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**IMPLEMENTATION OF THE RIGHT TO
DEVELOPMENT: A NEW ZEALAND PERSPECTIVE**

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Abstract

An analysis of the implementation of the right to development (RTD) in a New Zealand context. The RTD is a broad right that is closely connected with human rights and sustainability. The definition of the RTD is contested reflecting the broadness and politicisation of the RTD. The history of the RTD further highlights the politicisation and ambiguity of the RTD. The ambiguity of the RTD has resulted in varying State perspectives and a lack of State recognition resulting in insufficient implementation. New Zealand has failed to recognise the RTD in terms of Māori development and aid responsibilities to the Pacific. Solutions for greater implementation of the RTD include the establishment of a convention, new declaration and a human rights protocol. The creation of a framework convention is proposed to address the politicisation of the RTD whilst promoting recognition and accountability for the RTD.

Keywords: “Right to Development”, “Implementation”, “Framework Convention”

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I Introduction

The former president of the International Court of Justice, Mohammed Bedjaoui, describes the right to development (RTD) as “the first and last human right, the beginning and the end, the means and the goal of human rights”.¹ The RTD is a process by which everyone “may participate in, contribute to, and enjoy economic, social, cultural and political development, in which all fundamental freedoms can be realized”.² Despite the importance of the RTD, the concept remains elusive for the 734 million people who live on less than \$1.90 per day.³ Implementation of the RTD is a contemporary issue. The United Nations (UN) Working Group on the Right to Development has recently created a draft convention on the Right to Development (DCRTD).⁴ The paper proposes that a shift to a framework convention best addresses the issues relating to implementation of the RTD, particularly from a New Zealand perspective.

The origins of the RTD reveal the principles of the RTD and the issues which inhibit recognition and implementation of the RTD. The main issues with the RTD are the broadness and lack of implementation mechanisms which prevent duty bearers from realising their obligations. These issues reduce State recognition of the RTD, both domestically and internationally as States are not held accountable to any external authorities.

An analysis of the RTD in a New Zealand context provides insight into New Zealand’s domestic and international obligations as a duty bearer of the RTD. Domestically, New Zealand’s indigenous people, Māori, suffer due to poor implementation of the RTD despite recognition under New Zealand’s founding document, the Treaty of Waitangi (the Treaty). Internationally, in the Pacific, the lack of effective aid means that the development of

¹ Mohammed Bedjaoui “The Right to Development” in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (Martinus Nijhoff Publishers, Leiden, 1991) 1182 at 1182.

² *Declaration on the Right to Development* GA Res 41/128 (1986), art 1.

³ World Bank “Poverty” <www.worldbank.org>.

⁴ *Draft Convention on the Right to Development, with commentaries* UN Doc A/HRC/WG.2/21/2/Add.1 (20 January 2020).

Pacific countries is hindered as New Zealand provides aid to favour its own commercial interests.

A range of solutions are available to support the implementation of the RTD. A solution that has been proposed by the UN Working Group on the Right to Development is an international convention on the RTD which has the advantage of making the RTD binding. There are also soft law options which may be beneficial including the establishment of a declaration. Furthermore, leverage of human rights mechanisms through a protocol may be another method of ensuring greater implementation and enforcement of the RTD.

Part II of this research paper provides an overview of the RTD concerning definition and history. Part III emphasises the necessary elements for implementation including legal status and the parties of the RTD. Part IV reveals issues which have prevented the implementation of the RTD globally. A detailed inquiry into the implementation of the RTD in a New Zealand context is explored in Part V. Finally, Part VI analyses possible solutions which will allow for greater implementation of the RTD, particularly in a New Zealand context. The paper concludes that a framework convention on the RTD would best promote both international recognition and New Zealand's recognition of the RTD, benefiting both Pacific nations and Māori.

II Overview of the Right to Development

The RTD is an established right at international law; however, the exact scope of the RTD is difficult to define. Part II concerns the definition and history of the RTD. An analysis of two academic definitions of the RTD reveals the key aspects of the RTD. The history of the RTD highlights the evolution and politicisation of the RTD.

A Definition

The definition of the RTD is often contested due to the broad nature of development. Development is multidimensional and aims to achieve higher standards of living for all

people.⁵ The process involves economic, social, political and cultural aspects.⁶ Trade, investment, finance, aid, debt, technology, innovation and global governance all have consequences for the achievement of the RTD.⁷ The primary distinction between definitions is the extent to which the RTD establishes international obligations.

A useful way of conceptualising the RTD is focusing on the RTD's connection with human rights. The RTD may be described as a "cluster right" which encompasses all human rights.⁸ Schrijver states that:⁹

[T]he right to a decent standard of living, including the right to food, water, clothing and housing, the right to work, the right to education, the right to life, and the right to freedom of expression and organisation, are a cluster of rights that together form a human right to development.

This conception reflects the individualistic nature of the RTD, the connection with human rights and its application within a domestic context rather than any focus on the international community.¹⁰ The idea of a cluster right is often used by developed countries in arguing that the RTD does not create any new obligations but rather consolidates existing human rights.¹¹

⁵ *Agenda for Development* UN Doc A/RES/51/240 (20 June 1997) at [1]; and *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development* UN Doc E/C.12/2011/2 (12 July 2011) at [4].

⁶ *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, above n 6, at [4].

⁷ The Office of the United Nations High Commissioner for Human Rights *Frequently Asked Questions on the Right to Development* (2016) at 15.

⁸ Nico Schrijver "A new Convention on the human right to development: Putting the cart before the horse?" (2020) 38(2) NQHR 84 at 92.

⁹ At 92.

¹⁰ Fantu Cheru "Developing countries and the right to development: a retrospective and prospective African view" (2016) 37(7) *Third World Q* 1268 at 1271.

¹¹ Karin Arts and Atabongawung Tamo "The Right to Development in International Law: New Momentum Thirty Years Down the Line?" (2016) 63 *Neth Int Law Rev* 221 at 235.

However, the conceptualisation of the RTD as the union of all human rights may dilute the strength of the RTD as those rights already exist under the core human rights treaties.¹² Villaroman's definition identifies novel aspects of the RTD focusing on the international community, and recognising duty bearers and right holders explicitly. The definition states that:¹³

The right to development is a right of a people to pursue an independent process of economic development that occurs within the broader context of international conditions that are conducive to the progressive realisation of ESC [economic, social and cultural] rights within their State.

The identification of right holders and duty bearers is essential for practical application; however, without means of accountability, the conceptualisation provides for limited practical application.

These two academic definitions of the RTD reveal the human right components of the RTD and the more novel aspects which focus on the international community creating conditions favourable for development. An analysis of the history of the RTD provides greater insight into the principles surrounding the RTD and the politicisation of the RTD with respect to these core aspects.

B History

1 Foundation of the Right to Development

The RTD has been highly politicised between developing and developed states.¹⁴ The UN has been at the forefront of development, initially emphasising development with respect

¹² Noel Villaroman "Rescuing a Troubled Concept: An Alternative View of the Right to Development" (2011) 29 NQHR 13 at 16.

¹³ At 16.

¹⁴ Arne Vandenberghe "The Right to Development in International Human Rights Law: A Call for its Dissolution (2013) 31(2) NQHR 187 at 209.

to economic, social, and cultural rights. In 1945, the UN Charter referred to “solving international problems of an economic, social, cultural or humanitarian character.”¹⁵ The importance of social and cultural rights was reiterated in the UN Declaration of Human Rights, which provides various economic, social and cultural rights from art 22 through to art 27.¹⁶

The RTD gained further traction following widespread decolonisation in the 1960s.¹⁷ In 1962, the UN General Assembly established the resolution on Permanent Sovereignty over Natural Resources, which promoted economic development of developing countries and affirmed the sovereignty of people and States over their natural resources.¹⁸ Building on resolution 1803, an early movement relating to the RTD was pursued by the “The Group of 77”, a group of 77 developing countries. The Group of 77 established the Charter of Algiers which outlined the core elements of the RTD in 1967.¹⁹ The Charter of Algiers stated that the:²⁰

The international community has an obligation ... to create conditions under which all nations can enjoy economic and social well-being, and have the means to develop their respective resources to enable their peoples to lead a life free from want and fear.

The articulation under the Charter of Algiers, emphasises the obligations of States in both an international and domestic context.²¹

¹⁵ *Charter of the United Nations*, art 1; and Serges Djoyou Kamga “Realising the Right to Development: Some Reflections” (2018) 16(7) *Hist Compass* 1 at 2.

¹⁶ *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, above n 6, at [2].

¹⁷ Villaroman, above n 12.

¹⁸ *Permanent Sovereignty over Natural Resources* GA Res 1803 (1962).

¹⁹ *Charter of Algiers* UN Doc MM.77/I/20 (30 October 1967); and Arts and Tamo, above n 11, at 225.

²⁰ Art 3.

²¹ Monique van Alphen Fyfe and Guy Fiti Sinclair “The United Nations” in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington 2020) 29 at 51; and Arts and Tamo, above n 11, at 225.

In the 1970s, a number of developing countries made proposals through the UN Conference on Trade and Development to alter the international economic system to favour developing countries in terms of trade and development aid.²² The 1973 oil crisis was a catalyst for international economic reform as it revealed the dependence of developed countries on developing countries for natural resources, providing developing countries with greater economic and political power.²³ The proposals resulted in the Declaration of the Establishment of a New International Economic Order in 1974.²⁴ The new international economic order aimed to support the economic growth of developing countries and allow for greater control over natural resources.²⁵

By the end of the 1970s, the new international economic order had failed to provide significant changes,²⁶ as developed countries remained apprehensive to any disturbance of the system which favoured their interests and failed to recognise international obligations.²⁷ The developed countries emphasised the domestic application of the RTD.²⁸ The hesitancy of developed countries in accepting international responsibility has been a significant issue in the evolution of the RTD.

The UN Commission on Human Rights officially recognised the RTD as a human right in 1977,²⁹ and recommended to the Economic and Social Council that the Secretary-General

²² *Proceedings of the united nations conference on trade and development* UN Doc TD/180 (21 May 1972) at 9; and United Nations Economic and Social Commission for Western Asia “New International Economic Order” <www.unescwa.org>.

²³ Omotayo Olaniyan “The New International Economic Order (NIEO): A Review” (paper presented to Nigerian Forum, March 1987) at 2.

²⁴ *Declaration on the Establishment of a New International Economic Order* GA Res 3201 (S-VI) (1974); and Fyfe and Sinclair, above n 21, at 51.

²⁵ Villaroman, above n 12, at 14; and David Beetham “The Right to Development and Its Corresponding Obligations” in Bard Andreassen and Stephen Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia, Cambridge, 2006) 79 at 79.

²⁶ Fyfe and Sinclair, above n 21, at 51.

²⁷ Olaniyan, above n 23, at 7.

²⁸ Cheru, above n 10, at 1271.

²⁹ Villaroman, above n 12, at 15.

should conduct a study on the RTD.³⁰ Subsequently, the Working Group of Government Experts on the Right to Development was established in 1981,³¹ resulting in extensive discussions within the General Assembly.³² The debate concerned the basis of the RTD and its justiciability and articulation.³³ The result was the creation of the United Nations Declaration on the Right to Development (UNDRTD).³⁴

2 *The UNDRTD and Sustainability*

The UNDRTD was adopted on 4 December 1986.³⁵ The United States of America cast the only negative vote, and eight nations abstained, all of which were developed countries.³⁶ The objection was due to a hesitancy to accept obligations to the international community, instead favouring State sovereignty and economic liberty.³⁷ The United States of America has been consistently opposed to any form of the RTD beyond “aspirational platitudes”.³⁸ Developed nations often argue that acceptance of a binding obligation would result in developing countries neglecting their domestic responsibilities for development.³⁹ The

³⁰ At 15.

³¹ *Report of the Working Group of governmental experts on the right to development* UN Doc E/CN4/1489 (11 February 1982) at 2.

³² Arjun Sengupta “On the Theory and Practice of the Right to Development” (2002) 24(4) *HumRtsQ* 837 at 839; and *Declaration on the Right to Development*, above n 2.

³³ At 840.

³⁴ At 839.

³⁵ *Declaration on the Right to Development*, above n 2.

