD, defines the RTD as an “inalienable human right” which permits human persons and people to “participate in, contribute to, and enjoy civil, cultural, economic, political and social development”. This provision – considered as “the heart and soul” of the Convention⁴⁵ – conveys a threefold entitlement stemming from the RTD, in respect of which various proposals for modification were made⁴⁶. However, and despite some suggestions in this regard⁴⁷, no definition of “development” is provided in the substantive provisions, so that the content of the RTD remains quite vague and aleatory. The Working Group did not elaborate much on this, implying that any definition of “development” would have failed to capture the multidimensional nature of the concept.

Another element concerning the normative scope of the RTD was provided by the African Commission on Human and Peoples’ Rights in the *Endorois* case decided in 2009⁴⁸, which dealt with the displacement by the Government of Kenya of the Endorois, an indigenous community, from their ancestral lands and the alleged violations of, *inter alia*, the RTD of this people as enshrined in the African Charter. In a significant passage of its decision on the merits, the Commission declared that:

“[The RTD] is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the [RTD]. Fulfilling only one of the two prongs will not satisfy the [RTD]. The African Commission notes the Complainants’ arguments that recognising the [RTD] requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in [RTD]”⁴⁹.

In other words, according to the African Commission, the RTD applies to both the *process* and the *outcome* of development, aiming at improving the well-being of the general population through their participation in the process and proceeds of development. This approach has

⁴⁴ One author observes indeed that “development has a variety of components and constitutes an ideal situation that rests on a multitude of factual and legal elements, many of which are not under the control of governments alone”. TOMUSCHAT, *Human Rights*, cit., at 153.

⁴⁵ The first revised commentary, para. 1, at 36.

⁴⁶ The largest modifications to Article 1 have been suggested by China, Cuba and Ecuador.

⁴⁷ Personhood Education suggested a definition of “development” to be inserted in the preamble. Women’s Federation for World Peace International also recommended inclusion of a definition of “development”.

⁴⁸ 276/03, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 46th Ordinary Session of the ACHPR, 25 November 2009.

⁴⁹ Ivi, para. 277.

also been supported in doctrine⁵⁰ and conveys the RTD a particularly strong legal force, inasmuch as the breach of either one of its two constitutive elements is considered sufficient in order for the violation of the RTD to be found⁵¹. Moreover, six criteria – namely equity, participatory nature, non-discrimination, accountability, transparency, and freedom of choice⁵² – are identified as necessary features of the RTD, with the alleged consequence that the failure to satisfy just one of those triggers a violation of that right. Yet the passage does not address the question of what development is intended for and what threshold must be reached for its realization.

Another feature of the RTD is its *dual dimension*, both internal and external⁵³. The former consists of the duty of the State to formulate national development policies that aim at the realization of all human rights, while the latter includes the duty of all States to cooperate with a view to achieving the RTD⁵⁴. In other words, development shall be considered both as a purely domestic and a common resource, from which all entities that are part of the international community should benefit in an equitable manner. According to one author, this duality can be explained in the following terms: a) the right to develop *erga omnes* claimed by a State which is “master in its own house” and opposable by the State against all parties; and b) the right to develop claimed by the State as an “active agent in international relations” and constituting a right over others⁵⁵. This is a progressive vision of the RTD that probably goes too far in considering it as an *erga omnes* obligation, but has the merit to stress the key solidarity aspect of the right.

To sum up, one may conclude that the RTD refers to multiple fields, entails two different components (a constitutive and an instrumental one), is informed by several criteria and may have a purely domestic and also an international dimension. However, no indication exists on what the term “development” consists of, so that any judicial appraisal shall require a certain amount of subjective interpretation and, possibly, margin of appreciation on the part of national authorities. One should reasonably acknowledge that every attempt to define with a high degree of precision the normative scope of the RTD, especially within an internationally binding instrument, is bound to encounter several obstacles. This appears the inevitable consequence of a multidimensional and extremely broad, other than controversial, human right. Future case-law and international practice – hopefully in the European context too – will help to better define its contours. To this end, the draft Convention represents an authoritative base on which the concept of RTD shall be built on.

⁵⁰ See e.g. A. SENGUPTA, *The Human Right to Development*, in B.A. ANDREASSEN, S.P. MARKS (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions*, Cambridge, 2010, p. 13 ff., at 23.

⁵¹ Actually, the wording used by the African Commission is not perfectly clear: after stating that the violation of one of the two prongs entails the violation of the whole RTD, the following sentence asserts that the RTD is not “satisfied” if only one of the two prongs is “fulfilled”. Apart from the obscure legal meaning of the verbs “satisfy” and “fulfil”, it is not clear whether the Commission wanted to simply repeat the previous concept or introduce a new one.

⁵² The criterion of the freedom of choice is mentioned in the ensuing passage. *Endorois* case, cit., para. 278.

⁵³ See among others S.P. MARKS (ed.), *Implementing the Right to Development: The Role of International Law*, Geneva, 2008, at 130.

⁵⁴ S.P. MARKS, B. RUDOLF, K. DE FEYTER, N. SCHRIJVER, *The role of international law*, in United Nations Human Rights, Office of the High Commissioner, *Realizing the Right to Development. Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, New York/Geneva, 2013, p. 445 ff., at 459.

The international dimension of the RTD is encapsulated in Article 13 draft Convention and in Article 3(3) DRTD regarding the duty to cooperate.

⁵⁵ BEDJAOU, *The Right to Development*, cit., pp. 1188-1192.

2.1.4. *Obligations Entailed*

The draft Convention contains more detailed and concrete state obligations⁵⁶ compared with the DRTD⁵⁷. In this regard, the first relevant aspect that emerges is the common tripartite typology included in the former instrument between obligations *to respect*, *to protect* and *to fulfil*, which is absent in the DRTD.

