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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*

Summary

The modern development enterprise and human rights movement have largely existed in parallel since the Second World War, although they share common goals. However, a growing rapprochement between the two fields is gradually occurring. This is both as a result of recent discontent with the outcomes of solely economically focused development efforts, and the increasing recognition of the important role human rights play in securing the basic conditions necessary for living with dignity.

The Special Rapporteur examines the ways in which human rights, and the right to health framework more specifically, can add value to development policies and programmes. Using the example of HIV/AIDS, the Special Rapporteur considers projects in which a human rights-based approach has been utilized, and explores the value added of that approach.

The report points to a number of challenges that remain in incorporating human rights into development work. In particular, the Special Rapporteur warns against adoption of a "culture of evaluation" to the detriment of human rights-based approaches. The report concludes with recommendations to the United Nations, and other actors in the development and human rights fields, concerning ways to further strengthen the integration of development and human rights.

* Late submission.

Contents

I. Introduction

1. This report is submitted in accordance with Human Rights Council resolutions 15/22 and 6/29. Over the last decade, particularly since the Millennium Declaration and formulation of the Millennium Development Goals (MDGs), development and the right to health have increasingly converged. Prior to this, the right to health (and human rights more broadly) had only occasionally been linked with development despite their largely common goals and only recently have significant efforts been made toward fully integrating the two disciplines. However, throughout the evolution of the modern development enterprise, it has been frequently recognized that health plays a critical role in achieving particular development outcomes; conversely, it has been increasingly noted of late that development strategies can also have significant positive and negative impacts on the health of populations.

2. Nearly half of the MDGs address health-related issues, which comprise fundamental aspects of the right to health, and the other MDGs address its underlying determinants. Moreover, many development programmes and institutions have begun to make use of a right to health approach in their practices and programmes. However, much work remains to be done, and in this report, the Special Rapporteur seeks to examine and analyze the convergences between development and the right to health, to more fully understand what it means to take a right to health approach to development.

3. Broadly speaking, development refers to processes of social change and to projects meant to transform national economies, particularly in former colonies or third world States.[1] A narrower conception of international development evolved after the Second World War with the establishment of institutions, policies, disciplinary formations and – most importantly – practices of intervention aimed toward the alleviation of poverty in the third world.[2] Although the modern development enterprise found its roots in the same conflict as that which gave birth to the international human rights movement, the two disciplines have largely existed in parallel and, despite their shared goals, have largely remained separate pursuits until recent times.

4. The links between health and development have long been acknowledged. It is generally recognized that securing a certain level of health-related development is a prerequisite for the overall economic development of a country.[3] For instance, in Africa, it is estimated that the HIV/AIDS pandemic has reduced the economic growth rate by between two to four per cent continent-wide.[4] Similarly, it has been estimated that the long-term negative effects of malaria result in a decrease in gross national product of up to 1.3 per cent in certain affected regions.[5]

5. The importance of particular aspects of health as they relate to poverty, and in turn, development, has also been well documented. For example, securing the sexual and

[1] Derek Gregory, *The Dictionary of Human Geography*, 5th ed. (Chichester, Wiley-Blackwell, 2009) p. 155.

[2] Ibid.

[3] Jocelyn E. Finlay, *The Role of Health in Economic Development*, PGDA Working Papers 2107, Program on the Global Demography of Aging, 2007), which states: "Accounting for the simultaneous determination of the key variables - growth, education, fertility - the results show that the indirect effect of health is positive and significant."

[4] Ibid.