³⁶ The eight countries that abstained were: Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden and the United Kingdom. *Declaration on the Right to Development*, above n 2; Arjun Sengupta, above n 32, at 40; and Sakiko Fukuda-Parr “The Right to Development: Reframing a New Discourse for the Twenty-First Century” *Social Research: An International Quarterly* 79 (2012) 839 at 859.

³⁷ Bonny Ibhawoh “The Right to Development: The Politics and Polemics of Power and Resistance” (2011) 33(1) *Hum Rights Q* 76 at 87.

³⁸ At 97.

³⁹ Enyinna Nwauche and Justice Nwobike “Implementing the Right to Development” (2005) 2 *J Hum Rights* 93 at 97.

politicisation of the RTD resulted in the UNDRTD being less radical than the movement proposed by the Group of 77.⁴⁰

The definition of the RTD under the UNDRTD fails to recognise the international obligations of the RTD. The definition focuses on the human rights component of the RTD describing it as:⁴¹

[A]n 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 realised.

Regardless, the UNDRTD does reflect aspects of developing States' perspective, in particular, emphasising the collective duty of states concerning development internationally.⁴² The UNDRTD recognises that development is about the improvement of the well-being of all individuals.⁴³ The RTD has a dual nature under the UNDRTD as it is recognised as both a collective and individual right reflecting the positions of both developed and developing countries.

The UNDRTD has recognised that cooperation is necessary to address development issues.⁴⁴ The focus on international cooperation reflects the position of developing countries with respect to the RTD. Art 6(1) refers to State cooperation for the promotion, encouraging and strengthening of human rights.⁴⁵ Article 3(3) and 4 provide for the obligation of States to cooperate and to form international development policies.⁴⁶

⁴⁰ Andrea Cornwall and Celestine Nyamu-Musembi "Why Rights, Why Now? Reflections on the Rise of Rights in International Development Discourse" (2005) 36(1) IDS Bull 9 at 12.

⁴¹ *Declaration on the Right to Development*, above n 2, art 1.

⁴² Art 4.

⁴³ *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, above n 6, at [4].

⁴⁴ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 11.

⁴⁵ *Declaration on the Right to Development*, above n 2, art 6(1).

⁴⁶ *Declaration on the Right to Development*, above n 2.

The UNDRTD recognises the connection between human rights and the RTD. The preamble of the UNDRTD reveals the importance of implementation of the rights under the International Covenant on Civil and Political Rights (ICCPR),⁴⁷ and International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁸ The importance of these two treaties and the close link to the UNDRTD is reiterated in art 1(1) and 6(2).⁴⁹

The Committee on Economic, Social and Cultural Rights (CESCR) has recognised how closely related the ICESCR is with the RTD as the rights within the ICESCR contribute directly to the economic, social and cultural aspects of development.⁵⁰ The CESCR has stated that by monitoring the implementation of the ICESCR, the CESCR contributes to monitoring the implementation of the RTD, although indirectly.⁵¹

The UNDRTD, like the ICESCR,⁵² has been criticised for being aspirational and having infinite implications as the scope of the RTD is wide and lacking in terms of monitoring mechanisms.⁵³ Due to the heavily politicised nature of the RTD, the UNDRTD has been unable to inspire significant international action,⁵⁴ as explored in Part IV.

The next major development related to the recognition of sustainability. There is a limited discussion within the UNDRTD as to environmental protections despite international

⁴⁷ *Declaration on the Right to Development*, above n 2; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

⁴⁸ *Declaration on the Right to Development*, above n 2; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976).

⁴⁹ Art 1(1) and 6(2).

⁵⁰ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 7.

⁵¹ *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, above n 6, at [7].

⁵² *Concluding Observations: Poland* UN Doc. C.12/POL/CO/5 (20 November 2009) at [9].

⁵³ Srirang Jha “A Critique of the Right to Development” (2012) 1(4) *JPG* 17 at 19 – 21; and Sakiko Fukuda-Parr, above n 36.

⁵⁴ Arts and Tamo, above n 11, at 229.

environmental law being well established by the time of the creation of the UNDRTD.⁵⁵ In 1992 the Rio Declaration on Environment and Development in Action remedied this issue by reaffirming the UNDRTD and provided 23 principles to guide States in sustainable development.⁵⁶ In 2002 the World Summit on Sustainable Development resulted in an implementation plan for sustainable development which explicitly references the RTD.⁵⁷ The implementation plan established three aspects of sustainable development which were economic development, social development and environmental protection.⁵⁸

Another major evolution of the RTD was the establishment of the eight Millennium Development Goals (MDGs) in 2000 focusing on poverty, hunger, child and maternal mortality rates, disease, education, gender inequality, environmental degradation and global partnership for development.⁵⁹ The MDGs global partnership reflected the position of developing countries and had significant impacts on development aid which increased by 66 per cent from 2000 to 2014.⁶⁰

In 2015 the RTD was provided renewed inspiration,⁶¹ through the 2030 Agenda for Sustainable Development which established a range of Sustainable Development Goals (SDGs).⁶² The SDGs build on the MDGs and seek to implement the RTD providing for a

⁵⁵ At 231.

⁵⁶ *Plan of Implementation of the World Summit on Sustainable Development* UN Doc A/CONF.199/L.7 (4 September 2002) at 34; and The Office of the United Nations High Commissioner for Human Rights, above n 7, at 13.

⁵⁷ *Plan of Implementation of the World Summit on Sustainable Development*, above n 56, at 3.

⁵⁸ Allan Boyle “Climate Change, Sustainable Development, and Human Rights” in Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds) *Sustainable Development Goals and Human Rights* (Springer Open, New York, 2020) 172 at 173.

⁵⁹ Marta Lomazzi, Bettina Borisch and Ulrich Laaser “The Millennium Development Goals: experiences, achievements and what’s next” (2014) 7(1) *Glob Health Action* 1 at 2.

⁶⁰ Cheru, above n 10, at 1276.

⁶¹ Arts and Tamo, above n 11.

⁶² Imme Scholz “Reflecting on the Right to Development from the Perspective of Global Environment Change and the 2030 Agenda for Sustainable Development” in Markus Kaltenborn, Markus Krajewski and Heike Kuhn (eds) *Sustainable Development Goals and Human Rights* (Springer Open, New York, 2020) 191 at 192; and *Transforming our world: the 2030 Agenda for Sustainable Development* GA Res 70/1, A/RES/70/1 (2015).

global partnership for sustainable development as per SDG 17.⁶³ Achieving the SDGs coincides with realisation of the RTD,⁶⁴ as the SDGs relate closely to economic, social, cultural and political rights. The MDGs and SDGs represent a tangible application of the RTD and the inclusion of global partnership under the MDGs and SDGs gives effect to the international dimension of the RTD.

As Scholz discusses, a tension exists between environmental protection and economic development with the latter often coming at the expense of the former.⁶⁵ In particular, developing countries have often felt that environmental protection is a barrier to development as economic use of natural wealth and resources is subjected to environmental provisions.⁶⁶ The United Nations Addis Ababa Action Agenda attempts to remedy this tension by establishing a global framework to coordinate finance with economic, social and environmental policies.⁶⁷ The 2030 Agenda for Sustainable Development integrates the United Nations Addis Ababa Action Agenda and has a particular focus on the perspective of developing countries.⁶⁸

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) has close ties to the RTD. The UNDRIP provides for many human rights which are closely associated with the RTD for indigenous people including the right to participate in decision making,⁶⁹ and the right to self-determination.⁷⁰ Importantly, art 23 provides specifically for indigenous peoples RTD.⁷¹

⁶³ Boyle, above n 58, at 173; and South Centre “The Right to Development at 30: Looking Back and Forward” *South Bulletin* (Geneva, 16 August 2016) at 9.

⁶⁴ United Nations Department of Economic and Social Affairs “The 17 Goals” <www.sdg.un.org>.

⁶⁵ Imme Scholz, above n 62, at 194.

⁶⁶ At 194.

⁶⁷ United Nations “Countries reach historic agreement to generate financing for new sustainable development agenda” <www.un.org>; and The Office of the United Nations High Commissioner for Human Rights, above n 7, at 14.

⁶⁸ At 14.

⁶⁹ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/296, A/RES61/296 (2007), art 18.

⁷⁰ Art 3.

⁷¹ Art 23.

The next major progression of the RTD is the consideration of whether a convention should be established. The UN Working Group on the Right to Development has drafted a convention, the DCRTD.⁷² The first draft was released on the 20 of January 2020 and reflects existing international legal instruments on the RTD.⁷³ The DCRTD substantially copies the definition of the RTD as under the UNDRTD,⁷⁴ adding principles such as sustainability which provides clarity for States in applying the RTD.⁷⁵ The DCRTD has yet to be scrutinised by States; however, the DCRTD places broader principles at the centre of the RTD,⁷⁶ avoiding discrete obligations to prevent further politicisation. States such as China, India, Egypt, Nigeria, and South Africa have supported the drafting of a convention.⁷⁷

III Legal Status and Parties of the Right to Development

Part III analyses the legal status of the RTD and identifies the right holders and duty bearers of the RTD. An understanding of the legal enforceability of the RTD is necessary to examine how the RTD may be implemented. Furthermore, recognition of right holders and duty bearers provides a basis for holding duty bearers accountable to the RTD.

A Legal status

The UNDRTD does not provide a legal basis for the RTD as it is a soft law instrument.⁷⁸ The RTD is often perceived as a political and moral right with the UNDRTD taking development “out of the realm of voluntariness and charity and into the sphere of rights

⁷² *Draft Convention on the Right to Development, with commentaries*, above n 4.

⁷³ *Draft Convention on the Right to Development, with commentaries*, above n 4.

⁷⁴ Art 4.

⁷⁵ Art 3.

⁷⁶ *Draft Convention on the Right to Development, with commentaries*, above n 4.

⁷⁷ *Report of the Working Group on the Right to Development on its twentieth session* (Geneva, 29 April to 3 May 2019) UN Doc A/HRC/42/35 (25 June 2019) at 6.

⁷⁸ Serges Djoyou Kamga *The Right to Development in the African Human Rights System* (Routledge, London, 2018) at 98; and, Villaroman, above n 12, at 17.

and required international cooperation.”⁷⁹ Article 38(1) of the Statute of the International Court of Justice provides that for the RTD to be legally binding under international human rights law the right must derive from an international treaty, custom or the general principles of international law.⁸⁰ Although the UNDRTD does not fit within these conditions, given its nature as a cluster right, core elements of the RTD, have been included in legally binding instruments.

The Charter of the United Nations and the international covenants on human rights recognise key aspects of the RTD in a legally binding manner.⁸¹ For example, self-determination in art 1 of the UNDRTD, also forms part of the ICESCR and the ICCPR.⁸² Other examples of overlap include art 11 of the ICESCR which provides for many aspects of the RTD, including rights relating to housing, food and clothing.⁸³

The RTD also features in regional instruments.⁸⁴ Notably, art 22 of the 1981 African Charter on Human and Peoples’ Rights (the African Charter) refers to the RTD.⁸⁵ The African Commission on Human and Peoples Rights (the African Commission), which deals with complaints relating to the African Charter, found the RTD to be justiciable.⁸⁶ In the *Endorois* case, which is discussed in more detail below, Kenya was found to have breached the RTD by failing to involve the Endorois people in decision-making processes and not equitably allocating the benefits of development.⁸⁷

⁷⁹ Arts and Tamo, above n 11, at 222.

⁸⁰ Polly Vizard *Poverty and Human Rights: Sen’s ‘Capability Perspective’ Explored* (Oxford University Press, Oxford, 2006) at 142.

⁸¹ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 5.

⁸² At 5.

⁸³ International Covenant on Economic, Social and Cultural Rights, above n 48, art 11.

⁸⁴ Serges Djoyou Kamga and Charles Manga Fombad “A Critical Review of the Jurisprudence of the African Commission on the Right to Development” (2013) 57(2) JAfrL 196 at 201.

⁸⁵ The African Charter on Human and Peoples’ Rights 1520 UNTS 217 (adopted on 27 June 1981, entered into force on 21 October 1986) art 22.

⁸⁶ Kamga, above n 78, at 206.

⁸⁷ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 9.