As it is known, this is a very common categorization, typical of international human rights law⁵⁸, which has been developed mainly with reference to economic, social and cultural rights. This distinction appears of great utility in the case of the RTD, since it helps to picture the wide spectrum of obligations of a different nature that such a right implicates and, by consequence, contributes to its justiciability inasmuch as the conduct of the State (or other subjects of international law) is to be assessed on the basis of the individual and specific obligation that has been violated. The draft Convention follows a “classic” tripartition, whereby the obligation to respect (Article 10) is essentially *negative* and prohibits States (or other subjects of international law) to act in such a manner as to directly and negatively affect the RTD. The obligation to protect (Article 11) is *mainly positive* and requires the duty bearers to take a number of administrative, legislative, investigative, judicial, diplomatic and other kind of measures, to prevent third parties from violating or hindering the realization of the RTD. Finally, the obligation to fulfil (Article 12) has also a *positive* nature and requires to take *more far-reaching and programmatic measures* (in particular, legislative ones) “with a view to progressively enhancing the [RTD], without prejudice to [...] obligations [of each State Party] to respect and protect the [RTD] [...] or to those obligations contained in the present Convention that are of immediate effect” (para. 1). It should be noted that the obligation to fulfil is functional to the implementation of the obligations to respect and to protect and is formulated in very generic terms, making it difficult to ascertain a possible breach.

The tripartite typology makes it clear that the RTD as codified in the draft Convention consists both of positive and, to a lesser extent, negative obligations. Another distinction that emerges when dealing with the RTD is that between “immediate” and “progressive realization” (or “progressive”) obligations. Also in this case, the question has been analyzed with special regard to the economic, social and cultural rights⁵⁹, in whose relevant treaties the concept of “progressive obligations” is often used⁶⁰. The difference between the two is quite intuitive: while immediate obligations require the duty bearers to

⁵⁶ It also includes a provision on general obligations of international organizations (Article 9).

⁵⁷ TESHOME, *The Draft Convention on the Right to Development*, cit., at 19.

⁵⁸ O. DE SCHUTTER, *International human rights law: cases, materials, commentary*, Cambridge, 2010, p. 242 ff. See also, *inter alia*, Committee on Economic, Social and Cultural Rights, General Comments No. 12, *The right to adequate food*, 12 May 1999, UN Doc. E/C.12/1999/5, para. 15; No. 14, *The right to the highest attainable standard of health*, 11 August 2000, UN Doc. E/C.12/2000/4 paras. 34-37; No. 19, *The right to social security*, 4 February 2008, UN Doc. E/C.12/GC/19, para. 43.

⁵⁹ See e.g. Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Factsheet No. 33, 2008.

⁶⁰ See e.g. Article 2(1) of the Covenant on Economic, Social and Cultural Rights (ICESCR), which establishes that each State Party “[...] undertakes to take steps [...] to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Convention”. Similarly, Article 26 of the American Convention on Human Rights, entitled “Progressive development”, prescribes that States Parties shall take measures “[...] with a view to achieving progressively [...] the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards”.

take measures that may achieve a certain, clearly-defined result in the short term, progressive obligations impose a continuous and protracted effort aimed at achieving a given objective.

The RTD would seem to entail progressive realization obligations mainly. This is obvious if one thinks of the essence of the RTD, where the concept of “development” itself is inherently a progressive goal that can’t be achieved (only) by resorting to immediate obligations. The draft Convention contains indeed some provisions encapsulating progressive realization obligations. For example, Article 11 (Obligation to protect) provides that “States Parties shall adopt and enforce all necessary, appropriate and reasonable measures, including administrative, legislative, investigative, judicial, diplomatic and others, to ensure that natural or legal persons, peoples, groups, or any other State or agents that the State is in a position to regulate do not nullify or impair the enjoyment and exercise of the [RTD]”, whereas Article 12 (Obligation to fulfil) imposes on States to “take measures, individually and through international assistance and cooperation, with a view to progressively enhancing the [RTD]”. In a similar vein, Article 13 (Duty to cooperate) requires States to “take deliberate, concrete and targeted steps, individually and jointly, including through cooperation within international organizations and engagement with civil society” aimed at the creation of international conditions favorable to the realization of the RTD. All these three obligations seemingly have a mainly progressive nature, by virtue of which States must *move towards* that specific goal⁶¹.

By way of conclusion, one may say that the majority of obligations stemming from the RTD are of progressive realization and programmatic nature. Yet, immediate obligations are also included in the draft Convention, as Article 12 reveals when, dealing with the obligation to fulfil, states that each State Party shall take measures to progressively enhance the RTD, without prejudice *inter alia* “to those obligations contained in the present Convention that are of immediate effect”. Furthermore, the Working Group stressed the importance of this kind of obligations by arguing that States Parties should not “wriggle out under the pretext that the obligations are only to «take measures» and that the rights are to be only progressively enhanced”⁶². Notwithstanding this, it is not easy to identify immediate obligations in the draft Convention and the Working Group should have made clear references to those⁶³. Be that as it may, immediate (negative and positive) obligations stemming from the RTD can also be strengthened through the judicial practice that in the next years the adoption of the draft Convention will possibly generate⁶⁴.

⁶¹ But it cannot be excluded that immediate obligations are also entailed, given the possible coexistence of these two categories.

⁶² The commentary, Article 12, lett. B, para. 3, at 93.

⁶³ One possible example is the obligation of States parties to respect, protect and fulfil the [RTD] for all *without discrimination of any kind* (Article 8, para. 1, emphasis added). The analogous obligation contained in Article 2, para. 2 of the ICESCR was indeed considered an obligation of immediate effect: see Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties’ Obligations*, 14 December 1990, UN Doc. E/1991/23, para. 1.

⁶⁴ Immediate obligations can in turn be distinguished into obligations of *result* and obligations of *due diligence*, whereby the former require that the conduct of the obligor produces a result, while the latter requires a certain conduct in itself, regardless of its outcome. However, they won’t be dwelt upon here mainly due to the fact that immediate obligations, as said, are difficult to identify with regard to the RTD. See among others R. PISILLO MAZZESCHI, *The Due Diligence Rule and the Nature of the International Responsibility of States*, in *German Yearbook of International Law*, vol. 35, 1992, p. 9 ff. and ID., *Responsabilité de l’État pour violation des obligations positives relatives aux droits de l’homme*, in *Recueil des Cours de l’Académie de Droit International de La Haye*, vol. 333 (2008), 2009, p. 175 ff.