[5] John Luke Gallup and Jeffrey D. Sachs, "The Economic Burden of Malaria", CID Working Paper No. 52 (July 2000), p. 7.

reproductive health of populations has an integral role in eliminating poverty and promoting economic growth, alongside its direct effects on individuals' health. Ensuring access to reproductive services, including family planning, is a vital step in disrupting the "repetitive cycle" of poverty, inequality and slow economic growth that is perpetuated by limited reproductive choices.[6] It has also been observed that development policies designed to improve economic conditions and living standards of communities can often have unintended effects on health; in particular, they can create additional health risks for vulnerable groups, which is known to compromise the welfare objectives of development policies.[7]

6. As this role of development policies in creating or exacerbating "diseases of poverty", alongside health problems associated with industrialization, has become increasingly acknowledged, more holistic approaches to development have been sought out, and the potential for the right to health to inform and guide development practice has increased. Indeed, the ability of people to enjoy an adequate level of health is today broadly recognized as a key development goal in itself. Over the last few decades, development theory has begun to shift its primary focus from economics to human conditions. This shift finds expression in the concepts of human development and the right to development,[8] and has created space for the right to health and other human rights to move closer to the centre of the process of development.

II. The growing convergence of development, human rights and the right to health

7. The relationship between development and human rights has undergone numerous changes over the past five to six decades. While each began as, and largely remains, an independent approach to addressing problems of human welfare, there has been an inexorable shift within the development sphere of late towards a more humanistic model of advancement and the recognition that health has an impact on economic development. This has necessarily come to include human rights, although the form in which human rights-based concepts and approaches are incorporated has varied, and there have been differing levels of acceptance of such concepts within the development sphere.

8. Earlier, narrower conceptions of development largely focused on indicators such as growth in GNP, rise in personal incomes, industrialization, technological advance, or social modernization.[9] This left little room for the inclusion of human rights, despite the fact that the overall aim of development was the improvement of the human condition, and in that respect development and human rights have always intersected. Significant evolution occurred in the 1980s to 1990s, alongside acknowledgement of the right to development as a stand-alone right, as will be discussed in Section III. Over this time, growing acceptance of human rights discourse within the development community took place. In particular, the human development, or "capabilities" approach to development pioneered by Amartya Sen and Martha Nussbaum appeared against the backdrop of the relative backlash against purely economic models of development that previously dominated this arena.

[6] United Nations Population Fund (UNFPA), "XV. The ICPD and MDGs: Close Linkages", p. XV-3.

[7] Diana E. Cooper Weil et al., *The impact of development policies on health: a review of the literature* (Geneva, WHO, 1990), p. 1.

[8] Alessandro Sitta, "The Role of the Right to Development in the Human Rights Framework For Development", paper prepared for the Human Development and Capabilities Approach Association, p. 2. Available from www.capabilityapproach.com/pubs/5_1_Sitta.pdf

[9] Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999), p. 3.

9. In 1987, the landmark study by the United Nations Children's Fund (UNICEF) "Adjustment with a Human Face" spurred global debate on the negative social impacts, including on health, of structural adjustment programmes prescribed by the international financial institutions as a means to achieve economic development. Three years later, in 1990, the United Nations Development Programme (UNDP) published the first *Human Development Report*. Alongside the report, UNDP created the Human Development Index, a summary measure of various human development indicators, such as maternal mortality, childhood education, gender disparities, poverty, etc. The index and report represented a major progression in development theory, which aimed to "[put] people back at the center of the development process" by going beyond income to assess people's long-term well-being.[10] This broader and holistic reconceptualization of development has been increasingly favoured and has facilitated efforts to recognize and incorporate human rights in development work.[11]

10. The evolved concept of development, which underwrites the MDGs and the contemporary development paradigm, represents a significant departure from these earlier views, making more evident the close overlap between development and human rights.[12] This close interrelationship between development and human rights is clearly spelled out in the 2000 Millennium Declaration and was underlined at the 2010 High-level Plenary Meeting of the United Nations General Assembly on the MDGs. As the outcome document states, "respect for and promotion and protection of human rights is an integral part of effective work towards achieving the Millennium Development Goals".[13]

11. The "capabilities" approach first articulated by Sen and developed by Nussbaum, which underlies the concept of human development, at its core requires removal of major sources of "unfreedom" in order for development to occur, including poverty, poor economic opportunities, tyranny, neglect of public facilities, and social deprivations.[14] This very acknowledgement allows a clear space in which human rights-based discourse can guide development. The capabilities approach recognizes rights as both "constitutive" of and "instrumental" to the overall process of development;[15] that is, rights and freedoms are not only necessary tools in achieving the goals of development, but that realization of rights should constitute an end-goal of development itself. More particularly, this approach holds that human rights are entitlements which make up a part of a set of central capabilities: a core set of freedoms, or rights, which form the basis of the very opportunities necessary to achieving a requisite level of human development.

