

The Human Right to Development: Between Rhetoric and Reality

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*Developed nations have a duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.*¹

*States . . . have no obligation to provide guarantees for implementation of any purported "right to development."*²

I. INTRODUCTION

The right to development (RTD) has been part of the international debate on human rights for over thirty years³ but has not yet entered the practical realm of development planning and implementation. States tend to express rhetorical support for this right but neglect its basic precepts in development practice. Paradoxically, the United States opposes or is reluctant to recognize development as an international human right, and yet the current administration has proposed to nearly double its development spending under a program that is strikingly similar to the international RTD model.

The purpose of this Article is to explore this paradox and through it reflect on the obstacles to the realization of the RTD and its compatibility with U.S. foreign policy. Part I provides a brief historical sketch of the RTD. Part II examines the politics of the RTD, that is, the positions articulated in the diplomatic setting regarding the RTD in accordance with conflicting perceptions of national interests. Part III discusses U.S. objections to the RTD and Part IV examines the similarities and differences between the RTD and the Bush Administration's new Millennium Challenge Account (MCA).

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1. President George W. Bush, Remarks at the International Conference on Financing for Development in Monterrey, Mexico, *available at* <http://www.un.org/ffd/statements/usaE.htm> (Mar. 22, 2002).

2. United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (Feb. 10, 2003) (transcript on file with the author).

3. See Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 20 (1988).

II. A BRIEF HISTORICAL OUTLINE OF THE RIGHT TO DEVELOPMENT

In the 1970s and 1980s the RTD was introduced as one of several rights belonging to a third "generation" of human rights.⁴ According to this view, the first generation consisted of civil and political rights conceived as freedom from state abuse. The second generation consisted of economic, social, and cultural rights, claims made against exploiters and oppressors. The third generation consisted of solidarity rights belonging to peoples and covering global concerns like development, environment, humanitarian assistance, peace, communication, and common heritage. The cataloguing of human rights into such neat generations is appealing in its simplicity. A general priority has been given to guaranteeing individual freedoms in eighteenth-century revolutionary struggles of Europe and North America, to advancing social justice in nineteenth- and twentieth-century struggles against economic exploitation, and to assigning rights and obligations to the principal agents able to advance global public goods in the late twentieth century.

However, this view is deceptive in its assumptions of both the temporal sequencing and qualitative nature of the normative propositions that have attained the status of international human rights. On closer scrutiny, the basic aspirations at the root of the claims of all three "generations" are not historically determined. People suffering repression and oppression have aspired to fair and equitable treatment for millennia. Liberation from slavery and colonialism—based on premises similar to those of the so-called third generation rights—was expressed in terms later reflected in human rights language. Religious freedom was a human rights concern well before the mid-twentieth-century separation of civil and political rights from economic, social, and cultural rights. Nevertheless, the formal articulation of the RTD in the form of texts using the human rights terminology is a phenomenon of the late twentieth century, beginning in the early 1970s.⁵ The U.N. General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development.⁶ The United States cast the only negative vote; eight other countries abstained.

The 1993 Vienna Declaration and Programme of Action called the RTD "a universal and inalienable right and an integral part of fundamental hu-

4. Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 *RUTGERS L. REV.* 435, 435–52 (1981).

5. Various starting dates have been proposed. For a significant starting date, see Judge Kéba M'Baye, *Le Droit au Développement Comme un Droit de L'Homme* [The Right to Development as a Human Right], *Leçon inaugurale de la Troisième Session d'enseignement de l'Institut International des Droits de L'Homme* [Inaugural Address of the Third Teaching Session of the International Institute of Human Rights] (July 3, 1972), in 5 *REVUE DES DROITS DE L'HOMME* [HUMAN RIGHTS JOURNAL, 503 (1972).

6. U.N. GAOR, 41st Sess., Supp. No. 53, at 183, U.N. Doc. A/RES/41/128 (1986). The Commission referred to the RTD in resolutions before the General Assembly adopted the Declaration. See, e.g., U.N. ESCOR, 33d Sess., Supp. No. 6, at 74–75, U.N. Doc. E/CN.4/1257; U.N. ESCOR, 35th Sess., Supp. No. 6, at 107, U.N. Doc. E/CN.4/1347; U.N. ESCOR, 37th Sess., Supp. No. 5, at 238, U.N. Doc. E/CN.4/1475. See also Commission Resolutions 4 (XXXIII) of 21 February 1977; 4 (XXXV) of 2 March 1979; 36 (XXXVII) of 11 March 1981; 985/44 of 14 March 1985.

man rights.”⁷ The RTD has also been given prominence in the mandate of the High Commissioner for Human Rights,⁸ and the General Assembly required the High Commissioner to establish “a new branch whose primary responsibilities would include the promotion and protection of the right to development.”⁹ The right is regularly mentioned in declarations of international conferences and summits and in the annual resolutions of the General Assembly and the Commission on Human Rights.

The United States, joined by several other Western countries, has been frustrated by what it perceives as the determination of countries in the Non-Aligned Movement (NAM) to force their interpretation of this right on what is essentially the group of donor states. The NAM countries, for their part, have a strong basis for decrying the failure of a half-century of decolonization and development cooperation to eliminate poverty and achieve the objectives of numerous development strategies. They take the position “that developing countries continue to face difficulties in participating in the globalization process, and that many risk being marginalized and effectively excluded from its benefits.”¹⁰ They therefore stress the impact of international trade, access to technology, debt burden, and the like on the enjoyment of the RTD.¹¹

A breakthrough occurred on April 22, 1998, when the U.N. Commission on Human Rights adopted by consensus a resolution on the RTD,¹² recommending to the Economic and Social Council the establishment of a follow-up mechanism consisting of an open-ended working group (OEWG) and an Independent Expert. The purpose of the working group was to monitor and review the progress of the Independent Expert and report back to the Commission. The Independent Expert was to “present to the working group at each of its sessions a study on the current state of progress in the implementation of the right to development as a basis for a focused discussion, taking into account, *inter alia*, the deliberations and suggestions of the working group.”¹³ Dr. Arjun Sengupta, a prominent Indian economist, was appointed Independent Expert and by 2004 had produced eight reports, while the OEWG had held five sessions.

Thirty-two years have elapsed since the RTD was publicly proposed as a human right,¹⁴ eighteen years since the General Assembly officially recognized this right in a Declaration,¹⁵ eleven years since a consensus involving

7. *Vienna Declaration and Programme of Action: Note By The Secretariat*, World Conference on Human Rights, Part I, ¶ 10, U.N. Doc. A/CONF.157/23 (1993) [hereinafter *Vienna Declaration*].

8. G.A. Res. 48/141, U.N. GAOR, 48th Sess., Supp. No. 49, at 261, U.N. Doc. A/48/141 (1993).

9. G.A. Res. 50/214, U.N. GAOR, 50th Sess., Supp. No. 49, at 296, U.N. Doc. A/50/214 (1995).

10. G.A. Res. 56/150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, U.N. Doc. A/56/150 (2001).

11. *Id.*

12. Commission on Human Rights Res. 72, U.N. ESCOR, 44th Sess., Supp. No. 3, at 229, U.N. Doc. E/CN.4/1998/177 (1998).

13. *Id.* at 233.

14. See *supra* note 5.

15. The Declaration on the Right to Development was adopted by the General Assembly in its reso-

all governments was reached on the RTD,¹⁶ and six years since the OEWG and the position of Independent Expert were established. A considerable body of commentary has appeared in support of the Declaration, mainly in legal and human rights publications,¹⁷ including those by the Independent Expert,¹⁸ but critical and skeptical views have also emerged in legal and political writings.¹⁹

The Commission decided in 2003 to request its Sub-Commission on the Promotion and Protection of Human Rights:

to prepare a concept document establishing options for the implementation of the right to development and their feasibility, *inter alia* an international legal standard of a binding nature, guidelines on the implementation of the right to development and principles for development partnership, based on the Declaration on the Right to Development, including issues which any such instrument might address.²⁰

Forty-seven countries voted in favor of the resolution; the United States, together with Australia and Japan, cast the only negative votes, and three countries abstained.²¹ U.S. policy has been consistently negative on the RTD in the political setting of the Commission on Human Rights and the General Assembly. The current Administration, however, has developed its own program for financing development, which incorporates the essence of the RTD without acknowledging any connection (Part IV).

lution 41/128 of 4 December 1986. See G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

16. See *Vienna Declaration*, *supra* note 7, at ¶¶ 10, 11, 72 and 73.

17. In this abundant literature, the following are particularly useful: Alston, *supra* note 3; Russell Barsh, *The Right to Development as a Human Right: Results of the Global Consultation*, 13 HUM. RTS. Q. 322, 322–38 n.3 (1991); N.J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 HUM. RTS. Q. 753, 753–87 (2000); UPENDRA BAXI, *The Development of the Right to Development*, in MAMBRINO'S HELMET?: HUMAN RIGHTS FOR A CHANGING WORLD, 22, 22–32 (Har-Anand Publications 1994); TATJANA ANSBACH ET AL., *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* (Subrata Roy Chowdhury et al. eds., Martinus Nijhoff Publishers 1992); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 J. MARSHALL L. REV. 235, 235–65 (1992); Anne Orford, *Globalization and the 'Right to Development'*, in PEOPLE'S RIGHTS 127, 127–84 (Oxford U. Press 2001).

