The Right to Development and State Responsibility

Towards Idealism without a Sense of Realism?

Master Thesis Public International Law
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1. Introduction

The human right to development (hereinafter: RTD) has been categorized in legal doctrine as a 'third generation right' or 'solidarity right', together with the right to peace and the right to a clean environment.[1] The RTD's goal is to establish an international order in which human rights can be fully realized. It seeks to ensure this goal by granting the right to a process of development in which everyone can participate and from which everyone can benefit. This process has to live up to certain standards, such as being carried out in accordance with existing human rights. The status, development and implementation of the RTD have been extensively debated since the 1970's.[2] Most of the debate is based on the Declaration on the Right to Development (hereinafter: the Declaration/ Declaration on the RTD), which proclaims the RTD as a human right and was adopted by the United Nations General Assembly (hereinafter: UNGA) in 1986.[3] The RTD was also referred to as an inalienable human right in the Vienna Declaration in 1993 and has been mentioned in numerous other outcomes of global summits and conferences.[4] Despite this broad basis of moral support, the RTD has not been warmly welcomed in practice and there are grave barriers to its effective implementation.[5] The inherent vagueness of the right and a lack of political consensus on its status and implementation strategies are only a few of the difficulties on the path towards full legal recognition.[6]

Many reports have been written on the status, content and implementation of the RTD. However, a less enterprising approach has been taken towards finding ways to hold states accountable for breaches of the RTD.[7] This is understandable, since obligations under the RTD are often still unclear and their status debated. However, indicators to determine a state's contribution to realizing the RTD are being established and its obligations may gradually gain the status of customary law. In the offing of a further evolution down this path, this thesis sets out to explore if and how the breach of obligations under the RTD could translate into state responsibility.[8] The

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1 *Realization of the Right to Development: Global Consultation on the Right to Development as a Human Right*, Report of the Global Consultation on the RTD 1991 (HR/PUB/91/2) (United Nations Centre for Human Rights, 1991) 22; Albie Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (2000) 53 *SMU L Rev* 1381, 1383: Classic freedom rights (also called civil and political rights) are generally seen as first generation and welfare rights (also called economic and social rights) as second generation human rights. Please note that all abbreviations used in the footnotes are explained in the Bibliography at the end of this thesis.

2 Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harv ILJ* 137, 137.

3 Declaration on the Right to Development, UNGA Res 41/128 (4 December 1986) UN Doc A/41/53 (Declaration on the RTD).

4 *Vienna Declaration and Programme of Action*, UN World Conference on Human Rights (12 July 1993) A/CONF157/23 (Vienna Declaration).

5 Marks, 'The Human Right to Development: Between Rhetoric and Reality' (n 2) 137.

6 Anja Lindroos, *The right to development* (Faculty of Law of the University of Helsinki, Helsinki 1999) 4-5 and 9.

7 Ibid.

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

regime of state responsibility is very much geared towards the classic bilateralist view of international law, where a right is considered to have a correlate obligation lying with another state.[9] Applying this formula to the RTD will demonstrate to be rather problematic. Therefore, this research focuses on adjustments that could be made to the current rules to overcome the identified obstacles. Already existing trends in human rights law and the principles of 'intergenerational equity' and 'common but differentiated responsibility' will be examined as possible bases for the further acceptance of transposing policy into obligations and breaches into accountability.[10] Intergenerational equity promotes a general notion of fairness in and among generations, while common but differentiated responsibility translates these historical and practical reasons for a state's capacity to contribute to the practical level of allocating primary responsibility for collective obligations.[11] Demonstrating how the RTD could be enforced through the regime of state responsibility may contribute to its further acceptance and guided development. Thereby, this thesis will hopefully offer new insights in a currently deadlocked debate. Chapter two will first outline the present status of the RTD. This will be the basis upon which to determine how the rules on state responsibility could be applied to violations of obligations under the RTD in Chapter three. Chapter four will then assess what adjustments could be made to make enforcement of the RTD through the regime of state responsibility a more plausible option.

2. Overview of the Present Status of the Right to Development

Some would argue that the RTD has always existed as a moral right. However, it was not before the 1970's until it evolved into a legal right with an international focus. Twenty-five years have passed since the adoption of the Declaration on the RTD, and yet many of its aspects remain ambiguous to this day. To better understand the RTD, this Chapter will offer an analysis of how it came into being and how it stands under current international law before moving on to the matter of state responsibility. Section 2.1 will offer an overview of its history and analysis of its current legal status. Section 2.2 will address the scope of the RTD, including its object, duty-bearers and beneficiaries. Section 2.3 describes and partially rebuts the criticism that the RTD has a non-justiciable character.

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otherwise they will only devaluate the meaning of human rights.

9 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, UN GAOR Supplement No 10, UN Doc A/56/10 chpIVE1 (Articles on State Responsibility) art 2 and 42; Lindroos, *The right to development* (n 6) 34-38.

10 See generally: Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford etc. 2006): A strong argument can be made for allocating secondary responsibility to other relevant actors than states. This matter, however, falls outside the scope of this thesis and is left to further research.

11 Edith Brown Weiss, 'Intergenerational Equity' (Nov 2008) MPEPIL; Ellen Hey, 'Common but Differentiated Responsibilities' (Nov 2008) MPEPIL.

2.1 History and Legal Status

Rudiments of the concept of a RTD can be found in the body of international law even directly after World War II. Although it did not receive full legal recognition at the time, the importance of ensuring a process of development as a precondition for the realization of human rights was recognized at an early stage in the evolution of human rights law.[12] For instance, Article 28 of the Universal Declaration of Human Rights (hereinafter: UDHR) adopted in 1948 already proclaims the entitlement to "a social and international order in which the rights and freedoms set forth in [the] Declaration can be fully realized."[13] Although no consensus existed on how this entitlement was to be realized, it was clear that cooperative state action would be indispensable. Offering support to developing states to realize human rights advanced rather naturally from the purposes and principles of the United Nations (hereinafter: UN) and is still seen as entrenched in the provisions of its basic (human rights) instruments.[14] However, no entitlement to such an internationally fostered process of development existed at the time.

The term RTD was first coined by leaders of developing states pursuant to and inspired by the decolonization process in the 1960's. It was originally strongly linked with the concept of a New International Economic Order and intended to strengthen demands of greater north-south equality and beneficial economic arrangements for developing states.[15] The RTD's evolution into a human right took place in the 1970's and commenced with a movement termed 'the structural approach'. This approach advanced solidarity rights as a modus to address global issues, for which the existing human rights were found to be too individually oriented. It responded to the recent appreciation that certain 'macro-conditions' were necessary for the realization of human rights, which could not be ensured from the 'micro-perspective' of individual human rights.[16] A Working Group of Governmental Experts was established in 1981, whose work contributed greatly to the adoption of the Declaration on the RTD in 1986. It advanced the RTD as the right to a process of development, which has to live up to certain standards and for which states carry the primary responsibility. Notably, the Declaration was adopted by the UNGA with 146 votes in favour, eight abstentions and

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12 Lindroos, *The right to development* (n 6) 3; *Proclamation of Tehran*, Final Act of the International Conference on Human Rights, Tehran (13 May 1968) UN Doc A/CONF32/41 at 3: "The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development."

13 Universal Declaration of Human Rights, UNGA Res 217 A(III) (10 December 1948) UN Doc A/810 71, art 28.

14 UNGA Res 1161 (XII) (26 November 1957) UN Doc A/RES/1161(XII): Stating that "a balanced and integrated economic and social development would contribute towards [...] the observance of and respect for human rights and fundamental freedoms."; Proclamation of Tehran (n 12) 3, 12 and 13; UNGA Res 2542 (XXIV) (11 December 1969) UN Doc A/RES/2542(XXIV) art 2; UNCHR Res 4 (XXXIII) (21 February 1977) UN Doc A/RES/4(XXXIII).

15 Noel G Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (2010) 22 *Fla JIL* 299, 300; Arjun Sengupta, Archna Negi, Moushumi Basu, *Reflections on the Right to Development* (Sage Publications, London 2005) 10.

16 Lindroos, *The right to development* (n 6) 5; UNCHR Resolution 5 (XXXV) (2 March 1979) UN Doc A/RES/5(XXXV); Proclamation of Tehran (n 12); Christian Tomuschat, *Human rights: Between Idealism and Realism* (Oxford UP, Oxford 2003) 52.

only one negative vote.[17] The RTD was later reaffirmed as an inalienable human right in several international instruments, the most important of which are the 1993 Vienna Declaration and Programme of Action, the 2000 Millennium Declaration and the 2005 World Summit Outcome Document.[18]

After the RTD's recognition as a human right, the international community of states embarked on the road towards its implementation. In 1990, a Global Consultation was held in Geneva to discuss the subject.[19] Since then, the RTD has been given prominence in the mandate of the High Commissioner for Human Rights and a new branch has been established under its Office for the promotion and protection of the RTD.[20] In 1998, the UN Commission on Human Rights (hereinafter: UNCHR) requested the Economic and Social Council (hereinafter: ECOSOC) to establish a follow up mechanism. This resulted in the erection of an open-ended Intergovernmental Working Group on the RTD and the appointment of an Independent Expert.[21] Within the framework of the Working Group, a high-level task force on the implementation of the RTD was created.[22] These bodies have all contributed to the enhanced understanding of the RTD and possible routes for its implementation in their own way, although they have also been criticized for not being able to offer innovative solutions to move the RTD past the current standstill.[23] Outside of the UN framework, many scholars joined the endeavour of further defining the RTD, assessing its scope and contemplating its implementation. Nevertheless, the implementation of the RTD has proven exceptionally troublesome and its recognition has, to date, not induced any notable improvement in state behaviour or the conditions in developing states.[24]

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17 The Right to Development, UNCHR Res 36 (XXXVII) (11 March 1981) UN Doc A/RES/36(XXXVII); UNGA Res 37/199 (18 December 1982) UN Doc A/RES/37/199, para 7; Declaration on the RTD (n 3): The only negative vote was cast by the United States.

18 *Rio Declaration of Environment and Development and Agenda 21,* UN Conference on the Environment and Development (3-14 June 1992) A/CONF151/26 (Vol I) (Rio Declaration); Vienna Declaration (n 4) para 10; Millennium Declaration, UNGA Res 55/2 (18 September 2000) UN Doc A/RES/55/2 (Millennium Declaration); *The Monterrey Consensus of the International Conference on Financing for Development*, International Conference on Financing for Development Monterrey, Mexico, 18-22 March 2002 (United Nations, 2003); 2005 World Summit Outcome, UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 (2005 World Summit Outcome); Declaration on the Right of Indigenous Peoples, UNGA Res 61/295 (13 September 2007) UN Doc (A/RES/61/295).

19 Report of the Global Consultation on the RTD 1991 (n 1).

20 High Commissioner for the promotion and protection of all human rights, UNGA Res 48/141 (20 December 1993) UN Doc A/48/141; New branch for the promotion and protection of the RTD under the Office of the High Commissioner on Human Rights, UNGA Res 50/214 (29 February 1996) UN Doc A/50/214, para 37.

21 UNCHR Res 1998/72 (22 April 1998) UN Doc E/CN4/1998/72; ECOSOC Decision 1998/269 (30 July 1998).

22 UNCHR Res 2004/7 (13 April 2004) UN Doc E/CN4/2004/7; ECOSOC decision 2004/249 (22 July 2004); Margot E Salomon, 'Towards a Just Institutional Order: A Commentary on the First Session of the UN Task Force on the Right to Development' (2005) 23(3) *NQHR* 409, 438: The added value of the task force lies in the fact that it allows very different actors to debate the RTD's implementation under the patronage of the UN.

23 The Working Group has to date held 11 sessions and the 12th session is scheduled for May 2011: Reports of the Working Group sessions: <http://www.ohchr.org/EN/Issues/Development/Pages/PreviousSessions.aspx> accessed 2 April 2011; Philip Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harv Hum Rts Ybk* 3, 23: Criticizes the Working Group for lacking interdisciplinary expertise and not being able to offer creative solutions for problems encountered without separating from the carefully reached but vague consensus on the RTD's object and scope.

24 Oscar Schachter, 'Challenge to the Legal Mind', in: Subrata Roy Chowdhury, Erik MG Denters and Paul JIM de

Even though it has been advanced at the global level as an 'inalienable' human right, it is still debated whether the RTD is positive international law.[25] Save Article 22 of the African Charter of Human and Peoples' Rights and Article 1(a) of the Arab Charter on Human Rights, the RTD does not have any explicit basis in treaty law.[26] The Declaration on the RTD was adopted by a UNGA resolution, which is not a legally binding instrument. It can, however, be a powerful instrument of soft law. Furthermore, it is entirely possible that the Declaration sparked the development of (certain elements of) the RTD into customary international law, which is based on state practice and *opinio juris*.[27] To strengthen claims as to its customary status, support can be found in (implicit) references in the UN Charter, the ICCPR and ICESCR and the reiteration of the existence of the RTD in other important instruments such as the Vienna Declaration in 1993. An example of an obligation under the RTD which is often already forwarded as a rule of customary law is the obligation to cooperate in the context of the RTD.[28] An in-depth discussion of the customary status of separate obligations under the RTD would require a great deal of research into state practice and extends the scope of this thesis. Therefore, the thesis builds on the expectation that obligations under the RTD will gradually attain the status of customary international law.[29]

2.2 Scope

The previous section described the evolution of the RTD from a precondition for the realization of human rights to a separate human right to a process of development, which is considered to be of added value on the basis of its comprehensive approach. It is important to understand how it is related to, and can be distinguished from, other human rights. Historically, individual rights are the most commonly accepted form of human rights and describe a right that the individual can assert against a state. Occasionally, human rights are asserted in the form of group rights, since this offers the benefit of collective representation. Group rights are the sum of rights of individuals comprising

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Waart, *The Right to Development in International Law* (Martinus Nijhoff, Dordrecht 1992) 27.

25 *Statute of the International Court of Justice* (adopted 26 June 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 38: The three accepted sources of positive international law as evidenced by art 38 are: (i) treaties; (ii) customary law, and; (iii) general principles of law recognized by civilized nations

26 *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev 5, 21 ILM 58 (ACHPR) art 22; *Arab Charter on Human Rights* (adopted 15 September 1994, not yet in force) reprinted in 18 Hum Rts LJ 151 (1997).

27 ICJ Statute (n 25) art 38(b); Ian Shaw, *International Law* (6th ed, Cambridge UP, 2008) 70: Opinio juris stands for the belief that a practice is law; Margot E Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford UP, 2007) 89: States that GA resolutions and declarations are often a source of new customary law. There are several factors which influence if and how fast a GA declaration is accepted into customary practice. "Assessing these factors as they apply to the [RTD] serves to reinforce the potency of its normative force." These indicators being: the Declaration's mandatory language, the voting pattern with which it was adopted and the many follow up mechanisms erected to further its implementation.