12. When development is perceived in terms of human development and capabilities, it is evident that the right to health has both constitutive and instrumental relevance in respect of development and poverty reduction.[16] The right is constitutive insofar as ill health and

[10] UNDP, "History of the Human Development Report". Available from http://hdr.undp.org/en/humandev/reports/

[11] Peter Uvin, *Human Rights and Development*, (Connecticut, Kumarian Press, 2004), p. 49.

[12] Amartya Sen, "Human Rights and Capabilities", *Journal of Human Development*, Vol. 6, No. 2 (July 2005), p. 151.

[13] Outcome document of the High-level Plenary Meeting of the General Assembly on the Millennium Development Goals "Keeping the promise: united to achieve the Millennium Development Goals" (A/RES/65/1), para. 53.

[14] Amartya Sen, *Development as Freedom*, p. 3.

[15] Amartya Sen, *Development as Freedom*, p. 35; see also Peter Uvin, *Human Rights and Development* (2004), p. 122.

[16] See OHCHR, *Human Rights and Poverty Reduction: A Conceptual Framework* (Geneva, United Nations, 2004) and OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (Geneva, OHCHR, 2006).

inadequate protection of the right to health are symptoms and constituent parts of inadequate human development and poverty, and instrumental in that the enjoyment of the right to health is instrumental in securing other human rights, such as the right to education and work, which are essential to the achievement of human development.

13. In other words, the new conception of development recognizes that the realization of human rights, including the right to health, is a central aspect of development itself. This connection has been elaborated in many forums, including the United Nations: the centrality of human rights in poverty reduction has been well recognized, and elaborated through a conceptual framework and guidelines on human rights and poverty reduction.[17] However, as previously discussed, health is also implicated in many other conceptions of development besides that involving poverty reduction, and it is this centrality of health to all aspects of development which makes it essential that a right to health approach be used in all development programmes and policies which seek to address health.

III. The right to health and development

14. The right to health is of particular importance to development. It is an inclusive right that encompasses the underlying determinants of health such as access to food and water and sanitation and poverty and discrimination. As such, the right to health is implicated in nearly all development activities, and should be a central component of development programming.

15. Of the eight Millennium Development Goals subsequently developed to reflect the objectives agreed upon in the Millennium Declaration in 2000, Goals 4, 5 and 6 deal with health directly and others deals with underlying determinants of health. At least 8 of the 16 MDG targets, and 17 of the 48 related indicators, are health-related. As the MDGs have become a major focus of health-related development work, it was an important step for these goals to place health at the very centre of the development enterprise. Moreover, at the 2010 high-level plenary meeting of the General Assembly, States committed to promoting global public health for all to achieve the MDGs and to ensure "respect for human rights, promote gender equality and the empowerment of women as essential means of addressing the health of women and girls, and to address the stigmatization of people living with and affected by HIV and AIDS".[18] The normative framework that is now well developed and understood for the right to health is well placed to inform the efforts towards achieving the MDGs.[19]

16. The following sections address in turn how human rights, and the right to health framework in particular, can inform development policies and programmes; the right to development and how it relates to the right to health; practical examples of use of the right to health framework in development efforts; and, finally, the benefits and challenges of integrating human rights into development programming.

A. The right to health framework

17. Comprehensive incorporation of human rights into development work necessitates changes in the practical approach taken to development work itself. The advancement of human rights through development work – as opposed to simply avoiding rights violations

[17] Idem.
[18] A/RES/65/1, para. 73 (i)
[19] A/59/422.

– is an important step, and one which largely remains a work in progress. The adoption of a right to health framework, in respect of health, and of human rights-based approaches more generally is one method by which genuine synchronicity can be achieved in respect of health-related development work and human rights.