Although, the RTD is not binding under the UNDRTD, it is evident that there are other ways in which the RTD has been given legal force. However, the scattered nature of these instruments hinders State recognition of the RTD as discussed below.

B Duty Bearers and Right Holders

The duty bearers and right holders of the RTD may be challenging to identify. From a human rights perspective, the duty bearer of the RTD will be the State.⁸⁸ Article 3(1) of the UNDRTD provides that “States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development”.⁸⁹ This paper concerns States obligations domestically and internationally with respect to the RTD. International obligations include aiding other states in the RTD through cooperation as provided for in art 6(1),⁹⁰ and creating conditions favourable to the achievement of the RTD.⁹¹ The international dimension of the RTD “entails the obligation of all States to cooperate in ensuring the right to development around the globe”,⁹² which is the novel aspect described in Villaroman’s definition above.

For right holders, an issue in determination arises as the UNDRTD expresses the RTD as both an individual and a collective right,⁹³ as evidenced by the use of the right in relation to “every human person” and “all peoples”.⁹⁴ The dual nature of the right reflects the tension between developed countries individualistic conception of rights and developing countries collective conception of rights.⁹⁵ The Office of the United Nations High

⁸⁸ Morten Broberg and Hans-Otto Sano “Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences” (2018) 22(5) IJHR 664 at 667.

⁸⁹ *Declaration on the Right to Development*, above n 2, art 3(1).

⁹⁰ Art 6(1).

⁹¹ Art 3(1).

⁹² Vandenbogaerde, above n 14, at 198.

⁹³ Arts and Tamo, above n 11, at 222.

⁹⁴ At 222.

⁹⁵ Arjun Sengupta “Right to Development as a Human Right” (2001) 36 Econ Polit Wkly 2527 at 2533.

Commissioner for Human Rights (OHCHR) states that development policies should focus on individuals.⁹⁶ However, groups also have the RTD as seen in the *Endorois* case.⁹⁷ Several distinct groups of people, such as indigenous people may be properly identified as right holders.⁹⁸ The applications of OHCHR and the African Commission in the *Endorois* case, discussed in detail below, reflect the tension arising due to the dual nature of the RTD.

Another issue arises in identifying representation for right holders as there are significant practical difficulties in invoking the RTD. There is little empowerment of right holders due to the lack of a comprehensive binding instrument on the RTD and subsequent absence of implementation mechanisms.⁹⁹ Therefore, right holders are unable to hold States accountable for domestic obligations due to the lack of representation and mechanisms necessary for right holders to exercise their rights.

Implementation mechanisms of the CESCR may provide an avenue for accountability for the RTD. The CESCR requires State parties to submit regular reports to monitor individual countries compliance with their obligations, which offers an avenue for the monitoring of aspects of the RTD.¹⁰⁰ Furthermore, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights provides an individual complaints mechanism to the CESCR.¹⁰¹ The complaints mechanisms allows for complaints to be made with respect to aspects of the RTD. However, an implementation mechanism which allows right holders to bring claims directly under the RTD would be beneficial in providing a forum for right holders to voice concerns relating to all aspects of the RTD.

⁹⁶ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 13.

⁹⁷ At 9.

⁹⁸ Villaroman, above n 12, at 21; and Georges Abi-saab “The Legal Formulation of a Right to Development” in Rene-Jean Dupuy (ed) *The Right to Development at the International Level* (Martinus Nijhoff Publishers, The Hague, 1980) 159 at 163.

⁹⁹ Obiora Chinedu Okafor “International Accountability in the Implementation of the Right to Development” (18 December 2019) Dalhousie University <www.dal.ca>.

¹⁰⁰ United Nations Human Rights Office of the High Commissioner “Monitoring the economic, social and cultural rights” <www.ohchr.org>.

¹⁰¹ *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* GA Res 63/117 (2008).

IV Issues of Implementation of the Right to Development

The UNDRTD has not resulted in significant implementation efforts.¹⁰² There are a few examples of direct implementation of the RTD, such as, the inclusion within the African Charter, as described above, and the recognition of the Supreme Court of India, as described in Part V. There is a Special Rapporteur on the RTD; however, reporting is only undertaken upon State invitation.¹⁰³ The MDGs and SDGs, as described above, represent an implementation of the RTD; however, do not explicitly refer to the RTD as articulated at international law. In July 2019, guidelines and recommendations were created regarding the practical implementation of the RTD.¹⁰⁴ Aside from these limited circumstances, there has been a widespread disregard of the RTD. Part IV endeavours to understand the reasons behind the lack of implementation of the RTD by States and the consequences of those issues with respect to implementation.

A Issues

There are various issues which have hindered implementation and effectiveness of the RTD. The politicisation and broadness of the RTD have resulted in ambiguity leading to a lack of State recognition highlighting the need for a comprehensive implementation mechanism.

The definition of the RTD is ambiguous. As discussed above, the UNDRTD provides for a broad definition.¹⁰⁵ The RTD is often criticised as being too broad and has been referred

¹⁰² Arts and Tamo, above n 11, at 222.

¹⁰³ *Report of the Special Rapporteur on the right to development on his mission to Switzerland* UN Doc A/HRC/45/15/Add.1 (5 August 2020) at 1; and *Report of the Special Rapporteur on the right to development on his visit to Cabo Verde* UN Doc A/HRC/42/38/Add.1 (26 July 2019).

¹⁰⁴ *Report of the Special Rapporteur on the right to development* UN Doc A/HRC/42/38 (July 2019).

¹⁰⁵ *Declaration on the Right to Development*, above n 2, art 1.

to as a right of everything.¹⁰⁶ Critiques suggest that the RTD amalgamates existing individual human rights rather than creating any novel rights.¹⁰⁷ The vague language used by the UNDRTD makes the RTD difficult to apply in practice.¹⁰⁸ The broadness of definitions across various instruments and academia reflects the inherent broadness and the politicisation of the RTD, which has resulted in the consolidation of various perspectives.

The dual nature of the RTD presents challenges in terms of recognising right holders and duty bearers. The RTD is a third-generation right,¹⁰⁹ which means that the RTD is collective and requires international responsibility.¹¹⁰ Many argue conceptualising the RTD as a collective right gives the right greater usability and creates novel rights beyond that of existing human rights conventions.¹¹¹ However, an individualistic conception makes it easier for a claim to be brought before human rights bodies.¹¹² Regardless, the dual dimension creates ambiguity as it allows for two different perspectives concerning the RTD. From an individualistic perspective, the RTD is the “synthesis of all human rights”.¹¹³ Whereas, from a collective perspective, the RTD represents the “creation of favourable conditions for general human development.”¹¹⁴ The two distinct perspectives inhibit comprehensive implementation of the RTD.

¹⁰⁶ Koen de Feyter “Towards a Framework Convention on the Right to Development” (paper presented to Dialogue on Globalisation, Berlin, April 2013); Villaroman, above n 12, at 16; and Yash Ghai and YK Pao *Whose Human Right to Development?* (Commonwealth Secretariat, Human Rights Unit Occasional Paper, 1989) at 13.

¹⁰⁷ Villaroman, above n 12, at 16.

¹⁰⁸ Isabella Bunn “The Right to Development: Implications for International Economic Law” (2000) *American University International Law Review* 15(6) 1425 at 1434; and Feyter, above n 106.

¹⁰⁹ Patrick Macklem “Human rights in international law: three generations or one?” (2015) 3(1) *LRIL* 61 at 74.

¹¹⁰ Spasimir Domaradzki, Margaryta Khvostova and David Pupovac “Karel Vasak’s Generations of Rights and the Contemporary Human Rights Discourse” (2019) 20 *Hum Rights Rev* 423 at 426.

¹¹¹ Villaroman, above n 12, at 21; and Mohammed Bedjaoui, above n 1, at 1182.

¹¹² Sengupta, above n 95, at 2528.

¹¹³ Olesia Perean “Issues on the Right to Development” (MA Essay, University of Essex, August 2015) at 5.

¹¹⁴ At 5.

B Consequences

The ambiguity addressed above allows for varying perspectives to be taken with respect to the RTD.¹¹⁵ The flexibility could be perceived as a positive as it allows for States to adapt the RTD to fit domestic contexts. However, flexibility is also problematic as States may take a view of the RTD that coincides with their own agenda, which is a particular problem for the RTD given its politicised nature. For example, the Special Rapporteur implicitly criticised the government of Switzerland for failing to meet international obligations under the RTD due to the governments focus on domestic implementation.¹¹⁶

The ambiguity has also allowed many developed States to entirely disregard the RTD.¹¹⁷ The lack of State recognition is found in New Zealand, as discussed below. The continued disregard of the RTD by States make recent attempts at creating guidelines for practical implementation on the RTD ineffective. There is a need for an implementation mechanism to ensure accountability and provide guidance as to the obligations of duty bearers.

The traditional debate between developed and developing countries continues,¹¹⁸ with division over duties and international cooperation.¹¹⁹ Implementation of the UNDRTD requires consistent accountability through monitoring and measurement; however, the establishment of measures has been hindered by political considerations.¹²⁰ The United States of America has resisted any form of indicators for the RTD.¹²¹ However, the European Union has supported quantitative and qualitative indicators of development.¹²²

¹¹⁵ Anne Orford “Globalization and the Right to Development” in Philip Alston (ed) *Peoples’ Rights* (Oxford University Press, Oxford, 2001) 127 at 132.

¹¹⁶ *Report of the Special Rapporteur on the right to development on his mission to Switzerland*, above n 103, at 17.

¹¹⁷ Paul Quintos “Reclaiming the Right to Development” (21 November 2011) Our World <www.ourworld.unu.edu>.

¹¹⁸ Bonny Ibhawoh, above n 37, at 77.

¹¹⁹ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 16.

¹²⁰ Arts and Tamo, above n 11, at 224.

¹²¹ Bonny Ibhawoh, above n 37, at 97.

¹²² *Report of the Working Group on the Right to Development on its sixteenth session* (Geneva, 27 April, 1-4 September 2015) UN Doc A/HRC/30/71 (28 October 2015) at [61].

The SDGs are used by the Special Rapporteur on the RTD as a means of tracking compliance with the RTD,¹²³ providing for broad categories to analyse the RTD.

The ambiguity and politicised nature of the RTD makes implementation and accountability inconsistent and elusive. The next section explores the implementation of the RTD in New Zealand.

V Implementation of the Right to Development by New Zealand

The RTD is often associated with developing countries; however, the RTD is just as important in developed countries.¹²⁴ Sengupta outlines that there is an obligation both nationally and internationally.¹²⁵ Developed countries, like New Zealand, are responsible for the development of their own populations and for the creation of favourable international conditions for development.¹²⁶

This part of the paper will expand on the analysis of the implementation of the RTD by using New Zealand as a case study. The analysis considers New Zealand's domestic obligations and international obligations. Nationally, the recognition of the RTD with respect to New Zealand's indigenous people will be examined. Internationally, New Zealand's role with development aid in the Pacific will be analysed. New Zealand has evidenced support for the RTD.¹²⁷ However, it recognises a more individualistic

¹²³ *Report of the Special Rapporteur on the right to development on his visit to Cabo Verde*, above n 103, at 7.

¹²⁴ Wade Mansell and Joanne Scott "Why bother about the right to development?" (1994) 21(2) *J Law Soc* 171.

¹²⁵ Nwauche and Nwobike, above n 39, at 97.

¹²⁶ Meredith Gibbs "The Right to Development and Indigenous Peoples: Lessons from New Zealand" (2005) 33(8) *World Development* 1365 at 1375.

¹²⁷ Andrew Little, Minister of Justice "New Zealand statement to the 37th session of the United Nations Human Rights Council" (speech to the United Nations Human Rights Council, Geneva, March 2018); and Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 235.

conception of the RTD “with the individual as the central subject ... the active participant and beneficiary.”¹²⁸

A Domestic Right to Development and Māori

The RTD applies to many of New Zealand’s most significant challenges, including child poverty and social housing. However, Māori as New Zealand’s indigenous peoples are a group which have endured significant historical grievances resulting in contemporary social and economic disparity from the general population of New Zealand. The inequality manifests itself in terms of health and economic standard of living.¹²⁹ Therefore, for these reasons, the RTD is pertinent to Māori.