28 Consolidation of Findings of the High-Level Task Force on the Implementation of the Right to Development, Report on its Sixth Session (25 March 2010) UN Doc A/HRC/15/WG2/TF/2 and Add1 and 2; Resolution on the Right to Development, UNHRC Res 15/25 (7 October 2010) UN Doc A/HRC/15/25, para 3(h).

29 Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (2002) 24(4) *Hum Rts Q* 837, 843.

a group.[30] Collective rights, however, consist of more than this. The distinguishing characteristic of collective rights is that they cannot be broken down into bilateral components because they protect a 'collective interest', over and above any individual interest.[31] A good example of collective rights are peoples' rights, like the right to self-determination. Solidarity rights such as the RTD are also most aptly described as collective rights, since they consist of a myriad of rights framing a comprehensive goal. This goal may not be in the interest of every state individually but is considered to be in the general interest of humankind and therefore of all states collectively. Another important characteristic is added in the case of solidarity rights, namely that this goal can only be realized through collective state action. Solidarity rights are therefore at least partly based on collective state obligations.[32] This is not the case for all collective rights, since not all peoples' rights necessarily give rise to collective state obligations.

A pragmatic approach to deconstructing the RTD's scope is to view it as containing an internal and external dimension, which is an approach often taken towards peoples' rights.[33] The internal dimension consists of obligations of states owed towards people within their jurisdiction to facilitate and regulate the process of development. The external dimension consists of obligations of states towards people outside their jurisdiction and the obligation of all states to cooperate for the realization of the RTD. Historically, the external dimension is the most innovative aspect of the RTD and is what marks it as a solidarity right. In the internal dimension, individual and group rights may still play a large role, while in the external dimension collective rights are more important. The RTD, like most solidarity rights, is very wide in scope and it is still uncertain how these internal and external dimensions relate exactly to the specific content of the RTD. An analysis will now be given of the RTD's object, beneficiaries and duty-bearers to offer some insight into its current scope.

2.2.1 Object

The dimension of a right which has become part of the international legal order is called its object. This does not necessarily correspond with societal practice or imply that the object is binding upon states.[34] It merely describes how a right is delineated in international instruments relevant to the body of international law. The object of the RTD can be described as realizing its goal of "a social and international order in which the rights and freedoms set forth in [the UDHR] can be fully

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30 Douglas Sanders, 'Collective Rights' (1991) 13(3) *Hum Rts Q* 368, 369: The right can still simultaneously be asserted by the individuals comprising the group. Group rights cease to exist when the violation of the rights of the individuals comprising the group ends.

31 Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature' (2003) 14(5) *EJIL* 907, 908-9; ACHPR (n 26) art 21 and 22: Of all influential human rights treaties, the term 'collective rights' is only used as such in the ACHPR, which proclaims several "collective rights of peoples."

32 Tomuschat, *Human rights: Between Idealism and Realism* (n 16) 78.

33 Salomon, *Global Responsibility for Human Rights* (n 27) 112-3.

34 Tomuschat, *Human rights: Between Idealism and Realism* (n 16) 63.

realized" through a process of development.[35] As such, the RTD is best described as a right to a particular process of development. This process of development has to live up to certain standards set forth in the Declaration on the RTD. An important preliminary observation is that solidarity rights generally consist of "a multitude of legal and factual elements many of which are not under the control of governments alone".[36] Since it is impossible to provide an elaborate description of all of these legal and factual elements surrounding the RTDs object, only several of its most important aspects will be highlighted before moving on to the more concrete matters of subject, corresponding obligations and addressees.

The Declaration describes development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population".[37] It revolves around the 'human person', which is considered to be an active participant, contributor and the main beneficiary of the process.[38] Furthermore, it must be carried out in accordance with existing human rights and fundamental freedoms. To a certain extent, the RTD is an aggregate right which draws its substance from other binding human rights instruments.[39] Independent Expert for the RTD Arjun Sengupta has stated that it is precisely by combining all human rights in the comprehensive process of development that the RTD can be elevated to a separate human right of added value.[40] This entails, among other things, that development is not merely a matter of enlarging a state's GNP. Of special importance are the Declaration's provisions referring to the right to equality of access to resources, transparency in decision making processes and a fair distribution of benefits. The Declaration also contains several references to the people's right of sovereignty over natural wealth and resources and the right to self-determination. They support the RTD in the sense that peoples cannot be coerced into disadvantageous (economic) relationships.[41] Another important element of the process is the priority afforded to ending massive and flagrant violations of human rights. It follows from logic that large scale human rights violations bar the process of development and negate people's right to take part in the process in a manner consistent with fundamental freedoms.[42] The RTD can be seen as a framework right,

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35 Declaration on the RTD (n 3) preamble.

36 Tomuschat, *Human rights: Between Idealism and Realism* (n 16) 51.

37 Declaration on the RTD (n 3) Preamble.

38 Declaration on the RTD (n 3) Preamble and art 2(1).

39 Tomuschat, *Human rights: Between Idealism and Realism* (n 16) 48; UNGA Res 41/128 (4 December 1986) UN Doc A/41/53.

40 Arjun Sengupta, 'Right to Development as a Human Right' (2001) 36(27) *EPW* 2527, 2527-9; Todd Howland, 'Multi-State Responsibility Extraterritorial Violations Economic Social and Cultural Rights' (2007) 35(3/4) *Den JILP* 389, 393: Adhering to fundamental human rights and striving towards their realization is not as inherent to development initiatives as one may tend to believe. Howland demonstrates that even peacekeeping operations do not consider maximizing the positive impact on the human rights situation in the host state as one of its main objectives.

41 Declaration on the RTD (n 3) preamble, art 1(2) and 5; Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 316: "One obvious violation of the right to economic self-determination is "economic coercion.""

42 Declaration on the RTD (n 3) art 5; Report of the Global Consultation on the RTD 1991 (n 1) 27; This is arguably

offering guidance to the process of development while always working towards the goal of an international order in which all human rights can be fully realized.[43]

It will have become clear that the exact content of the RTD is still somewhat obscure. This has led critics to label it as 'a right to everything' and dismiss it as not being a proper human right. Some critics are even of the opinion that it only disrupts and devaluates the present system of human rights because it is ill-defined and can easily be disregarded.[44] Indeed, it would be helpful if more specific guidance were offered with respect to its content. Since the RTD is a right to a process in which all rights are progressively realized, this means that some rights will be realized sooner than others. This does not mean that violating certain rights or exchanging them for other rights is permitted. Neither that retrogressive measures are allowed without proper justification with respect to the fulfilment of any of the rights. These are certain negative restraints which apply to all rights contained in the process.[45] However, it does call for prioritization with regard to the action required of states when taking positive steps towards the RTD's fulfilment. As indicated above, one of these priorities has already been determined, namely ending large scale human rights violations. In the process of further clarifying the RTD's content, the Working Group on the RTD could follow the example of the Committee on Economic, Social and Cultural Rights (hereinafter: CESCR). The CESCR has booked great progress in determining a minimum core content for many economic and social rights. Below this minimum essential level of satisfaction, a norm is "deprived of its *raison d'être*".[46] Determining such a minimum core content for the RTD could offer guidance for its implementation and would give it a more enforceable character.

2.2.2 Duty-Bearers

From a textual analysis of the Declaration, it is clear that the "primary responsibility for the creation of national and international conditions favourable to the realization of the [RTD]" lies with states.[47] What is required of states in more concrete terms is elaborated on in the rest of the Declaration. A distinction is made between states acting nationally and states acting internationally. States acting nationally should undertake "all necessary measures for the realization of the right to development" including the formulation of "appropriate national development policies" and ensuring "equality of opportunity for all in their access to […] resources" and distribution of the benefits.[48] This has been

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already an customary under customary law in the form of the R2P. See generally: Serena K Sharma, 'Toward a Global Responsibility to Protect: Setbacks on the Path to Implementation' (2010) 16(1) *Global Governance* 121.

43 The term 'framework right' is introduced here as the present author believes it fitting to describe the RTD.

44 Gibson, 'The Right to a Clean Environment' (n 8) 17.

45 Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (n 29) 867.

46 CESCR, *General Comment 3: The Nature of States Parties Obligations* (Art 2 par 1 of the Covenant) UN Doc 14/12/90, para 10, emphasis added.

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

48 Ibid art 2 and 8.

interpreted to include taking "concrete steps to improve economic, social and cultural conditions".[49] As such, states acting nationally have certain obligations towards people within their jurisdiction to facilitate and manage the process of development described in the Declaration. However, states acting nationally may also have obligations towards people who are affected by their national development programmes outside of their jurisdiction.[50] Therefore, although to a large degree obligations of states acting nationally correspond with the internal dimension, some obligations incumbent on states acting nationally may also fall within the external dimension.

States internationally are, above all, beseeched to cooperate for the removal of obstacles to and full realization of the RTD. This obligation to cooperate under the RTD is based upon Article 4 of the Declaration in conjunction with the preamble, which in turn refers to the obligation to co-operate as included in the UN Charter.[51] It was reiterated in the Vienna Declaration and its importance is fostered by many other human rights instruments such as the ICESCR.[52] It entails, among other things, that states must cooperate in an effective manner in formulating international development policies, complementing the efforts of developing states as well as actualizing "equitable economic relations and a favourable economic environment at the international level".[53] Over time, the obligation to cooperate has already shaped the practice of a preferential treatment of developing states in international (economic) relations.[54] Obligations of states acting internationally correspond with the RTD's external dimension. The Working Group has already developed indicators to assess the contribution of global development partnerships towards the realization of the RTD. These indicators are seen as a potential basis for concrete and binding state obligations.[55] Although not literally advanced by the Declaration, these obligations in the external dimension are considered to include forms of cooperation in the framework of International Organizations

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49 Report of the Global Consultation on the RTD 1991 (n 1) 44.

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

51 Ibid preamble, art 4, 10 and 3(3) jo *Charter of the United Nations* (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(3), art 55: "(...) the United Nations shall promote: 1. higher standards of living, full employment, and conditions of economic and social progress and development; 2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and 3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."; and art 56: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

52 Vienna Declaration (n 4) Point 10 in the Programme of Action: "States should cooperate with each other in ensuring development and eliminating obstacles to development."; *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 2(1) and 11.

53 Vienna Declaration (n 4) para 10 and 12; Declaration on the RTD (n 3) art 4 and 10; Sengupta, 'Right to Development as a Human Right' (n 40) 2529.

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

55 Consolidation of Findings of the High-Level Task Force on the Implementation of the Right to Development, Report on its Sixth Session (25 March 2010) UN Doc A/HRC/15/WG2/TF/2, Add1&2; Resolution on the Right to Development, UNHRC Res 15/25 (7 October 2010) UN Doc A/HRC/15/25, para 3(h): **"**That the Working Group shall take appropriate steps to ensure respect for and practical application of the above-mentioned standards […] and evolve into a basis for consideration of an international legal standard of a *binding nature* through a collaborative process of engagement."

(hereinafter: IOs). To what extent these obligations can actually bind IOs as such is a matter for further development of the law.[56]

Much of the criticism on the RTD is directed at the difficulties implied in identifying the exact holders of obligations in the external dimension. The criticism is powered by the coherence principle, which pronounces the view that entitlements cannot be seen as proper rights if they are not complemented by 'agency-specific' duties. It would go too far to support the assumption that a lack of agency-specific duties means that a right does not exist.[57] A more conducive approach in the context of the RTD is that of 'imperfect obligations' as proposed by Kant, forwarding that "the claim [attached to a right] can be generally addressed to all those who are in a position to help".[58] However, there is certainly some merit in this criticism in the context of this thesis since it frustrates the finding of breach if it cannot be attained to what extent a state is bound by obligations under the RTD. If violations of the RTD are ever to translate into state responsibility, it will be necessary to satisfy the need for agency-specific obligations to a satisfactory level.[59] This entails that the RTD must be complemented by a burden-sharing mechanism which can distribute collective obligations and determine their scope for respective duty-holders. Chapter four discusses the principle of common but differentiated responsibility as a basis for this burden-sharing mechanism.

2.2.3 Beneficiaries

Arguably, the RTD originally arose as a people's right that could be claimed against the international community as a whole.[60] Over time it was moulded into a human right and the view that the RTD consists solely of a right belonging to peoples and covering global concerns has now become oversimplified. As previously stated, a right may be an individual-, group- or collective right and the RTD is best described as a collective right. However, the Declaration on the RTD also advances individual rights such as the right to participate in the process of development and the right to an equal share of the benefits.[61] This corresponds with the internal dimension of the RTD

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[56] Report of the Global Consultation on the RTD 1991 (n 1) 25; Development for All in a Globalizing World, UNGA Res S-24/2 (Copenhagen +5, special session, 1 July 2000) UN Doc A/RES/S-24/2, para 39, 93, 132(b) 134, 149(b) (Copenhagen +5): In a follow up resolution of the Copenhagen World Summit in 1995, the GA appealed directly to the World Bank and the International Monetary Fund (hereinafter: IMF) to take due regard of the "objectives and policy approaches" of the UN; See for a case study of how IOs incorporate human rights in their policies and programming (or rather the lack thereof): Anna F S Russell, 'International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water?' (2010) 9(1) *Journal of Human Rights* 1.

[57] Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96(4) *AJIL* 798, 800-1: The coherence principle has lost much of its importance in light of the rise of an international community in which many legal grey zones exist and obligations no longer fit the straight jacket of traditional bilateralism.

[58] Amartya Sen, *Development as Freedom* (Oxford UP, 1999) 230.

[59] Abigail Gosselin, 'Global Poverty and Responsibility: Identifying Duty-Bearers of Human Rights' (2006) 8(1) *Human Rts Rev* 35, 38.

[60] Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 300.

[61] Sengupta, 'Right to Development as a Human Right' (n 40) 2528; Declaration on the RTD (n 3) preamble and art 1(1) and 2(1).

and can, to a certain degree, be seen as the correlate of the obligations of states owed towards their own people. It fits the prevailing view that a state has the primary responsibility for the realization of human rights on its territory.[62] The RTD also has a clear collective dimension and contains several references to peoples' rights, which mostly correspond with the external dimension of the RTD.[63] It is still rather controversial to whom the term 'people' refers in the context of the RTD. The territorial interpretation of a people as referring to a state's populations has encountered a great deal of resistance.[64] Therefore, the interpretation that is currently most accepted seems to lean towards seeing them as groups that do not cover the entire population of a state.

Looking beyond the ambit of the Declaration, it has also been suggested that the RTD would be more effective when viewed as applicable in the horizontal relationship between states. It has even been argued that moulding the RTD into a human right forms "a convenient excuse for the evasion of [primary] responsibility".[65] Even though such an approach does not directly emanate from the text of the Declaration, it could be seen as flowing from the external dimension in which states are obliged to cooperate and assist each other. It is rather unlikely at this stage that the RTD will be accepted as a state right. Its evolution since the 1970s has been based upon its articulation as a human right, which is seen as inherent to human beings and not to states. This sentiment is illustrated by the fact that serious objections were made to the idea of recognizing states as the beneficiaries of the RTD at the Global Consultation on the RTD in 1990.[66] However, this does not lead us to readily embrace the consequent assumption that states will never become entitled to claim the RTD. As Sengupta has noted, there may be a slight nuance between the role of a rights-holder and the beneficiary of a right.[67] Even though a collectivity, such as a state, is acknowledged as a rights-holder for the purpose of asserting a certain right on behalf of its constituents, individuals may still be the ultimate beneficiaries. If the territorial interpretation of the term 'people' becomes more generally accepted, states may thus be granted the entitled to claim the RTD on behalf of its people. If one considers the state to be merely another facet of a collectivity of human beings, this construction may in fact be rather logical.[68] The interpretation also makes sense from a practical point of view, as states have the status and the means to effectively represent their population.