18. The right to health framework complements current development approaches by underlining the importance of aspects such as participation, community empowerment and the need to focus on vulnerable populations. The right to health analytical framework "unpacks" the right to health, making it easier to understand and apply in practical settings. Its key elements are as follows:[20]

(a) Identification of relevant national and international human rights laws, norms and standards;

(b) Recognition that the right to health is subject to resource constraints and progressive realization, requiring the identification of indicators and benchmarks to measure progress over time;

(c) Recognition that the right to health imposes some obligations that are of immediate effect, and are not subject to progressive realization;

(d) Recognition that the right to health includes freedoms and entitlements;

(e) The objective of ensuring that all health services, goods and facilities shall be available, accessible, acceptable and of good quality;

(f) States have duties to respect, protect and fulfil the right to the highest attainable standard of health;

(g) Special attention should be given to issues of non-discrimination, equality and vulnerability;

(h) Opportunities are required for the active and informed participation of individuals and communities in decision-making that has a bearing on their health;

(i) Developing countries have a responsibility to seek international assistance and cooperation, while developed States have some responsibilities towards the realization of the right to health in developing countries; and

(j) Effective, transparent and accessible monitoring and accountability mechanisms must be available at the national and international levels.

19. Development and the full realization of the right to health both require long-term strategies and planning. At the same time, the right to health framework demands that immediate steps be taken to ensure the core obligations of the right to health, and that special attention be given to the situation of vulnerable and marginalized groups. Whereas some elements of the right to health allow for progressive realization in accordance with available resources, others must be realized immediately. The realization of these aspects of the right to health cannot be conditioned through prioritization in development planning, policies and programmes. As the Committee on Economic, Social and Cultural Rights has clarified, States have a core minimum obligation to ensure the satisfaction of minimum essential levels of the right to health under the International Covenant on Economic, Social and Cultural Rights (ICESCR), including:

(a) The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;

[20] A/62/214, para. 71.

(b) Opportunities are required for the active and informed participation of individuals and communities in decision-making that has a bearing on their health;

(c) Access to the minimum essential food which is nutritionally adequate and safe;

(d) Access to shelter, housing and sanitation and an adequate supply of safe drinking water;

(e) The provision of essential drugs;

(f) Equitable distribution of all health facilities, goods and services.[21]

20. In respect of human rights more broadly, it has been noted that there was historically a lack of clarity concerning the content of human rights-based approaches. This was mitigated by the Common Understanding agreed upon by United Nations agencies in 2003. This document represents the achievement of conceptual consensus; however, it lacks detail and has been difficult to operationalize. United Nations agencies have employed the Common Understanding in inconsistent ways,[22] and, outside the United Nations system, the definitions and uptake of human rights-based approaches vary even more widely. However, common elements can still be distilled from most approaches taken, and can be used to inform implementation of a right to health approach to development.

21. According to the Common Understanding, a human rights-based approach requires that each stage of development programming – that is, the goals, processes and outcomes of development – be informed by, and further, human rights:[23]

(a) Goals: All programmes, policies and technical assistance should further the realization of human rights;

(b) Processes: Human rights standards and principles guide programming in all sectors and phases of the programming process; and

(c) Outcomes: Development cooperation contributes to the development of duty-bearers to meet their obligations and of rights-holders to claim their rights.

22. The following further elements have been identified by the United Nations as necessary, specific, and unique to a human rights-based approach to development:

(a) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights;

(b) Programmes which assess the capacity of rights-holders to claim their rights, and of duty bearers to fulfill their obligations, and the development of strategies to build these capacities;

(c) Programmes which monitor and evaluate both outcomes and processes guided by human rights standards and principles; and

[21] Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health.

[22] Sofia Gruskin, Dina Bogecho and Laura Ferguson, "'Rights-based approaches' to health policies and programs: Articulations, ambiguities, and assessment" *Journal of Public Health Policy*, vol. 31, No. 2 (2010), p. 134.