18. Arjun Sengupta, *Realizing the Right to Development*, 31 DEV. AND CHANGE 3, 553 (2000); Arjun Sengupta, *Right to Development as a Human Right*, ECON. & POL. WKLY., July 7, 2001, at 2527; Arjun Sengupta, *Theory and Practice on the Right to Development*, 24 HUM. RTS. Q. 837 (2002); Arjun Sengupta, *Implementing the Right to Development*, in SUSTAINABLE DEVELOPMENT AND HUMAN RIGHTS (Nico Schrijver ed., 2002); Arjun Sengupta, *Development Co-operation and the Right to Development*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN. ESSAYS IN HONOUR OF ASBJØRN EIDE 371 (Morton Bergsmo ed., 2003) [hereinafter Sengupta, *Development Co-operation and the Right to Development*].

19. See, e.g., Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473 (1985).

20. Commission on Human Rights Res. 2003/83, U.N. Doc. E/CN.4/RES/2003/83 (2003).

21. *Id.* (The three abstentions were Canada, Korea, and Sweden.)

III. U.S. OPPOSITION TO THE RIGHT TO DEVELOPMENT IN POLICY

A. *The Politics of the Right to Development*

The political discourse of the various working groups on the RTD and the Commission on Human Rights is often characterized by predictable posturing of political positions rather than practical dialogue on the implementation of the RTD. From the beginning, the concept of the RTD has been controversial. It emerged from the legitimate preoccupation of newly independent countries with problems of development and the dominance of East-West issues on the agenda of the Commission on Human Rights, marginalizing the concerns of the political South, except for racial discrimination, apartheid, and foreign occupation, which did receive special consideration. Efforts to use the U.N. to advance the idea of a New International Economic Order (NIEO) had emboldened Third World delegations. But the challenge to the prevailing order favoring Western industrialized countries generated a reaction that ranged from cautious support among Western European delegations to outright hostility for the idea of a human RTD from the United States and a few others.

This politicization of the RTD discussion in the U.N. has been maintained throughout the various Working Groups and even during the period of the OEWG and the Independent Expert, established pursuant to resolution 1998/72. The political positions can be categorized roughly into four groups. One group, the most active members of the NAM in the Working Group, sometimes calling itself the "Like-Minded Group" (LMG) consists of Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam.²² Their interests are to use the RTD to reduce inequities of international trade, the negative impacts of globalization, differential access to technology, the crushing debt burden, and similar factors they see as detrimental to the enjoyment of human rights and development. In the same vein, they have supported the follow-up to the Durban Conference against Racism and the idea that the RTD involves obligations of the international community to create better conditions for development.²³

A second group consists of the more moderate developing countries that genuinely want to integrate human rights into their national policies and want to maintain a positive relationship with the donor community, the international development agencies, and financial institutions.

A third group is made up of countries in transition and developed nations that tend to support the RTD as a vehicle to improve the dialogue between

22. List circulated by the Secretariat at the Open-ended Working Group on the Right to Development (Feb. 10, 2003) (on file with the author). In 2004, LMG ceased to exist and the group spoke through the NAM representative (Malaysia).

23. These concerns are reflected in issues assigned to the Independent Expert. See G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, U.N. Doc. A/2890 (2001).

developed and developing countries and would like to see some progress made in implementing this right. This group, particularly the European Union, sometimes expresses skepticism and occasionally sees its role in the Commission as damage-limitation. They will go along with a resolution if nothing particularly objectionable is inserted or will abstain.

The fourth group, in which the United States is almost always the key protagonist, votes against these resolutions. The other members of this group vary according to circumstances and have included Japan, Denmark, and Australia, along with smaller countries under the influence of the United States.

Some recent voting may illustrate the politics of the RTD. In 2001 at the Commission on Human Rights, most European nations voted for the resolution on the RTD, although the United States and Japan voted against it and the United Kingdom, the Republic of Korea, and Canada abstained.²⁴ From the March–April session of the Commission to the September–December session of the General Assembly, the voting had shifted and 123 voted in favor and four against (Denmark, Israel, Japan, and the United States), with forty-four abstentions.²⁵ Among the abstaining countries were the principal donors: Australia, Austria, Belgium, France, Germany, Norway, Sweden, and the U.K., who had agreed to the resolution in 2000.²⁶

At the Commission session in April 2002, when the United States was not a member, references to the Durban Conference Against Racism were retained, but the Commission was willing to endorse the conclusions adopted by consensus at the third session of the OEWG. The vote in the Commission was thirty-eight to none, with fifteen abstentions.²⁷ At its 57th session in December 2002, the General Assembly endorsed the conclusions of the OEWG by a vote of 133 in favor with four negative votes (United States, Australia, the Marshall Islands and Palau), and the abstention of forty-seven other countries.²⁸ The dramatic change at the General Assembly was due in part to the insistence on a reference to the Durban Conference Against Racism and, especially for the United States, to the insertion of language relating to the international political economy, which had not been agreed to in April. South Africa, presenting the draft on behalf of the NAM, said it “forged new ground for the [Third] Committee as it was based on the agreed conclusions of the last session of the Working Group on the Right to Development.”²⁹ However, the Australian representative expressed surprise that

24. Commission on Human Rights Res. 9, U.N. ESCOR, 57th Sess., at 68, U.N. Doc. E/CN.4/2001/167 (2001) (adopted by a vote of 48 to 2, with 3 abstentions).

25. G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, U.N. Doc. A/2890 (2001) (adopted on Dec. 19, 2001).

26. GA Res. 55, U.N. GAOR, 55th Sess., Supp. No. 49, at 405, U.N. doc. A/55/49, vol. 1 (2000).

27. Commission on Human Rights Res. 69, U.N. ESCOR, Supp. No. 3, at 292, U.N. doc. E/CN.4/2002/200, Part I (2002).

28. G.A. Res. 556, U.N. GAOR, 57th Sess., Supp. No. 49, U.N. doc. A/57/49 (2002) (adopted on Dec. 18, 2002, by a vote of 133 to 4, with 47 abstentions).

29. Press Release, U.N. GAOR, 57th Sess., 52d mtg., U.N. Doc. GA/SHC/3726 (2002), available at

“the main sponsors of a relevant text introduced a draft resolution to the Commission that went far beyond what had been agreed” and voted against the resolution; the E.U. also felt it a “pity that the text did not include language that had been agreed during the negotiations”; Canada found the outcome “disheartening” and abstained; the United States voted against the draft, explaining that:

[w]hile there was much in the draft that the United States would support, it would express profound disagreement to the inclusion of language on macroeconomic policy and globalization. Neither did the United States support adding to the mandate of the High Commissioner for Human Rights burdensome tasks related to development, which were already being considered by other United Nations agencies.³⁰

Within the context of this highly politicized issue, there are specific concerns of the United States, to which I will now turn.

B. U.S. Objections to the Right to Development

When the drafting group was established in 1981,³¹ the U.S. government, under the Reagan Administration, made it clear to the other members that the RTD Declaration should not be used as a means of resuscitating NIEO. Nor would the United States allow the Declaration to create any entitlement to a transfer of resources; aid was a matter of sovereign decision of donor countries and could not be subject to binding rules under the guise of advancing every human being’s RTD.

That bargain was kept insofar as the Declaration of 1986 does not purport to establish any legally binding obligations and remains at the level of general principles. The United States, nevertheless, voted against it. The rejections—or at best reluctant participation in a consensus—seem to result from five concerns shared by each of the U.S. administrations. These concerns relate to the underlying political economy; the relation of the RTD to economic, social and cultural rights; conceptual confusion; conflicts of jurisdiction; and general resistance to international regulation.

1. Ideological Objections Based on Political Economy

Especially under Republican administrations, but also under Democratic ones, the United States has expressed implicitly and at times openly the idea that the American experience is built on self-reliant, entrepreneurial efforts

<http://www.un.org/News/Press/docs/2002/gashc3726.doc.htm> (last visited Feb. 9, 2004).

30. Press Release, U.N. GAOR, 57th Sess., 57th mtg., U.N. Doc. GA/SHC/3729 (2002), available at <http://www.un.org/News/Press/docs/2002/GASHC3729.doc.htm> (last visited Feb. 9, 2004).