2.2. *Application Ratione Personae*

Two of the thorniest questions concerning the RTD are those of the identification of its right holders and duty bearers. These questions will be addressed in turn.

2.2.1. *Right Holders*

Both the DRTD and the draft Convention make it clear that the RTD pertains both to every human person *and* all peoples⁶⁵. Both instruments promote, in fact, a “people-centered development” and adopt a “human-centered approach”. The dichotomy between persons and people as subject of international human rights law lies at the heart of the problem of the “third generation” of rights, of which the RTD is a vivid example⁶⁶. However, some doubts arise about the different scopes of Article 1 DRTD, where peoples are considered active subjects (i.e. holders or beneficiaries) of the RTD, and Article 2, where peoples instead are not mentioned and only “human persons” are defined as central subjects. This gap has been filled by the draft Convention, which proclaims that “individual *and* peoples are the central subjects of development and must be the active participants and beneficiaries of the [RTD]”⁶⁷.

While the term “human person” is evident by itself⁶⁸, the concept of “people” may be leaving room to interpretations. However, neither instrument clarifies what that implies for the purposes of the RTD. A reference in this regard may be found in the *SHRO* case decided by the African Commission in 2009⁶⁹, concerning alleged violations of human rights – including the RTD – by the Republic of Sudan against the indigenous Black African tribes in the Darfur region. The Commission maintained that a “people” identifies a group of individuals sharing some characteristics, such as language, religion, culture, the territory they occupy in a State, common history, and ethno-anthropological factors. Moreover, it was observed that in States with mixed racial composition, race becomes a determinant of groups of “peoples”, just as ethnic identity⁷⁰.

⁶⁵ The African Charter, on the other hand, considers it a right of peoples only.

⁶⁶ R. RICH, *The Right to Development: A Right of Peoples?*, in J. CRAWFORD (ed.), *The Rights of Peoples*, Oxford, 1988, p. 39 ff., at 43; M. NAKAGIRI, *Right to Development in Today's Draft Convention: Retransformation into a State's Right?*, in *Ejil:Talk!*, 21 March 2022, available at <<https://www.ejiltalk.org/right-to-development-in-todays-draft-convention-retransformation-into-a-states-right/>> (last accessed 1 March 2023).

⁶⁷ Draft Convention, preamble and Article 3(a) (emphasis added).

The addition of the term “people” had been explained by the drafters of the very first draft convention in the following terms: “[...] development should not only be human person-centred, but where development is related to traditional lands, natural resources or other rights that belong to a particular «people» which cannot be reduced to individual rights, then development must also be people-centred”. Draft Convention on the Right to Development with Commentaries (“first draft Convention”), 20 January 2020, A/HRC/WG.2/21/2/Add.1, para. 5, at 24.

⁶⁸ Nonetheless, especially in the European Court of Human Rights’ case-law, it is controversial whether the unborn child can also be considered a person directly protected by the rights contained in the European Convention on Human Rights, *in primis* the right to life. In any case, it is here submitted that this aspect should not considerably impact on the RTD.

⁶⁹ 279/03-296/05, *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. Sudan*, 45th Ordinary Session of the ACHPR, 27 May 2009.

⁷⁰ *Ivi*, para. 220.

In a similar vein, in its decision of 2009 in the already mentioned *Endorois* case, the African Commission – after having admitted that the concept of “people” is a contested term with strong political connotations⁷¹ – clarified what some of its constitutive elements are, namely “a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy [...] or suffer collectively from the deprivation of such rights”⁷².

Another insight on the concept of “people” may be found in the *Ogiek* case decided by the African Court on Human and Peoples’ Rights⁷³. The case regards an eviction notice issued by the Government of Kenya against the Ogiek, an indigenous minority ethnic group living in a Kenyan forest area, and the consequent alleged violation of, *inter alia*, their RTD. In its judgment on the merits of 2017, the Court maintained that the term “people” comprises “all populations as a constitutive element of a State”, including “the ethnic groups or communities identified as forming part of the said population within a constituted State”⁷⁴.

According to these definitions, the concept of “people” identifies a group of individuals sharing certain cultural, anthropological, and social traits who find themselves living within the jurisdiction of a State. Therefore, it would seem that the term is used in a strict sense, to indicate the right of these groups *vis-à-vis* their own governments, in accordance with the internal dimension of the RTD mentioned before. In short, the RTD can be defined as a collective right *sui generis* having it a double holder: on the one hand, the single individual who, regardless of the status, is entitled to the protection and guarantees provided by the right, and, on the other, an identified group of persons, a “people” possessing some common features and being recognized within a State. In this regard, the scope *ratione personae* of the RTD as to its beneficiaries appears wider than other typical collective rights (like the rights of indigenous people and minorities), which specifically identify a group of persons as such (and not the single individual too) as the holder of the right.

2.2.2. Duty Bearers

The other question pertaining to the RTD’s application *ratione personae* is that of its duty bearers. In our opinion, it is possible to envisage three different categories of duty bearers.

At the first level are States, which can be defined as *full* duty bearers of the RTD. It seems evident in fact both in the DRTD and in the draft Convention that States are the principal duty bearers of the RTD. Focusing on the draft Convention, its Part III on obligations stemming from the RTD, as mentioned earlier, articulates the duty by the States Parties to respect, protect and fulfil this right. States are also called to cooperate among each other to implement the RTD, and have “primary responsibility” for creating the conditions for its full realization⁷⁵. Furthermore, States Parties to the draft Convention have other ancillary duties, such as to ensure full and equal enjoyment of the RTD for all women and

⁷¹ *Endorois* case, cit., para. 147.

⁷² *Ivi*, para. 151.

⁷³ 006/2012, *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, 26 May 2017.

⁷⁴ *Ivi*, paras. 197-199 and 208.

⁷⁵ Draft Convention, Article 13, para. 2.

men⁷⁶, to prevent and suppress corruption⁷⁷ and to establish legal frameworks for assessing risks and impacts of their national laws, policies and practices and international legal instruments onto the implementation of the Convention⁷⁸.