[23] United Nations, "The Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among UN Agencies", p. 1.

(d) Programming informed by the recommendations of international human rights bodies and mechanisms.[24]

23. In practical terms, this approach does not simply require that the goals and outcomes of development are loosely aligned with those of human rights. More is necessary; in particular, it is vital that the processes around development and implementation of programming adopt a human rights-based approach, as will be discussed further. Similarly, use of human rights in development requires the use of good programming practices, but adoption of such practices in and of itself does not constitute adoption of a right to health, or human rights-based approach. For instance, use of monitoring and evaluation is not uncommon in development practice, and yet its inclusion does not constitute use of a human rights-based approach without an attendant careful analysis of both the rights and duties of the parties involved in the programme, and an examination of their capacity to claim their rights and fulfill their obligations, respectively.

24. The actual content of a right to health approach as applied to development programming may vary in individual circumstances, and the Special Rapporteur believes that adaptation and flexibility are necessary depending on the nature of the development initiatives undertaken, the context, and so forth. However, in the Special Rapporteur's opinion, adoption of a right to health approach should at least require: (1) the clear and explicit placement of human rights at the centre of health-related programming strategies, and (2) inclusion of some or all of the core elements of a right to health approach in a methodical manner. The framework should be considered in its entirety, and if elements of the framework are not adopted, it should be clear that their inclusion has at least been considered, rather than individual elements being cherry-picked in an ad-hoc manner. Operationalization of a rights-based approach to health should also reflect the Common Understanding.

B. Complementarities of the right to health and the right to development

25. In considering the relationship between the right to health and development, the Special Rapporteur considers it necessary to reflect on the complementarities of the right to health and the right to development. The present section does not exhaustively examine the relationship between the right to health and the right to development, but seeks to contribute to a discussion of how these rights feed into, and realize the core goals of, development.

26. The concept of a "right to development" was articulated in a series of international conferences, culminating in 1986, when the right was recognized in a declaration adopted by the General Assembly,[25] and in 1993 the right to development was reaffirmed, as part of the Vienna Declaration and Programme of Action.[26] Before that, in 1981, the right to development was also enshrined in Article 22 of the African Charter on Human and Peoples' Rights.

27. Within the United Nations system, a Working Group on the Right to Development was established in 1989 with a mandate to monitor and review progress made in the promotion and implementation of the right to development. The Working Group has been supported in its work by an independent expert on the right to development (1998-2003)

[24] Ibid., p. 2.
[25] A/RES/41/128
[26] A/CONF.157/23

and a High-Level Task Force on the implementation of the right to development (2004-2010).

28. The right to development is a self-standing right,[27] which includes all other human rights. As the Declaration on the Rights to Development states in its article 1, it is a right "by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[28] Accordingly, the right to development includes the right to health guaranteed in ICESCR and other international human rights treaties.[29]

29. The right to development is a right of individuals and of peoples. It is distinguishable from the right to health in this respect, which is more related to the individual citizen's relationship with the State. Nevertheless, overlap exists. General comment No. 14 of CESCR confirms that the right to health, as outlined in Article 12 of the ICESCR, has both collective and individual dimensions, and that collective rights are critical in the field of health, as modern public health policy relies heavily on prevention and promotion, approaches directed primarily towards groups.[30] Similarly, both the right to health and the right to development underline the imperative of ensuring transparency, equality, participation, accountability and non-discrimination.[31]

30. The right to health extends to the underlying determinants of health, embracing a wide range of socio-economic factors that promote conditions in which people can lead a healthy life,[32] which necessarily incorporates other rights. Yet a distinct feature of the right to development is its focus on a process of simultaneously advancing the full range of human rights. In this regard the words of former independent expert on the right to development and former chairperson of the Working Group on the Right to Development, Arjun Sengupta, are illustrative. As he notes: "the right to health could be implemented on its own, but when treated as a component of the right to development, its realization must include policies to expand resources as well as institutions over time, taking into account competing claims of other rights which must be coordinated with the right to health. Such exercise might imply a much larger claim on resources and much greater inputs from international cooperation than would be the case for the fulfilment of the right to health by itself."[33]

31. The comprehensive nature of the right to development has the potential to encourage cross-sectoral collaboration and decrease "siloing" in pursuing realization of rights, and the right could be also used to address the underlying determinants of health through provision of public goods and distributive justice.[34]

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[27] Laure-Hélène Piron, *The Right to Development: A Review of the Current State of the Debate for the Department for International Development*, Department for International Development (April 2002), p. 31

[28] A/RES/41/128, art. 1

[29] A/RES/41/128

[30] E/C.12/2000/4, note 30.