31. Commission on Human Rights Res. 36, U.N. ESCOR, 37th Sess., Supp. No. 5, at 237, U.N. Doc. E/CN.4/1475 (1981).

to create a great country out of the wilderness and that this hard-won success cannot be willed upon others through a Declaration. In 1981, when the drafting process began, Michel Novak, author of *The Spirit of Democratic Capitalism* and current director of social and political studies at the American Enterprise Institute, explained that "in addressing this item, my delegation finds it useful to translate the phrase 'right to development' into terms rooted in our own experience."³² He went on to remind the Commission that:

In 1881 . . . no one spoke of a "right to development." But our nation had an *opportunity* to develop, perhaps even a *responsibility* to develop. Our people knew that a responsibility to develop was imposed on them by their own capabilities and blessings, and by their new ideas about political economy.³³

The U.S. delegation stressed the idea that development occurs thanks to economic liberties and private enterprise rather than a claimed right to development. Again, Novak told the Commission:

in this Commission we have heard transnational corporations maligned. But no single institution has been so responsible for the great leap forward of economic development in this century as the private business corporation. The large business corporation is relatively new in history. The private independent transnational corporation is even newer.³⁴

In case there was any doubt that capitalism is the economic model and motor of development, he continued:

we have heard distinguished delegates . . . speak of "obscene profits." Are we to understand that losses are virtuous? Where there are no profits, there can be only losses or stagnation. But these are the exact opposite of development. Development itself is a form of profit—a reasonable return on investments made, a reasonable growth, and a reasonable surge forward. We recognize that both profits and losses can be judged by a rule of reason . . . on the whole, an economy without profit is an economy without development.³⁵

This view was picked up by the U.S. representative in the Working Group of Governmental Experts in 1987, who said "it was more important to look

32. Statement by Dr. Michael Novak, U.S. Representative to the U.N. Human Rights Commission, C.H.R. Res. 36, U.N. ESCOR, 37th Sess., Supp. No. 5, at 237, U.N. Doc. E/CN.4/1475 (1981) (text of statement on file with author) [hereinafter Novak Statement].

33. *Id.*

34. *Id.*

35. *Id.*

at the tremendous contributions made by countries like the United States to the actual development of developing countries than to listen to rhetoric on the right to development from countries that had contributed nothing positive to assist developing nations."³⁶

About the only difference in nuance between Republican and Democratic administrations is that the former stress economic liberties as the motor for development while the latter attach importance to individual rights more generally as making development possible. Novak told the commission in 1981, "Our road to development lay in trusting *economic* liberty first . . ."³⁷ Ambassador Nancy Rubin, a Clinton appointee, expressed the more general position that all freedoms are necessary for development. She told the Commission in 1999 that "her delegation believed that it would be useful to focus the debate on the role of individual freedom in fostering development and the role that transparency, good governance and the effective rule of law played in promoting natural growth and prosperity."³⁸ Translating this perspective into a practical suggestion, she stated her hope that:

the working group would make a thorough study of the close relationship between economic and social development, on the one hand, and respect for universally recognized human rights and fundamental freedoms, on the other. Comparing successful developing countries with less successful ones, in relation to their protection of human rights and the openness of their economic policies, would prove instructive for the working group.³⁹

Ambassador George Moose, also appointed under the Clinton Administration, told the Commission in 2000:

There was a direct and demonstrable relationship between individual liberty and economic progress. Indeed, it was the protection of individual liberties which unleashed a people's creative and entrepreneurial spirit. Governments had an overriding responsibility to their citizens, and genuine and sustainable development was fostered primarily by expanding individual human rights.⁴⁰

It may be presumed to be a sincerely held belief of the decision-makers in the U.S. government that the best path to development is through free enterprise domestically and free trade internationally. Although this perspec-

36. Statement by the U.S. Representative, in *Report of the Working Group of Governmental Experts on the Right to Development*, U.N. ESCOR, 43d Sess., Annex II, Agenda Item 8, at 11–12, U.N. Doc. E/CH.4/1987.10 (1987), quoted in Alston, *supra* note 3, at 22.

37. *Id.*

38. Statement by the U.S. Representative to the Commission on Human Rights, U.N. ESCOR, 55th Sess. ¶ 82, U.N. Doc. E/CN.4/1999/SR.59 (1999).

39. *Id.* ¶ 81.

40. U.N. ESCOR, 56th Sess., 10th mtg. ¶ 38, U.N. Doc. E/CN.4/2000/SR.10 (2000).

tive has been frequently reiterated in the context of the debate on the RTD, the United States has not explicitly made the argument that the RTD is incompatible with this economic theory.

Professor Philip Alston described that the Reagan Administration considered the RTD:

as the antithesis of a large part of its foreign policy. In this view, the right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights and to permit the third World to "distort" the issue of human rights by affirming the equal importance of economic, social and cultural rights with civil and political rights and by linking human rights in general to its "utopian" aspirations for a new international economic order.⁴¹

In spite of NIEO receding into history and the Cold War being over for more than a decade, there is a residual ideological hostility to the RTD from the U.S. government.

Occasionally, the U.S. delegation introduces the idea that the RTD is invoked as a pretext for developing countries to violate civil and political rights. Before the Declaration was adopted, the United States stated, "We cannot accept the view that before civil and political rights can be fully accorded to a people, an ideal economic order must first be established."⁴² In fact, the 1986 Declaration endorses this very position:

in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.⁴³

The Declaration further calls on states "to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights."⁴⁴ The Vienna Declaration and Programme of Action clearly reinforced the position that "the lack of development may not be invoked to justify the abridgement of internationally recognized human rights."⁴⁵ This reaffirmation was acknowledged by Amba-

41. Alston, *supra* note 3, at 22.

42. Novak Statement, *supra* note 32.

43. G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986). This idea is further developed in Art. 6, ¶ 2 of the resolution, which stipulates that "equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights."

44. *Id.* at Art. 6, ¶ 3.

45. *Vienna Declaration*, *supra* note 7, at ¶ 10.

sador Rubin before the Commission in 1999.⁴⁶ The United States is correct to challenge other countries if they were to use the RTD as a pretext for violating any human rights. Joel Danies, appointed by the Bush Administration, explained the negative vote on the resolution as a whole in 2003 “because it continued to present the concept that lack of development justified the denial of internationally recognized human rights.”⁴⁷ If such remarks are based on an interpretation of the 1986 Declaration as justifying such denial, they are inaccurate; if they reflect a criticism of erroneous interpretations of the RTD by certain delegations, then they may be on target.

2. Objections to the Right to Development Based on the Relation Between the Right to Development and Economic, Social, and Cultural Rights

What is more problematic for the United States from the perspective of political economy is the “equal attention and urgent consideration” provision of the preamble and article 6 of the Declaration since it would require such attention be paid to economic, social, and cultural rights, which is not the position of the U.S. government. In 2003, the U.S. delegation explained:

In our estimation the right to development (RTD) is not a “fundamental,” “basic,” or “essential” human right. The realization of economic, social and cultural rights is progressive and aspirational. We do not view them as entitlements that require correlated legal duties and obligations. States therefore have no obligation to provide guarantees for implementation of any purported “right to development.”⁴⁸

For most developing countries and development agencies, as well as the Independent Expert, the realization of economic, social and cultural rights is critical to the implementation of the RTD. The Independent Expert has selected the rights to health, adequate food, and education for his studies.⁴⁹ Neither he nor any of the agencies that have expressed themselves on the RTD have claimed that the concern for economic, social and cultural rights should be at the expense of civil and political rights. However, the U.S. position that economic, social, and cultural rights are merely aspirational and therefore the RTD loses importance, confuses the significance of the RTD with the legal nature of economic, social, and cultural rights. In development practice, all human rights, including the RTD, require progressive

46. U.N. ESCOR, 55th Sess., 10th mtg. ¶ 17, U.N. Doc. E/CN.4/1999/SR.10 (1999).

47. Statement by Joel Danies, U.S. Representative to the U.N. Human Rights Commission, Summary Record of the 63d Meeting, 59th Sess., at 5, ¶ 15, U.N. Doc. E/CN.4/2003/SR.63 (2003) [hereinafter Danies Statement].

48. United States Government, Statement at the U.N. Commission on Human Rights, *supra* note 2.

49. *Report of the Independent Expert on the Right to Development*, U.N. GAOR, 55th Sess., at 11, ¶ 38, U.N. Doc. A/55/306 (2000).

measures. In this sense, building a fair and effective justice and law enforcement system is not fundamentally different from building a fair and effective health system. Internal reforms and external assistance need to be actively pursued to advance both categories of rights on the basis of clear principles, which the human rights framework of the RTD provides. The U.S. position does not appear to accept this approach.