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62 Report of the Working Group on the Right to Development on its Ninth Session (10 September 2008) UN Doc A/HRC/9/17, para 27: The remarks made by Cuba, Egypt and Pakistan are illustrative of the push and pull between developing states, who emphasise the collective external dimension and western states who emphasise the individual internal dimension.

63 Declaration on the RTD (n 3) preamble and art 1(1) and (2) and art 5.

64 Gudmundur Alfredsson, 'Peoples' (Aug 2007) MPEPIL, para 23-4.

65 Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 305-9 and 323.

66 Report of the Global Consultation on the RTD 1991 (n 1) 24.

67 Sengupta, 'On the Theory and Practice of the Right to Development' (n 29) 862-3.

68 John R Morss, 'The Legal Relations of Collectives: Belated Insights from Hohfeld' (2009) 22(2) *LJIL* 289, 290: "The state might come to be seen as just one kind (or a family of kinds) of the internationally salient collective entity […]." Especially since states have adequate means to represent its people.

2.3 Justiciability

In previous sections the scope of the RTD was discussed, including the ambiguities still surrounding certain of its aspects. An overarching objection often made against the RTD is that it is of a non-justiciable character. In an international law setting, justiciability has been defined as the question whether a matter is appropriately resolved by a court of law or whether its 'nature' prohibits this. It differs from the more narrow meaning usually ascribed to justiciability in domestic legal spheres. In international law, a tradition of rendering certain matters non-justiciable evolved largely from the fear of losing grip over perceived political necessities. Several factors are seen as undermining justiciability, ranging from the absence of an easily ascertainable rule of international law that covers the situation to labelling the matter a political-question which should be left to democratically elected institutions.[69] Two factors are often mentioned as undermining the RTD's justiciability, namely the imperfect nature of its obligations and the fact that many of its obligations are positive and have potentially tremendous resource implications.

Economic and social rights faced criticism much along the same lines. Still, many economic and social rights are now considered to contain a 'significant justiciable dimension'.[70] With regard to the political nature of resource allocation, the CESCR observed that courts already decide upon many other matters with great resource implications. In any case, it should not be a reason to deny a norm an any and all justiciability. Furthermore, it is widely recognized that economic and social rights also imply obligations to respect and protect, which are considered to have a more justiciable character than obligations to fulfil. Obligations to fulfil are positive rights which are progressively realized. However, even the justiciability of obligations to fulfil has been made more acceptable. For example by introducing certain negative constraints, such as the prohibition of retrogressive measures without strong justification, which can easily be applied by courts.[71] The delineation of a minimum core contents of ESC rights has also helped define thresholds of compliance and thereby enhanced the justiciable character of these rights.[72] The CESCR will shortly be able to hear individual complaints and further elaborate on matters affecting the justiciability of ESC rights, which may lead to an increased acceptance of positive rights with resource implications.[73]

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69 For more information on the basis of the separation between justiciable and non-justiciable conflicts, see: Hersch Lauterpacht, 'The Doctrine of Non-Justiciable Disputes in International Law' (1928) 24 *Economica* 277, 288-9; Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (n 1).

70 CESCR, *General Comment 9: The domestic application of the Covenant* (3 December 1998) UN Doc E/C12/1998/24, para 10; CESCR, *General Comment 3: The Nature of States Parties Obligations* (n 46) para 10.

71 Sachs, 'Social and Economic Rights: Can They Be Made Justiciable' (n 1) 1389-90.

72 CESCR, *General Comment 3: The Nature of States Parties Obligations* (n 46) para 10; Robert E Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (1994) 16(4) *Hum Rts Q* 693, 712: Certain countries, such as Canada, have been very successful in measuring the impact of policies on the level of respect of ESC rights; Hugo Stokke, 'What is Left of State Responsibility: Turning State Obligations into State Responsibility in the Field of Economic, Social and Cultural Rights' (Yearbook 2002) *Hum Rts in Dev* 37.

73 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (adopted 10 December

In time, a similar evolution towards justiciability is likely to take place for the RTD. It is based on both civil and political and economic and social rights and will undeniably contain a justiciable dimension. The negative restraint on retrogressive measures in respect of certain obligations under the RTD could certainly apply. Furthermore, the delineation of a minimum core content would also enhance its justiciability. The only major objection to the RTD's justiciability that has not yet been addressed in the context of economic and social rights is the imperfect nature of obligations under the RTD. Before deciding upon a claim, it is true that it must first be possible to ascertain what obligations a state holds and how far they reach. However, it would be premature to assume that imperfect obligations cannot be made perfect, for instance through the introduction of a burden-sharing mechanism or setting thresholds of compliance for specific obligations.[74] These options will be more elaborately discussed in later sections.

3. The RTD and the Law of State Responsibility

The previous chapter illustrated the RTD's emergence and its evolution into a human right to a particular process of development in which all human rights and fundamental freedoms can be fully realized. Now that its basic elements have been pieced together, it is time to move on to the matter of state responsibility. Scholars have generally shied away from exploring how state responsibility could come into play for breaches of the RTD.[75] To a certain extent this is understandable, since the RTD's status is still debated and many of its obligations remain unclear. Enforcement requires an even higher degree of acceptance of the primary norm than implementation, since states have to be willing to subject themselves to legally binding obligations with which they can be forced to comply. Therefore, finding ways to implement the RTD was considered to have priority over finding ways to enforce it. Yet, twenty-five years after the adoption of the Declaration, the efforts to implement the RTD have still not brought about any notable changes. Therefore, it is time to start exploring other options to influence state behaviour with the object of inducing compliance with the RTD.[76] In that context, analysing how the RTD could be enforced through the rules on state responsibility will be a useful exercise and may even increase the acceptability of the primary norm.

The fact that the attributable breach of an international obligation triggers state responsibility and a regime of norms aimed at granting the injured party reparation is considered to be a general principle of international law.[77] The International Law Commission's (hereinafter: ILC)

2008, not yet in force) UN Doc A/63/435, art 18.

74 Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (n 29) 856.

75 Lindroos, *The right to development* (n 6) 9.

76 Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights' (n 72) 693: Pointing out that most human beings are now completely dependent on organized society.

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

Draft Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter: the Articles/ Articles on State Responsibility) have contributed greatly to clarifying this regime of secondary norms.[78] The Articles have gained much authority and largely reflect customary law, although they were never adopted in the form of a binding international agreement.[79] The two basic requirements for the regime to be triggered are the breach of an international obligation and attribution of that breach to the wrongdoing state.[80] Many human rights treaties already provide specific enforcement tools. However, the law of state responsibility remains of great importance in complementing these treaty regimes and regulating the enforcement of customary human rights norms.[81]

Based on reasons described above, there is not yet any practice in the area of ensuring state responsibility for violations of the RTD. For the sake of clarity, therefore, the first step will be to reflect the *status quo* of the framework of state responsibility for human rights violations generally. Section 3.1 will focus on invocation, since this is what grants access to the rules of redress. Section 3.2 will focus on attribution, and more specifically the attribution of a violation to a plurality of responsible states. These are both areas with a strong bilateral focus and adjustments will most likely be needed before being applied to violations of the RTD. The *status quo* of the rules on finding a breach will not be discussed here, since they depend largely on the primary norm at issue which was already extensively addressed in the previous Chapter. Section 3.3 will then analyse whether or not the existing framework could do justice to claims on the basis of a breach of the RTD in light of its special features. This section will address all three aspects of invocation, the finding of a breach and attribution and how they are applied to the RTD.

3.1 The Invocation of State Responsibility for Human Rights Violations

It is commonly accepted that the responsibility of a state for a breach of international law is of an objective nature. This means that it does not depend upon the claim of another state or individual and exists as soon as there is an attributable breach of an international obligation.[82] Nevertheless,

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78 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge UP, 2002) 315: The system of state responsibility as we know it today is based largely on the work of the ILC, which engaged in a codification exercise in the 1950's and finished in 2001.

79 See generally: David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *AJIL* 857: Therefore, it must always be established whether a certain Article reflects customary law when being applied to a particular situation.

80 Articles on State Responsibility (n 9) art 2.

81 Bird, 'Third State Responsibility for Human Rights Violations' (n 8) 884 and 900: There are also scholars who view human rights as a self contained regime. They promote treaty exclusivity and disapprove of having recourse to extra-conventional means of enforcement. This limits the options to enforce human rights. See for instance: Alston, 'Making Space for New Human Rights: The Case of the Right to Development' (n 23) 11: States that the separation of human rights law from international law 'proper' is one of the greatest deficiencies in current institutional and academic approaches to human rights law.

82 ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, in Yearbook of the ILC 2001, Vol II, UN Doc A/CN4/SERA/2001/Add1 (Commentary to the Articles on State Responsibility)

being able to base a claim of state responsibility on a formal entitlement does grant access to the scheme of norms allowing for subsequent claims of cessation, reparation and other forms of redress. As such, it is of great importance in granting international law its coercive nature.[83] Invocation is described as "taking measures of a relatively formal character" and must be distinguished from simple forms of protest.[84] During the drafting process, the ILC decided to limit the scope of potential claimants primarily to 'injured states', based on the bilateralist notion that all obligations have a correlative right lying with another state.[85] Subject to certain requirements and in exceptional cases, it is also possible for a state other than an injured state to invoke responsibility because of the importance of the norm breached.[86] However, the Articles on State Responsibility do not endow any other actors than states with a general entitlement to invoke state responsibility. This is of critical importance, since it limits the applicability of the Articles largely to the relationship between states, although they are sometimes applied in the relationship between individuals and states by analogy.[87] As noted above, human rights treaties usually provide specific enforcement tools to state parties and some also grant individuals the possibility to complain directly to an international institution. These *lex specialis* enforcement regimes thereby indirectly grant individuals an entitlement to invoke state responsibility. The Articles on State Responsibility merely proclaim that they are "without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[88] The possibilities of invoking state responsibility on the basis of such *lex specialis* regimes will be discussed first in section 3.1.1. Subsequently, section 3.1.2 will discuss the complementary role of the Articles on State Responsibility.

3.1.1 *Lex Specialis* Regimes

Human rights instruments principally seek to regulate the vertical relationship between a state and

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Commentary to Part II, para 2.

83 Shaw, *International Law* (n 27) 694; James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility', in: Malcolm D. Evans (ed), *International Law* (Oxford UP, 2003) 446; Hans Kelsen, *Principles of International Law* (Holt Rinehart and Winston, New York 1966) 5.

84 Commentary to the Articles on State Responsibility (n 82) Commentary to art 42 para 2: It may consist of commencing proceedings before an international institution, the formal presentation of a claim to another state etc.

85 Margo Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility' (2004) 79(5) *NYULR* 1902, 1902; ILC, 'Report of the International Law Commission on the Work of its 25th Session' (7 May-13 July 1973) UN Doc A/9010/Rev1 (Part 2) 182, para 9.

86 Articles on State Responsibility (n 9) art 48 and 54.

87 Menno T Kamminga, 'Legal Consequences of an Internationally Wrongful Act Against an Individual', in Tom Barkhuysen (ed) *The execution of Strasbourg and Geneva human rights decisions in the National Legal Order* (Martinus Nijhoff Publishers, The Hague 1999) 68, 68: "Interestingly, international tribunals generally appear to assume that the principles and rules of inter-state responsibility may be applied mutatis mutandis in the legal relationship between a state and an individual."

88 Commentary to the Articles on State Responsibility (n 82) Commentary to art 33(2) para 4: "[I]t may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State."

the people within its jurisdiction.[89] Since individuals are considered the direct beneficiaries, it seems logical that they would be entitled to assert their right in the international arena if a violation is committed towards them by a state. Indeed, opportunities for individuals to complain directly to an independent international institution exist under several (universal) human rights instruments.[90] In such cases, the entitlement to invoke state responsibility and the consequences of a finding of state responsibility are not determined on the basis of the Articles, but rather on the basis of the *lex specialis* rules set down in the respective human rights instruments.[91] The duty to provide reparation is then owed to individuals. However, not all human rights instruments envisage individual complaints mechanisms and those that do usually offer them in the form of an optional clause or protocol to which the member state must consent.[92] Furthermore, with the exception of several regional human rights institutions, the decisions of the treaty bodies are not binding. In general, existing enforcement regimes for human rights instruments are often described as inaccessible, weak or ineffective.[93] Thus, the key to enforcement is still left largely in the hands of the states.

Several human rights instruments which establish independent bodies with jurisdiction over claims of state responsibility also envisage a *lex specialis* possibility of bringing inter-state claims.[94] A state may then invoke the responsibility of another state on the basis of a breach of its legal interest in full adherence to the treaty and not on the basis of its link with the injured individual. The jurisdiction of these institutions and power to determine the consequences of a violation is again grounded in the *lex specialis* rules of the relevant human rights instrument.[95] The question has been raised whether or not a filing state should be granted standing at all when it cannot be considered

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89 For example: *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 24 March 1976) 999 UNTS 171 (ICCPR) art 2 (1); *European Convention for the Protection of Human Rights and Fundamental Freedoms* (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 222 (ECHR) art 1.

90 *Optional Protocol to the International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force March 23 1976) 999 UNTS 302; *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 22; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (CEDAW Optional Protocol); and several regional instruments, such as: ECHR (n 89) art 34.

91 See for example: ECHR (n 89) art 41.

92 Kaplan, 'Using Collective Interests to Ensure Human Rights' (n 85) 1911-3: The paradox in such a system is that the most notorious violators of human rights are the least likely to subject themselves to judicial scrutiny.

93 Bird, 'Third State Responsibility for Human Rights Violations' (n 8) 894, 898 and 900.

94 There are several regional mechanisms which guard over the application and implementation of regional human rights instruments and also have jurisdiction over inter-state claims, such as the European Commission and Court of Human Rights (ECtHR) set up under the ECHR, the Inter American Commission and Court of Human Rights (IACtHR) set up under the IACHR and the African Commission Human and Peoples' Rights (ACtHPR) set up under the ACHPR. The first two mechanisms have an impressive body of case law and great influence on the progressive development of international human rights law. Furthermore, several human rights instruments provide for the possibility of disputes related to the interpretation or application of that instrument being put before the International Court of Justice (ICJ). Finally, there are several quasi-judicial bodies such as the Human Rights Committee (HRCee), set up under the ICCPR, with recommendatory powers.