[31] E/CN.4/2005/WG.18/2, para. 32.

[32] E/C.12/2000/4, para. 4.

[33] Arjun. K. Sengupta, preface in Stephen P. Marks (ed.), *Implementing the Right to Development: The Role of International Law*, Friedrich Ebert Stiftung & Harvard School of Public Health, 2008.

[34] Benjamin Mason Meier and Ashley M. Fox, "Development as health: Employing the Collective Right to Development to Achieve the Goals of the Individual Right to Health", *Human Rights Quarterly*, vol. 30, No. 2 (May 2008), pp. 318, 338-339.

32. Moreover, the right to development focuses specifically on the duty of States to act jointly towards the realization of human rights. While the obligation of international cooperation is also recognized under ICESCR and other human rights treaties, [35] this aspect of both rights can be more comprehensively addressed through use of the right to development. In this regard, the high-level task force on the implementation of the right to development (HTF) developed a set of criteria for the evaluation of global partnerships (Millennium Development Goal 8). The criteria were developed around three attributes of the right to development: comprehensive and human-centred development policy; participatory human rights processes; and social justice in development. They include a number of sub-criteria and indicators, several of which relate to the right to health. In developing and testing these criteria, the Task Force inter alia examined partnerships relating to access to medicines and the fight against AIDS, tuberculosis and malaria.[36]

33. The right to health can help operationalize the right to development. The right to development is not contained in a legally binding instrument at the international level, and thus, although it draws its foundations from binding human rights treaties, it is not directly enforceable in most countries.[37] However, the Special Rapporteur notes that, in a recent landmark ruling, the African Commission determined that a State had violated the right to development enshrined in article 22 of the African Charter on Human and Peoples' Rights.[38] In this respect, the right to health may provide support in achieving development goals through judicial enforcement where the right to development currently lacks the legal tools to do so. Along with addressing longer-term, underlying determinants relating to development outcomes, narrower interventions should simultaneously be pursued to address immediate rights infringements that impact on development.[39]

34. For example, individuals are increasingly bringing cases before national courts concerning breaches of their right to health.[40] This approach has been particularly successful in securing access to essential medicines, a core aspect of development progress. Such cases may be brought by a particular litigant, but may result in provision of medicines to affected communities, thereby demonstrating the fact that enforcement of the right to health need not occur only for the benefit of one individual.[41] Such litigation represents a powerful tool, not only to achieve a particular legal outcome, but to significantly strengthen and empower a social movement around the cause forming the subject matter of the litigation in question,[42] further ensuring realization of the right.

35. The operationalization of the right to development can also be informed by the significant amount of work undertaken in respect of the collective aspect of the right to health. For instance, the World Health Organization (WHO) has long recognized the importance of social justice for health; the Commission on Social Determinants of Health

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[35] See ICESCR Art 2, general comments 2 and 14, paras. 38-42

[36] See A/HRC/12/WG.2/TF/CRP.1 and A/HRC/15/WG.2/TF/CRP.2

[37] Felix Kirchmeier, "The Right to Development – where do we stand?" *Dialogue on Globalization, Occasional Papers*, No. 23 (July 2006), p. 11.

[38] African Commission on Human and Peoples' Rights, 4 February 2010: 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya.

[39] Paul Farmer, "Pathologies of Power: Rethinking Health and Human Rights," American Journal of Public Health (October 1999), 89/10, pp. 1486-96.