3. Conceptual Objections to the Right to Development

The United States has complained that the formulations and definitions used are not clear and require rethinking before they can be taken seriously. U.S. representative Novak said in 1981, “[t]he concept of ‘development’ is itself in need of development. The fact of development in certain nations under certain conditions is clear. But theories as to why such development has occurred are not clear.”⁵⁰ Similarly, the conceptual clarity was at issue in 1998, when the U.S. delegate, Nancy Rubin, said:

as this morning’s debate on the agenda shows, there is no agreement on what comprises the Right to Development. While we all hope to be able to reach consensus on this issue, the numerous and, at times, contradictory opinions expressed in the last Working Group indicates that we still need more time to discuss the Right to Development to find common ground on which we can all agree.⁵¹

In 2003, Danies explained the U.S. negative vote in part because “there is no internationally accepted definition of such a right.”⁵² In spite of the constant efforts of the Independent Expert to provide a definition of the RTD, it must be acknowledged that delegates and scholars continue to voice confusion over the definition.

The principal contribution to the conceptual debate from the United States has been to declare that the RTD is a synthesis of rights, without any particular additional cement. Rubin, representing the United States in 1998, told the Commission that:

[h]er government subscribed to the view that the right to development was a synthesis of many human rights and that the role of human rights was to empower individuals and communities. Implementation of the right to development was therefore predicated

50. Statement by Nancy Rubin, U.S. Delegate to the U.N. Human Rights Commission, Comment on the Working Group on the Right to Development, 54th Sess., (Apr. 27, 1998) (transcript on file with the author).

51. Statement by Joel Danies, U.S. Representative to the U.N. Human Rights Commission, Comment on the Working Group on the Right to Development, 59th Sess. (2003), *available at* <http://www.humanrights-usa.net/statements/0425RtoD.htm> (last visited Feb. 16, 2003).

52. *Id.*

on Governments meeting their obligations to promote universal human rights for each individual citizen so that every member of society could reach his or her full potential.⁵³

The Independent Expert does not share the view that the RTD can be understood exclusively as a “synthesis right.” He wrote in his fifth report:

The right to development is a composite right to a process of development; it is not just an “umbrella” right, or the sum of a set of rights. The integrity of these rights implies that if any one of them is violated, the whole composite right to development is also violated. The independent expert describes this in terms of a “vector” of human rights composed of various elements that represent the various economic, social and cultural rights as well as the civil and political rights. The realization of the right to development requires an improvement of this vector, such that there is improvement of some, or at least one, of those rights without violating any other.⁵⁴

The importance of realizing all human rights in the context of development is shared by the United States government and the Independent Expert; the United States does not seem to be ready to follow the Independent Expert further to identify the “value added” which he finds in the policies that can make the “process” achieve the objectives of the Declaration.

4. *Jurisdictional Objections to the Right to Development*

The United States is particularly adamant regarding the lack of jurisdiction of the Commission on Human Rights over matters of trade, international lending and financial policy, activities of transnational corporations, and other aspects of globalization. In 2003, the U.S. delegate to the Working Group referring to a suggestion of a seminar on development and trade, remarked:

in this Working Group, in this forum, these delegates do not have the appropriate expertise for such a discussion. Further, we are concerned that such a seminar would divert limited and scarce resources available to the Office of the United Nations High Commissioner for Human Rights (OHCHR) for other activities that cannot and are not being addressed in other fora.⁵⁵

53. Commission on Human Rights, 54th Sess., 58th mtg. at 4, ¶ 10, U.N. Doc. E/CN.4/1998/SR.58 (1998).

54. *Fifth Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2002/69*, at 5, ¶ 6, U.N. Doc. E/CN.4/2002/WG.18/6 (2002).

55. United States Government, Statement at the U.N. Commission on Human Rights, *supra* note 2.

The U.S. position is based on an understandable concern that the Commission should avoid addressing from a human rights perspective issues about which the United States is engaged in intense negotiations with the World Trade Organization (WTO), the World Bank, the International Monetary Fund (IMF), regional development banks, the Organization for Economic Cooperation and Development (OECD), and regional settings such as the Asia-Pacific Economic Cooperation (APEC) summit. In those settings, as well as in bilateral negotiations, the United States is able to pursue its perceived interests with interlocutors who are not likely to challenge the impact of U.S. policies by raising human rights issues—particularly in a forum where U.S. influence is much greater. Human rights activists and NAM delegates, on the other hand, consider the Commission and the treaty bodies as the principal sources of pressure on states to ensure that human rights are not forgotten in the economic and financial negotiations.

5. *Regulatory Objections to the Right to Development*

When drafting began on the Declaration in the early 1980s, the United States took the position that it could accept mere principles, but not an attempt to legislate rules in the manner of the New International Economic Order. The U.S. position, supported mainly by Germany and the U.K. at the time, prevailed in the final text. The U.S. delegation has been vigilant on this point ever since.

In 2003, the United States opposed a paragraph that referred to the option of an international legal standard of a binding nature because it was not discussed in the Working Group.⁵⁶ The United States called for a recorded vote in which Australia, Canada, Japan, and Sweden joined the United States to oppose the paragraph.⁵⁷ At the Commission, the U.S. delegate said that “[h]is delegation opposed the proposal that the Sub-Commission should prepare a concept document on a legally binding instrument on the right to development because it would devote scarce resources to a project that would be unlikely ever to garner significant support.”⁵⁸

The objection, however, is more than procedural. The United States is firmly opposed to the idea of regulating state behavior to conform to the RTD or any elements thereof. The proposal from the LMG that was retained in the 2003 Commission resolution regarding such a binding legal instrument is now before the Sub-Commission. Resolution 2003/83, adopted in April 2003, requested a concept document from the Sub-Commission on the Promotion and Protection of Human Rights for submission to the sixty-first session of the Human Rights Commission.

56. Danies Statement, *supra* note 47, at 3, ¶ 5.

57. *Economic and Social Council Official Records*, U.N. Commission on Human Rights, 59th Sess., Supp. No. 3, at U.N. Doc. E/2003/23/E/CN.4/2003/135 (2003), available at <http://www.unhcr.ch/html/menu2/2/59chr/voting25pm.htm>.

58. Danies Statement, *supra* note 47, at 5, ¶ 15.

In response to this request, the Sub-Commission requested that member Florizelle O'Connor prepare, with no financial implications, a working paper identifying possible alternatives to respond to this request to be submitted to the Sub-Commission's next session. Should that body propose any such instrument or even voluntary guidelines, the United States, with its consistent resistance to any regulatory mechanism regarding the RTD, will likely find reason to object to it.

C. Exceptions to U.S. Opposition to the RTD

U.S. opposition to the RTD has not been systematic. There were two principal moments when the United States joined a consensus on the RTD. The first was at the World Conference on Human Rights in Vienna, when the Vienna Declaration and Programme of Action was adopted by consensus and included the following statement: "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights."⁵⁹ In the debates in the Commission on Human Rights, the United States has acknowledged: "In Vienna, we affirmed the RTD as a universal and inalienable right with the human person as the central subject of development."⁶⁰ More recently, Ambassador Moose reminded the Commission that "there was broad consensus on certain basic truths such as the affirmation in the Vienna Declaration that the human person was the central subject of development."⁶¹

The second time the United States joined a consensus was in 1998, when the mechanism of the OEWG and the position of the Independent Expert were created. At that time, the U.S. delegate said that it:

was pleased to be able to join the consensus on the draft resolution despite some serious reservations concerning paragraph 4(c), which implied that developing countries were being actively excluded from the globalization process, the reference in paragraph 4(d), to structural reforms and the statement in paragraph 3(a) that the right to life included a right to the "minimum necessities of life." The unwillingness of the sponsors to accept a reference to freedom of speech and belief and freedom from fear and want was also disappointing, since those four freedoms should be the cornerstone of any serious approach to human rights problems.⁶²

The United States has thus expressed opposition to international standard setting regarding the RTD that it perceives as either challenging its neoliberal

59. *Vienna Declaration*, *supra* note 7, at ¶ 10.

60. Statement by Nancy Rubin, *supra* note 50.

61. Commission on Human Rights, 56th Sess., 10th mtg. at 6, ¶ 31, U.N. Doc. E/CN.4/2000/SR.10 (2000).

62. Statement by Nancy Rubin, *supra* note 50, at 4, ¶ 9.

eral priorities, acknowledging rights and duties in the area of economic, social, and cultural rights, perpetuating conceptual confusion, introducing conflicts of jurisdiction with economic negotiations, or proposing regulation of state behavior. Where such concerns are not present, it has gone along with consensus positions on the RTD. These positions of principle can be usefully contrasted with U.S. practice in financing development.

IV. PROPOSED U.S. DE FACTO IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT IN PRACTICE

A. *Absence of the Right to Development in Practice*

The importance of implementing of the RTD has been a constant refrain of resolutions, statements by delegations, and conclusions of working groups. When it comes to setting priorities and allocating resources, however, this goal has been conspicuously absent in the policies and practice at the national and international levels.