95 See for example: ECHR (n 89) art 41.

directly injured. The ECtHR has taken a clear stand on this point, explaining that the Convention should benefit from 'collective enforcement' in light of its special character as creating "objective obligations" […] "over and above a network of mutual bilateral undertakings".[96] Yet, in many instances states have shown reluctance in filing such inter-state complaints for human rights violations. Human rights treaties do not contain the reciprocal push and pull which offers the basis for the effective functioning of many bilateralist legal relationships under international law.[97] The purely moral damage that a state incurs easily becomes inferior to other national interests and offers little incentive to take a firm stand for the sake of human rights protection.

3.1.2 The Articles on State Responsibility

If there is no *lex specialis* regime in place, state responsibility can be invoked by an injured state as envisioned by Article 42 of the Articles on State Responsibility. A state is considered injured if the breached obligation was owed to it individually, or to a group of states of which the injured state is specifically affected as it has suffered "particular adverse effects".[98] Actual material damage is not a prerequisite.[99] By bringing a claim against the wrongdoing state, an injured state is granted access to all the means of redress discussed in the Articles. It has a right to reparation, may request insurance of non-repetition and under certain conditions it can take countermeasures against the wrongdoing state. Countermeasures are measures taken towards a wrongdoing state which, under normal circumstances, would be contrary to international obligations. However, the wrongfulness of the measures is precluded because they are taken in reaction to a previous wrongful act of another state with a view of ensuring cessation and reparation. In the decentralized system of international law in which an "impartial settlement of disputes through due process of law is not yet guaranteed", countermeasures are still an important mechanism to ensure compliance with international obligations.[100]

The bulk of inter-state claims involving state responsibility for human rights violations are based on diplomatic protection. Diplomatic protection has remained relevant because of the limited remedies available to individuals themselves to assert their rights at the international level. It is based on the fiction that a violation of a national's rights is a violation of the state's rights and a state

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96 *Ireland v the United Kingdom*, 18 January 1978, ECtHR Series A no. 25, para. 239: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a "collective enforcement"; By virtue of Article 24 (art. 24), the Convention allows Contracting States to require the observance of those obligations without having to justify an interest deriving, for example, from the fact that a measure they complain of has prejudiced one of their own nationals."

97 André Nollkaemper, *State Responsibility* (Reader 2009-2010 UvA, Amsterdam 2009) 135-7 and 145-7.

98 Commentary on the Articles on State Responsibility (n 82) Commentary to art 42 para 12.

99 *Rainbow Warrior (New Zealand v France)* (Arbitration Tribunal) [1990] 82 ILR 499.

100 Commentary to the Articles on State Responsibility (n 82) Commentary to Article 52, para 2: Explains that countermeasures are a form of self-help where no impartial third party procedure exists or if the state who acted wrongfully will not participate in this procedure.

can therefore bring a claim as an injured state on the basis of Article 42.[101] Many of the rules with regard to bringing claims based on diplomatic protection have been codified by the ILC in its Draft Articles on Diplomatic Protection.[102] A problematic aspect from the viewpoint of the victim and the effective and undifferentiated enforcement of human rights obligations is that the state is not obliged to use its right to afford diplomatic protection. Furthermore, the legally injured state is not required to transmit any damages obtained to the factually injured individual.[103] Moreover, diplomatic protection cannot be exercised without a link of nationality. Thus, when a state has committed violations against its own nationals other states cannot act on their behalf and an enforcement gap exists.[104]

Besides claims by injured states, a 'state other than an injured state' may also invoke the responsibility of a wrongdoing state under Article 48(1) of the Articles on State Responsibility. A precondition for this entitlement is that the wrongdoing state breached an obligation *erga omnes* or *erga omnes partes. Erga omnes* obligations are considered to be of such fundamental importance that "all states can be held to have a legal interest in their protection."105 Only several human rights norms are considered to be of the *erga omnes* type, such as the prohibitions of genocide, slavery and racial discrimination, and the concept is still surrounded by controversy.106 *Erga omnes partes* obligations on the other hand, are both more common and more accepted. They are indivisible obligations contained in an international instrument designed to protect the collective interest of a group. As such, a breach is considered to "radically change the position of every other party with respect to the further performance of its obligations".[107] The ILC mentions human rights treaties as one of the prime example of obligations *erga omnes partes* in its commentary to Article 48.108 The reasoning behind Article 48 resembles what was discussed above in the context of inter-state claims procedures for multilateral human rights instruments, namely that certain norms should benefit from collective enforcement. A non injured state's entitlements in case of a breach of an *erga omnes* or *erga omnes partes* obligation under Article 48(2)(a) are limited to claiming cessation or non-repetition. Additionally, Article 48(2)(b) also mentions a right to claim reparation for the beneficiaries of the obligation breached. This entitlement is currently not yet considered *lex lata* and before it becomes a viable option in practice, additional requirements may have to be added so that

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[101] Menno T. Kamminga, 'Legal Consequences of an Internationally Wrongful Act Against an Individual' (n 87) 68.
[102] ILC, Draft Articles on Diplomatic Protection, August 2006, UN GAOR Supplement No 10, UN Doc A/61/10 (Articles on Diplomatic Protection) art 1 and Part II, art 3(1) ff and Part II, art 14 ff.
[103] Nollkaemper, *State Responsibility* (n 97) 348-50: A state of nationality may even choose to exercise diplomatic protection against the injured individual's will.
[104] Menno T Kamminga, 'Legal Consequences of an Internationally Wrongful Act Against an Individual' (n 87) 68.
[105] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Merits) [1970] ICJ Rep 3, para 33.
[106] Ibid para 34; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29.
[107] Commentary to the Articles on State Responsibility (n 82) Commentary to Article 42, para 13, citing Article 60(2)c of the Vienna Convention on the Law of Treaties.
[108] Ibid Commentary to Article 48, para 7.

it is not abused.[109] Finally, Article 54 indicates that states who are entitled to invoke state responsibility in accordance with Article 48 can also take 'lawful measures' to ensure cessation and reparation.[110] The Article deliberately does not use the term 'countermeasures', since great risks are inherent to the use of countermeasures in the collective interest and the practice is also not yet accepted as positive law.[111] The commentary to Article 54, however, clarifies that the Articles on State Responsibility neither approve nor forbid countermeasures in the collective interest and leave the matter open for further crystallization in practice.[112] By incorporating Article 48 and 54, the growing importance of integral norms which cannot be broken down into reciprocal bilateral obligations has gained some recognition in the Articles on State Responsibility. However, bringing an inter-state complaint on the basis of Article 48 for a breach of human rights is not yet common practice because of the lack of a reciprocal push and pull. Therefore, this options is not used to its full potential to enhance human rights protection.[113]

3.2 Multiple Attribution

Attribution is the link between an act of an individual and responsibility of the state, since a state is a hypothetical entity and cannot act on its own account. An act can only be attributed to the state if it was carried out by individuals for whose acts the state carries some form of responsibility. This can be based on the status of the individual as an organ of the state, the fact that the individual exercises a certain degree of government authority or on the primary norm in cases where a state had a due-diligence obligation to control the acts of individuals.[114] The thesis will not dive any further into the many technical aspects attached to construing this link, but will focus on the lacuna with regard to multiple attribution leading to shared state responsibility. The ILC has taken a traditional approach towards the distribution of responsibility over several wrongdoing states, basing it on the principle of independent responsibility. This entails that a state is only responsible for its own actions constituting a separate wrongful act, irrespective of the responsibility of other states.[115] It seems to be a somewhat outdated approach in light of the increased intensity of state cooperation and rise of collective state obligations, which may be breached by several states simultaneously. A historical explanation for the underdevelopment of the framework in this respect is that, until recently, most judicial claims at the international level concerned areas of law where

[109] It may be necessary to require an invoking state to establish that it is truly acting in the interest of the injured party.
[110] Commentary to the Articles on State Responsibility (n 82) Commentary to Article 54, para 6 and 7: Describes Article 54 as a 'saving clause'.
[111] Kaplan, 'Using Collective Interests to Ensure Human Rights' (n 85) 1920-3.
[112] Articles on State Responsibility (n 9) art 48 jo 54; Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (n 78) 305.
[113] Bird, 'Third State Responsibility for Human Rights Violations' (n 8) 883.
[114] Articles on State Responsibility (n 9) art 4(1); Nollkaemper, *State Responsibility* (n 97) 35-7 and 41-96.
[115] Articles on State Responsibility (n 9) Chapter I; Nollkaemper, *State Responsibility* (n 97) 136-9.

shared responsibility hardly occurred. Therefore, methods of dispute settlement are usually still biased towards single state responsibility on the basis of considerations of limited competence, procedural simplicity or effectiveness.[116]

Chapter IV of the Articles on State Responsibility contains several legal constructions which deal with instances where the primary weight of the wrongful act lies with one state, but was committed with the help of another. On the basis of these constructions, a controlling or assisting state may be held responsible for acts which were technically carried out by another state. Article 17 and 18 provide that a state can be held responsible for directing and controlling the wrongful acts carried out by another state or coercing another state into committing an internationally wrongful act. However, Articles 17 is only applicable in exceptional situations where a dominant state has both direction and control over the wrongful conduct.[117] The threshold for coercion, contained in Article 18, is even higher.[118] What remains is the doctrine of complicity embodied by Article 16, which deals with situations in which one states assists another state in the commission of a wrongful act.[119] However, one of the requirements is that the state must have the intention of facilitating the wrongful act, which excludes cases of 'deliberative indifference'.[120] Even if a state is found to be complicit, both states are still held independently responsible for their own wrongful acts. If two or more states are responsible for one factually indivisible wrongful act, for instance by acting through a shared organ, it is unclear how responsibility is allocated and the burden of reparation distributed. At the moment, the only method of dealing with attribution in cases of "factually indivisible wrongful acts" which has some basis in international law, is that of joint and several liability.[121] This principle entails that injured states can invoke responsibility and require full reparation from every one of the states that contributed to the damage. The advantages from the victim's viewpoint is that he or she is spared the difficult task of proving how much each state contributed to the wrongful act. What it would mean under international law in terms of a subsequent claim held by the state that was officially held responsible and required to provide reparation towards the other contributing states is as of yet unclear.[122]

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[116] John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Liability' (1988) 13(2) *Yale J Int'l L* 225, 232-5

[117] Articles on State Responsibility (n 9) art 17 and 18; Commentary to the Articles on State Responsibility (n 82) Commentary to Article 17, para 6.

[118] Ibid Commentary to Article 18.

[119] Articles on State Responsibility (n 9) art 16.

[120] Ibid; Mark Gibney, Katarina Tomasevski, Jens Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 *Harv Hum Rts J* 267, 293-4: Commenting on the threshold of complicity, the authors state that a large gap exists in which states can go unpunished for the facilitation of human rights violations in other states, even with the knowledge that they are being committed.

[121] Separate Opinion Judge Simma in *Oil Platforms Case (Islamic Republic of Iran v USA)* (Merits) [2003] ICJ Rep 324 (Separate Opinion Judge Simma in the *Oil Platforms* case) paras 64-78; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240 (*Nauru* case) para 48.

[122] Noyes and Smith, 'State Responsibility and the Principle of Joint and Several Liability' (n 116) 225: "Given [the] lack of attention to multiple state responsibility, it is not surprising that the issue of reparation in such cases has

If a claim is brought in front of a dispute settlement body, one of the first questions that arises with regard to multiple attribution is whether a claiming state still has standing if the violation is partly attributable to a third state which is not a party to the dispute.[123] If such an 'indispensable parties rule' applies, injured states would have to ensure they claim the responsibility of every state which possibly contributed to the wrongful act. Luckily, the indispensable parties rule has been interpreted restrictively in international law and only applies if a third state's legal interest would form 'the very subject matter' of the decision and is an actual prerequisite for the determination of responsibility of the other state.[124] Therefore, an injured state will not easily be denied standing if it claims the responsibility of at least one of the principal wrongdoing states.

3.3 Suitability of the Current Framework

To truly influence state behaviour, it would be a great step forward to be able to hold states accountable for non-observance of obligations under the RTD. Since there is no *lex specialis* enforcement option, a claim would have to be based on the customary regime of secondary norms which has largely been captured in the Articles on State Responsibility. However, the Articles on State Responsibility do not offer an ideal enforcement regime for the RTD. The suitability of the current framework will be discussed from the perspective of invocation, finding a breach and attribution. Invocation is discussed in section 3.3.1 and is of importance since an entitlement to invoke state responsibility grants access to the means of redress contained in the Articles on State Responsibility. Section 3.3.2 will discuss the finding of a breach and section 3.3.3 will discuss multiple attribution, as they are the two basic requirements for state responsibility.

3.3.1 Invocation and the RTD

Since there is no *lex specialis* regime for the RTD and consequently no independent body with jurisdiction over claims brought by individuals or other nonstate actors, the first option for the invocation of state responsibility based on a breach of the RTD is for an injured state to bring a claim based on diplomatic protection. The two main conditions for a state to be able to bring a claim based on diplomatic protection are that the injured individual has that state's nationality and has exhausted the local remedies of the respondent state.[125] Even though the doctrine of diplomatic protection originally arose out of the need to protect the rights of 'nationals abroad', the fact that a national is indeed abroad at the time that the injury occurs is not a prerequisite.[126] Therefore,

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received even less attention."

[123] Ian Brownlie, *State Responsibility* (Clarendon Press, Oxford 1983) 100-2.

[124] Ibid; *Monetary Gold Removed from Rome in 1943 (Italy v France, UK and USA)* (Preliminary Question) [1954] ICJ Rep 19; ICGJ 183 (ICJ 1954) para 45; *Nauru* case (n 121) para 55.

[125] Articles on Diplomatic Protection (n 102) art 1, 3(1) ff and 14 ff.

[126] ILC, Draft Articles on Diplomatic Protection, with commentaries, in Yearbook of the ILC 2006, Vol II, part II, UN

diplomatic protection may give the state of nationality a right to act on behalf of its (collective) citizens when their rights are breached by another state. Salomon endorses this view by reference to the internal and external dimension of the RTD. She argues that, internally, individuals and peoples may assert their rights under the RTD against their state, while externally states are entitled to enforce the RTD "on behalf of its people".[127] To a certain extent, a claim of diplomatic protection based on a breach of the RTD could be compared with the situation in which a state's nationals' rights are breached as a result of environmental damage emanating from another state. Based on Article 15(c) of the ILC's Draft Articles on Diplomatic Protection, the condition of exhausting the local remedies of the wrongdoing state may be relinquished in such a situation.[128] This exception is based on the view that it would be unreasonable to require the injured individuals to exhaust the local remedies of the respondent state if there is no "voluntary link or territorial connection between the injured individual and the respondent State."[129] However, it is equivocal if Article 15(c) of the Articles on Diplomatic Protection is a codification of customary law or should still be seen as an element of progressive development.[130] In case of a breach of the RTD, the requirement of exhausting local remedies may lead to a situation in which (representatives of) a group of injured individuals in a state in Africa are required to travel to a state in Europe to exhaust local remedies. Needless to say, this would impose a heavy burden on the victims, cause an unnecessary prolongation of the procedure and extra costs. It is questionable whether diplomatic protection is at all a proper basis for claims based on violations of collective rights. This question has, to date, remained unanswered and is not yet even being actively discussed in legal doctrine.