[40] Hans V. Hogerzeil et al., "Is Access to Essential Medicines as Part of the Fulfilment of the Right to Health Enforceable through the Courts?", *Lancet* vol. 368, No. 9532, pp. 305-311 (2006).

[41] Mark Heywood, "South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health" *Journal of Human Rights Practice*, vol. 1, No. 1 (March 2009), p. 22.

[42] Ibid.

has highlighted the importance of domestic legislation enshrining the right to health, and recognition of the rights of citizens to participate in public policy and budgeting,[43] which has the potential to strengthen health systems.

C. Use of the right to health framework in HIV/AIDS programmes

36. Successful examples of the use of the right to health in programming and the evidence of its value-added to health-related development can be found in the context of HIV. The public health response to HIV was possibly the first instance in which the relationships between health and human rights became overwhelmingly apparent, and observations can be drawn from this that may be useful to further strengthen the integration of human rights and development.

37. Around 33.3 million people worldwide[44] are currently living with the human immunodeficiency virus (HIV), a retrovirus which causes acquired immunodeficiency syndrome (AIDS), a universally fatal syndrome causing failure of the human immune system. One of the most pressing health and human rights conundrums of modern life, it has been described as a "health threat of massive proportions"[45] and an "extraordinary challenge"[46], and represents the first illness that has essentially required the introduction of a public health response that gave heed to human rights. The relationship between HIV and development has also been clearly recognized over time. The pernicious effect of HIV on human development is being tackled through its prioritization as one of the eight Millennium Development Goals, and UNDP has noted that "mainstreaming" HIV into development processes is effective.[47] The connections between HIV/AIDS and human rights were articulated by the International Guidelines on HIV/AIDS and Human Rights ("Guidelines"), which recognize the central role played by human rights in addressing, limiting and attempting to eradicate HIV/AIDS.

38. The historical evolution of the response to HIV/AIDS is a good example of a health problem with strong implications for human development contained most effectively by protecting and promoting human rights. Jonathan Mann described three clearly defined phases in the response to the epidemic: the first period concerned discovery of the illness and corresponding uncertainty surrounding its containment, while the second period largely focused on individual risk reduction and behavioural change, accompanied by the use of discriminatory prevention measures justified under a "public health rationale". It was not until the third period, in the late 1980s, that a societal dimension was included in the approach to the disease, and the concept of "vulnerability" arose in identifying barriers to individual control over health. The "traditional" public health approaches initially applied to HIV/AIDS, consisting of information, education and services targeted at changing individuals' behaviour and reducing risk, were effective but ultimately insufficient to

[43] Commission on Social Determinants of Health, *Closing the gap in a generation: health equity through action on the social determinants of health* (Geneva, WHO, 2008), p. 97.

[44] WHO/UNAIDS, *Global summary of the AIDS epidemic: 2009* (Geneva, 2009), p 1. Available from: http://www.who.int/hiv/data/2009_global_summary.png

[45] Jonathan Mann, Daniel Tarantola and Thomas Netter, eds., *AIDS in the World*, vol. 1, (Cambridge, Massachusetts, Harvard University Press, 1992), p. 1.

[46] Michael Kirby, "AIDS and the Law" *South African Journal of Human Rights*, vol. 9, No. 1 (1993), p. 2.

[47] UNDP, "HIV, the Millennium Development Goals and development planning". Available from: http://www.undp.org/hiv/focus_dev_planning_mainstreaming.shtml

contain the spread of HIV/AIDS, not least because they assumed a static social environment.[48]

39. The second phase of the response, in which the international community promoted the prevention of discrimination under the "public health rationale", is a clear example of recognition of the impact of human rights on health, and vice versa. It became increasingly clear that violations of the right to health, such as the State's failure to prevent discrimination towards people living with HIV and AIDS (or, indeed, discrimination perpetrated by the State itself) actually reduced the effectiveness of HIV prevention programmes. Conversely, where rights were protected by the State, through clear preservation of anonymity in the context of HIV testing, participation in testing and counseling increased. The elimination of discrimination and protection of basic freedoms not only upheld rights but furthered public health aims concurrently.[49]