The collective nature of the RTD coincides well with te ao Māori, the Māori world view, which recognises the interconnectedness of issues and focuses on collective well-being.¹³⁰ However, as described above, the New Zealand government appear to focus on an individualistic conception of the RTD perhaps hindering full recognition of the RTD. Application of the RTD in New Zealand has arisen with respect to fishing rights,¹³¹ the radio spectrum,¹³² and petroleum resources¹³³ as recognised by the Waitangi Tribunal (the Tribunal). However, the courts have been more reluctant in consideration of the RTD resulting in suppression of Māori interests. The RTD does not claim to be a panacea for Māori; however, a consideration of the RTD may provide a new perspective to analyse the issues.

1 Recognition of the Right to Development

¹²⁸ Little, above n 127.

¹²⁹ Lisa Marriott and Dalice Sim “Indicators of Inequality for Māori and Pacific People” (Working Paper in Public Finance, Victoria University of Wellington, August 2014).

¹³⁰ Grant Berghan “What does a collective identity mean from a Māori point of view?” (March 2007) Hauora <www.hauora.co.nz> at 1.

¹³¹ *Muriwhenua Fishing Claim Report*, above n 127.

¹³² Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 776, 1999).

¹³³ Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003).

In New Zealand, the RTD can be read into the Treaty,¹³⁴ which is New Zealand's founding document representing a relationship between Māori and European settlers. The Tribunal has found the RTD to be within the context of partnership as a principle of the Treaty.¹³⁵ The Treaty is often viewed as an enforceable international treaty.¹³⁶ However, the Treaty is only directly enforceable if incorporated in statute.¹³⁷

The Tribunal has recognised the RTD in terms of resources of Māori.¹³⁸ In 1988 the Tribunal discussed the RTD in the Muriwhenua Fishing Claim Report, making explicit reference to the UNDRTD.¹³⁹ The report stated that the Treaty provided a development right for Māori.¹⁴⁰ The RTD in this context allowed for a development of fisheries beyond those traditionally fished and was reiterated in the Ngai Tahu Sea Fisheries Report.¹⁴¹ The Tribunal found that the right of Māori to develop resources is not confined to traditional use and “includes the development of the resource for economic benefit and by modern technology.”¹⁴²

The most comprehensive articulation of the RTD was in the Radio Spectrum Management and Development Final Report which acknowledged the RTD for Māori people rather than just resources.¹⁴³ The majority finding of the Tribunal recognised the RTD on three

¹³⁴ Edward Greig “The Māori Right to Development and New Forms of Property” (LLB (Hons) Dissertation, University of Otago, 2010) at 3; and *Muriwhenua Fishing Report*, above n 127, at 235.

¹³⁵ At 5; *Muriwhenua Fishing Report*, above n 127, at 235 and Melanie Jayne Jagusch “Māori Property and Commercial Rights to Freshwater: The Potential for Recognition and Redress following Judicial Decisions in 2012 – 2013” (LLB (Hons) Dissertation, University of Otago, 2013) at 36.

¹³⁶ Matthew Palmer *The Treaty of Waitangi In New Zealand's law and constitution* (Victoria University Press, Wellington, 2008) at 167.

¹³⁷ Mark Barrett and Kim Connolly-Stone *The Treaty of Waitangi and Social Policy* (Ministry of Social Development, December 1998) at 6; Ministry of Justice “Treaty of Waitangi” <www.justice.govt.nz>; *New Zealand Māori Council v Attorney-General* [2008] 1 NZLR 318 at [63]; and *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 591.

¹³⁸ Gibbs, above n 126, at 1369.

¹³⁹ *Muriwhenua Fishing Report*, above n 127, at 235.

¹⁴⁰ At 235.

¹⁴¹ Waitangi Tribunal *Ngai Tahu Sea Fisheries Report* (Wai 27, 1992) at 254.

¹⁴² Waitangi Tribunal *Te Arawa Representative Geothermal Resource Claims* (Wai 153, 1993) at 34.

¹⁴³ *Radio Spectrum Management and Development Final Report*, above n 132, at 30.

levels.¹⁴⁴ First, “the right to develop resources to which Māori had customary and traditional uses prior to the Treaty”.¹⁴⁵ Secondly, “the right of the partnership principle to develop to include resources not known about or used in a traditional manner at 1840”.¹⁴⁶ Thirdly, “the right of Māori to develop their culture, their language and their social and economic status using whatever means are available.”¹⁴⁷

In the He Maunga Rongo Report, it was found that the RTD for Māori included developing properties and existed with respect geothermal features.¹⁴⁸ In 2015 the RTD was discussed in the Report on the Māori Community Development Act Claim,¹⁴⁹ in which the Tribunal emphasised the right to develop their own institutions of self-government being within the Māori RTD.¹⁵⁰

The New Zealand government has also recognised the importance of development with respect to Māori through New Zealand’s voluntary national reporting on the progress of SDGs.¹⁵¹ The 2019 voluntary national report identifies Māori disparity and is evidence of a commitment to achieving the SDG’s and subsequently Māori development.

The executive, in particular central government agencies, are also taking positive steps towards Māori development. The Māori Economic Development Strategy created by the Ministry of Business Innovation and Employment is a movement in the right direction. The Māori Economic Development Strategy has six objectives these are greater educational participation and performance, establishment of a skilled workforce, increased financial literacy, greater government partnership with Māori, more discussions about development

¹⁴⁴ At 53.

¹⁴⁵ At 62.

¹⁴⁶ At 63.

¹⁴⁷ At 63.

¹⁴⁸ Waitangi Tribunal *Radio Spectrum Management and Development Final Report* (Wai 1200, 2008) at 1593.

¹⁴⁹ Waitangi Tribunal *Whaia te Mana Motuhake In Pursuit of Mana Motuhake* (Wai 2417, 2015).

¹⁵⁰ At 32.

¹⁵¹ Ministry of Foreign Affairs and Trade *He Waka Eke Noa Towards a Better Future Together: New Zealand’s Progress Towards the SDGs* (2019).

of natural resources and the use of Māori Inc to generate growth.¹⁵² Māori Inc is a unique idea which envisages Māori working together to drive economic growth.¹⁵³ However, these initiatives make no specific reference to principles of the RTD. The RTD may help guide the progress of New Zealand government and allow for a consideration of the broader aspects of development.

2 Failures in Implementation

Despite Tribunal recognition of the RTD with respect to resources, socio-economic and participation components; the New Zealand courts have been reluctant to recognise the RTD. In general, the decisions of the Tribunal are non-binding on the courts;¹⁵⁴ therefore, there is no obligation for courts to follow Tribunal findings. The New Zealand courts have engaged in a limited discussion of the RTD concerning resources; however, have yet to consider the RTD in terms of social and economic disparity.¹⁵⁵ The most direct reference to the RTD was in *Taranaki Fish & Game Council v McRitchie* in which Becroft J made explicit reference to the UNDRTD, and found that the defendants were able to fish species introduced since the signing of the Treaty.¹⁵⁶ However, the Court of Appeal overturned the decision, without reference to the RTD, on the basis of a particular statutory code.¹⁵⁷ It is important to note that the decision was on a technicality and that the Court of Appeal later upheld that Māori fishing rights may develop from that of traditional practices; however, once again without direct reference to the RTD.¹⁵⁸

¹⁵² Ministry of Business Innovation and Employment *The Crown-Māori Economic Growth Partnership* (November 2012) at 4.

¹⁵³ At 4.

¹⁵⁴ Waitangi Tribunal *Guide to the Practice and Procedure of the Waitangi Tribunal* (2012) at 10.

¹⁵⁵ Greig, above n 134, at 18.

¹⁵⁶ *Taranaki Fish & Game Council v McRitchie* [1997] DCR 446 at 470; and Catherine Irons Magallanes “International Human Rights and their Impact on Domestic Law on Indigenous Peoples’ Rights in Australia, Canada, and New Zealand” in Paul Havemann (ed) *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (Oxford University Press, Auckland, 1999) at 262.

¹⁵⁷ *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 at 147.

¹⁵⁸ *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

A comparison may be drawn with the Canadian courts. The New Zealand courts have demonstrated a reluctance to follow Canadian decisions due to the different constitutional context.¹⁵⁹ The Canadian Constitution Act 1982, officially recognises the rights of indigenous people,¹⁶⁰ which provides the Canadian courts with a stronger basis to recognise the RTD of indigenous peoples. However, the Canadian courts have followed a similar reasoning to New Zealand courts. The case of *R v Morris* established that changes in methods of traditional activities did not impact the right of indigenous people to carry out those activities.¹⁶¹ Like New Zealand, Canada does not have a perfect track record with respect to indigenous peoples,¹⁶² and substantially comes to similar conclusions as to the New Zealand courts.¹⁶³ Therefore, New Zealand courts are not unique in failure to recognise indigenous peoples RTD.

Furthermore, even the Tribunal's recognition of "the right of Māori to develop ... their social and economic status using whatever means are available"¹⁶⁴ does not go far enough. The qualification of "using whatever means are available" provides recognition of Māori as right holders of economic and social elements of development; however, does not recognise the obligations of the State as duty bearer. The broadness of the RTD and lack of practical implementation mechanisms allows for the New Zealand government to ignore its role as duty bearer of the RTD. The ambiguity of the UNDRTD has prevented any meaningful dialogue surrounding the RTD in New Zealand.

New Zealand has failed in the application of the provisions of the RTD, which are most relevant to indigenous people such as self-determination. The UNDRTD in art 1(2) specifically mentions the right to self -determination including, full sovereignty over their

¹⁵⁹ *New Zealand Māori Council*, above n 137, at [81].

¹⁶⁰ Constitution Act C 1982 s 35(1).

¹⁶¹ *R v Morris* [2006] 2 SCR 915 at [33].

¹⁶² *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya* UN Doc A/HRC/27/52/Add.2 (4 July 2014) at 20.

¹⁶³ Greig, above n 134, at 35.

¹⁶⁴ *Radio Spectrum Management and Development Final Report*, above n 132, at 63.

natural wealth and resources.¹⁶⁵ The reference to self-determination within the RTD is often formulated around decolonisation,¹⁶⁶ and provides only limited self-government within the State's framework rather than full political independence.¹⁶⁷ Therefore, the calls for new constitutional models for Māori¹⁶⁸ are not sanctioned by the RTD. However, self-determination under the RTD plays a significant role in recognising sovereignty over resources. New Zealand has been improving within this area through the establishment of various resources co-management arrangements with Māori.¹⁶⁹

New Zealand also evidenced hesitancy in adoption of the UNDRIP,¹⁷⁰ which as described above is vital for the realisation of the RTD with respect to indigenous peoples. Despite New Zealand's recent support of the UNDRIP,¹⁷¹ the government has previously indicated that the UNDRIP is aspirational¹⁷² failing to fully recognise the State's role with respect to the RTD and indigenous peoples.

The UNDRTD also ensures effective participation, equality, and non-discrimination under article 2(3).¹⁷³ Participation is a vital aspect of the RTD and a key feature discussed by the Special Rapporteur on the RTD in terms of implementation.¹⁷⁴ Māori may question the extent to which they have effective participation in New Zealand's legal and political sphere. James Anaya, Special Rapporteur on the rights of indigenous peoples, found that

¹⁶⁵ *Declaration on the Right to Development*, above n 2, art 1(2).

¹⁶⁶ Nicholas Schrijver "Self-determination of peoples and sovereignty over natural wealth and resources" in *Realising the Right to Development* (United Nations Publications, 2013) 95 at 100.

¹⁶⁷ At 98.

¹⁶⁸ Matike Mai Aotearoa *The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (Iwi Chairs' Forum, January 2016).

¹⁶⁹ Samuel Wevers "Recognising Rangatiratanga: Sharing Power with Māori through Co-Management" (LLB (Hons) Dissertation, University of Otago, 2011) at 62.

¹⁷⁰ Survival International "New Zealand finally supports UN Declaration on indigenous rights" (20 April 2010) <www.survivalinternational.org>.

¹⁷¹ *United Nations Declaration on the Rights of Indigenous Peoples*, above n 69.

¹⁷² John Key "National Govt to support UN rights declaration" (press release, 20 April, 2010).