At the national level, ministries of foreign affairs of most countries instruct their delegates to the Commission on Human Rights and the General Assembly to vote for the RTD resolutions and support the concept in speeches. It is apparent that the reference to the RTD in these foreign policy positions, however, has little impact on national development policy and practice.

At the regional level, both donor and recipient countries have policies for development cooperation without reference to the RTD. Priority has been given to Africa in the U.N. through the United Nations New Agenda for the Development of Africa in the 1990s (UN-NADAF) and the African States' New Partnership for Africa's Development (NEPAD), also without an explicit reference to the RTD.⁶³ The Organization for Economic Cooperation and Development's Development Assistance Committee (OECD/DAC) deals with human rights-related issues, such as governance, through its Network on Good Governance and Capacity Development (GOVNET), and conflict, peace and development co-operation, through the Network on Conflict, Peace and Development Co-operation (CPDC Net). The Organization has also elaborated a set of strategies for sustainable development, defined as "a co-ordinated set of participatory and continuously improving processes of analysis, debate, capacity-strengthening, planning and investment, which integrates the economic, social and environmental objectives of society, seeking trade offs where this is not possible."⁶⁴ While many of the fundamental RTD's principles of equity, non-discrimination, participation, transparency and accountability may be found throughout its development programs, strategies and themes, neither human rights nor the RTD is explicitly part of DAC's approach to development cooperation.

63. *Fifth Report of the Independent Expert*, *supra* note 54, at 10, ¶¶ 18–24.

64. OECD, *Strategies for Sustainable Development: Practical Guidance for Development Co-operation*, DCD/DAC (2001) 9, Mar. 21, 2001, at 8.

In Cotonou on June 23, 2000, the European Community signed a Partnership Agreement with the African, Caribbean and Pacific states providing \$25 billion through 2007, which includes a political dimension calling for a dialogue to assess “respect for human rights, democratic principles and the rule of law, and good governance.”⁶⁵ As the Greek ambassador, speaking on behalf of the E.U., said to the Commission on Human Rights in 2003: “The Cotonou Partnership Agreement between the European Union and the African, Caribbean, and Pacific countries constitutes a concrete contribution to the fight against poverty and a further step towards the realization of the Right to Development.”⁶⁶ However, these statements are only a minor part of the political dialogue; neither human rights nor the RTD appear among the objectives of the partnership or its fundamental principles.

The U.S. government is no exception to this general disconnect between the Geneva rhetoric of the RTD and the neglect for it in development policy circles. It is all the more unlikely that the United States would apply the RTD in its development policy since, unlike most European countries, it opposes resolutions on the RTD more often than it joins a consensus. There does not appear to be any reference to this right in the policies of the United States Agency for International Development (USAID) or in any other federal agency dealing with development cooperation. There exist no incentives to employ the RTD discourse or to request inter-agency task forces to consider the ways and means of implementing this right. Whatever conversations may take place in the Bureau for International Organization Affairs, the instructions that reach Geneva are to cite what the government considers good practice in U.S. development financing but not to accept that such practices are based on any concern for development as a human right.

International policy setting is equally problematic. Development strategies have been decided upon in recent years in meetings of the Bretton Woods Institutions, the United Nations Department of Economic and Social Affairs, United Nations Development Program (UNDP), and others. The World Bank and IMF’s Poverty Reduction Strategy Papers (PRSPs), the World Bank’s Comprehensive Development Framework (CDF), and the Common Country Assessment and United Nations Development Assistance Framework (CCA/UNDAF) denote policies that have far greater visibility than the RTD, command the attention of decision makers, and make resources available for each country. Although each approach contains elements and principles that overlap with the RTD,⁶⁷ the effort that goes into conceiving, funding, and monitoring them is done outside of the RTD framework.

65. Françoise Moreau, *The Cotonou Agreement—New Orientations*, in THE ACP-EU COURIER: SPECIAL ISSUE ON THE COTONOU AGREEMENT, Sept. 2000, at 6, 7–8.

66. Ambassador Tassos Kriekoukis, Head of the Delegation of Greece on Behalf of the European Union, Statement at the Commission on Human Rights, 59th Sess., Item 7: The Right to Development (Mar. 25, 2003) (text on file with the author).

67. See Sengupta, *Development Co-operation and the Right to Development*, *supra* note 18, at 385–87.

The U.N. summits tend to make one allusion to the RTD, often as a reluctant political compromise in response to U.S. efforts to eliminate all reference to human rights and the RTD. For example, world leaders agreed in September 2000 at the United Nations Millennium Summit on a set of goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women, and the General Assembly adopted The Millennium Development Goals (MDGs), which included the commitment “to making the right to development a reality for everyone and to freeing the entire human race from want.”⁶⁸ In his report on the implementation of the MDGs, the Secretary General quoted the above statement on the RTD but had little to report on action relating to that passage.⁶⁹ Nor did he provide any indication of whether or how the RTD could have a role in the MDGs.⁷⁰ When UNDP devoted its *Human Development Report* to the MDGs in 2003, it provided an assessment of the common motivations of human rights and the MDGs⁷¹ but the RTD was not mentioned, in spite of the participation of the Independent Expert on the Right to Development in the advisory panel.⁷²

Another example is the World Summit on Sustainable Development held in Johannesburg, South Africa, September 2–4, 2002. The human rights language was removed entirely from the Declaration of Johannesburg and the brief reference in the draft to the importance of human rights, including the RTD, was replaced by this sentence: “We commit ourselves to building a humane, equitable and caring global society, cognizant of the need for human dignity for all.”⁷³ The expression “human rights” is not mentioned once in the Declaration. In the Plan of Implementation, the Summit mentioned the RTD in several places. In the introduction to the Plan, the Summit merely noted that “peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.”⁷⁴

With respect to sustainable development in Africa, the Summit said that:

achieving sustainable development includes actions at all levels to . . . [c]reate an enabling environment at the regional, sub-regional,

68. G.A. Res. 55/2, U.N. GAOR, 55th Sess., 8th plen. mtg., Agenda Item 60(b), ¶ 11, U.N. Doc. A/RES/55/2 (2000).

69. *Implementation of the United Nations Millennium Declaration: Report of the Secretary-General*, U.N. GAOR, 57th Sess., Agenda Item 44, ¶ 38 and ¶¶ 82–89, U.N. Doc. A/57/270 (2002).

70. *Id.*

71. U.N. Development Programme, HUMAN DEVELOPMENT REPORT 2003, at 28, Box 1.1 (2003), available at http://www.undp.org/hdr2003/pdf/hdr03_complete.pdf (last visited Feb. 9, 2004).

72. *Id.* at viii.

73. *Report of the World Summit on Sustainable Development*, Res. 1, Annex: Johannesburg Declaration on Sustainable Development, at 1, ¶ 2, U.N. Doc. A/CONF.199/20 (2002).

74. *Report of the World Summit on Sustainable Development*, Res. 2, Annex: Plan of Implementation of the World Summit on Sustainable Development, at 9, ¶ 5, U.N. Doc. A/CONF.199/20 (2002).

national and local levels in order to achieve sustained economic growth and sustainable development and support African efforts for peace, stability and security, the resolution and prevention of conflicts, democracy, good governance, respect for human rights and fundamental freedoms, including the right to development and gender equality.⁷⁵

With respect to the institutional framework for sustainable development, the Summit affirmed:

Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing.⁷⁶

The U.S. government has tended to be behind the efforts to remove references to human rights at conferences and summits, like WSSD, the Children's Summit, the General Assembly Special Session on HIV/AIDS and the Food Summit. The General Assembly recently reaffirmed over U.S. opposition its "commitments to implement the goals and targets set in all the major United Nations conferences, summits, and special sessions and those undertaken at the Millennium Assembly, in particular, those relating to the realization of the RTD."⁷⁷

Similar observations can be made about the Specialized Agencies (WHO, ILO, FAO, UNESCO, etc.) and U.N. funds and programs (UNDP, UNIFEM, UNICEF, etc.), whose approaches to development cooperation rarely include human rights and almost never the RTD. Among the Specialized Agencies, ILO and UNESCO have the most explicit mandates on human rights, and UNICEF has adopted the Convention on the Rights of the Child as its normative framework. However, the level of development assistance is relatively modest and the policies of international cooperation are not yet attuned to the RTD.

One part of the U.N. system where the RTD has an acknowledged place of prominence is the OHCHR, which includes a "Research and Right to Development Branch." When that Office was created, the General Assembly required the High Commissioner to "recognize the importance of promoting a balanced and sustainable development for all people and of ensuring realization of the right to development, as established in the Declaration on the Right to Development" and included among the responsibilities of the Office "to promote and protect the realization of the right to development

75. *Id.* at 44, ¶ 62(a).

76. *Id.* at 64, ¶ 138.