A second option would be for a non-injured state to bring a claim based on a breach of the RTD under Article 48. Articles 48 and 54 do mark a step towards multilateral reality by recognizing that 'a state other than an injured state' may have a legitimate and well-intentioned interest in the observance of certain rights embodying collective interests.[131] Therefore, they may have a large role to play in the future of human rights protection, especially in situations where a state commits violations against its own citizens.[132] A situation may arise in which a state violates obligations towards its own people under the RTD's internal dimension. However, in the external dimension, which is the dimension that marks the RTD as a solidarity right, other states will normally be responsible for violations. Still, bringing a claim based on Article 48 may form a useful alternative for a claim based on diplomatic protection, if the latter would require that the local

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Doc A/CN4/SERA/1995/Addl (Part 2) (Commentary to the Articles on Diplomatic Protection) Commentary to art 1, para 4 and art 15(c) para 7.

127 Salomon, *Global Responsibility for Human Rights* (n 27) 112-113.

128 Articles on Diplomatic Protection (n 102) art 15(c).

129 Commentary to the Articles on Diplomatic Protection (n 126) Commentary to art 15(c) para 7.

130 Ibid Commentary to art 15(c) para 9.

131 Bird, 'Third State Responsibility for Human Rights Violations' (n 8) 884.

132 Ibid 892-3.

remedies of the respondent state are exhausted. In any case, the Articles currently do not form a basis upon which states other than injured states may enforce the RTD. First of all, the RTD is not classifiable as an obligation *erga omnes* or *erga omnes partes* and not likely to gain such a status in the near future. To add to this, certain parts of Article 48 and 54 are also not yet considered *lex lata*.

Neither Article 42 nor Article 48 forms a convincing basis upon which to claim state responsibility for a violation of the RTD. Furthermore, the exclusive focus on the relationship between states and how to hold each other accountable does not properly reflect the much more complicated legal relationships covered by the RTD. In the internal dimension, for instance, it would be more logical to grant individuals and other nonstate actors an entitlement to assert their rights against states who commit violations against them.[133]

3.3.2 Finding a Breach of the RTD

When determining whether an international obligation has been breached, much depends on the primary obligation at issue.[134] It was touched upon in Chapter 2 that the Declaration does not offer much guidance with respect to the RTD's scope, the content of obligations or exact duty-holders. Therefore, one of the greatest challenges in conceiving a framework of accountability for breaches of the RTD will be the advancement and acceptance of actual binding and enforceable state obligations. The history of failed attempts at concrete implementation measures illustrates that there is, as of yet, a certain resistance of states towards the types of obligations that the RTD implies. Reservations to these obligations are strongest with regard to its external dimension, which gives rise to transnational and even several collective state obligations. Because human rights treaties traditionally function on a jurisdictional basis, states are not fully accustomed to holding binding obligations towards people(s) outside their jurisdiction, let alone being held accountable for violations thereof.[135] Furthermore, obligations under the RTD are often positive obligations of an imperfect nature, without offering any guidance as to how these obligations are distributed among states. Even though transnational human rights obligations are not considered unacceptable altogether, basing them on a solidarity right which is very wide in scope and does not give much

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[133] This may be their own state, or another state which has violated their rights under the RTD because the individual was affected by (the implementation of) its development policy.

[134] Articles on State Responsibility (n 9) art 2(b); ILC, Second Report on State Responsibility by Special Rapporteur, Mr. James Crawford, March 1999, UN Doc A/CN4/498, para 3: "In deter mining whether there has been a breach of an obligation, consideration must be given above all to the substantive obligation itself, its precise formulation and meaning, all of which fall clearly within the scope of the primary rules."

[135] Most human rights instruments, with the notable exception of the ICESCR, contain a jurisdiction clause limiting the effect of the instrument to a state's citizens or all individuals on their territory, eg: ICCPR (n 89) art 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [...]"; A few human rights (instruments) are recognized to have extraterritorial effects, be it under strict circumstances, eg: *Loizidou v Turkey*, No 15318/89, ECtHR 1996-VI No 26, 18 December 1996, para 56: The ECHR has extraterritorial effect when members exercise "effective overall control" outside of their territory.

guidance with respect to the exact duty-bearers gives rise to too many insecurities. Ways will have to be found to make it more acceptable for states to take on binding obligations under the RTD.

Furthermore, several factors undermine the enforceability of obligations under the RTD. Enforceability is understood in this context as the acceptance and identification of rights and duties to such a degree as to allow entitled actors to force duty-holders to comply.[136] This means they must to be sufficiently clear and precise to allow the determination of a breach. Apart from the fact that the RTD lacks a burden-sharing mechanism, it also gives rise to positive state obligations, which are generally considered of a less enforceable nature than negative obligations. Henry Shue demonstrated that most human rights do not give rise to one single correlative duty, but rather to the intertwined duties to respect, protect and fulfil. His typology has made it possible to distinguish an enforceable dimension in many rights traditionally seen as 'positive rights'.[137] The RTD will be no exception in this regard and certainly contains obligations to respect and protect. However, in the grand scheme of things, obligations to fulfil are most central to the RTD's realization.[138] This has certain implications for the finding of a breach, since obligations to fulfil are generally breached through omission. The threshold for finding a breach through omission is generally higher than for conduct and may even require the establishment of a causal link.[139] Establishing a causal link between the existence of global problems and the omission of one or several states is extremely difficult, since the damage is most likely to be rather distant from the cause and the intermediate processes are not adequately understood. Therefore it is complicated to find a breach without at least some grip on what it is that states are required to do to comply with their obligations.

3.3.3 Multiple Attribution and the RTD

Cooperation between states is central to the RTD and fits the trend towards an integrated and interdependent international community. Regrettably, its 'twin principle' of shared state responsibility in the sense of holding states jointly accountable has not kept pace.[140] The principle of individual state responsibility and high thresholds in place for holding states accountable for

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[136] There is some disagreement among scholars about the exact definition and inter-linkage of the terms 'justiciability' and 'enforceability'. The two terms are sometimes used synonymously, while others make a stark distinction between the two based on the fact that 'justiciability' presupposes the existence of a review mechanism. In Chapter 2, justiciability was already defined as "whether a matter is appropriately resolved by a court of law". The enforceability of a norm is understood here as the acceptance and identification of entitlements and duties to such a degree as to allow the entitled actors to force duty-holders to comply through a legal process.

[137] Henry Shue, *Basic Rights* (2nd edn, Princeton UP, 1996) 52; Salomon, *Global Responsibility for Human Rights* (n 27) 192: "This tripartite typology […] advances a general appreciation of the equal significance, force and justiciability of socio-economic rights vis-a-vis civil and political rights."

[138] Sengupta, 'On the Theory and Practice of the Right to Development' (n 29) 857.

[139] Andrea Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (2007) 18(4) *EJIL* 695, 703 and 709; Nollkaemper, *State Responsibility* (n 97) 123: Causality is not a general precondition for state responsibility, however, in case of a breach through omission it will sometimes need to be established; Salomon, *Global Responsibility for Human Rights* (n 27) 187-9

[140] Salomon, *Global Responsibility for Human Rights* (n 27) 71.

contributory conduct are distressing when seen in the context of the RTD. The external dimension of the RTD gives rise to collective state obligations and breaches thereof may be attributable to several states simultaneously. As demonstrated in the first part of this Chapter, it is still equivocal what the consequences under the current regime of state responsibility are for breaching collective obligations. It may lead to inequitable situations if a breach committed in the framework of a partnership for development would be attributed to one state which is then required to make full reparation.[141] At the very least, that state would have to be able to require compensation from the other contributing states on the basis of joint and several responsibility. The outlook of possibly being held accountable for a wrong committed at least partly by others may discourage states from fully accepting the RTD as a basis for binding collective obligations.

Under the current system, which state in a partnership for development is held accountable will depend largely on chance and the burden of reparation is likely to be unequally distributed. That will have to change before it can be applied to violations of the RTD in the external dimension. The obligation to cooperate under the RTD is illustrative of a shift of focus from the peaceful coexistence of states towards a further integration on the basis cooperation and shared responsibility.[142] It is of the utmost importance to complement this shift with a set of secondary principles which offers equitable solutions in case of a violation. This is not wholly catered to by the ILC's traditional approach towards the distribution of responsibility over several wrongdoing states on the basis of independent responsibility.[143]

4. Alternative Approaches: Exploring the Outlines of a More Welcoming Framework

Many of the problems described in section 3.3 are linked to the ILC's bilateralist approach running out of pace with the complicated legal reality of an integrated international community.[144] However, several problems have also been identified which can be ascribed to the vague nature of the RTD itself. This Chapter will assess how different approaches to filling the gaps in the accountability framework may contribute to the creation of a system on the basis of which claims to invoke state responsibility for violations of the RTD could eventually be entertained. Furthermore, it will be

[141] Howland, 'Multi-State Responsibility Extraterritorial Violations Economic Social and Cultural Rights' (n 40) 391: For instance in UN multilateral peacekeeping missions, where the missions are often more influential and have more resources at their disposal than the government of the host state itself.

[142] Millennium Declaration (n 18) Prt I para 6: "We consider certain fundamental values to be essential to international relations in the 21st century [...]: *Shared responsibility.* Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally."

[143] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 138) 708-9.

[144] See generally: Weiss, 'Invoking State Responsibility in the Twenty-First Century' (n 57); Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harv ILJ* 1, 2-4.

discussed how obligations under the RTD could become more accepted and could become of a more enforceable character. Most of these approaches have not found sufficient support to be considered *lex lata*. Nonetheless, some have been categorized as elements of the progressive development of the law, usually founded on sufficient practice but not yet recognized as law. Others are new ideas that have yet to be considered as progressive development of the law but may be exactly the radical change that is needed.

In an attempt to offer acceptable solutions to the identified problems, an innovative approach will be taken by exploring how the principles of intergenerational equity and common but differentiated responsibility could contribute to the acceptance and guided development of these alternative approaches. Intergenerational equity, which promotes a sense of fairness among generations, could reinforce the RTD as a rule of international law.[145] Common but differentiated responsibility, which proposes a distribution of primary responsibility on a differentiated basis, could see to the problem of identifying duty-bearers and the scope of their obligations while effectuating burden-sharing among states.[146] These principles have been taken from the context of environmental law, which is more experienced in transposing responsibility for global concerns into legal obligations and ensuring accountability when these obligations are breached.[147] It must be acknowledged that a certain tension exists between the analysis of the status of the law and the benefits of a progressive interdisciplinary approach that may guide future practice. Nonetheless, doing research outside a particular field of law and drawing conclusions based on analogies is a recognized method of expanding legal frameworks.[148] If the approaches are ever to be accepted into mainstream international law thinking, they must be either so equitable that they are undeniably just or flow from already accepted standards and practice. What this means in more concrete terms is that they must also be acceptable to the critics of the RTD and therefore the elements of enforceability and coherence must be taken into account.[149]

Section 4.1 will have a look at invocation and how breaches of the RTD could be more easily invoked while preventing enforcement deficits. Section 4.2 will then have a look at finding a breach and in that context discuss how obligations under the RTD could be made more acceptable and enforceable. Section 4.3 will discuss multiple attribution and how a framework of accountability could take shape in which states are held responsible on an equitable basis for

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145 Francesco Francioni, 'Equity in International Law' (Apr 2007) MPEPIL, para 1.
146 Hey, 'Common but Differentiated Responsibilities' (n 11) para 1.
147 Rebecca M Bratspies and Russel A Miller, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (Cambridge UP, 2006) 227.
148 Brownlie, *State Responsibility* (n 123) 92: "It is assumed, for good reasons, that public international law grows out of the practice of States. Nonetheless, there are certain areas in which the framework of concepts and general principles must be derived from a more sophisticated matrix than the casual exchanges of diplomacy. State responsibility provides the most important example of this type of case."
149 Sengupta, 'Right to Development as a Human Right' (n 40) 2533.

wrongs jointly committed.

4.1 Alternative Approaches to Invocation

The previous chapter illustrated that exercising diplomatic protection on the basis of Article 42 is not an ideal method of enforcing collective obligations under the RTD. On the other hand, invocation by a non-injured state on the basis of Article 48 is not possible since the RTD cannot yet be seen as containing obligations *erga omnes* or *erga omnes partes*. This section analyses how the secondary norms on invocation could be adjusted to enhance options of enforcing the RTD through the regime of state responsibility. First of all, the Articles on State Responsibility have been criticized for not "deal[ing] sufficiently with the right of individuals and nonstate entities to invoke the responsibility of states" and it has been argued that it is time for a revision in that respect.[150] At present, a 'saving clause' submits that the Articles do not prejudice the rights of other actors to invoke responsibility when the breached norm is owed directly to an individual or other non-state entity. However, this does not grant these other actors an entitlement to invoke responsibility, which is left entirely up to *lex specialis* regimes of law.[151] There is a widespread existence of *lex specialis* regimes in which individuals are entitled to invoke state responsibility. However, it is inevitable that enforcement gaps remain. These enforcement gaps could be mitigated by reflecting the increased importance of nonstate actors in invoking state responsibility in the general regime on state responsibility.[152] This could offer a basis for individuals, groups or peoples' to invoke a state's responsibility for violations of obligations owed to them under the RTD.

Second, the idea has been forwarded in Chapter two that states could be framed as rights-holders of rights under the RTD, simultaneously with or as opposed to individuals depending on the obligation at issue. This way of configuring the RTD could be based on the territorial interpretation of the term people combined with the purpose of the external dimension to ensure cooperation between states in the framework of the RTD.[153] A state could then invoke another state's responsibility based on a breach of its own right and the complexities inherent to exercising diplomatic protection for the enforcement of a collective right are circumvented. States are not traditionally the holders of human rights, however, construing states as rights-holders is certainly defendable on the basis of the considerations of enforceability and the special character of solidarity

[150] Weiss, 'Invoking State Responsibility in the Twenty-First Century' (n 57) 799.

[151] Commentary to the Articles on State Responsibility (n 82) Commentary to art 32(2) para 4: The Commentary further specifies that "it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State."

[152] Weiss, 'Invoking State Responsibility in the Twenty-First Century' (n 57) 809.

[153] Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 309: Villaroman takes this view, which cannot be considered as positive law or even as the most accepted approach towards the RTD, very far. "Therefore, owing to its unique nature and historical origin, the right to development is only applicable in the external relations between developed and developing states (horizontal dimension), and not in the relations between a state and its own people or an individual (vertical dimension)."

rights. It does not imply that individuals are not still the ultimate beneficiaries of a right. To avoid abuse, a state could be required to prove that it is truly acting on behalf of its people. This approach has certain advantages, such as its simplicity and the fact that it could function within the current framework of the Articles on State Responsibility while awaiting other necessary changes. Injured states have access to all means of redress contained in the Articles, including taking countermeasures against the wrongdoing state if the requirements are met. An obvious disadvantage is the fact that it is not likely to be easily accepted, since the territorial interpretation of the term people is still rather equivocal.[154] However, the horizontal dimension between states in human rights law may slowly become more generally recognized and solidarity rights may become more influential.[155] This option should then be seriously considered.