¹⁷³ *Declaration on the Right to Development*, above n 2, art 2(3).

¹⁷⁴ *Report of the Special Rapporteur on the right to development*, above n 104, at 5.

Māori participation is vulnerable to being overridden by majority interests.¹⁷⁵ The Universal Periodic Review in 2019 further emphasised the need for greater partnership between Māori and the New Zealand government.¹⁷⁶

The failure of recognition has contributed to inequality for indigenous people in New Zealand. The 2019 Universal Periodic Review found that Māori had lower life expectancy and higher unemployment rates.¹⁷⁷ Māori also experience a range of other social issues which reflect social and economic inequality. In particular, Māori have a high imprisonment rate relative to their proportion of the overall population. Of those incarcerated in New Zealand, 52.8 per cent are Māori,¹⁷⁸ despite Māori only making up 16.5 per cent of the total population of New Zealand.¹⁷⁹

In addressing, social and economic inequality, Māori may only enforce responsibility through voting in general elections; however, given their minority representation, this is ineffective. However, Māori may be able to leverage international human rights instruments. As Koen De Feyter argues the RTD in a domestic context is already recognised through human rights obligations.¹⁸⁰ Thus, Māori may not require explicit judicial recognition of the RTD; however, they may campaign for the New Zealand government to ratify the Optional Protocol of the CESCR which establishes an individual complaint process.¹⁸¹ New Zealand has yet to take action with respect to the Optional

¹⁷⁵ James Anaya *Report of the Special Rapporteur on the rights of indigenous peoples* UN Doc A/HRC/18/35/Add.4 (31 May 2011) at [14].

¹⁷⁶ *Report of the Working Group on the Universal Periodic Review* UN Doc A/HRC/41/4 (1 April 2019) at 7.

¹⁷⁷ *Report of the Working Group on the Universal Periodic Review* UN Doc A/HRC/41/4/Add.1 (17 June 2019) at 3.

¹⁷⁸ Department of Corrections “Prison Statistics: March 2020” <www.corrections.govt.nz>.

¹⁷⁹ Stats NZ “New Zealand’s population reflects growing diversity” <www.stats.govt.nz>.

¹⁸⁰ Koen De Feyter “Towards A Multi-Stakeholder Agreement on the Right to Development” in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 97 at 104.

¹⁸¹ United Nations Human Rights Office of the High Commissioner “Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” <www.ohchr.org>; *Optional Protocol*, above n 101.

Protocol.¹⁸² The complaint mechanism would provide an avenue for Māori to exercise the RTD indirectly; however, the mechanism may be criticised as weak due to its extensive eligibility criteria.¹⁸³

Another counterargument to the use of the Optional Protocol is that there is an advantage for Māori in the RTD specifically. The RTD provides a holistic overview of development which is beneficial as Māori suffer from systemic disadvantages as a result of a range of factors.¹⁸⁴ Therefore, a human rights conception which looks at specific rights may be detrimental in considering the wider aspects of Māori disparity.

3 Potential Applicability of the Right to Development

The limited acceptance of the RTD restricts Māori in New Zealand. The Tribunal has attempted to apply the RTD in various instances; however, there is a lack of recognition through the New Zealand courts to recognise the RTD. The failure is reflective of the broadness of the RTD. The SDGs provide a useful means of measuring the RTD. Reports on New Zealand's progress with respect to the SDGs highlight social and economic disparity for Māori.¹⁸⁵ The failure of implementation contributes to the failing of the SDGs for Māori who suffer disproportionately from lower education, health, income, housing, and incarceration outcomes.¹⁸⁶

¹⁸² Ministry of Justice “Constitutional Issues and Human Rights” (19 August 2020) <www.justice.govt.nz>; and Judy McGregor, Sylvia Bell and Margaret Wilson “The impact of economic and social human rights in New Zealand case law” 21(1) AJHR 143 at 145.

¹⁸³ Malcolm Langford “Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2009) 27 NR 1 at 2.

¹⁸⁴ Paulette Ripikoi “Wairua and Wellbeing: Exploratory perspectives from Wāhine Māori” (MSc Dissertation, Massey University, 2015) at 5.

¹⁸⁵ Ministry Foreign Affairs and Trade *New Zealand Voluntary National Review 2019* (July 2019).

¹⁸⁶ Victoria University of Wellington *The People's Report on the 2030 Agenda and Sustainable Development Goals: An alternate report for Aotearoa New Zealand* (2019) at 11.

On a practical level, the lack of recognition by the courts limits the justiciability of the RTD. The recognition of the RTD through the courts would provide a form of enforcement helping ensure that New Zealand upholds the RTD. As outlined by the Tribunal, the RTD is relevant to the socio-economic development of Māori and in upholding participatory rights.

The New Zealand Judiciary should follow the Supreme Court of India as an example of implementation of the RTD.¹⁸⁷ The UNDRTD has been implemented in India through the use of Directive Principles of State Policies and Fundamental Rights under the Indian Constitution, which focus on social and economic equality.¹⁸⁸ The Supreme Court of India has explicitly recognised the RTD in 25 distinct cases focusing on disadvantage groups.¹⁸⁹ Māori are a significantly disadvantaged group and the Indian Supreme Court has shown how the judiciary may use the RTD in protecting a disadvantaged group. The courts have found that disadvantaged groups should be provided benefits through alteration of distribution.¹⁹⁰ The Supreme Court used the UNDRTD directly in the *Murlidhar Dayandeo Kesekar v Vishwanath Pandu Barde*, to prevent the alienation of lands from a group of indigenous people.¹⁹¹

Another instance of justiciability of the RTD is the *Endorois* case decided in 2010, which evidences how the RTD can be applied to indigenous people in a quasi-judicial setting.¹⁹² The Endorois are indigenous people with a population of around 60,000 who occupy an area near the Lake Bogoria in Kenya.¹⁹³ The Kenyan government established the Lake Bogoria Game Reserve which restricted access of Endorois to their traditional lands impacting the livelihoods of the Endorois.¹⁹⁴ The African Commission found this to be in

¹⁸⁷ Dharmendra Singh “Galvanisation of the Right to Development within the Shared Constitutional Space in India” (2018) 19(2) Asia Pac J Hum Right Law 268 at 273.

¹⁸⁸ Constitution of India 2007, Part III and IV (India).

¹⁸⁹ Singh, above n 187, at 278.

¹⁹⁰ At 278; and *Devati Balasubrahmanyam v District Collector, Nellore* (1986) 2 ALT 1.

¹⁹¹ *Murlidhar Dayandeo Kesekar v Vishwanath Pandu Barde* MANU/SC/1046 (1995) at [10].

¹⁹² The Office of the United Nations High Commissioner for Human Rights, above n 7, at 9.

¹⁹³ At 9.

¹⁹⁴ At 9.

breach of the RTD as under the African Charter.¹⁹⁵ The Endorois had been insufficiently consulted, and their free prior and informed consent had not been obtained.¹⁹⁶ The Endorois also did not receive a fair share of the benefits of the reserve.¹⁹⁷ The analysis by the African Commission emphasises the role which the RTD may play in terms of encouraging indigenous peoples participation and mitigating disparity.

The basis for that decision was a regional instrument, the African Charter, that made the RTD binding.¹⁹⁸ Whereas, in New Zealand the legal uncertainty of the Treaty has allowed for the New Zealand courts to continually ignore the social and economic inequality which Māori continually suffer.¹⁹⁹

Greater recognition of the RTD will not solve all issues for Māori. However, it will allow for a holistic overview of development which may prevent New Zealand from seeing Māori issues in silos and allow for more robust solutions for economic and social issues. The more holistic approach to development under the RTD better coincides with Māori perceptions of well-being which have a more holistic focus,²⁰⁰ and the interconnected nature of te ao Māori.²⁰¹ The RTD coincides well with Māori due to its comprehensive articulation as compared to an individualistic human rights approach which may disregard broader contextual factors.

4 Conclusion

New Zealand fails to recognise the RTD despite its relevance for Māori development. However, it is important to recognise that New Zealand is in no way bound internationally or domestically to implement the RTD as the UNDRTD is soft law. The ambiguous nature of the UNDRTD makes explicit recognition of the RTD difficult for the New Zealand

¹⁹⁵ At 9.

¹⁹⁶ At 9.

¹⁹⁷ At 9.

¹⁹⁸ The African Charter on Human and Peoples' Rights, above n 85, art 22.

¹⁹⁹ Ministry of Social Development "Reducing Inequalities" <www.msd.govt.nz>.

²⁰⁰ Paulette Ripikoi, above n 184, at 22.

²⁰¹ Te Ara "Te Ao Mārama – the natural world" <www.teara.govt.nz>.

government. Furthermore, the RTD under the Treaty will only be implemented if incorporated in statute.

The Tribunal has provided significant recognition to the RTD; however, the New Zealand courts have remained reluctant. The cases of the Supreme Court in India and the African Commission reveal the benefits of upholding the RTD in a judicial setting. Recognition of the RTD coincides well with the holistic nature of Māori culture. Thus, the New Zealand courts should consider application of the RTD in achieving similar outcomes to reduce the social and economic disparities that exist within New Zealand society.

B International Right to Development and the Pacific

The RTD also establishes international obligations as the UNDRTD provides for international cooperation and the creation of international conditions favourable for the realisation of the RTD.²⁰² These obligations are not binding; however, are essential to the realisation of the RTD. The Pacific provides a lens for which New Zealand's international RTD obligations may be analysed. New Zealand's role in the Pacific is a contemporary issue which has recently been inquired into by Parliament.²⁰³

Pacific nations experience challenges relating to limited natural resources, physical distance from overseas markets and vulnerability to external shocks.²⁰⁴ The Pacific islands are also particularly vulnerable to the effects of climate change.²⁰⁵ The Pacific and Development Group within the Ministry of Foreign Affairs and Trade (MFAT) manages New Zealand's development role in the Pacific.²⁰⁶ MFAT has Official Development Assistance (ODA) funding, of which Pacific nations receive 60 per cent.²⁰⁷ Empirical evidence suggests that aid has positive impacts on economic growth and human

²⁰² *Declaration on the Right to Development*, above n 2.

²⁰³ Foreign Affairs, Defence and Trade Committee *Inquiry into New Zealand's aid to the Pacific* (August 2020).

²⁰⁴ World Bank "The World Bank In Pacific Islands" <www.worldbank.org>.

²⁰⁵ World Bank, above n 204.

²⁰⁶ Foreign Affairs, Defence and Trade Committee, above n 203, at 7.

²⁰⁷ Ministry of Foreign Affairs & Trade "Our aid partnerships in the Pacific" <www.mfat.govt.nz>.

development.²⁰⁸ However, New Zealand's lack of consideration of the RTD may inhibit the effectiveness of aid provided to the Pacific.

1 Responsibility

The UNDRTD provides for “adequate, effective and transparent” aid.²⁰⁹ Developing countries and some commentators argue that this creates an obligation on developed countries to provide development aid.²¹⁰ However, developed countries are reluctant to accept any legal duty to provide development aid.²¹¹ New Zealand, in particular, has resisted any legally binding international obligations associated with the RTD.²¹² Given that the UNDRTD is soft law, developed countries are not bound to the obligations described under the UNDRTD. However, the CESCR and OECD suggest that developed countries should commit 0.7 per cent of gross national income (GNI) as ODA.²¹³ The Special Rapporteur on the RTD has reiterated that 0.7 per cent of GNI is an achievable goal for ODA from developed countries.²¹⁴

At most, there is an emerging obligation with respect to development aid; however, many developed countries may recognise a moral and political obligation to provide aid to

²⁰⁸ Terrence Wood “Submission to the inquiry into New Zealand's aid to the Pacific 2019” (August 2019) at 1.

²⁰⁹ The Office of the United Nations High Commissioner for Human Rights, above n 7, at 16.

²¹⁰ Nwauche and Nwobike, above n 39, at 97; *Commission on Human Rights: report on the thirty-third session* UN Doc E/CN.4/1257 (11 March 1977) at [40]; Villaroman, above n 12, at 50; and Arts and Tamo, above n 11, at 222.