77. G.A. Res. 223, U.N. GAOR, 57th Sess., at 432, ¶ 6, U.N. Doc. A/RES/57/223 (2002) (adopted Dec. 18, 2002, by a vote of 133 to 4, with 47 abstentions).

and to enhance support from relevant bodies of the United Nations system for this purpose”⁷⁸ However, this area, like many others falling within the responsibilities of the High Commissioner, is understaffed and underfunded. The United States has reminded the Commission that there are not enough resources to request a study on an aspect of the RTD it would rather not have studied.⁷⁹

The Independent Expert concluded his sixth report by noting that the RTD has not been realized during this period of accelerated globalization “because appropriate policies for realizing the right to development have rarely been adopted.”⁸⁰ The absence of clear national and international policies integrating the RTD approach into the development process is symptomatic of the RTD being merely rhetorical: governments and intergovernmental organizations do not genuinely expect their support for the concept of the RTD to have consequences. Bucking this trend, the United States has rejected the rhetoric of the RTD while in practice supporting principles that happen to conform to it.

B. Millennium Challenge Account as an Example of the U.S. Right to Development in Practice

The U.N. Conference on Financing for Development brought together in March 2002 in Monterrey, Mexico, fifty Heads of State or Government, 200 delegates at the ministerial level, and leaders from the private sector, civil society, and all the major intergovernmental financial, trade, economic, and monetary organizations. Thabo Mbeki, President of South Africa, was one of the few speakers to mention the RTD, but he only recalled the commitment he had made to the RTD at the Millennium Summit.⁸¹ At the Monterrey Conference, President Bush launched an idea that is not far removed from the concept of the RTD and even the development compact, as proposed by the Independent Expert. In his March 22, 2002 speech to the conference President Bush said, “Developed nations have a duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.”⁸² He then proposed a \$5 billion annual increase of Overseas Development Assistance (ODA) through a new Millennium Challenge Account (MCA), “devoted to projects in nations that govern justly, invest in their people and encourage

78. G.A. Res. 141, U.N. GAOR, 48th Sess., Supp. No. 49, at 262, U.N. Doc. A/48/49 (1993).

79. See, e.g., Danies Statement, *supra* note 47, at 5, ¶ 15.

80. *Preliminary Study of the Independent Expert on the Right to Development. Mr. Arjun Sengupta, on the Impact of International Economic and Financial Issues on the Enjoyment of Human Rights. Submitted in Accordance with Commission Resolutions 2001/9 and 2002/69*, ¶ 39, U.N. Doc. E/CN.4/2003/WG.18/2 (2002).

81. President Thabo Mbeki, Address at the International Conference on Financing for Development, available at <http://www.un.org/ffd/statements/southafricaE.htm> (Mar. 21, 2002).

82. President George W. Bush, Remarks at the International Conference on Financing for Development, available at <http://www.un.org/ffd/statements/usaE.htm> (Mar. 22, 2002).

economic freedom.”⁸³ As subsequently elaborated, the MCA will provide funds to developing countries that are strongly committed to three goals defined as follows:

Good governance: Rooting out corruption, upholding human rights, and adherence to the rule of law are essential conditions for successful development.

The health and education of their people: Investment in education, health care, and immunization provide for healthy and educated citizens who become agents of development.

Sound economic policies that foster enterprise and entrepreneurship: More open markets, sustainable budget policies, and strong support for individual entrepreneurship unleash the enterprise and creativity for lasting growth and prosperity.⁸⁴

The new program has been described as “the most fundamental change to U.S. foreign assistance policy since President John Kennedy introduced the Peace Corps and the USAID in the early 1960s.”⁸⁵ On January 23, 2004, President Bush signed the law creating the Millennium Challenge Corporation (MCC) which will administer the MCA. The law provided \$1 billion in initial funding for the 2004 fiscal year. The MCC Board met on February 2, 2004 and approved both an interim CEO as well as candidates for participation in the MCA in the 2004 fiscal year.⁸⁶

There are clear similarities with the Right to Development-Development Compact (RTD-DC) approach, especially with respect to the first two MCA goals. The Independent Expert defines a development compact as “a mechanism for ensuring that all stakeholders recognize the ‘mutuality of obligations,’ so that the obligations of developing countries to carry out rights-based programmes are matched by the reciprocal obligations of the international community to cooperate to enable the implementation of the programmes.”⁸⁷ He based his concept on, as described in his fourth report, “the original proposal of the Norwegian Minister Stoltenberg and further developed by others, including himself in the late 1980s, following the pioneering use of the Support Group mechanism by the IMF in resolving the problems of the arrears of defaulting countries.”⁸⁸ He considers his concept of the RTD-DC as less ambitious than Stoltenberg’s “development contracts” and

83. *Id.*

84. Press Release, USAID, Millennium Challenge Account Update Fact Sheet, available at http://www.usaid.gov/press/releases/2002/fs_mca.html (June 3, 2002).

85. Steve Radelet, *Will the Millennium Challenge Account Be Different?*, WASH. Q., Spring 2003, at 171.

86. See <http://www.mca.gov>. See also *The Launching of the Millennium Challenge Account*, Alan P. Larson, Under Secretary for Economic, Business and Agricultural Affairs, Department of State, Foreign Press Center Briefing, Washington, D.C., available at <http://fpc.state.gov/28839.htm> (Feb. 3, 2004).

87. *Fifth Report of the Independent Expert*, *supra* note 54, at ¶ 14(c).

88. *Fourth Report of the Independent Expert on the Right to Development*, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2001/19, ¶ 55, U.N. Doc. E/CN.4/2002/WG.18/2 (2001).

“more linked to an understanding or an agreement between a developing country undertaking programmes of adjustment and reform and a group of industrial countries which would ensure the provision of necessary assistance to implement the programmes.”⁸⁹

The mutuality of obligations is clearly in the MCA and even in the “challenge” concept. The focus on governance, including human rights, and on health and education certainly overlap with the RTD-DC approach defined by the Independent Expert.⁹⁰

This similarity is all the more intriguing considering that the United States did not endorse the inclusion of the RTD in the Monterrey Consensus within the long enumeration of mutually reinforcing and essential elements for sustainable development. Those elements were good governance, sound economic policies, solid democratic institutions, and “freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies.”⁹¹ It is difficult to interpret this text as attaching much importance to the RTD for policy purposes. The real thrust of the document comes in the next paragraph, which states that “appropriate policy and regulatory frameworks” should be pursued in ways that “foster a dynamic and well functioning business sector,” adding that this must be done “while improving income growth and distribution, raising productivity, empowering women and protecting labour rights and the environment.”⁹² In sum, the Monterrey Consensus gave scant attention to the RTD in setting policy priorities for financing development.

The new U.S. funding program announced in Monterrey, nevertheless, bears a striking resemblance to the RTD-DC in at least seven respects listed in the following table.

89. *Id.* ¶ 55 n.20.

90. The four elements of RTD-DC are a rights-based development program, poverty reduction and social indicator targets, development compacts, and a monitoring mechanism. See *Preliminary Study of the Independent Expert*, *supra* note 80, at Box 1.

91. *Report of the International Conference on Financing for Development, Monterrey, Mexico, March 18–22, 2002*, International Conference on Financing for Development, at 3, U.N. Doc. A/CONF.198/11 (2002).

92. *Id.*

RTD-DC AND MCA COMPARED

| <i>Features of the Right to Development-Development Compact</i> | <i>Features of the Millennium Challenge Account</i> |
|--|--|
| "Mutuality of obligations" (Sengupta) | "Developed nations have a duty . . . to share our wealth" (Bush) |
| Callable funds through the RTD-DC | Increase of ODA by \$5B per annum through a MCA |
| "It would be useful to invoke the concept of a development compact once again in working out programs for implementing the right to development." (Sengupta) ⁹³ | "This new compact for development breaks with the past by tying increased assistance to performance and creating new accountability for all nations." (Bush) ⁹⁴ |
| Focus on health, education, and food | Focus on health, education, and a well functioning business sector |
| Principles of transparency and accountability | Principle of good governance |
| Principles of equity, non-discrimination, participation | "Genuine partnership," "open consultative process" ⁹⁵ |
| Growth with equity and a rights-based approach | Growth as part of the G-7 Agenda for Growth |

The United States certainly sees the value of the MCA as part of its national policy to reduce poverty but avoids acknowledging publicly any parallel to the RTD. A significant difference between the RTD-DC and the MCA is that the former foresees a multilateral funding mechanism while the latter is exclusively administered by the MCC, a U.S. entity. In fact, during the debate on the RTD at the Commission in 2003, the U.S. delegate used the MCA to justify its vote against the resolution. In a statement to the Working Group, the delegate said:

The United States does not dispute that there is an international component to development. As such, President Bush has announced plans for a Millennium Challenge Account or "MCA." This mecha-

93. Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 881 (2002).

94. Press Release, President George W. Bush, Message to the Congress of the United States, available at <http://www.whitehouse.gov/news/releases/2003/02/20030205-4.html> (Feb. 5, 2003).