At a second level are international organizations (IOs), which can be labelled as *functional* duty bearers of the RTD. In particular, the draft Convention includes a provision on their general obligation to “refrain from conduct that aids, assists, directs, controls or coerces, with knowledge of the circumstances of the act, a State or another international organization to breach any obligation that the State or the latter organization may have with regard to [RTD]”⁷⁹. The provision mirrors those contained in the Articles on the responsibility of IOs dealing with the responsibility of an IO in connection with the act of a State or another IO and is absent in the DRTD⁸⁰. It appears clear that, according to this norm, IOs have a narrower duty – of a purely negative nature – than that of States, since they must refrain only from aiding, assisting, controlling or coercing a State or another IO to breach an obligation stemming from the RTD, while no obligation to respect, protect or fulfil the right is incumbent upon them. In this regard, the provision seems quite isolated from the rest of the Convention and inadequate to cover other situations in which IOs may actually be considered full duty bearers of the RTD.

Finally, at a third level are all those other subjects of international law (such as individuals, groups, and peoples) and non-state actors (such as businesses and corporations), which can be defined as *partial* duty bearers of the RTD. According to the draft Convention, these entities have only the (very) general duty to refrain from participating in the violation of the RTD⁸¹. Like the one which is incumbent upon IOs, this appears to be primarily a negative obligation, which in truth seems quite weak and vague, so that it becomes difficult to ascertain when a breach may actually occur. However, it can be inferred that these subjects, in particular businesses and corporations, also have positive obligations inasmuch as they have the capacity to contribute to creating conditions favorable to the realization of the RTD⁸².

2.3. *Interrelatedness with Other International Standards*

The RTD is inherently related to all the other human rights recognized at the universal level⁸³. As the draft Convention emphatically maintains, the RTD is “an integral part of human rights and should be realized in conformity with the full range of civil, cultural, economic, political and social rights”⁸⁴. This is probably its most interesting feature and also

⁷⁶ *Ivi*, Article 16.

⁷⁷ *Ivi*, Article 18.

⁷⁸ *Ivi*, Article 20.

⁷⁹ *Ivi*, Article 9.

⁸⁰ Draft articles on the responsibility of international organizations, in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two, paras. 87-88, Articles 14-19.

⁸¹ Draft Convention, Article 7.

⁸² The UN *Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework*, 2011, which enucleate *inter alia* the obligations of business enterprises to respect human rights, can represent a useful reference in this regard.

⁸³ See A. SENGUPTA, *On the Theory and Practice of the Right to Development*, in *Human Rights Quarterly*, vol. 24, 2002, p. 837 ff., at 868.

⁸⁴ Draft Convention, Article 6(2).

a source of complexity, inasmuch as the realization of the RTD or failure thereof should be assessed taking into account other human rights possibly involved. Moreover, the provision mentioned says little about the legal implications of this relationship, especially under an international responsibility perspective, and does not differentiate among human rights. In this paper, two important rules of international law will be considered, namely the right to self-determination and the principle of sustainable development, that seem to have the closest link to the RTD.

2.3.1. *The Right to Self-Determination*

The relationship, defined in literature even as a “symbiotic interaction”⁸⁵, between the RTD and the right to self-determination, is widely acknowledged⁸⁶. As the draft Convention declares, those rights “are integral to each other and mutually reinforcing”⁸⁷. Similarly, the DRTD states that the RTD “implies the full realization of the right of peoples to self-determination”⁸⁸. In other words, there can be no RTD without right to self-determination, and vice versa.

The draft Convention dedicates a specific provision (Article 5) to this relationship, identifying six tenets: a) The RTD implies the full realization of the right of all peoples to self-determination; b) The right to self-determination pertains to all peoples, by virtue of which they pursue the realization of their RTD; c) The RTD and the right to self-determination entail the free disposal by all peoples of their natural wealth and resources; d) The States Parties to the draft Convention have to promote the realization of the right to self-determination; e) States are called to fight against phenomena that hinder the right to self-determination, such as colonialism, apartheid, and threats of war; f) The territorial integrity or political unity of States shall always be protected.

In light of the strong and interdependent link as depicted in the draft Convention, one may wonder whether the violation of the RTD *automatically* entails a violation of the right to self-determination. On this count, it is not clear whether the right to self-determination is purely *functional* to the achievement of the RTD and vice versa, or whether one “contains” the other as its integral part and, in this case, which one is the “container”. In the former case, breaches of those rights are to be treated as separate matters under the international law of responsibility, so that the violation of the RTD would not entail the violation of the right to self-determination; in the latter case, instead, the violation of one of those rights – especially when the breach of the wider right working as “container” is at stake – would necessarily imply a violation of the other right.

The African judicial practice seems to adopt the former approach. In the *SHRO*, *Endorois* and *Ogiek* cases mentioned before, in fact, the complainants alleged the breach of the RTD, but not of the right to determination. On their part, the African Commission and the African Court found the violation of Article 22 of the African Charter⁸⁹, but did not make

⁸⁵ N. SCHRIJVER, *Self-determination of peoples and sovereignty over natural wealth and resources*, in United Nations Human Rights, Office of the High Commissioner, *Realizing the Right to Development*, cit., p. 85 ff., at 101.

⁸⁶ For a scholar, those rights have the same nature. See BEDJAOU, *The Right to Development*, cit., at 1184. See also G. ABI-SAAB, *The legal formulation of a right to development*, in *Colloques/Workshop Series*, in The Hague Academy of International Law, R.-J. DUPUY (ed.), *The Right to Development at the International Level*, Alphen aan den Rijn, 1980, p. 159 ff., at 163.

⁸⁷ Draft Convention, Preamble and Article 3(f).

⁸⁸ DRTD, Article 1(2).

⁸⁹ *SHRO* case, cit., para. 224; *Endorois* case, cit., para. 298; *Ogiek* case, cit., para. 211.

any reference to the possible breach of the right to self-determination under Article 20. Be that as it may, future case-law and practice stemming from the possible adoption of the draft Convention may contribute to clarify this relationship.