²¹¹ Nwauche and Nwobike, above n 39, at 97; Stephen Marks “The Human Right to Development: Between Rhetoric and Reality” (2004) 17 *Harv Hum Rights J* 137 at 148; Philip Alston “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals” (2005) 27(3) *Hum Rights Q* 755 at 777; and Arts and Tamo, above n 11, at 222.

²¹² Ibrahim Salama “The Right to Development: renewal and potential” in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 117 at 124.

²¹³ *Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development*, above n 6, at [6]; and Laura Walters “NZ is a long way off its international aid commitment but is moving in the right direction” (09 May 2018) Stuff <www.stuff.co.nz>.

²¹⁴ *Report of the Special Rapporteur on the right to development on his mission to Switzerland*, above n 103, at 17.

developing countries.²¹⁵ New Zealand's aid to the Pacific appears to be founded on a moral and political basis due to New Zealand's proximity and the role New Zealand has played historically in the Pacific.

New Zealand has a historical relationship with the Pacific which may form the basis for New Zealand's moral obligation to the Pacific. Boister states that "New Zealand is, in the Pacific, much more influential than its size and resources might suggest".²¹⁶ In the 1960s New Zealand was instrumental in gaining independence for many Pacific nations. New Zealand was one of two colonial powers who voted in favour of the Declaration on the Granting of Independence to Colonial Countries and Peoples.²¹⁷

New Zealand has strong connections to Polynesia, namely, the Cook Island, Niue, Tokelau and Samoa. The Cook Islands and Niue have free association with New Zealand and thus New Zealand has an obligation to provide financial and administrative support.²¹⁸ Furthermore, New Zealand has legal obligations to Tokelau which is a non-self-governing territory of New Zealand.²¹⁹ The special relationship between Samoa and New Zealand is enshrined through the Treaty of Friendship between the two countries.²²⁰ The Treaty of Friendship provides for working together to promote the welfare of the population of Samoa through assistance.²²¹

²¹⁵ Nwauche and Nwobike, above n 39, at 97.

²¹⁶ Neil Boister "New Zealand and the Pacific" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington 2020) 303 at 311.

²¹⁷ Kenneth Keith "New Zealand" in Ben Saul and others (eds) *The Oxford Handbook of International Law in Asia and the Pacific* (Oxford University Press, London, 2019) 796 at 798.

²¹⁸ At 798; and Ministry of Foreign Affairs & Trade *Evaluation of New Zealand's Aid Programmes in the Cook Islands, Niue, Samoa and Tokelau* (December 2015) at 8.

²¹⁹ Ministry of Foreign Affairs & Trade "About Tokelau" <www.mfat.govt.nz>.

²²⁰ Ministry of Foreign Affairs & Trade, above n 218, at 8.

²²¹ Treaty of Friendship between the Government of New Zealand and the Government of Western Samoa, New Zealand - Samoa 453 UNTS 3 (signed 1 August 1962, entered into force 1 August 1962), art 4.

2 *Development Aid*

New Zealand has had a role in the establishment of international trust funds, the first being the Tuvalu Trust Fund.²²² These trust funds have been implemented across many countries in the Pacific, including Kiribati, Niue and Tokelau.²²³ The funds provide a form of aid with the aim of establishing economic development and financial autonomy of the beneficiary.²²⁴

Since the early 2000s, New Zealand has had a development aid system that focused on poverty reduction.²²⁵ New Zealand has recently increased its focus on sustainable development.²²⁶ Any development aid that New Zealand provides is required to align with the 2030 Agenda for Sustainable Development,²²⁷ reflecting the evolution of the RTD.

In 2015 the Organisation for Economic Co-operation and Development (OECD) conducted a review of New Zealand's development aid. The OECD found that New Zealand was a supporter of small island developing states and advocated for the right of states to protect their ocean resources.²²⁸ The report stated that New Zealand supports developing countries beyond development aid through policies which include low remittance costs, trade systems and employment schemes.²²⁹ New Zealand has played a role in transferring its experience with Pacific small islands to the Atlantic, Caribbean and Indian Ocean

²²² Boister, above n 216, at 309.

²²³ At 309.

²²⁴ Radio New Zealand "Tuvalu Trust Fund pleased with performance" (25 May 2007) <www.rnz.co.nz>.

²²⁵ John Overton "Development assistance and humanitarian aid" (20 June 2012) Te Ara <www.teara.govt.nz>.

²²⁶ Jo Spratt and Terence Wood "Change and Resilience in New Zealand Aid under Minister McCully" (2018) 14(2) PQ 25 at 27.

²²⁷ Foreign Affairs, Defence and Trade Committee, above n 203, at 8.

²²⁸ Organisation for Economic Co-operation and Development *OECD Development Co-operation Peer Reviews: New Zealand 2015* (June 2015) at 15.

²²⁹ At 15.

regions.²³⁰ New Zealand also utilises multilateral resources to aid the Pacific region.²³¹ These include acting as a broker for development banks working in the Pacific region.²³²

There has also been a focus on the effects of climate migration in the Pacific.²³³ MFAT has created an Action Plan for Pacific climate-related displacement and migration.²³⁴ New Zealand is seeking to use ODA to avert and delay climate-related displacement.²³⁵

New Zealand has been effective in considering international responsibilities in reporting on the SDGs. As discussed above, SDG 17 is the most relevant with respect to the international dimension of the RTD. New Zealand provides a breakdown of development aid and other strategies which represent partnership in achieving the SDGs.²³⁶ The focus of aid within New Zealand's reporting suggests that New Zealand considers development aid to be fundamental in realising the SDGs.²³⁷ New Zealand has worked alongside the Pacific SDG Taskforce in order to support development within the Pacific and help with the creation of the Pacific Roadmap for Sustainable Development.²³⁸

The OECD report and New Zealand's role with respect to climate-related effects suggests a net positive role of New Zealand within the Pacific. Furthermore, New Zealand's support has resulted in advances of SDG's particularly relating to health, women's empowerment, and environmental protection.²³⁹ The next section identifies areas in which New Zealand may improve with respect to development aid.

²³⁰ At 16.

²³¹ At 16.

²³² At 16.

²³³ Ministry of Foreign Affairs and Trade *Pacific climate change related displacement and migration: a New Zealand action plan* (Paper for the Environment, Energy and Climate Committee, 2 May 2018).

²³⁴ Ministry of Foreign Affairs and Trade, above n 233.

²³⁵ Ministry of Foreign Affairs and Trade, above n 233.

²³⁶ Ministry of Foreign Affairs and Trade, above n 151, at 115.

²³⁷ At 117.

²³⁸ At 117.

²³⁹ Ministry of Foreign Affairs and Trade *Annual Report 2018 -2019* (2019) at 25.

3 *Development Aid Failures*

Measuring the success of New Zealand's development aid may be analysed through two measures: value and effectiveness. In terms of value, New Zealand's aid contribution aims to be 0.28 per cent of GNI by 2021 which is substantially less than the 0.7 per cent suggested by the OECD and CESC. ²⁴⁰ In contrast, the United Kingdom regularly meets its 0.7 per cent commitment. ²⁴¹ Therefore, there is a failure regarding the dollar value of the aid that New Zealand is providing; however, New Zealand's aid also fails in terms of effectiveness as discussed below.

Donor countries often provide development aid to benefit their foreign policy objectives. ²⁴² New Zealand is a great example, as New Zealand has often focused development aid on areas relevant to advancing the commercial and political interests of New Zealand. ²⁴³ Donor motives are essential to successful aid. ²⁴⁴ New Zealand's focus on providing tertiary scholarships to Pacific nations has been criticised as having little development merit and merely facilitating connections to be made with elite families of Pacific nations supporting future commercial and political relationships. ²⁴⁵

In August 2020 the Foreign Affairs, Defence and Trade Committee conducted an Inquiry into New Zealand's aid to the Pacific which highlighted how aid with a connection to New Zealand's own interests failed many demographics. In particular, Aid for Trade models, which aim to build trade capacity, tended to benefit men more than women. ²⁴⁶

The OECD has also recommended increased tracking of financing to better record the impact of development aid. ²⁴⁷ The OECD criticised New Zealand for failing to promote

²⁴⁰ Laura Walters, above n 213.

²⁴¹ Laura Walters, above n 213.

²⁴² Nwauche and Nwobike, above n 39, at 105.

²⁴³ Spratt and Wood, above n 226, at 28.

²⁴⁴ Wood, above n 208, at 2.

²⁴⁵ Spratt and Wood, above n 226, at 29.

²⁴⁶ Foreign Affairs, Defence and Trade Committee, above n 203, at 25.

²⁴⁷ Organisation for Economic Co-operation and Development, above n 228, at 15.

the monitoring and evaluation of poverty.²⁴⁸ In terms of international cooperation, New Zealand has also failed to share disaster response lessons learnt from the Pacific with other nations.²⁴⁹

A recommendation from the OECD was to have a greater focus on sustainable development.²⁵⁰ Sustainable development appears to be reflected by Cabinet's recent approval of New Zealand's policy for International Cooperation for Effective Sustainable Development (ICESD).²⁵¹ The ICESD seeks to contribute to the prosperity of all countries.²⁵² The ICESD is connected to the Pacific Reset, which is a regional strategy designed to strengthen relationships between New Zealand and the Pacific.²⁵³ The Pacific Reset is set to provide more than \$700 million from 2018 to 2022.²⁵⁴ Although the Pacific Reset, like much of New Zealand's aid, is not altruistic but instead aims to promote a more prosperous New Zealand.²⁵⁵

New Zealand has also been criticised for not designing country-specific strategies and failure to support long term capacity building.²⁵⁶ The Pacific is not homogenous. New Zealand has significant experience in providing aid to Polynesia,²⁵⁷ due to the close links between New Zealand and Polynesia as identified above. However, significant experience does not mean that strategies can be replicated across the Pacific or even within Polynesia as needs differ from country to country.²⁵⁸

²⁴⁸ At 16.

²⁴⁹ At 21.

²⁵⁰ At 15.

²⁵¹ Ministry of Foreign Affairs & Trade "Our approach to aid" <www.mfat.govt.nz>.

²⁵² Foreign Affairs, Defence and Trade Committee, above n 203, at 23.

²⁵³ Claire Huit "The Pacific Reset: New Zealand Re-Engages Oceania" (20 December 2019) University of Texas <www.sites.utexas.edu>.

²⁵⁴ Craig McCulloch "\$714m to be pumped into govt's 'Pacific reset' plan" (8 May 2018) RNZ <www.rnz.co.nz>.

²⁵⁵ Craig McCulloch, above n 254.

²⁵⁶ Organisation for Economic Co-operation and Development, above n 228, at 18 and 19.

²⁵⁷ Wood, above n 208, at 4.

²⁵⁸ At 4.

There may also be an issue as to whether aid reaches the intended recipients. There is a significant issue with respect to ongoing corruption within the Pacific which prevents aid from reaching intended recipient.²⁵⁹ High-level officials often misuse funds due to a lack of local monitoring.²⁶⁰ New Zealand reports to the International Aid Transparency Initiative which monitors whether aid reaches its intended recipients;²⁶¹ however, more comprehensive monitoring would be favourable.

Finally, a significant failure of New Zealand's aid is the lack of accountability. Accountability is reduced as the recipients of aid do not vote in New Zealand elections; therefore, accountability cannot exist in the same way that it does with domestic policy.²⁶² Furthermore, the interest-based focus of New Zealand's aid may make the Pacific States reluctant to represent right holders due to political ties.

4 Conclusion

Although there are a range of failures identified above, it is important to recognise that New Zealand plays a crucial role in implementing the RTD within the region despite a lack of binding obligation under the UNDRTD. The question of potential applicability with respect to New Zealand's international obligations is more complex as compared to domestic obligations. The complexity arises as the existence of international obligations is a matter of debate between developed and developing countries which has resulted in less defined obligations on States. However, in terms of development aid value, greater application of the RTD may involve reaching the target of 0.7 per cent of GNI. The 0.7 per cent figure has been suggested by the Special Rapporteur on the RTD,²⁶³ and is encouraged through the Addis Ababa Action Agenda.²⁶⁴

²⁵⁹ Transparency International New Zealand "Submission to the inquiry into New Zealand's aid to the Pacific 2019" (August 2019) at 1.

²⁶⁰ At 2.