95. *Background Paper: Implementing the Millennium Challenge Account* (Feb. 5, 2003), available at http://www.mca.gov/Documents/MCA_BackgroundPaper_FactSheet.pdf.

nism will be used to fund development projects in nations that govern justly, invest in their people and encourage economic freedom. The MCA will reward nations that root out corruption, respect human rights and adhere to the rule of law. Sound economic policies unleash the enterprise and creativity that are at the heart of sustainable development.⁹⁶

It is tempting to conclude that that the United States rejects the RTD in multilateral settings yet applies it as a matter of national policy without using the term. However, this is only partially true, for the reasons set out in the next section.

*C. Critique of the Millennium Challenge Account from
the Right to Development Perspective*

The premise of the MCA—that countries that govern well and invest in people merit increased ODA—is a near perfect fit with the RTD-DC. However, the parallel should not be pushed too far. There are at least four sets of critical observations that can be made about the MCA from the RTD perspective.

1. Negativism

First, U.S. rejection of the rhetoric of the RTD through negative votes on most resolutions of the Commission and the General Assembly and resistance to the mention of the RTD in Declarations of summits and conferences is not trivial. If the United States supports the basic idea of the RTD in practice, the other donor countries and potential recipient countries should expect its cooperation and support in the rhetorical affirmation of development as a human right. U.S. rhetorical support should not be resisted due to the fear that development would be considered an “entitlement” allowing any individual or government to “sue” the U.S. government for failure to meet the expectations of the 1986 Declaration. It is unnecessary to attach such a restrictive “entitlement” meaning to RTD. It is certainly to the credit of any country to hesitate before accepting a legal obligation because it intends to take seriously any and all obligations. However, there is little to fear from a non-binding declaration that articulates many fundamental positions of the U.S. government. U.S. unwillingness to join other nations in reaffirming this right and human rights more generally in the context of major conferences also contributes to resentment against the United States. U.S. negativism toward the RTD is thus a reason to avoid making too hasty a parallel between the RTD and the MCA.

96. United States Government, Statement at the U.N. Commission on Human Rights, *supra* note 2.

2. Performance Criteria

Second, the sixteen specific indicators to be used to determine eligibility for MCA funding include very little on human rights as compared with the RTD-DC, which requires the realization—or at least non-retrogression—of all human rights. Under the MCA, a country must score above the median on half of the indicators in each of the three groups (six for ruling justly, four for investing in people and six for economic freedom), and score above the median on corruption regardless of ranking on the other criteria.⁹⁷

The following table lists the indicators developed by government officials to ensure that the methods and data be transparent, publicly available, accurate, current, easy to understand, and cover as many countries as possible.⁹⁸

MCA PERFORMANCE INDICATORS

| <i>Ruling Justly</i> | <i>Investing in People</i> | <i>Economic Freedom</i> |
|---|---|---|
| Control of Corruption Source: World Bank Institute http://www.worldbank.org/wbi/governance/pubs/govmatters3.html | Public Primary Education Spending as % of GDP Sources: World Bank and national sources | Country Credit Rating Source: <i>Institutional Investor Magazine</i> , September 2002. |
| Voice and Accountability Source: World Bank Institute http://www.worldbank.org/wbi/governance/pubs/govmatters3.html | Primary Education Completion Rate Sources: World Bank and national sources | Inflation (must be below 20%) Source: IMF |
| Government Effectiveness Source: World Bank Institute http://www.worldbank.org/wbi/governance/pubs/govmatters3.html | Public Expenditure on Health as % of GDP Sources: World Bank and national sources | Three-year Budget Deficit Source: IMF and national sources |

97. Radelet, *supra* note 85, at 175–76.

98. Larry Nowels, *The Millennium Challenge Account: Congressional Consideration of a New Foreign Aid Initiative*, CRS REPORT FOR CONGRESS (Cong. Research Serv.), Aug. 26, 2003, at CRS-10.

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| <p>Rule of Law</p> <p>Source: World Bank Institute</p> <p>http://www.worldbank.org/wbi/governance/pubs/govmatters3.html</p> | <p>Immunization Rates: DPT and Measles</p> <p>Sources: World Bank, U.N., governments</p> | <p>Trade Policy</p> <p>Source: The Heritage Foundation, Index of Economic Freedom</p> <p>http://www.heritage.org/research/features/index/</p> |
| <p>Civil Liberties</p> <p>Source: Freedom House</p> <p>http://www.freedomhouse.org/research/freeworld/2002/tableindcountries.pdf</p> | | <p>Regulatory Policy</p> <p>Source: World Bank Institute</p> <p>http://www.worldbank.org/wbi/governance/pubs/govmatters2001.htm</p> |
| <p>Political Freedom</p> <p>Source: Freedom House</p> <p>http://www.freedomhouse.org/research/freeworld/2002/tableindcountries.pdf</p> | | <p>Days to Start a Business</p> <p>Source: World Bank</p> <p>http://rru.worldbank.org/DoingBusiness/SnapshotReports/EntryRegulations.aspx</p> |

Source: Larry Nowels, *The Millennium Challenge Account: Congressional Consideration of a New Foreign Aid Initiative*, CRS REPORT FOR CONGRESS (Cong. Research Serv.), Aug. 26, 2003, at CRS-10.

The indicators that will be used to determine which countries meet the conditions to receive MCA support rely on a narrow selection of sources; however, some of them may appear biased ideologically. This critique does not apply to such reasonable indicators as the income threshold of \$1,435 annual per capita and eligibility for concessional borrowing from the World Bank. It relates more to the use of the World Bank Institute and Freedom House as sole sources for the indicator of “ruling justly” and the World Bank (and WHO for immunization rate) for the indicator of “investing in people.” The sources for “economic freedom” are Institutional Investor, the IMF, the World Bank Institute, the World Bank and the Heritage Foundation. These institutions generally apply credible methods of data collection and analysis. However, Freedom House and the Heritage Foundation are clearly identified with the political right and tend to represent the neoliberal approach to economic issues. These sources are consistent with the known preferences of the Bush Administration. However, a program that is ex-

pected to be applied to a wide range of countries over a long period of time would be more credible if it drew on a more diverse set of sources. The Senate Foreign Relations Committee manifested some concern about this potential bias by expressing in its report on S. 1160 its intention "that the selection be based on development needs and performance, and not on immediate political considerations."⁹⁹

In addition, the State Department's own country reports on human rights are not listed as a source. This may be because Freedom House provides a ranking of countries on the basis of its calculation of political liberty whereas the State Department provides a more qualitative assessment. The exclusion of these government reports is all the more difficult to justify since they were created to be used for foreign assistance. It is less surprising that reports by Human Rights Watch and Amnesty International, two of the best-known human rights monitoring organizations, are not listed since they may be presumed to be too liberal for the current administration. Furthermore, the system of special procedures of the U.N., reports of special rapporteurs, observations of treaty monitoring bodies and international human rights tribunals are additional sources of relatively reliable information on the human rights performance of potential recipient countries.

The reliance on Freedom House may be presumed to be based on the fact that it produces a numerical ranking of countries. The use of this source as the sole performance indicator of human rights could mean that crucial decisions affecting billions of dollars and millions of lives will be based on the reduction of complex social and political systems to a single number or ranking.

There are also anomalies in the application of the current criteria. Due to the use of hurdles and median rather than aggregated ranking and to the relative inattention to human rights, some countries with poor human rights records, like China and Vietnam, could be in good standing to receive monies.¹⁰⁰ An Open Society Institute study of the MCA considers several indicators under the category of "ruling justly" as belonging in the category of "economic freedom," such as corruption, rule of law and government effectiveness.¹⁰¹ The MCA would also be much more relevant to the RTD if the category "ruling justly" were more explicit about human rights. In the current version of the Senate bill, the expression "human rights" does not appear a single time, although "human and civil rights" is mentioned once, on par with "private property rights" as an eligibility requirement of "just and democratic governance."¹⁰²

99. *Id.* at CRS-12.

100. *Id.* at CRS-15.

101. THOMAS PALLEY, OPEN SOCIETY INSTITUTE, *THE MILLENNIUM CHALLENGE ACCOUNTS: ELEVATING THE SIGNIFICANCE OF DEMOCRACY AS A QUALIFYING CRITERION* (2003), cited in Nowels, *supra* note 98, at CRS-16.

102. Millennium Challenge Act of 2003, S. 1160, 108th Cong. § 104(a)(1)(B) and (C) (1st Sess. 2003).

Under the category “investing in people,” the planners of the MCA might have gone beyond World Bank concepts and considered The Human Development Index, created by UNDP for its annual *Human Development Report*. This Index was designed to highlight the extent to which governments invest in people, with a focus on education and health—precisely what the MCA is supposed to favor.