2.3.2. *The Principle of Sustainable Development*

According to one of its most famous definitions, sustainable development is the development “which meets the needs of the present without compromising the ability of the future generations to meet their own needs”⁹⁰. This concept has gained great prominence, especially after the adoption of the Agenda 2030 by the UN General Assembly in 2015, which has identified 17 sustainable development goals and several related targets⁹¹.

While it is not mentioned in the DRTD, sustainable development is listed among the general principles that shall guide the Parties to achieve the object and purpose of the draft Convention and implement its provisions⁹². In a similar vein with respect to the right to self-determination, the relevant norm provides that “the [RTD] cannot be realized if development is unsustainable”, stressing the inextricable link between the two standards. This relationship is further strengthened by Article 23 entitled “Sustainable development”, which call upon States Parties to realize a development which is sustainable, in accordance with relevant international law obligations and without compromising the ability of present and future generations to realize the RTD. In other words, the draft Convention clearly supports a *right to sustainable development*⁹³.

Similarly to what has been observed with regard to the right to self-determination, problems relating to international responsibility may nonetheless arise. In particular, it is interesting to see whether a conduct by a State Party that respects, promotes and fulfils the various obligations as listed in the draft Convention, but which in some ways fails to pursue development in a sustainable way, may be considered in breach of the RTD. As the draft Convention currently stands, it seems that the provisions on sustainable development are too generic to trigger possible international wrongful acts. At the most, it can be assumed that those norms set a sort of obligations of *due diligence*, so that States can be held responsible only insofar as they do not use their “best efforts” in order to guarantee the realization of sustainable development.

Another aspect that deserves attention is the possible impact of the “right to sustainable development” on the realization of other rights contained in human rights treaties. In fact, regional human rights judicial bodies have variously operationalized the concept of sustainable development in their case-law⁹⁴. Among these, the European Court of Human Rights (ECtHR) has focused on the environmental pillar of sustainable development and connected situations of severe environmental issues to the violation, in

⁹⁰ World Commission on Environment and Development, *Our Common Future (Brundtland Report)*, 1987.

⁹¹ UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015.

⁹² Draft Convention, Article 3(g).

⁹³ In this sense see also DE FEYTER, *The Convention on the Right to Development*, cit., at 432.

It has been suggested that concrete environmental obligations in relation to the process and outcome of development should also have been elaborated in the draft Convention, in light of the environmental degradation and climate change issues largely caused today by the search for development. See TESHOME, *The Draft Convention on the Right to Development*, cit., at 15.

⁹⁴ On this matter see E. FOLKESSON, *Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest*, in *Erasmus Law Review*, 2013, p. 142 ff.

particular, of the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). This occurred, for example, in the *López Ostra*⁹⁵, *Fadeyeva*⁹⁶ and, more recently, *Pavlov and others*⁹⁷ cases, where the failure by the respondent State to strike a “fair balance” between the individual right and the general interest to protect the environment was crucial for determining the breach. The adoption of the draft Convention may thus encourage the Strasbourg Court to further extend the scope of application of other rights included in the ECHR (such as the right to life and the prohibition of torture) to situations in which one or more pillars of the concept of sustainable development are in question.

3. Factors Warranting the Elaboration of the Right to Development in the European Human Rights System

It has been shown that the RTD is emerging as a substantive binding right, pertaining to both individuals and peoples and incumbent – to various degrees – upon all subjects of international law. In light of its evolving features and wide scope of application *ratione materiae* and *personae*, the RTD is needed in the European context and should become a justiciable right as soon as possible⁹⁸.

There are various reasons that support this stance. Apart for the sake of legal certainty and uniformity with other regional human rights systems, some factual and legal challenges of human rights’ protection in Europe are stressed in the following subparagraphs. They have a dual effect as far as the RTD is concerned. On the one hand, they may hinder the effective realization of this right, causing possible violations that risk to remain non-justiciable. On the other hand, those challenges can at the same time be tackled through the application and realization of the RTD, which can work as a legal deterrent in this regard.

Before proceeding, it should be noted that aspects related to the *internal dimension* of the RTD are analyzed. Nevertheless, “international” drivers also exist, but they probably represent the greatest disincentives for richer States, especially Western European ones, to elaborate a legally binding RTD. In particular, a general reluctance on the part of European States and the EU can be observed. On the one hand, in fact, no EU Member State voted in favor of Resolution 76/163 of the UN General Assembly on the RTD⁹⁹; in a similar vein, all European States that were members of the Human Rights Council at that time voted against Resolution 48/10 on the RTD¹⁰⁰. On the other hand, the EU has expressed its support for the RTD, but is not in favor of elaborating an international legal standard of a binding nature, which is not considered an appropriate or efficient mechanism for realizing sustainable

⁹⁵ *López Ostra v. Spain*, Application no. 16798/90, 9 December 1994, para. 58.

⁹⁶ *Fadeyeva v. Russia*, Application no. 55723/00, 9 June 2005, para. 134.

⁹⁷ *Pavlov and Others v. Russia*, Application no. 31612/09, 11 October 2022, para. 92.

⁹⁸ Europe is indeed a melting pot of peoples and minorities. According to some scholars, there are 360 larger or smaller minorities in Europe (including small peoples without their own State), with a total of 107 million members, which corresponds to one seventh of all Europeans. See B.S. PFEIL, C. PAN, P. VIDESOTT, *National Minorities in Europe*, vol. 1, Berlin, 2018, at 4.

⁹⁹ UN General Assembly, *The right to development*, A/RES/76/163, 16 December 2021. Moreover, only five Member States of the Council of Europe (besides Russia as of July 2022) voted in favor, namely Armenia, Azerbaijan, Bosnia Herzegovina, Serbia and Turkey

¹⁰⁰ Human Rights Council, *The right to development*, A/HRC/RES/48/10, 8 October 2021.

development¹⁰¹. It is plausible that this cautious approach is because the *international dimension* of the RTD might entail the duty on industrialized States to contribute also to the development of less developed countries, for example through economic assistance¹⁰². However, even if the EU and its Member States decide not to adhere to the Convention, the provisions concerning the *international dimension* of the RTD will still affect to some extent the relationships between the EU, its Member States and the States that do ratify the treaty, as long as the latter will be bound by the obligations contained in it when dealing with the EU and its Member States¹⁰³.