Third, another option would be to allow non-injured states to invoke state responsibility for breaches of the RTD in the collective interest. A look will be taken at how Articles 48 and 54 may serve the purpose of forming a basis for RTD claims, subject to certain changes. As previously mentioned, certain of the RTD's obligations would have to become classifiable as *erga omnes* or *erga omnes partes* obligations. It has been argued that ensuring sustainable development is already an *erga omnes* obligation and that the RTD falls within the grace of this concept.[156] Alternatively, for the RTD to be a basis for *erga omnes partes* obligations, a treaty would have to be established for its protection. Realistically, however, either of these options will require a further acceptance of the RTD and a widespread conviction that solidarity rights are indeed the proper framework for addressing global concerns. That said, the RTD would be a proper candidate as a basis for *erga omnes partes* obligations, since situations can certainly be envisioned where non-observance by one state drastically changes the position of other states in a partnership for development. Furthermore, it can even be argued that solidarity rights addressing a global concern, which has been recognized as a general interest which can only be ensured through collective and coordinated action by the international community of states, could on that basis alone be seen as giving rise to *erga omnes* obligations. In that case, a state other than an injured state could require cessation and non-repetition of violations of the RTD. Since the RTD largely implies obligations to fulfil, it would also be a major advancement if Article 48(2)(b) - allowing for a non-injured state to require reparation in name of the beneficiaries of the obligation breached - is accept as *lex lata*.

Which brings us to the option of taking (counter)measures in reaction to a breach. If

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[154] Gibson, 'The Right to a Clean Environment' (n 8) 17: Gibson ends up with the same conceptualization in which states are the holders of solidarity rights and individuals the beneficiaries, only objecting to the categorization of solidarity rights as a human right. She proposes the term universal rights, which would be "less disruptive of existing human rights."

[155] Villaroman, 'The Right to Development: Exploring the Legal Basis of a Supernorm' (n 15) 309 and 323; CESCR, *General Comment 3: The Nature of States Parties Obligations* (n 46) para 14.

[156] Chowdhury, *The right to development in international law* (n 24) 244-5 and 256.

certain of the RTD's obligations become classifiable as *erga omnes (partes)* obligations, a state other than an injured state will be allowed to take lawful measures in reaction to a breach in accordance with Article 54. Such lawful responses to unlawful acts, otherwise known as retortions, are not likely to amount to much more than the diplomatic means that a state already has to its disposal. Even though countermeasures in the collective interest are not currently considered legally justified, neither have they been written off as completely unacceptable. Limiting the types of countermeasures that can be taken in reaction to breaches of the RTD may diminish the probability of abuse and make the practice more easily acceptable. For instance, temporarily suspending treaty rights of subordinate importance or taking moderate economic measures towards a wrongdoing state may offer exactly the right impulse to induce it to resume compliance.[157] Thus, if qualified in the correct manner, taking countermeasures in the collective interest could balance the risks of abuse against the risk that flagrant violations of the RTD are not addressed at all.[158] It has been argued that allowing for limited types of collective countermeasures could help state responsibility become a "common tool for the enforcement of human rights obligations" and remain relevant in light of the trend away from bilateralism.[159] In the long run, it may be possible to draw up a more refined framework, allowing for different kinds of measures for different kinds of breaches.

4.2 Content, Acceptability and Enforceability of Obligations

The fact that the status and content of obligations under the RTD are still unclear can at least partly be ascribed to the fact that transnational and collective state obligations based on a solidarity right are not yet considered fully acceptable. However, the external dimension of the RTD which contains such obligations is inextricably part of its core content, since the right was born from the appreciation that global concerns would have to be addressed by states collectively for individual rights to be realized. To some degree, these types of obligations require a re-conceptualization of the existing framework of human rights, which has traditionally been most active in the relationship between a state and its citizens. In recent years, state practice in the area of human rights law displays an increasingly progressive attitude towards transnational state obligations. Section 4.2.1 will address how these transnational state obligations may pave the way for the future acceptance of binding obligations under the RTD in its external dimension.

Furthermore, it was touched upon that the threshold of accountability for breaches through omission is often higher than for breaches of conduct. This is especially true if the parameters of the required conduct are very vague, as is the case with obligations under the RTD. In light of the importance of obligations to fulfil for the RTD, ways will have to be found to make the

[157] Commentary to the Articles on State Responsibility (n 82) Commentary to Article 54 para 3 and 4.
[158] Bird, 'Third State Responsibility for Human Rights Violations' (n 8) 892-3.
[159] Kaplan, 'Using Collective Interests to Ensure Human Rights' (n 85) 1933.

obligation to progressively realise these obligations sufficiently clear and precise to be able to determine when they are breached. Two approaches will be discussed towards increasing the enforceability of obligations under the RTD in section 4.2.2. Finally, section 4.2.3 analyses what role the principle of intergenerational equity can play in increasing the acceptability of the RTD and offering a framework for its guided development.

4.2.1 Transnational State Obligations

There are noticeable trends in several fields of law that evidence an increased acceptance of responsibility for the (human) rights of individuals in other states, without there being any link based on jurisdiction or citizenship.[160] One field of law where transnational obligations have gained considerable ground is the area of environmental law. Because of the intrinsically global character of environmental challenges, environmental law can offer valuable precedents. It has been rather successful in offering a framework to hold states accountable for violations of transnational obligations. As such, these obligations have contributed to the realization of at least some aspects of the solidarity right to a clean environment.[161] For example, an important principle in environmental law which is the basis for several transnational state obligations is the prevention of significant transboundary harm.[162] It is a compound obligation of due diligence, consisting of a set of quite specific subsidiary obligations.[163] The principle confirms that transnational due diligence obligations can be owed to states and individuals simultaneously.

A similar move towards a global distribution of responsibilities is taking place in human rights law. There are now numerous examples of obligations with an extraterritorial element. Most of them do not form a complete departure from the controlling notion of jurisdiction, but do support the move away from a strictly territorial applicability of human rights.164 Furthermore, the ICJ has confirmed that collective transnational obligations can exist on the basis of a state's "capacity to

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[160] See for example: Gibney, 'Transnational State Responsibility for Violations of Human Rights' (n 120) 273-88; Howland, 'Multi-State Responsibility Extraterritorial Violations Economic Social and Cultural Rights' (n 40) 402-7; See also: Millennium Declaration (n 18) principle 2: "We recognize that, in addition to our separate responsibilities to our individual societies, we have a *collective responsibility* to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people [...]."

[161] Tomuschat, *Human rights: Between Idealism and Realism* (n 16) 49: The right to a clean environment was first recognised in the Stockholm Declaration in 1992.

[162] *Trail Smelter Arbitration (United States v Canada)* 3 RIAA 1905 (16 April 1938 and 11 March 1941) 1965; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 27; Rio Declaration (n 18) Principle 2: Even though the principle has not always been consistently enforced (the most notable exception being the Chernobyl disaster) it is considered to stand firmly within the realm of positive international law.

[163] Bratspies, *Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration* (n 146) 112 and 147 and Rio Declaration (n 18) Principle 17: These subsidiary obligations include an obligation to carry out an impact assessment, an obligation to notify and consult with potentially affected states and accountability for injurious consequences of its unilateral decision; ILC, Draft Articles on Prevention of Transboundary Harm From Hazardous Activities, May 2001, UN GAOR Supplement No 10, UN Doc A/56/10 chp V, art. 9 (1) and (2); Although not considered *lex lata*, it is worth noting that in its draft, the ILC broadened the scope of the principle even further by imposing a far reaching obligation to consult "with a view of achieving acceptable solutions".

[164] *Alan v Switzerland*, CAT/C/16/D/21/1995, 8 May 1996; *Loizidou* case (n 134) para 56.

effectively influence" instead of whether a state has jurisdiction over the people involved.[165] This shift towards global responsibilities under human rights law has been reflected in common state positions pronounced in the last decade, indicating that the laws of cooperation and shared responsibility have become central concepts.[166] There is authoritative support for the position that the UN Charter creates a binding obligation to cooperate for the purpose of creating a favourable environment for the realization of human rights.[167] Taking this changed perspective as the outset for a further exploration of trends in human rights law, scholars have asserted that human rights do indeed create binding transnational obligations which may support the goal and arguably the contents of obligations under the RTD. These approaches are discussed below, in an order which can give some indication of how obligations to respect, protect and fulfil may be construed under the RTD.

First of all, it has been suggested that human rights create certain transnational obligations to respect, such as an obligation introduced by Thomas Pogge to stop imposing the "unjust global institutional order".[168] It is based on the view that the current inequitable world-order in itself violates fundamental human rights norms because it deprives human beings of their "proportional resource share" and "avoidably and foreseeably" maintains large-scale human rights deficits.[169] Margot Salomon supplements this theory, proposing that since obligations have already been violated on a global scale, states actually have "an obligation to remedy that violation and prevent its continuation".[170] Although these theories are not commonly accepted, they highlight the paradox between the perceived non-derogable nature of certain human rights obligations and a global reality which in itself ensures violations of these obligations.[171] The RTD steps into a niche by offering a much needed but more moderate, and thus more acceptable, framework to address this paradox. For instance, an important obligation to respect based on the RTD could be the obligation

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[165] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 2 (*Genocide* case): The 'collective' obligation to prevent genocide.

[166] Millennium Declaration (n 18) Prt I para 6.

[167] Brownlie, *State Responsibility* (n 123) 256: "There is probably also a collective duty of [UN] member states to take responsible action to create reasonable living standards both for their own peoples and for those of other states"; Salomon, *Global Responsibility for Human Rights* (n 27) 87-8 and 98: The framework offered by the UN Charter (n 51) in art 1(3), 55 and 56 has been filled in by many, more specific and legally binding, universal human rights standards to that effect; *Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Merits) [1980] ICJ Rep 3, para 91: The ICJ interpreted the UN Charter on the basis of the UDHR, implicitly endorsing the view that its obligations may be interpreted in light of subsequent human rights instruments.

[168] Thomas Pogge, 'World Poverty and Human Rights' (2005) 19(1) *EIA* 1, 5; Salomon, *Global Responsibility for Human Rights* (n 27) 192: Elaborating upon the meaning of this obligation within the framework of the RTD.

[169] Pogge, 'World Poverty and Human Rights' (n 167) 3-5: Sweeps away the argument of historical entitlements with the rebuttal that the current world order was historically brought about through grave human rights violations.

[170] Salomon, *Global Responsibility for Human Rights* (n 27) 192-3.

[171] The obligations forwarded by Pogge and Salomon are very broad and unspecific, while at the same time suggesting a complete overhaul of the current world order. Moreover, the links between these obligations and the continuation of poverty are disputed and without consensus they will not be accepted as law.

not to discriminate in development policies.172 This obligation will be part of both the internal and external dimension of the RTD and can take on transnational or collective form. For instance if a state affects individuals outside of its jurisdiction with discriminatory development policies or if a collectivity of states discriminates in its development policies.

Second, a popular vehicle for the promotion of transnational obligations under international human rights law is the advancement of obligations to protect. This gained impetus especially with the debates surrounding the responsibility to protect (hereinafter R2P).[173] Building on the notion of sovereignty as responsibility, the R2P offers a basis for the international community to step in if a state itself is 'unwilling or unable' to protect its population. It was recently expressly applied when the UN Security Council authorized military intervention in Libya.[174] Other examples of transnational obligations to protect individuals against the conduct of another state include the principle of non-refoulement attached to the prohibition of torture and the obligation to end violations of the right to self-determination.175 Furthermore, the duty to protect individuals against "business-related human rights harm" may become, and arguably already is, an element of the progressive development of international law.[176] Transnational obligations to protect are well-accepted and some are already (on their way to becoming) *lex lata*. It has even been forwarded that a generalized framework for 'state bystander responsibility' should be introduced to assess when a state has an obligation to "protect against third-party harm or what that obligation requires".[177] Under the RTD, an obligation to protect could take on the form of protecting people against grave cases of mismanagement of the process of development by other states. In any case, transnational obligations to protect lead to a system in which flagrant human rights violations are more effectively addressed. They therefore fit the priority afforded by the RTD to removing grave human rights violations as primary obstacles to development.

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172 Declaration on the RTD (n 3) preamble and art 4(1); Ivy Mungcal, 'Netherlands Eyes Cutting Number of Aid-Recipient Countries' (21 March 2011) *Devex* <http://www.devex.com/en/articles/netherlands-eyes-cutting-number-of-aid-recipient-countries> accessed 15 April 2011: It could be argued that the recent decision of the Dutch government, to cut its ties of development cooperation with states in which the Netherlands itself does not have an (economic) interest, is discriminatory and retrogressive and therefore in violation of the RTD.

173 See generally: ICISS, *The Responsibility to Protect* (International Development Research Centre, Ottawa 2001) (ICISS Report); 2005 World Summit Outcome (n 18) para 138: The R2P is not yet considered *lex lata*, however, the recent intervention in Libya will offer an interesting precedent for the future acceptance of this concept.

174 UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970(2011) and UNSC Res 1973/2011 (n 70).

175 Hakimi, 'State Bystander Responsibility' (n 46); *Alan* case (n 163): Non-refoulement has already been accepted as a principle of positive international law and its applicability has crystallized in practice; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 159.

176 See for instance: Bunn, 'The Right To Development: Implications for International Economic Law' (n 54) 1457; Declaration on the RTD (n 3) art 3; Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UNCHR Res 2003/12 (26 August 2003) UN Doc E/CN4/Sub2/2003/12/Rev2, H17; Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of Special Representative John Ruggue (21 March 2011) UN Doc A/HRC/17/31, A1 and B7: This obligation of states to protect against business-related human rights harm exists primarily within a state's own jurisdiction, but also transnationally for all states with respect to businesses in conflict zones. Note that these guidelines are not binding.

177 Hakimi, 'State Bystander Responsibility' (n 46) 344, 354-76.

Third, in addition to the primary responsibility of domestic states for the fulfilment of economic and social rights, it has been proposed that external states have 'secondary obligations' to fulfil if a domestic state is unable to do so.[178] In support of this obligation to 'support to fulfil', scholars largely refer to the ICESCR, which obliges states to devote "the maximum of [...] available resources" to the realization of economic and social rights through "assistance and cooperation" without being restrained by a jurisdictional clause.[179] In spite of the convincing interpretation, transnational obligations to support to fulfil have not yet been embraced by states. Most developed states are afraid of the great resource implications and being forced to undermine their own interests. A balance must be struck between acceptable obligations which can foster the process of development while still allowing states to protect their self-interest. To reach this objective, transnational state obligations to fulfil will first have to become more refined.[180]

4.2.2 Due Diligence or Intermediary Thresholds

The previous section illustrated how obligations to respect, protect and fulfil may eventually be construed under the external dimension of the RTD. If these obligations gradually attain the status of customary law they could start realizing at least some aspects of the RTD, much like the role of the customary principle prohibiting transboundary harm in environmental law. However, it was concluded that the Declaration on the RTD does not give rise to well defined obligations and that this complicates the determination of a breach. This is especially true for obligations to fulfil which are breached through omission. A breach of such an obligation is very difficult to prove in case of a lack of clearly identified parameters for the required conduct.[181]

Following the example of the principle preventing transboundary harm, the RTD could likewise be viewed as a framework right with a subset of transnational due-diligence obligations. These obligations all contribute to realizing its comprehensive goal, but do not have to be measured against the ultimate achievement of this goal for a breach to occur. Introducing due diligence obligations under the auspices of the RTD opens up the possibility of holding states accountable for not taking "the necessary, diligent steps" towards fulfilling obligations of result.[182] Reading due

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[178] Salomon, *Global Responsibility for Human Rights* (n 27) 191.