3. *Free Market and Economic Growth*

Third, the stress on economic freedoms, open markets, and “policies that foster enterprise and entrepreneurship” would appear to put at a disadvantage countries that engage in redistributive programs and seek improvements in the condition of vulnerable and marginalized groups through regulation of business and other policies based on equity, accountability, transparency and participation, all principles in the 1986 RTD Declaration. The MCA policy clearly favors growth rather than human rights. In his testimony to the House Financial Services Committee Subcommittee on Domestic Monetary Policy, Technology and Economic Growth, USAID Administrator Andrew Natsios, explained the background of the MCA, “put simply, economic development assistance in poor countries works best when you are pursuing good policies that are conducive to growth.”¹⁰³ In his remarks to the Senate Committee on Banking Housing and Urban Affairs, Treasury Secretary John Snow cited the MCA as part of U.S. support for the new “G-7 Agenda for Growth,” through which “G-7 countries have committed to concrete structural reform actions to increase productivity, spur growth, and create jobs.”¹⁰⁴ In this context he described the MCA as targeting “assistance to countries that perform on pro-growth policies and delivering results for people.”¹⁰⁵ Neither official mentioned human rights.

This perspective is reflected in conservative policy centers. In its research paper on the MCA, the Heritage Foundation explained the importance of economic freedom for the MCA in these terms:

Adherence to policies that promote economic freedom should be the most heavily weighted of the three broad criteria that countries must meet in order to qualify for MCA funding. Only economic freedom, which depends on the rule of law, leads to higher per capita income and the alleviation of poverty. While improvements

103. *Millennium Challenge Account: Hearing Before the Subcomm. on Domestic Monetary Policy, Tech., and Econ. Growth of the House Comm. on Fin. Services*, 108th Cong. (2003) (statement of Andrew Natsios, Administrator, U.S. Agency for International Development).

104. *Exchange Rate Policy: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2003) (advance text of remarks by John Snow, Secretary, U.S. Dept. of Treasury).

105. *Id.*

in health and education are not prerequisites of economic development, they are its consequences.¹⁰⁶

That report makes no mention of human rights.

Growth is, of course, not incompatible with the RTD. The Independent Expert has clearly made growth part of the concept of the RTD. He noted in his third report that "we must include the growth of resources, such as GDP and technology, as an integral element in the vector of rights that constitute the right to development."¹⁰⁷ However, in his formulation, growth cannot be at the expense of equity: "As considerations of equity and justice are primary determinants of the right to development, the whole structure of growth will have to be determined and reoriented by them."¹⁰⁸ He further clarifies the priority of equity over growth by saying "if there is a trade-off, such that growth will be less than the feasible maximum, it will have to be accepted in order to satisfy the concern of equity."¹⁰⁹ Moreover, "growth of resources must be realized in the manner in which all human rights are to be realized, that is, following the so-called rights-based approach. . . ."¹¹⁰ This is not the same understanding of growth in the G-7 Agenda for Growth or the MCA.

4. *Relative Commitment*

Fourth, the increase in ODA through the MCA should be viewed in relation to the wealth of the donor and to the other policies that influence the poverty of the recipient countries. While the MCA represents considerable sums, if and when they are expended, it is not reflective of the total picture of U.S. development assistance. The total ODA of the United States, the highest in absolute terms at \$11.4 billion in 2002, represented only 0.11% of gross national income, down from 0.21% in 1990.¹¹¹ The doubling of ODA to be achieved by 2006 would merely restore it to the 1990 level. Moreover, the amount per capita of U.S. citizens is \$39, down from \$57, and only 15% of this total reaches the least developed countries.¹¹² Doubts have also been expressed that the full amount will be forthcoming. One observer noted:

106. Paolo Pasicolan & Sara J. Fitzgerald, *The Millennium Challenge Account, Backgrounder #1602*, available at <http://www.heritage.org/Research/TradeandForeignAid/bg1602.cfm> (Oct. 18, 2002). See also Paolo Pasicolan, *Keeping the Millennium Challenge Account Focused on Promoting Growth and Prosperity, Executive Memorandum #880*, available at <http://www.heritage.org/Research/TradeandForeignAid/em880.cfm> (May 20, 2003).

107. *Third Report of the Independent Expert on the Right to Development, Mr. Arjun Sengupta, Submitted in Accordance with Commission Resolution 2000/15*, U.N. ESCOR, 57th Sess., ¶ 14, U.N. Doc. E/CN.4/2001/WG.18/2 (2001).

108. *Fourth Report of the Independent Expert*, *supra* note 88, at ¶ 12.

109. *Id.* at ¶ 13.

110. *Id.* at ¶ 11.

111. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 290, Table 15 (2003).

112. *Id.*

The same yawning chasm between rhetoric and budgetary reality [as exists with respect to the Global Fund to Fight AIDS, Tuberculosis and Malaria] appears likely to swallow the Millennium Challenge Account. The Bush administration has requested a mere \$1.3 billion in its 2004 budget—not very encouraging given its promise to endow the account with \$10 billion over three years. And, as these two programs wind their way through the appropriations process, most congressional observers assume they'll be shredded even further.¹¹³

The *Financial Times* reported:

Assuming the MCA gets up to full funding of Dollars 5bn a year—and campaigners expect it to get less for next year from Congress than the Dollars 1.3bn the administration wanted—it is still likely to leave the U.S. at the bottom of the league table of rich countries' overseas aid as a percentage of national income.¹¹⁴

These predictions were accurate, since the final MCA authorization for FY04 was only \$1 billion. The concern for human rights and investment in people does not appear to guide other U.S. programs to finance development, whereas other countries apply international human rights standards to the full range of development-related decision-making, including but going beyond development assistance and cooperation. A recent example is Sweden, where a government bill submitted to parliament in May 2003 provides for an integrated policy for global development that includes not only ODA but also trade, agriculture, security, immigration using a human rights perspective and support for poverty reduction. It applies a country strategy process of five-year programs with partner countries using a questionnaire for democracy and human rights. The MCA is limited to the expenditures that the Millennium Challenge Corporation will handle. The United States does acknowledge, in the context of the MCA, "official development assistance can never provide more than a small percentage of the resources that are needed for development. Countries that rule justly, invest in their people, and promote economic freedom will energize individual initiative, mobilize domestic capital, attract foreign investment, and expand markets."¹¹⁵

Another way of critiquing the MCA is to place it in the broader context of its commitment to global partnerships. The "Commitment to Development Index" (CDI) was created by the Center for Global Development and

113. Alan Beattie, *Marshall Plan Success Echoes Across Time: Comparisons Are Being Made Between Powell and His Predecessor Who Helped Reconstruct Postwar Europe*, FIN. TIMES, USA ED. 2, Nov. 12, 2003, § The Americas, at 2.

114. *Id.*

115. Nowels, *supra* note 98.

Foreign Policy for that purpose. CDI not only compares the dollar amount provided in aid, but it factors in qualitative and quantitative features of policies that affect poor countries, including aid, trade barriers, the environment, investment, migration and peacekeeping.¹¹⁶ The United States ranks with Japan at the bottom of that Index.

V. CONCLUSION

If the United States is serious about implementing the MCA, demonstrated by a significant increase of resources and perhaps partial commitment to supporting countries that integrate human rights into development, these actions may be more important than a rhetorical commitment to the RTD. Indeed, the key question is whether the rhetoric of the MCA is matched by the reality, or if it remains a mere rhetorical device used to cover aid policies that, in the end, do not further human rights in development.

The future of the RTD will depend on the extent to which governments are willing to address the political and practical obstacles to its implementation. The political obstacles appear in the tone and substance of the deliberations as well as the decisions of the Commission and General Assembly. It is up to those governments that take the RTD seriously to shift the discourse away from posturing and towards specific programs and mechanisms that will assist governments in meeting their obligations in this area. The most important obstacle to implementing the RTD is the practical one, because of the lack of incentives to modify the formal policies of the international agencies and national governments and to incorporate meaningful approaches to this right in the practice of development.

The United States appears to be an exception by offering a model for implementing the RTD at the country level, although it refuses to acknowledge the relevance of the RTD to the MCA. As shown above, the MCA has several key elements that correspond to the main ideas of the RTD-Development Compact. It would no doubt enrich the dialogue on the RTD if the MCA were offered for discussion as one country's attempt to translate the RTD into policy and practice. Unfortunately, the U.S. Government has chosen not to pursue this route.

Instead, the United States' potential contribution to render the RTD "a reality for everyone" becomes another example of U.S. exceptionalism and dislodges the United States even further from multilateral engagement and cooperation. The United States' MCA policy is based on a homegrown approach to development assistance. The United States could use this policy to engage at an international level. Doing so, the United States could leverage other resources and become a welcome partner of countries that could benefit from and contribute to the RTD. In the end, however, it is likely

116. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 161, Box 8.10 (2003).

that the implementation of the MCA will follow the Washington consensus and link free markets and economic growth with political freedom, rather than the Vienna consensus on the RTD.