²⁶¹ International Aid Transparency Initiative "About" <www.iatistandard.org>.

²⁶² Wood, above n 208, at 5.

²⁶³ *Report of the Special Rapporteur on the right to development on his mission to Switzerland*, above n 103, at 17.

²⁶⁴ *Resolution adopted by the General Assembly on 27 July 2015 GA Res 69/313 (2015)* at 17.

In terms of aid effectiveness, the use human rights impact assessments may help evaluate the impact of aid.²⁶⁵ New Zealand may benefit from inviting the Special Rapporteur to undertake a country visit in order to make suggestions as to how New Zealand may better monitor aid to allow for greater application of the international dimension of the RTD.

The politicised nature of the RTD has resulted in a lack of discrete binding development obligations and guidance allowing for New Zealand to continually ignore the RTD resulting in low value and less effective aid. New Zealand needs to develop an agenda which focuses on outcomes for Pacific nations rather than New Zealand's own commercial or political interests. The Pacific would benefit from international law implementation mechanisms relating to the RTD which would be able to hold New Zealand accountable, encouraging greater aid obligations which are monitored comprehensively.

C Conclusion on New Zealand's Implementation of the Right to Development

In New Zealand, the principles of the RTD have been implemented ineffectively. In the domestic context, there is a lack of recognition of the RTD despite social and economic inequality of Māori. New Zealand also fails in an international context as development aid is provided at a rate below targets and focuses on New Zealand's own interests, reducing effectiveness. An application of the RTD may ensure greater accountability. Below is a discussion of solutions which seek to ensure greater implementation of the RTD domestically and internationally.

VI Solutions for Implementation of the Right to Development

The application of the RTD in a New Zealand context reveals issues in implementation both domestically and internationally. These issues arise due to a lack of certainty concerning the RTD and a lack of monitoring mechanisms reflecting the politicisation and

²⁶⁵ *Report of the Special Rapporteur on the right to development on his mission to Switzerland*, above n 103, at 17.

ambiguity of the RTD. A solution for greater implementation of the RTD should aim to clarify duty bearer obligations and establish accountability mechanisms for international and domestic obligations. The primary issue involves navigating the politicisation and ambiguity of the RTD whilst simultaneously creating accountability to ensure effective recognition and implementation of the RTD.

For New Zealand in an international context, there must be discrete obligations to provide more development aid and increased monitoring needs to be implemented to ensure aid is effective for the Pacific and not merely New Zealand's own agenda. Aside from the OECD, there is no external mechanism for monitoring New Zealand's development aid. However, monitoring does vary depending on the project, and external monitoring may be used.²⁶⁶ In a domestic context, there is also only limited monitoring under the UNDRIP and through the role of the Special Rapporteur on the rights of indigenous peoples, which allows for the continued disregard of the RTD. The Universal Periodic Review also monitors aspects of the RTD; however, fails to make explicit reference to the RTD. As described above, despite the overlap with individual rights, there is still a benefit to considering the RTD holistically and the RTD's guiding principles. Therefore, the establishment of effective monitoring mechanisms is essential to both the domestic and international context.

The primary solution that is proposed is the establishment of a convention on the RTD. A framework convention is suggested to address the politicisation of the RTD whilst ensuring accountability. This paper also considers the establishment of a new declaration and a protocol. Any solution should aim to remedy the lack of inclusion of sustainability within the UNDRTD,²⁶⁷ and provide stronger provisions for indigenous people as provided in the DCRTD. The solutions are analysed with respect to implementation within New Zealand and the international community.

Any solution regardless of form should seek to provide a comprehensive instrument on the RTD clarifying aspects which were neglected in the UNDRTD, particularly sustainability

²⁶⁶ Ministry of Foreign Affairs and Trade "Evaluation and research" <www.mfat.govt.nz>.

²⁶⁷ Feyter, above n 180, at 97.

and the international dimension of the RTD. Each solution must also directly reference the Guidelines and Recommendations on the Practical Implementation of the RTD as these offer a significant benefit to States.²⁶⁸

A A Convention

1 Benefits of a Convention

A proposed solution is the establishment of a binding convention on the RTD. Despite being comprehensive the UNDRTD is often criticised for its lack of binding force.²⁶⁹ A convention offers a legally binding instrument allowing for greater realisation of the RTD. The DCRTD provides a useful basis for which to analyse the potential benefits and difficulties of an international convention. The creation of a framework convention may be beneficial in achieving cooperation, perception changing and accountability.

The primary benefit of a convention is its legally binding nature. States that become party to the convention will be legally bound by the obligations under the convention. The legal weight of the convention will make it harder for States to disregard their obligations as occurred with the UNDRTD which was not legally binding. The legally binding nature of a convention on the RTD, gives the RTD a higher status at international law and would provide a counterweight in the interpretation of other treaties which may conflict with the RTD.²⁷⁰

The principle of state continuity may be beneficial for a convention on the RTD. The application of the RTD has been highly politicised. However, if a State were to ratify a convention on the RTD all subsequent governments would be bound by that convention which would ensure that the RTD is applied regardless of the government of the day. In a

²⁶⁸ *Report of the Special Rapporteur on the right to development*, above n 104.

²⁶⁹ *First Discussion Draft / Preliminary outline on the importance of a legally binding instrument on the right to development* UN Doc A/HRC/AC/23/CRP.4 (22 July 2019) at 5.

²⁷⁰ Feyter, above n 106, at 9.

New Zealand context, the removal of politics surrounding aid may be particularly important as different governments take significantly distinct approaches to aid.²⁷¹

As occurred with the establishment of the United Nations Convention on the Rights of Persons with Disabilities the treaty-making process may alert States to the RTD and assist in defining many of the indefinite aspects of the UNDRTD.²⁷² The treaty-making process may help in adjusting international social norms as State parties gain a greater understanding of each other's perspectives concerning the RTD.²⁷³ The negotiation process ensures that States work together and overcome points of difficulty, which is essential given that development is an issue for which the international community as a whole is responsible. A convention would put the RTD on a par with other human right treaties potentially resulting in greater significance being afforded to the RTD.²⁷⁴

A binding instrument would raise awareness of the RTD and may promote domestic planning for more significant application of the RTD.²⁷⁵ In New Zealand, if a convention on the RTD were signed a National Interest Analysis (NIA) would be conducted by the most relevant government department which concerning the RTD would likely be MFAT or the Ministry of Social Development.²⁷⁶ The NIA is presented to Parliament and discusses the benefits and negatives of the convention.²⁷⁷

Following ratification Parliament may implement legislation giving effect to the RTD. Domestic legislation could include things such as the adoption of a poverty elimination

²⁷¹ Spratt and Wood, above n 226.

²⁷² Michael Stein and Janet Lord "The Normative Value of a Treaty as Opposed to a Declaration: Reflections from the Convention on the Rights of Persons with Disabilities" in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 27 at 30.

²⁷³ At 31.

²⁷⁴ *Report of the Working Group on the Right to Development on its twentieth session*, above n 77, at 4.

²⁷⁵ Stein and Lord, above n 272, at 30; and Nico Schrijver "Many roads lead to Rome: How to arrive at a legally binding instrument of the right to development" in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 127 at 129.

²⁷⁶ Ministry of Foreign Affairs and Trade "National Interest Analysis" <www.mfat.govt.nz>.

²⁷⁷ New Zealand Parliament "Parliament's role in international treaties" (17 April 2019) <www.parliament.nz>; and Ministry of Foreign Affairs & Trade, above n 276.

agency as in Nigeria following the establishment of the African Charter.²⁷⁸ The creation of legislation by Parliament would prevent the New Zealand courts disregard of the RTD with respect to Māori as international obligations are relevant considerations for the New Zealand courts.²⁷⁹ Even without legislation, New Zealand courts frequently reference unincorporated international instruments in reasoning.²⁸⁰ Implementation is not necessarily guaranteed as New Zealand courts have afforded the RTD under the Treaty limited importance,²⁸¹ despite the Treaty's significance within New Zealand.²⁸² However, the New Zealand courts will afford greater significance to a convention as compared to a soft law solution as evidenced by the fact that the UNDRTD has only once been referenced by the courts.²⁸³

A convention may result in the establishment of a Committee which would administer the implementation and monitoring of the RTD.²⁸⁴ The DCRTD provides for the creation of the Conference of States Parties and an Implementation Mechanism in arts 24 and 26, respectively.²⁸⁵ Article 24 provides for a Conference of State Parties which will regularly review the effective implementation of the DCRTD,²⁸⁶ examining reports of State Parties,²⁸⁷ and promoting cooperation through the exchange of information.²⁸⁸

²⁷⁸ Obiora Chinedu Okafor "Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights" in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 52 at 60.

²⁷⁹ See *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2014] NZCA 516 at [56].

²⁸⁰ Alice Osman "The Effects of Unincorporated International Instruments on Judicial Reasoning in New Zealand" (LLB (Hons) Dissertation, University of Otago, 2012) at 1.

²⁸¹ *Taranaki Fish & Game Council v McRitchie* (1998) 3 NZLR 611 (HC).

²⁸² Palmer, above n 136, at 167.

²⁸³ Magallanes, above n 156, at 262.

²⁸⁴ Sabine von Schorlemer "Normative Content of a Treaty as opposed to a Declaration on the Right to Development: A Commentary" in Stephen Marks (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) 33 at 35.

²⁸⁵ *Draft Convention on the Right to Development, with commentaries*, above n 4, art 24 and 26.

²⁸⁶ Art 24(1).

²⁸⁷ Art 24(2).

²⁸⁸ Art 24(3).

The Conference of Parties will also establish an implementation mechanism consisting of independent experts who will review requests of right holders.²⁸⁹ The implementation mechanism is essential as allowing right holders to bring claims to an external body gives power to the RTD. Ideally, the implementation mechanism would be compulsory; however, developed States may be reluctant to accept a convention with a compulsory implementation mechanism. In a domestic context, an implementation mechanism would ensure recognition of the RTD of Māori. In the international context, it allows for recipients of development aid to bring a claim despite issues of accountability. The implementation mechanism is critical to ensure the recognition and application of the RTD in New Zealand and within the international community.

The DCRTD may benefit from becoming a framework convention as it already concerns broad principles of the RTD rather than discrete obligations.²⁹⁰ Conceptualisation as a framework convention would not substantially change the DCRTD; however, it would encourage the creation of more discrete obligations through later legislation or protocols.²⁹¹ A framework convention may also be useful in creating a solution which allows for broader state participation. A framework convention still provides the benefits listed above, including binding legal status, promotion of domestic planning, international cooperation, and the potential creation of implementation mechanisms.

A convention must face a trade-off between State participation and obligations. A convention which imposes many discrete obligations will likely be ignored by the international community. A framework convention avoids politicisation as States create their own obligations whilst simultaneously creating a forum for discussion between States.²⁹² Framework conventions have been used to solve issues which require collective international action such as international environmental law.²⁹³ with a notable example

²⁸⁹ Art 26.

²⁹⁰ *Draft Convention on the Right to Development, with commentaries*, above n 4, at 2.

²⁹¹ Economic Commission for Europe *Informal Notice 5* (Geneva, 4 October 2011) at 1.

²⁹² Feyter, above n 106, at 8.

²⁹³ Economic Commission for Europe, above n 291, at 1.

being the United Nations Framework Convention on Climate Change.²⁹⁴ A framework convention has long been considered with respect to the RTD, with the Intergovernmental Group of Experts on the Right to Development considering a framework convention as early as 1996.²⁹⁵ A framework convention may better reflect the dynamic nature of the RTD as evolutions could be reflected within protocols.²⁹⁶

2 *Issues of a Convention*

A convention has a range of issues. The ambiguity of the RTD will remain despite the creation of a convention. The DCRTD follows the vague definition provided in the UNDRTD.²⁹⁷ The ambiguity of the RTD has resulted in the lack of practical application and the reduced importance of the RTD. Therefore, without discrete obligations, any new convention will likely be perceived as aspirational as the UNDRTD and the ICESCR.²⁹⁸

A convention may also be hindered by politicisation. Issues may arise in negotiations around obligations as States have varying interpretations of the RTD. Negotiation may result in a watered-down version of the RTD being articulated under the convention.²⁹⁹ There has already been a divergence of views with respect to whether a convention should be drafted.³⁰⁰ Liechtenstein proposed that “at this stage, a legally binding instrument of the right to development would be counter-productive, as it does not enjoy universal support”.³⁰¹ Even with a framework convention, there is a risk that developed countries remain reluctant in creating domestic legislation or ratifying protocols concerning aid obligations.