[179] Ibid 75-7, noting that the ICESCR defines obligations on the basis of international co-operation and as requiring pro-active steps; Wouter Vandenhole, *A Partnership for Development: International Human Rights Law as an Assessment Instrument*, Submission to the UN High-Level Task Force on the RTD for its 2nd session, November 2005, 3, para 4: "[...] States parties to the ICESCR, are to respect, protect and fulfil economic, social and cultural rights not only domestically but also abroad. Though these extraterritorial obligations may still be in need of further conceptualisation, their existence should go undisputed"; ICESCR (n 52) art 2(1).

[180] Vandenhole, *A Partnership for Development: International Human Rights Law as an Assessment Instrument* (n 178) 4-9 para 7 and 19: "[...] States parties to the Covenant may be rather reluctant to accept the idea of legally binding third state obligations as long as their scope has not been further clarified. Therefore, demystifying the concept of third state obligations is a major challenge in order to increase their acceptability."

[181] Nollkaemper, *State Responsibility* (n 97) 101-3.

[182] Timo Koivurova, 'Due Diligence' (Aug 2007) MPEPIL, para 3.

diligence obligations into broad norms is demonstrably capable of increasing a norms' enforceability and has had considerable impact on state conduct.[183] Moreover, it could play a role in the distribution of responsibility to "otherwise undifferentiated state players" as an embodiment of the Kantian notion of imperfect obligations addressed towards to all those state who are in a position to help.[184] This undercuts difficulties related to establishing a causal link between a breach through omission of obligations to fulfil under the RTD and the persistence of grave inequality in the world.

A second approach to enhance the enforceability of obligations under the RTD which, although somewhat ambitious at this stage, cannot be left unmentioned is specifying correlative obligations in a treaty text or subsequent binding instruments. In spite of the obvious drawback that this approach will likely result in a more restrictive formulation, the texts could incorporate intermediary thresholds which will create enforceable obligations. These intermediary goals could be established by merging the human rights approach with existing development goals such as the Millennium Development goals.[185] Again, this approach shows similarities with a construction in environmental law, namely the instruments aimed at regulating climate change and reducing the emission of greenhouse gases. In this example, a framework treaty was adopted and subsequent amendments set forth specific targets to be achieved by all states party to the treaty.[186] This more realistic approach is also more prone to influence state conduct in the near future, rather than waiting for certain elements of the RTD to attain customary status. It would also be advantageous for the determination of a breach, since the specific targets could be framed as obligations of result and the determination of a breach would only require comparing the result required with the result achieved.[187]

4.2.3 Intergenerational Equity

Moving on to the question of how the approaches discussed above can be guided in their further development and how their acceptance can be strengthened, the role that the principle of intergenerational equity could play will now be discussed. Equity is the embodiment of a general

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[183] *Genocide* case (n 164); *Velásquez Rodríguez Case* (Merits) IACrtHR (Ser C) No 4 (1988) 29 July 1988, para 166 and 172-177; ILC, Report on the work of its 51st session, July 1999, UN GAOR Supplement No 10, UN Doc A/54/10 chp10(a) para 178.

[184] Salomon, *Global Responsibility for Human Rights* (n 27) 186-7; Which states are the holders of specific due-diligence obligations could be based on several different indicators. This will be further discussed in section 4.3.1.

[185] Millennium Declaration (n 18); Philip Alston, *A Human Rights Perspective on the Millennium Development Goals* (Millennium Project Task Force on Poverty and Economic Development, 2004) 4: "Human rights advocates need to prioritize, stop expecting a paradigm shift, and tailor their prescriptions more carefully."

[186] *United Nations Framework Convention on Climate Change* (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107; Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 22.

[187] Nollkaemper, *State Responsibility* (n 97) 102.

notion of "what is fair and reasonable in the administration of justice".[188] It is a rather diffuse concept and its use is sometimes associated with a certain degree of arbitrariness. Nevertheless, it can be a useful tool to correct or complement otherwise unjust outcomes of legal reasoning. It is not a formal source of law, but has been marked as an 'element in the progressive development of the law'.[189] Equity may have a role in adjusting general rules to specific cases, filling gaps or be a catalyst or guiding force of changing custom. It has observed to be of paramount importance at this "time when international law has ceased to be a system of negative obligations of pure coexistence among States and has become a much more complex system of positive obligations whose nuances in content and scope can often to be captured by a proper use of equity and equitable principles."[190]

A concept closely related to the principle of equity is that of intergenerational equity, which has gained recognition mainly in environmental law. It is the expression of a notion of fairness among generations and "has been invoked in international law as a basis upon which to provide standards for allocating and sharing resources and for distributing the burdens of caring for resources".[191] Essentially, the principle has become the basis of duties held by current generations towards future generations and has been recognized as a quickly developing principle of international law. Whether this means that future generations have rights towards current generations is still controversial, since there are not yet any identifiable holders of these rights. The principle has not been explicitly applied in the case-law of the ICJ, however, it has been alluded to in several concurring and dissenting opinions in an appeal to the Court to "pay due recognition to the rights of future generations" in its decisions.[192] It is important to note that reference has been made to human rights and development in instruments dedicated to intergenerational equity and thus the reinforcing link between these sets of principles has already been established.[193]

There is a conceptual link between intergenerational equity and intragenerational equity, the latter referring to equity between people of the same generation. What the status is of

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[188] Francioni, 'Equity in International Law' (n 144) para 1, 3 and 26: Argues that, despite political and cultural differences, there undeniably exists "a common sense of fairness and equity among different peoples of the world".

[189] Ibid para 26; ICJ Statute (n 27) art 38.

[190] Francioni, 'Equity in International Law' (n 144) para 19 and 26.

[191] Weiss, 'Intergenerational Equity' (n 11) para 1-3, 7, 12 and 27: Intergenerational equity in environmental law has a forward looking perspective and can been seen as the legal voice of future generations. The duties entail ensuring resources of "comparable options and quality" and "non-discriminatory access" for future generations; Edith Brown Weiss, 'In Fairness to Future Generations' (1990) 32(3) *Environment* 6, 10: Argues that intergenerational rights can be seen as 'class-rights' and do not need identifiable rights-holders.

[192] Dissenting opinion of Judge Weeremantry in the Nuclear Weapons Advisory Opinion, cited in Weiss, 'Intergenerational Equity' (n 11) para 26-7.

[193] Several international declarations and conference outcomes refer to 'future generations' or 'the children of the world' in the context of human rights. See e.g.: 2005 World Summit Outcome (n 18) principle 12; Copenhagen +5 (n 93) Annex I Political Declaration; Millennium Declaration (n 18) principle 2; UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generations (adopted on 12 November 1997) 29th session GC, art 10 (1): "The present generations should ensure the conditions of equitable, sustainable and universal socio-economic development of future generations, both in its individual and collective dimensions, in particular through a fair and prudent use of available resources for the purpose of combating poverty"

intragenerational equity and whether it exists as a separate principle is unclear. In scholarly writings it is most often mentioned in the context of sustainable development and intragenerational equity. It is well accepted that the current intragenerational situation does not live up to general standards of fairness in light of the great disparities in the distribution of wealth and resources. The concept of intergenerational equity is seen as encompassing intragenerational equity, because the poor who cannot provide in their basic needs today cannot be expected to adhere to their intergenerational obligations towards future generations.[194] Therefore, the inequitable distribution of wealth and resources in the intragenerational situation needs to be addressed before intergenerational rights can be fully secured. This is where the principle of common but differentiated responsibility comes into play, which will be addressed in the section 4.2.1.

The principle of intergenerational equity corresponds with the RTD on two levels. First, the RTD was designed to address the current inequity in the intragenerational situation which, as we saw above, is a prerequisite for the full adherence to intergenerational rights. Second, developing states still suffer from the major setback in development which was brought about during the period of colonization and slavery which preceded the current world-order.[195] The ensuing claim which has been forwarded by many developing states is that they are entitled to a beneficial treatment or even a completely restructured economic order. However, to answer the question what the principle of intergenerational equity means in legal terms for the current generation and the rights-based approach to development is extremely complicated. These entitlements would be based on a myriad of violation of the rights of certain parts of previous generations, some possibly still continuing.[196] Even under environmental law, where the principle is best developed, it is unclear what entitlements current generations may have based upon the failure of past generations to secure intergenerational rights. It is practically impossible to disentangle exactly what rights and entitlements present-day generations have towards past generations and how this translates into intragenerational equity today.[197]

However, the extended application of the principle of intergenerational equity to (solidarity) rights could serve the same purpose as equity in general international law. It could be used as a basis for the weighing of interests in particular cases, complement the law where lacunas exist and, most importantly, form the catalyst for or guide the development of new customary rules of law. As such, the principle can offer strong support to claims for beneficial treatment and arrangements

[194] Weiss, 'Intergenerational Equity' (n 11) para 11.
[195] Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, Cambridge 2002) 209.
[196] Salomon, *Global Responsibility for Human Rights* (n 27) 187.
[197] Pogge, *World Poverty and Human Rights* (n 167) 209: Recognizes that it would be unworkable to impose "restitutive responsibility" on "affluent descendants of those who took part in [past] crimes". However, he argues that the inequitable situation should not be upheld because the "allocation of these positions" took place through a historical process in which rights were grossly violated.

under international (economic) law, as it has done for developing states under *lex specialis* regimes of environmental law. Therefore, intergenerational equity may be able to play a positive role in supporting the contents of the RTD, guiding its further crystallization and creating "conditions favourable to the realization of the [RTD]".[198]

4.3 Distribution of Obligations and Multiple Attribution of Violations

A mechanism for the distribution of obligations among states and framework in which breaches can be attributed to multiple states simultaneously are valuable tools to enforce cooperation and burden-sharing under the primary norm. However, both these aspects are currently lacking with respect to collective obligations under the RTD and in the framework of dealing with a plurality of responsible states under the Articles on State Responsibility. The RTD covers a complicated causal relationship between state conduct, the persistence of poverty and intragenerational inequity. Even though causality is not a general precondition for attribution or state responsibility, it will play a role with regard to the distribution of primary responsibility.[199] In practice, some states will have a greater capacity to influence the development process of certain states than others and this should be reflected in the burden-sharing mechanism. Section 4.3.1 will discuss what role the principle of common but differentiated responsibility can play in this regard. The main question that has remained unanswered with regard to attribution of violations of the RTD is how cases will be addressed where a single violation is attributable to several states. In light of the tradition of independent responsibility, it may prove an immense challenge to offer an alternative framework that does incorporate forms of shared state responsibility. Section 4.3.2 will discuss what options there are to develop a framework of secondary norms which is better suited to address cases of multiple attribution.

4.3.1 Common but Differentiated Responsibility

Common but differentiated responsibility is a principle applied to distribute primary responsibility, however it also has direct consequences for the allocation of responsibility under secondary norms.[200] At the heart of this principle lies the notion that there are certain shared concerns that can only be effectively addressed if all states cooperate in the pursuance of a *common* goal. At the same

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[198] Declaration on the RTD (n 3) art 3.

[199] Commentary to the Articles on State Responsibility (n 82) Commentary to Chapter II, para 4; Vandenhole, *A Partnership for Development: International Human Rights Law as an Assessment Instrument* (n 178) 4-9 para 7 and 19: Considers on what basis duty sharing between the domestic and external states should take place under the ICESCR: "It is submitted that the third state obligations of particular states will vary according to the degree of causality between their policies and actions and the non-realization of Covenant rights in other countries."

[200] Hey, 'Common but Differentiated Responsibilities' (n 11) para 18: "[I]n terms of general international law the concept of common but differentiated responsibilities is most likely to qualify as a principle of international environmental policy or soft law".

time, the obligations are distributed on a *differentiated* basis as an acknowledgement of the fact that some states' historical contribution to the problem is greater or that they cannot be required to contribute equally based on their socio-economic situation. Like the principle of intergenerational equity, common but differentiated responsibility is applied mainly in environmental law. It is the legal embodiment of the argument forwarded by developing states that it would be unfair to expect them to reduce their polluting activities to the same extent as developed states, since developed states have been able to profit from their polluting behaviour for decades.[201] Notably, the principle illustrates a departure from the strict adherence to the consequences of the formal equality of states. The differentiation is included in multilateral environmental agreements in a variety of ways. For instance, developing states can be granted grace periods, have lower substantive obligations or a treaty can include provisions requiring developed states to assist developing states in complying with their obligations through financial or technical means.[202]

The analogy with the RTD is rather self-evident, since development is both one of the main reasons for differentiation and a ground upon which its implementation is based. States which are relatively more developed, can contribute more to the realization of collective obligations. It has even been argued that applying the principle to environmental law in inefficient, since then the principle cannot ensure the optimal achievement for either development or the environment.[203] On the one hand, environmental issues cannot be addressed without "a fundamental restructuring of economic and social relations at local, national and global levels" and on the other, there is a strong argument to make for decoupling these two rather different goals.[204] Furthermore, common but differentiated responsibility also recognizes the common interest in realizing the comprehensive goal of a collective obligation. This suits the concept of solidarity rights. On a side-note, it must be mentioned that reaching an economic and social order in which all human rights can be fully realized is not fully comparable to securing a sustainable use of the environment. The latter is sure to affect every state on more or less equal footing and offers a greater incentive for wealthier states to take action on a differentiated basis, since the alternative will likely give rise to even greater costs. While in the case of the RTD, wealthier states can quite easily subtract themselves from the negative consequences of not reaching its goal. Nevertheless, the international community of states have already lent their support to the RTD, which at least "gives rise to reasonable expectations that

[201] Ibid para 19: "[I]t has given developing States a basis for claiming that their position is to be taken into account in the formulation of treaty regimes."
[202] Ibid para 7.
[203] Ibid para 19; Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) *AJIL* 276, 294: Argues that merging the problems of poverty and pollution has drawbacks, since it may lead to suboptimal achievement for both and reduces transparency and accountability.
[204] Hey, 'Common but Differentiated Responsibilities' (n 11) para 19; Stone, 'Common but Differentiated Responsibilities in International Law' (n 202) 283-4 and 293: Stone distinguishes between three forms of common but differentiated responsibility and argues that elevating development to a legal right would lead to the most inefficient form. There is no longer a pareto improvement and parties are left off worse than before.