Be that as it may, we believe that internal drivers are so compelling that they should prevail over any possible counterargument and convince European States of the necessity of the RTD.

3.1. Major Challenges

One of the problems that emerges when dealing with the RTD is *economic poverty*, that has also been its main driver in the first phase of its creation. Since, according to the definition contained in the draft Convention, all individuals and peoples have the inalienable right to participate in, contribute to and enjoy economic development, poverty may be seen as a major obstacle to this end¹⁰⁴. When one thinks of the concept of poverty, Europe hardly comes to mind, being it usually identified as a “First World” continent. However, recent data show that poverty and social exclusion are spread phenomena in Europe as well, despite to a minor extent than one may observe in Africa or Asia. Countries like Romania, Bulgaria, Greece and Spain are those in which the percentages of people at risk of poverty and social exclusions are the highest¹⁰⁵.

Since the RTD should guarantee the equal “distribution” of development, another obstacle is *discrimination*, which may jeopardize the realization, in particular, of social and cultural development. According to a recent study¹⁰⁶, discrimination (in particular race-based), remains very much present in Europe, albeit under-reported. Many broad categories

¹⁰¹ On the EU position see most recently *Report of the Working Group on the Right to Development on its twenty-first session* (Geneva, 17-21 May 2021), A/HRC/48/64, 30 June 2021, para. 11, at 4 and *Report of the Working Group on the Right to Development on its twenty-second session* (Geneva, 22-26 November 2021), A/HRC/51/38, para. 12, at 5.

¹⁰² In its comment to the first draft Convention, the EU noticed in this regard that “the rights-holders of the [RTD] are individual human beings, whereas the role of states is to fulfil, respect and protect human rights. To the contrary, in the present text, focus is placed on international cooperation, and obligations of industrialised countries towards developing countries. It promotes the narrative of international solidarity and economic and social development as prerequisites for the realization of human rights. Therefore, the text as it stands now distorts the framework of international human rights law as enshrined i.e. in the UN Charter, Universal Declaration and the human rights covenants”. See Compilation of comments and textual suggestions on the draft convention on the right to development, A/HRC/WG.2/22/CRP.1, 21 October 2021, at 110.

¹⁰³ DE FEYTER, *The Convention on the Right to Development*, cit., at 429.

¹⁰⁴ Draft Convention, Preamble, 14th recital.

¹⁰⁵ In 2021, 95.4 million people that were at risk of poverty or social exclusion in the European Union, corresponding to 21.7 % of the EU population. Eurostat’s online publication, *Living conditions in Europe – poverty and social exclusion*.

¹⁰⁶ The study was conducted by the Young European Federalists (JEF Europe) and it’s part of the Project Mindset financed by the European Commission, started in 2020. See in particular A. HUBER, L. HOPP, *Mapping regional attitudes on discrimination based on ethnic origin in Italy, Sweden & Romania*, 2021, download available at <<https://jef.eu/project/mindset-moving-the-ideas-of-non-discrimination-supporting-an-equality-transformation/>> (last accessed 1 March 2023).

can be mentioned in which this phenomenon occurs, such as day to day life in major areas (employment, education, housing and access to social services); human rights violations against members of Roma communities; hostile attitudes to and stigmatization of migrants, refugees and asylum-seekers; increasingly widespread anti-Semitic incidents; intensification of expressions of Islamophobia; use of racist, anti-Semitic and xenophobic arguments in political discourse; and a negative climate in public opinion, which plays a crucial part in the emergence of expressions of racism and intolerance in society¹⁰⁷. Since the promotion and protection of human rights is one of the most powerful weapons against discrimination and racism, the application and realization of the RTD at the European level can be seen as another legal tool to address this situation, which may supplement and reinforce the anti-discrimination legislation already in place at national level¹⁰⁸.

Another challenge that stands out is *corruption*. As stated in the draft Convention, “corruption represents a serious obstacle to the realization of the [RTD]”¹⁰⁹. In particular, civil and political development can be seriously jeopardized by corruption. According to the anti-corruption report issued by the European Commission in 2014¹¹⁰, corruption varies in nature and extent from one country to another, but it affects all EU Member States, impinging on good governance, sound management of public money, and competitive markets. Moreover, the results delivered by the legal instruments and institutions to prevent and fight corruption are not satisfactory across the EU¹¹¹. More recently, the 2022 Eurobarometers on corruption have shown that corruption remains a serious concern for EU citizens and businesses in the EU¹¹².

A fourth challenge to the realization of the RTD in Europe is the presence of *internal and international conflicts*. Among these, the threat against the national sovereignty, unity and

¹⁰⁷ I. GACHET, *Combating Racism and Racial Discrimination in Europe*, UN Chronicle, available at <<https://www.un.org/en/chronicle/article/combating-racism-and-racial-discrimination-europe>> (last accessed 1 March 2023).

¹⁰⁸ In this regard, the most significant advance in recent years has been the adoption of Protocol No. 12 to the ECHR, which came into force on 1 April 2005. The Protocol contains a general independent clause prohibiting discrimination and has been ratified by 20 out of the 47 Member States as of today (March 2023).

¹⁰⁹ Draft Convention, Article 18. This provision was added to the first draft Convention of 2020.

¹¹⁰ In February 2017, the Report was discontinued. The then Commission vice-president Frans Timmermans argued that the first and only Report published in 2014 had provided the basis for deepened work and consultations as part of the EU’s anti-corruption framework and that subsequent reports were therefore not necessary.

¹¹¹ European Commission, *Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report*, COM(2014) 38 final, 3 February 2014. In light of this issue, the European Commission published a study in January 2023 aiming at providing recommendations for possible EU measures in the area of corruption prevention and repression and to assess and compare the impacts of the identified policy options, also with a view to modernize EU legislation. See I. GAGLIO et al., *Strengthening the fight against corruption. Assessing the EU legislative and policy framework*, 15 December 2022.