²⁹⁴ United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 9 May 1992, entered into force 21 March 1994).

²⁹⁵ *Progress report of the Intergovernmental Group of Experts on the Right to Development on its first session* UN Doc E/CN.4/1997/22 (21 January 1997) at 15.

²⁹⁶ At 16.

²⁹⁷ *Draft Convention on the Right to Development, with commentaries*, above n 4, art 4

²⁹⁸ *Concluding Observations: Poland*, above n 52, at [9].

²⁹⁹ Schorlemer, above n 284, at 35.

³⁰⁰ *Report of the Working Group on the Right to Development on its twentieth session*, above n 77, at 18.

³⁰¹ *First Discussion Draft / Preliminary outline on the importance of a legally binding instrument on the right to development*, above n 269, at 6.

The primary issue of a convention is the ability for State parties to take no action. States may fail to ratify the convention resulting in continued disregard of the RTD. An example of this is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) which entered into force in 2003; however, only 55 states have ratified the ICRMW despite the ICRMW being considered a core UN human rights instrument.³⁰² New Zealand has yet to ratify the ICRMW despite having significant issues concerning the exploitation of migrant workers. Therefore, a similar outcome could occur for a new convention on the RTD with countries such as New Zealand failing to adopt the convention.

Under a framework convention, States may be more likely to become party; however, there may be a risk of insufficient commitments as States have greater control over the obligations created. However, the implementation mechanism may mitigate this issue by encouraging the establishment of comprehensive obligations.

3 Conclusion

The primary benefit of a convention is the accountability that implementation and monitoring bodies can provide. The convention process will also aid the recognition of the RTD. The most significant issue of a convention is that States may choose not to ratify and that politicisation may result in another purely aspirational instrument. A framework convention may be beneficial as it articulates broad principles but facilitates the establishment of standards and discrete obligations through protocols or national legislation which ensures participation whilst also encouraging the establishment of discrete obligations.³⁰³

³⁰² Beth Lyon and Stefanie Grant “Indirect Success? The Impact and Use of the ICRMW in Other UN Fora” (Research Paper, Cornell Law School, 2017) at 101; and Office of the United Nations High Commissioner for Human Rights “Status of Ratification Interactive Dashboard” <www.ohchr.org>.

³⁰³ Nele Matz-Lück “Framework Conventions as a Regulatory Tool” 1 *GoJIL* (2009) 3 439 at 440.

B Other Solutions

As described above a convention faces a range of issues which inhibit implementation of the RTD. There are various other solutions which may be considered including the establishment of a new declaration and a human rights protocol relating to the RTD.

1 A New Declaration

Schrijver suggests the creation of a reformulated declaration on the RTD on the 35th Anniversary of the UNDRTD in December 2021.³⁰⁴ The wording of a treaty and a declaration are not necessarily different;³⁰⁵ therefore, a new declaration may clarify the RTD and provide specific guidelines for State obligations. The benefit of a declaration is that it does not require the same level of consensus as a convention as States need not ratify a declaration.³⁰⁶ Therefore given the dichotomy of opinion between developed and developing States, a declaration may be more appropriate.

A declaration may serve the purpose of promoting and protecting the rights of those who require the RTD by emphasising the needs of developing countries and vulnerable peoples.³⁰⁷ The changing of State perceptions to view the RTD as a useful and practical tool is essential, given the politicisation of the RTD. For New Zealand, the declaration may serve as a guide in adopting domestic legislation that can achieve the principles of the RTD.

An updated declaration would reignite the discussion of the RTD and may prompt New Zealand to create measures for Māori development and development aid within the Pacific.

³⁰⁴ Schrijver, above n 8, at 92.

³⁰⁵ Schorlemer, above n 284, at 33.

³⁰⁶ Schrijver, above n 8, at 92; and Alberto Costi, Scott Davidson and Lisa Yarwood “The Creation of International Law” in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington 2020) 153 at 187.

³⁰⁷ Mauro Barelli “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58(4) *Int Comp Law Q* 957 at 983.

A declaration will also provide a basis for which binding principles may be established,³⁰⁸ either domestically or internationally.

For New Zealand, a regional declaration may also be a solution. The Pacific Islands Forum Secretariat (PIF) may be the appropriate body to bring a regional declaration into fruition. The PIF is an inter-governmental organisation that allows for the regular discussion of regional policy.³⁰⁹ The PIF has 18 member States, including New Zealand.³¹⁰ The PIF has established a range of declarations on matters of regional concern which are soft law.³¹¹ Soft law coincides with the “Pacific Way” of establishing solutions as it emphasises political outcomes over legal outcomes.³¹² It is only for issues such as fisheries that treaty obligations have been established by the PIF, with the 1989 Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.³¹³ However, this related to a discrete issue concerning fishing as compared to the RTD, suggesting a declaration is more appropriate to cover the broad scope of the RTD.

A regional declaration could provide for a targeted regional approach which seeks to address issues within the Pacific, including strengthening relationships between States. However, a regional declaration fails to engage the international community. The international dimension of the RTD relies heavily on international cooperation and the participation of the wider international community. In particular, the climate migration issues that the Pacific are facing are not able to be solved with a solely regional approach as climate change is an international issue.

³⁰⁸ Isabella Bunn *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Hart Publishing, Oxford, 2012) at 139.

³⁰⁹ Boister, above n 216, at 324.

³¹⁰ The Council of Regional Organisations of the Pacific “Profile: Pacific Islands Forum Secretariat” <www.cropict.usp.ac.fj>.

³¹¹ Boister, above n 216, at 326.

³¹² At 326.

³¹³ At 326.

The most significant issue concerning declarations is that they are not binding; therefore, implementation is not enforceable.³¹⁴ However, declarations may still have implementation mechanisms. For example, the Expert Mechanism on the Rights of Indigenous Peoples which assists States in achieving the provisions of the UNDRIP.³¹⁵ However, these mechanisms have more of a monitoring rather than enforcement function reflecting the lack of binding obligations created by the declarations.³¹⁶ Although the UNDRIP has had a positive effect in creating changes in perceptions and articulating the rights of Indigenous peoples;³¹⁷ with respect to the RTD, greater accountability is essential.

Overall, a declaration would address the politicisation of the RTD; however, a declaration fails to create the accountability that is required to implement the RTD. The lack of enforceability is a significant downfall as accountability is essential to solving the problems with States, such as New Zealand's, lack of recognition and application of the RTD.

2 *A Human Rights Protocol*

Realisation of the RTD may be possible under existing human rights treaty monitoring mechanisms through a development-focused reading of the human rights treaties.³¹⁸ A protocol which clarifies the RTD's position with respect to the core human rights conventions,³¹⁹ may integrate the RTD into human rights treaties as an overarching standard.³²⁰ The protocol would allow States to report on the RTD under treaty body

³¹⁴ Stephen Marks *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, Berlin, 2008) at 9.

³¹⁵ United Nations Human Rights Office of the High Commissioner "Expert Mechanism on the Rights of Indigenous Peoples" <www.ohchr.org>.

³¹⁶ Federico Lenzerini "Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples" (2018) 23 J Hum Rights 51 at 59.

³¹⁷ New Zealand Human Rights Commission "More work on putting UNDRIP into action needed" <www.hrc.co.nz>.

³¹⁸ Martin Scheinin "Advocating the Right to Development Through Complaint Procedures Under Human Rights Treaties" in Bård Andreassen and Stephen P. Marks (eds) *Development as a Human Rights: Legal, Political and Economic Dimensions* (Harvard University Press, Cambridge, 2006) 274 at 274.

³¹⁹ Nico Schrijver, above n 8, at 92.

³²⁰ Schrijver, above n 8, at 92.

procedures.³²¹ A protocol would serve to reemphasise the role that States must fulfil in realising the RTD. By putting the RTD in the context of human rights, States, in particular developed States, may be less likely to ignore their obligations under the UNDRTD or other binding agreements.

The protocol would leverage the international human right treaty compliance mechanisms. For example, a protocol that clarifies that the RTD is integral to the ICESCR may result in the CESCR making more direct inquiries into the RTD. A protocol may also provide for specific obligations,³²² including the creation of a compliance committee.³²³ However, the human rights treaties fail to recognise any international dimension of rights.³²⁴ Therefore, the international obligations owed to the Pacific under the RTD may be neglected as bodies like the CESCR tend to take a domestic focus as aforementioned.

A protocol is also limited in that it will not establish binding obligations unless ratified. Therefore, like a convention, there is a risk of continued disregard of States with respect to their obligations under the RTD, effectively limiting application. As discussed above, New Zealand has failed to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, evidencing the potential for disregard by States of a new protocol. In particular, New Zealand has demonstrated a willingness to overlook protocols under human rights treaties. A protocol is also a less empathic proclamation of the importance of the RTD as compared to the creation of a convention or a reformulated declaration and is therefore more susceptible to being overlooked.

Overall, a human rights protocol is undesirable as it focuses on developed countries perspectives which has allowed for continued disregard of the RTD. The human rights focus may ignore significant benefits of the RTD and the international dimension of the RTD. Therefore, a protocol would fail to address New Zealand's failures within the Pacific

³²¹ At 93.

³²² Feyter, above n 106, at 15.

³²³ At 15.

³²⁴ At 4; Feyter, above n 180, at 98; and *List of issues prior to submission of the fourth periodic report of New Zealand* UN Doc E/C12/NZL/QPR/4 (12 April 2016).

in terms of providing effective aid as within a human rights framework, donor recipients are unable to hold States accountable.

C Conclusion on Solutions

The various solutions offer different results. The declaration offers a non-binding means of promoting the RTD; however, a declaration is at risk of being overlooked by many States as occurred with the UNDRTD. A protocol allows for the consideration of the RTD under the framework of human rights treaties establishing accountability; however, only with respect to domestic obligations. Therefore, neither a new declaration nor a protocol establishes the necessary recognition and accountability to give effect to the RTD.

The best solution is a framework convention on the RTD. The primary strength of a convention is that it allows for the establishment of an external implementation mechanism giving greater voice to right holders. In the domestic context, Māori may bring a claim to the mechanism to ensure that the New Zealand government do not disregard the RTD. In an international context, an implementation mechanism with the mandate to monitor aid value and effectiveness would ensure that New Zealand provides effective aid to the Pacific.

A framework convention may also consolidate the politicisation issue, ensuring global participation, whilst still providing for implementation mechanisms to ensure the comprehensive recognition of the RTD. A framework convention will allow countries to establish their own RTD commitments; however, will provide accountability to ensure that these commitments coincide with the principles of the RTD.

VII Conclusion

The RTD is a fundamental right due to its interaction with human rights and the international equality it strives to uphold. The RTD has a long history at international law; however, it fails to be comprehensively recognised by New Zealand and many other States.

The ambiguity of the RTD, politicisation and the lack of implementation mechanisms present problems for the RTD for New Zealand's domestic and international obligations. An analysis of the RTD concerning Māori reveals New Zealand's failure in recognising the RTD. New Zealand appears to disregard the RTD despite its inclusion within the Treaty. In the Pacific, New Zealand's pursuit of its own interests inhibits the provision of effective aid to the Pacific.

The New Zealand context reveals a need to establish effective implementation mechanisms to ensure New Zealand and other States are accountable for domestic and international obligations under the RTD. There are a range of available solutions including a convention, a new declaration and a human rights protocol. Of the proposed solutions, a framework convention is the most beneficial allowing for the creation of an implementation mechanism whilst also addressing the politicisation of the RTD. Given the objective of accountability, the recognition and application of the RTD through the force of a binding instrument is beneficial. However, allowing States to formulate their own obligations ensures greater participation from the international community.

The importance of the RTD cannot be understated. The establishment of a framework convention encourages participation from the international community and establishes a means of accountability. In a New Zealand context, a framework convention will result in more significant application of the RTD allowing for holistic considerations of Māori development and ensuring more effective aid for the Pacific.

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