states will fulfil their requisite duties".[205]

When seen in the context of the principle of intergenerational equity, discussed above, the application of common but differentiated responsibility recognizes that "historical actions affect the allocation and timing of responsibilities owed to present and future generations."[206] As such, it translates intergenerational equity to the intragenerational level by affecting the allocation of obligations at the inter-State level.[207] In more practical terms, this entails that, seen against the background of historical contributions to the inequitable world-order, differentiated responsibilities may take on the form of additional responsibilities of the wealthier states to assist developing states. If the principle were to be applied to human rights obligations under the RTD, the first step is to determine how the differentiation should be implemented. One could argue that certain human rights instruments already provide for a distribution of responsibility based on common but differentiated responsibility, without calling the principle by its name. For instance, the rights under the ICESCR are qualified by the general formulation that they should be fulfilled to "the maximum [of a states'] available resources'.[208] When viewed as meaning a states' 'real' resources, as opposed to what part of its budget a state decides to allocate to fulfilling economic and social rights, this automatically leads to the conclusion that states have differentiated responsibilities.[209]

Although in theory the principle remains rather abstract, it may have profound impact if it is accepted at the concrete level of binding obligations. First, a basis will have to be found upon which states acquire responsibility for a certain collective obligation. In the Genocide case for instance, the ICJ acknowledged that the obligation to prevent genocide could be held by several states simultaneously. It then replaced the traditional concept of jurisdiction as a basis for primary responsibility with the notion of a state's "capacity to effectively influence".[210] This was held to be dependent upon several factors formulated in an open-ended fashion, such as the 'geographical distance' towards a state.[211] Likewise, it has been proposed that the R2P should be made implementable by determining the scope of each state's obligation on the basis of its respective 'capacity to avert the harm'. Monica Hakimi further specifies this distribution by proposing a framework for determining when a state has an obligation to protect, based on two main criteria: the

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[205] Salomon, *Global Responsibility for Human Rights* (n 27) 92.
[206] Weiss, 'Intergenerational Equity' (n 11) para 17.
[207] Hey, 'Common but Differentiated Responsibilities' (n 11) para 5.
[208] ICESCR (n 52) art 2.
[209] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Hum Rts Q* 156, 178.
[210] *Genocide* case (n 164) para 430; Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 138) 700.
[211] *Genocide* case (n 164) para 430: Other factors were the "legal position" towards and "strength of political [and other] links" with the state and its people. A review of practice is likely to indicate several other factors of importance.

relationship with the abuser and the severity of the harm.212 These grounds upon which a state acquires obligations already involve a certain degree of differentiation, since the scope of obligations will differ based on the applicability of these indicators or criteria to a particular state.

In the case of the RTD, collective obligations could be based on a states' 'capacity to assist' other states in the development process. The capacity to assist could be determined on the basis of several indicators, such as a states contribution to the emergence of the inequitable intragenerational situation and the benefits it derives from it and its relative wealth and power in the international community of states.[213] These indicators to determine when states have an obligation and what the scope of that obligation is could partially be distilled from practice and partially be developed through empirical research. The indicators may apply differently to obligations to respect, protect and fulfil and will likely become more refined in practice.[214] Undoubtedly, the status and contents of the obligations under the RTD will have to further crystallize before a proper differentiation can take place. However, once binding obligations are deemed to exist, a differentiated distribution will allow them to become agency-specific while still upholding the central elements of cooperation and equity inherent to the RTD.

4.3.2 Shared State Responsibility

The final roadblock is the lack of clear rules of secondary law on the matter of jointly responsible states. At the moment, the only feasible method of dealing with attribution in cases of "factually indivisible wrongful acts" is that of joint and several liability.[215] However, there are not yet any set procedures through which a state can acquire compensation from the other contributing states once it has made full reparation to the victim of the joint wrongful act. States will be more willing to cooperate if they have a guarantee that they will not have to bear the full consequences of wrongful acts which are partly attributable to other states. In domestic systems, many legal theories exist on the allocation of responsibility among several wrongdoers. These theories distinguish between different degrees of contributory conduct to the same wrongful act for instance on the basis of fault

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212 Hakimi, 'State Bystander Responsibility' (n 46) 364: Based on these two criteria, the relationship with the abuser and the severity of the harm, Hakimi identifies thresholds often applied in practice. The first criterion is fulfilled if a state 'substantially enabl[es] the violation', based on the relationship with the abuser or sometimes with the victim. The second criterion is fulfilled in case of serious physical or psychological harm or if the harm affects people because they belong to a vulnerable group.

213 Salomon, *Global Responsibility for Human Rights* (n 27) 193: "The content of this principle of common but differentiated responsibilities in the context of international cooperation for human rights provides the basis for our indicators that may assist in determining responsibility for world poverty." The indicators distinguished by Salomon are: (i)The contribution that a state made to the emergence of the problem; (ii) It's relative power at the international level; (iii) Whether it is in a position to assist; (iv) The states that benefit the most from the existing distribution of global wealth.

214 Whereas obligations to respect and protect are likely to be dependent upon the strength of (political) links with a beneficiary, the obligation to fulfil will be more dependent upon a state's 'real' available resources; CESCR, *General Comment 3: The Nature of States Parties Obligations* (n 46) para 14.

215 Separate Opinion Judge Simma in *Oil Platforms* case (n 121) para 78; *Nauru* case (n 121) para 48.

or negligence or the strength of the respective causal relationships.[216] For many reasons, this is an extremely complex task on the level of state conduct. It implies seeking for intentions behind the actions of state agents, untangling extremely complicated causal relationships and requires a great amount of research into each case.[217]

However, if it is to some degree possible to measure individual states' contributions to a wrong, apportionment of international state responsibility based on a "comparative fault analysis" has not yet completely been ruled out of the realm of possibilities.[218] It has been argued in earlier sections that this may do more justice to the possibility of achieving a result through cooperative action.[219] Common but differentiated responsibility may have a supportive role to play in this regard. If it is accepted as a basis upon which to distribute obligations, the scope of a contributing state's responsibility will then depend on the scope of the obligations distributed to it. In comparison with joint and several liability, there is a down-side. First of all, it negates the possibility of victims to obtain full reparation by claiming the responsibility of just one wrongdoing state. It may be unfair to require the victim to claim the responsibility of every contributing state or prove which share of a wrong is attributable to which state. This can partly be mitigated by shifting the burden of proof to the wrongdoing state(s). However, international judicial dispute mechanisms generally lack procedures "that could allow the mandatory joinder of parties or compulsory jurisdiction over multiple defendant state".[220] Moreover, states usually refrain from submitting themselves to systems envisioning compulsory dispute settlement mechanisms. Therefore, many adjustments would have to be made to balance out the interests of all parties to the dispute.

It is clear that methods of addressing shared responsibility and distributing obligations to provide reparations will need to be fleshed out before a claim based on a breach of collective obligation under the RTD becomes imaginable. In a world where universal rights are no longer disputed and law cannot be defined by borders or on the basis of citizenship, it is of the utmost importance to complement this development by a set of secondary principles which indeed offers equitable solutions. However complex a task, it must be kept in mind that law must develop on the basis of equity and not on the basis of simplicity.[221] In this case, equitable solutions could be

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[216] Howland, 'Multi-State Responsibility Extraterritorial Violations Economic Social and Cultural Rights' (n 40) 398; Brownlie, *State Responsibility* (n 123) 95: Note that state responsibility is objective and does not require fault.

[217] David J Bederman, 'Contributory Fault and State Responsibility' (1990) 30(2) *VaJIL* 335, 335: "Special problems arise when analogies from private domestic law are used in the adjudication of international law. When municipal rules are elevated in this way, it becomes difficult not only to give content to those principles, but also to locate them in a proper structure for analyzing international law issues."

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

[219] Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment' (n 138) 708.

[220] Noyes and Smith, 'State Responsibility and the Principle of Joint and Several Liability' (n 116) 235.

[221] Howland, 'Multi-State Responsibility Extraterritorial Violations Economic Social and Cultural Rights' (n 40) 408: "Roman law offers one of the first examples of how a legal system is renovated under the influence of equitable

reached by adapting the global framework or, for instance, by developing *lex specialis* regimes of accountability for this particular field of law. In any case, a matching framework of accountability should be developed by investigating the true distribution of responsibility among actors.

5. Conclusion

By approaching the emergence of the RTD through the lens of state responsibility, this thesis has attempted to offer innovative insight into challenges it faces. It became clear that the current framework of state responsibility and the primary norm itself are both not entirely suitable to ensure accountability for breaches of the RTD.[222] A process of re-conceptualization of either one or both of these frameworks will have to take place before responsibility for the global challenge of development can be properly distributed, attributed, claimed and enforced. This is entwined with the shift of the function of international law from ensuring peaceful coexistence towards accommodating an international community of states which have to cooperate, and therefore share responsibility in primary and secondary sense, to address problems affecting them on the basis of their interdependence.

It has been demonstrated that certain existing legal theories and trends in international law could support the necessary re-conceptualization.[223] When appraising the usefulness of these approaches in the context of the RTD, it became clear that none of them are ideal and together they do not yet cover all important aspects of an accountability framework for the RTD. Part of this has to do with the many uncertainties still surrounding the RTD, enhanced by the embryonic state of research into indicators for assessing the contribution of states to specific obligations under the RTD.[224] Nevertheless, the shortcomings of the current framework and alternative approaches explored above do shed some light on the barriers that will need to be overcome to provide a more fostering environment for this fragile right. In overcoming these barriers, guidance can be sought in the principles of intergenerational equity and common but differentiated responsibility. These principles recognize the broader set of circumstances contributing to the need for a RTD while at the same time offering an equitable and realistic basis for its implementation and ultimately its enforcement.

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ideas."; Brownlie, *State Responsibility* (n 123) 99, referring to the reasoning on imputability in the Corfu Channel case: "The Judgment of the Court remains a valuable reminder of the need to avoid generalizing principles and simplistic polarities in the sphere of State responsibility."

222 See section 3.3 Suitability of the Current Framework.

223 See generally Chapter 4 Alternative Approaches: Exploring the Outlines of a More Welcoming Framework.

224 Michael Ignatieff and Kate Desormeau, 'Measurement and Human Rights: Introduction', in: *Tracking Progress, Assessing Impact*, a Carr Center Project Report (Harvard University, Kennedy School, Summer 2005) 1-8, 1, 4-5; Andrew Hines, 'What Human Rights Indicators Should Measure' in: *Tracking Progress, Assessing Impact*, a Carr Center Project Report (Harvard University, Kennedy School, Summer 2005).

The time has come to shortly reflect on ways forward. Several approaches have the demonstrable capacity of creating possibilities for holding states accountable for breaches of the RTD. These approaches will now be merged into two comprehensive propositions. The first proposition adheres to what is most likely to happen, namely the gradual attainment of certain obligations under the RTD of the status of customary international law.[225] To enhance the enforceability of the RTD, it could be construed as a framework right with a subset of customary due diligence obligations. States can then be held accountable for failing to take the necessary diligent steps towards the realization of obligations, which are all ultimately aimed at the realization of the RTD. These obligations could be distributed on the basis of the application of the principle of common but differentiated responsibility by analogy.[226] As such, imperfect obligations addressed at all those states in a position to assist are made more concrete and agency-specific. The second proposition offers great potential but also requires great commitment and making use of maturing insight, namely the development of a *lex specialis* regime for the RTD based on a framework treaty and the adoption of subsequent binding instruments prescribing specific obligations.[227] The regime could merge the human rights approach with existing development goals and, as such, take a more realistic approach by setting intermediary goals.[228] The principle of common but differentiated responsibility could then be integrated into the treaty mechanism. The latter proposition also opens up the possibility of establishing a specialized supervisory body.

However, neither of these propositions will lead to a system of accountability for breaches of the RTD without a complementary shift in the regime of state responsibility or erection of a *lex specialis* regime of accountability.[229] Three major advancements could be made by adapting the regime of state responsibility as it currently stands, the first two of which have already been called for separately from the RTD. First of all, the possibility that other actors than states may be entitled to invoke state responsibility should find a more firm reflection in the Articles than the current savings clause.[230] As such, the enforcement gaps and lack of a reciprocal push and pull in integral norms is at least mitigated by enhanced possibilities for individuals, groups and peoples to claim their rights.[231] Second, diplomatic protection can be used as a basis to bring claims by an injured state. However, it would be even more effective if states would be recognized as rights-holders of

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[225] See section 4.2.1 Transnational State Obligations: This is likely to manifest itself first in the area of obligations to protect and prevent harm, since transnational state obligations in this area have already flourished under other (human rights) norms.

[226] See section 4.2.3 Common but Differentiated Responsibility.

[227] See section 4.2.2 Due Diligence and Intermediary Thresholds

[228] Philip Alston, *A Human Rights Perspective on the Millennium Development Goals* (n 184) 4: "Human rights advocates need to prioritize, stop expecting a paradigm shift, and tailor their prescriptions more carefully."

[229] Unless the *lex specialis* supervisory body progressively implements the proposed changes.

[230] See section 4.1 Invocation.

[231] See Chapter 3.1 The Invocation of State Responsibility for Human Rights Violations: Individuals do not have standing before many of the fora adjudicating inter state claims. Furthermore, available mechanisms are often weak, inaccessible or ineffective. Naturally, these problems will also have to be addressed in their own right and time.

the RTD. They could then invoke responsibility of other states based on a breach of their own right without resource to the fiction underlying diplomatic protection or possibly having to exhaust local remedies in the respondent state. More far-fetched alternatives to invocation are the use of Articles 48 and 54. However, serious adjustments would have to be made before the latter option could become reality.[232] Finally, shared responsibility of states under primary norms should be translatable into shared responsibility under secondary norms.[233] In an integrated international community of states where common concerns can only be addressed through cooperation, state responsibility is lagging behind with its focus on bilateral relationships between pairs of states.

Finally, it is safe to say that the status and contents of the RTD have not yet sufficiently crystallized to found binding and enforceable state obligations. On the up side, there is much room for guided development down a path that may lead to a framework in which this becomes possible. The first important step will be creating momentum to move the RTD beyond its current standstill, which will require the acceptance of a more progressive approach towards the nature and implications of solidarity rights. For instance, the acceptance that the RTD creates certain rights owed to other states, or rights which at least can be claimed by states on behalf of their people without having to exhaust the local remedies of the respondent state, would be a great first step.[234] Intergenerational equity may help by offering a legal basis for many of the arguments traditionally forwarded in favour of the RTD, while giving them a more convincing yet moderate character. Once to momentum is there, the above considerations will be useful informants to the RTD's further implementation.

[232] Articles on State Responsibility (n 9) art 48 and 54; See section 4.1 Invocation.
[233] See section 4.3.2 Multiple Attribution; For an excellent research initiative into issues of shared responsibility under international law led by André Nollkaemper, visit: <http://www.sharesproject.nl/homepage> last accessed 3 April 2011.
[234] See section 2.2.3 Beneficiaries and section 4.1 Invocation.

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