¹¹² According to the data collected, almost seven in ten Europeans (68%) believe that corruption is widespread in their country and over four in ten Europeans (41%) consider that the level of corruption has increased in their country. In the meantime, only 31% of respondents are of the opinion that their government’s efforts to combat corruption are effective. Furthermore, more than six in ten European companies (63%) consider that the problem of corruption is widespread in their country and a majority of companies (51%) think that it is unlikely that corrupt people or businesses in their country would be caught, or reported to the police or prosecutors. See Special Eurobarometer 523 on Corruption (2022) & Flash Eurobarometer 507 on Businesses’ attitudes towards corruption in the EU (2022) and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2022 Rule of Law Report, The rule of law situation in the European Union*, COM(2022) 500 final, 13 July 2022, pp. 10-11.

territorial integrity of Ukraine due to the military aggression carried out by the Russian Federation in February 2022 stems out. As observed, the Russian invasion into Ukraine will have far-reaching consequences in a variety of areas, as the situation has evolved into a humanitarian crisis, has turned food and energy security volatile and raised questions about the architecture of global security, other than impacting negatively on the enjoyment of basic human rights¹¹³. Being the maintenance of international peace and security one of the fundamental tenets of international law as also recognized in the draft Convention¹¹⁴, the Ukrainian war is compromising the realization of the RTD of the Ukrainian people primarily, deteriorating basic parameters such as incomes, living conditions, access to food and services. However, its impact will go beyond Ukrainian borders and also depending on the intensity, duration and outcome of the hostilities, it is likely to impact massively also on the European economy and society.

3.2. *Legal Aspects*

First of all, it should be recalled that the RTD is not recognized in any legally binding instrument of a European character. This is a normative gap that should be filled in the coming years. The adoption of a dedicated protocol to the European Convention on Human Rights (ECHR) could be a possible solution. Likewise, the entry into force of the draft Convention can also contribute to solve this problem. In this regard, IOs such as the EU and the Council of Europe can be bound to the Convention, as long as they declare the extent of their competence with respect to matters governed by the Convention¹¹⁵. Clearly, the ratification by the largest number of Member States is also desirable.

As a result of the lack of a specific provision, the RTD almost never finds reference in regional case-law on human rights. Looking at the two most relevant European judicial authorities, i.e. the Court of Justice of the EU (CJEU) and the ECtHR, it can be noticed that the former has never used the expression “RTD”, while the latter has mentioned it in a couple of cases only, in order to assess the compatibility of the conduct of the respondent State with Article 8 ECHR on the right to respect for private and family life and with exclusive reference to the RTD of the *children*¹¹⁶. In those instances, the Strasbourg Court

¹¹³ Among recent analyses see UN, *Global Impact of war in Ukraine on food, energy and finance systems*, Brief No. 1, 13 April 2022; N. KATSER-BUCHKOVSKA, *The consequences of the war in Ukraine will be far-reaching*, in *World Economic Forum*, 22 April 2022, available at <<https://www.weforum.org/agenda/2022/04/an-unfair-war-economic-social-and-security-consequences-of-the-russian-invasion-into-ukraine/>> (last accessed 1 March 2023); A.H. CORDESMAN, *The Longer-Term Impact of the Ukraine Conflict and the Growing Importance of the Civil Side of War*, in *Centre for Strategic & International Studies*, 6 June 2022, available at <<https://www.csis.org/analysis/longer-term-impact-ukraine-conflict-and-growing-importance-civil-side-war>> (last accessed 1 March 2023); D. DESIERTO, *The Human Right to Food, Freedom from Hunger, and SDG 2: Global Food Crisis and Starvation Tactics from the Russian Invasion of Ukraine*, in *Ejil:Talk!*, 9 June 2022, available at <<https://www.ejiltalk.org/the-human-right-to-food-freedom-from-hunger-and-sdg-2-global-food-crisis-and-starvation-tactics-from-the-russian-invasion-of-ukraine/>> (last accessed 1 March 2023).

For the human rights crisis in Ukraine see Human Rights Council, “The deteriorating human rights situation in Ukraine stemming from the Russian aggression”, A/HRC/RES/S-34/1, 16 May 2022 and Council of Europe, Commissioner for Human Rights, *Memorandum on the human rights consequences of the war in Ukraine*, 8 July 2022.

¹¹⁴ Draft Convention, Article 22.

¹¹⁵ *Ivi*, Article 30.

¹¹⁶ *Vavříčka and Others v. the Czech Republic*, Applications nos. 47621/13, 3867/14, 73094/14, 19298/15, 19306/15 and 43883/15, GC, 8 April 2021, para. 194; *S.J.P. and E.S. v. Sweden*, Application no. 8610/11, 28 August 2018, para. 88. The expression was also used in *Pine Valley Development Ltd. and Others v. Ireland*,

presumably used the expression in a functional way as an element contributing to respect for family life, but not as an autonomous right¹¹⁷.

Of course, other provisions are included both in the ECHR and in the Charter of Fundamental Rights of the European Union (hereinafter, EU Charter) covering aspects linked to the RTD¹¹⁸. For instance, Articles 14 ECHR and 21 EU Charter on the prohibition of discrimination; Articles 11 ECHR and 12 EU Charter on the freedom of assembly and association; and Articles 2 ECHR and 14 EU Charter on the right to education. Of the two instruments, the EU Charter has a more RTD-oriented profile. In fact, it contains provisions on: the rights of the child¹¹⁹ and protection of children at work, aiming to safeguard *inter alia* their “safety, health or physical, mental, moral or social development or to interfere with their education”¹²⁰; the freedom to conduct a business¹²¹; the right to access to placement services¹²²; social security and social assistance¹²³; access to services of general economic interest¹²⁴; environmental protection, to be pursued in accordance with the principle of sustainable development¹²⁵. Yet, despite their interrelatedness with the RTD, the freedoms and rights included in the ECHR and, to a major extent, in the EU Charter, deal only with some aspects of the RTD and thus provide a *partial protection* in this regard. For example, some provisions cover mainly economic aspects of the RTD (for example, the freedom to conduct a business), other provisions are more focused on social and cultural development (for example, social security and assistance) and on political development (for example, freedom of assembly and association), while others are addressed to specific sections of the population (for example, children). Moreover, it is known that the norms of the EU Charter are addressed uniquely to the institutions and bodies of the EU and to the Member States only when they are implementing EU law¹²⁶, so that a whole range of possible situations in which the RTD is at stake may remain outside the scope of application of the EU Charter. On the other hand, the ECHR has a wider application *ratione personae*¹²⁷, but it has few relevant provisions contributing to the RTD, as previously noted.

Another legal issue that warrants the elaboration of the RTD in the European context is related to its application *ratione loci*. As the draft Convention maintains with regard to the obligation to protect, States Parties shall adopt and enforce measures to ensure that “natural or legal persons, peoples, groups, or any other State or agents that the State is in a position

Application no. 12742/87, 6 June 1990, para. 76, by the European Commission on Human Rights but with exclusive regard to the RTD existing in Irish law.

¹¹⁷ It should be observed that the wording of the ECtHR is controversial in both cases, since it respectively refers to the protection of the RTD *and* education (*Vavřička case*) and health (*S.J.P. case*) of the children, thus apparently considering the RTD as a separate issue.

¹¹⁸ Other conventions on human rights adopted by the Council of Europe can be related to the RTD. Among these, the 1996 European Social Charter dealing with economic, social and cultural rights and the 1995 European Framework Convention for the Protection of National Minorities. However, their legal relevance is limited, inasmuch as the former has a flexible and differentiated bindingness so that each Contracting State may choose the provisions to be bound, while the latter contains rather vague norms of a programmatic nature only. Moreover, both conventions do not provide for judicial mechanisms of control.

¹¹⁹ EU Charter, Article 24.

¹²⁰ *Ivi*, Article 32.

¹²¹ *Ivi*, Article 16.

¹²² *Ivi*, Article 29.

¹²³ *Ivi*, Article 34.

¹²⁴ *Ivi*, Article 36.

¹²⁵ *Ivi*, Article 37.

¹²⁶ *Ivi*, Article 51(2).

¹²⁷ ECHR, Article 1.

to regulate do not nullify or impair the enjoyment and exercise of the [RTD] *within or outside their territories* when: (a) Such conduct occurs, partially or fully, on the territory of the State Party; (b) The natural or legal person has the nationality of the State Party; (c) The State Party has the requisite legal duty under either domestic or international law to supervise, regulate or otherwise exercise oversight of the conduct of the legal person engaging in business activities, including those of a transnational character¹²⁸. Therefore, the duty to protect also applies extraterritorially as long as the State is in a position to impact the enjoyment of the RTD outside its territory through its acts or omissions in those three particular scenarios, of which the criterion of the nationality of the individual or legal person (lett. b) appears the widest¹²⁹. The draft Convention thus adopts a *functional model* to extraterritorial application of human rights¹³⁰, according to which what matters is a State's capability to deny or interfere with the right even if it does not necessarily have an effective control or power over the person or the territory¹³¹. The functional model appears broader, among others, than the spatial and personal models developed by the ECtHR¹³² and, if kept, could ensure a wider degree of protection, at least as far as the RTD's obligation to protect is concerned.

4. Concluding Remarks

The burgeoning RTD should function as the legal operative arm of the concept of development. Yet its nature, content and application *ratione materiae, personae* and *loci* are still controversial matters, which the work of the Human Rights Council is attempting to solve.

It would be a mistake to consider today the RTD as a right interesting only less developed countries. The evolution that the RTD has undergone as of the 1960s with its enlargement to the social, cultural, civil and political spheres and the emergence of global common challenges made it fit well for the entire international community.

It is here assumed that the application of the RTD in Europe is necessary both under an internal and an international perspective. Under the former, economic disparities, humanitarian crises, and international conflicts, among other things, concretely jeopardize the realization of the RTD and at the same time require its implementation. Moreover, a legally binding instrument that regulates the RTD could boost regional human rights courts, and the ECtHR in particular, to interpret certain provisions in an evolutionary way and to apply them to cases related to the lack of sufficient economic and social development. Under an international perspective, and despite its unattractiveness to industrialized States, the elaboration of the RTD in Europe could potentially create the legal basis for contributing to

¹²⁸ Draft Convention, Article 11 (emphasis added).

¹²⁹ It should be observed that the first criterion was phrased differently in the first revised version, which read: "Such conduct *originates from* or occurs on the territory of the State Party". First revised draft Convention, Article 11(a) (emphasis added). The deletion of the words "originates from" was requested by the Holy See in order to limit the scope of the provision. First revised commentary, para. 1, at 90.

¹³⁰ TESHOME, *The Draft Convention on the Right to Development*, cit., at 16.

¹³¹ Y. SHANY, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, in *The Law and Ethics of Human Rights*, 2013, p. 47 ff., at 67-68; M. MILANOVIC, *Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations*, in *EJIL:Talk!*, 16 March 2021, available at <<https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/>> (last accessed 1 March 2023).

¹³² In a nutshell, the ECHR applies to the territories in which the Contracting Parties exercise their jurisdiction, included in areas under their effective control (spatial model) or to acts of their authorities producing effects outside their own territory (personal model).

the development of non-Europeans as well, inasmuch as the latter would benefit from a legally required cooperation from the EU. In turn, this would guarantee a higher degree of security and peace worldwide.

As the Ghanaian philosopher Kwasi Wiredu argued in 1972, “[o]nce development is no longer viewed merely in terms of growth of national income or even per capita income, but in the larger sense of the creation of conditions conducive to the full realization of the individual in every aspect of his/her being, it is an aspiration which should be pursued in all countries”¹³³. The time is ripe for the RTD to follow the same logic.

¹³³ K. WIREDU, *Human solidarity: a philosophical exposition*, paper presented to the United Nations Educational, Scientific and Cultural Organization (UNESCO) expert meeting on human rights, human needs and the establishment of a new international economic order, Paris, 19-23 June 1973 (paper SS-78/CONF.630/4), at 12.