40. The relationship between the law, public health and human rights has thus been seen as of particular importance in relation to HIV. In an attempt to control the virus and the social practices that result in its spread, laws may be hastily enacted that are only partially successful in achieving behavioural change. The "AIDS paradox" is that: "…one of the most effective laws we can offer to combat the spread of HIV which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination."[50] Indeed, this paradox does not exist only in respect of laws. Any development intervention designed to combat the spread of HIV which respects the human rights of those directly affected by and those most at risk of HIV, will ultimately be more effective in achieving its stated goals.

41. HIV thus represents a good example of the multi-faceted relationship between health and human rights.[51] It shows how health policies and legislation can impact detrimentally on human rights, while violations of human rights can detrimentally affect health. Thus, policies and legislation which allow for the quarantining of a person who has contracted HIV would infringe on the right to liberty and security of person, while "naming and shaming" people who test positive to HIV, in violation of their right to privacy and confidentiality, creates stigma and deters others from seeking out testing and counselling. This close interrelationship also means that human rights and health-related policies and programmes have a great potential to be mutually reinforcing in the realization of health-related development and the right to health.

42. However, there is still insufficient attention to these interactions, particularly in respect of development work. For instance, performing a human rights impact assessment of development policies and programmes, and documenting human rights abuses, are strategies that largely deal with the first two relationships mentioned. Incorporating human rights into each aspect of health-related development programming from its initiation is much more difficult to achieve.

43. As noted, in the initial, panicked response to HIV, there were calls for quarantine, compulsory notification, and even branding of those people living with HIV.[52] As

[48] Jonathan Mann et al., *Health and Human Rights: A Reader* (New York, Routledge, 1999), pp. 217-218.

[49] Ibid.

[50] Michael Kirby, "AIDS and the Law" *South African Journal of Human Rights*, vol. 9, No. 1 (1993), p. 3.

[51] Lawrence Gostin, *The AIDS pandemic* (Chapel Hill, University of North Carolina Press, 2004) pp. 64-67.

[52] Edwin Cameron and Edward Swanson, "Public health and human rights – the AIDS crisis in South Africa" *South African Journal on Human Rights*, vol. 8, No. 1 (1992), p. 201.

knowledge grew, and the hysteria surrounding its modes of transmission gradually abated, the extremity of the responses decreased, but identification of the symbiotic relationship between achieving public health and development outcomes, and protecting and promoting human rights, took longer to gain widespread acceptance. It remains overlooked in certain spheres of development, and the lessons learned regarding the effectiveness of responding to HIV using human rights are being increasingly forgotten. Nevertheless, where approaches utilizing human rights have been employed to address HIV, outcomes have been extremely encouraging.

44. The experience of the Sonagachi Project, started by the All India Institute of Hygiene and Public Health in Kolkata, India in 1992, is indicative of the potential of right to health-based interventions. While the project began as a traditional STD/HIV intervention amongst sex workers in the red-light areas within the district, it soon evolved into one that had at its core central facets of the right to health framework – most importantly, community participation – in an effort to empower the sex worker community to realize their own rights, and ultimately prevent the spread of HIV. The programme noted successful outcomes in respect of health and development; its most quantifiable effects included significantly improved condom usage,[53] and reduced HIV rates amongst the Sonagachi sex worker population.[54] However, its processes and their effects have also been thoroughly researched, reflecting its successes in advocacy and community leadership.

45. These processes – participation-based empowerment intervention strategies – are grounded in the right to health framework, and had a broad impact on factors reducing vulnerability of sex workers to infection with HIV and other STDs. Outcomes of these processes also included improved knowledge of STDs and condom protection and the establishment of social support amongst sex workers.[55]

46. The Special Rapporteur notes that this set of interventions, which has ultimately resulted in significant development of affected communities, successfully applied core elements of the right to health framework, including participation and non-discrimination. The interventions also acknowledged and promoted the fundamental freedoms and entitlements of the sex workers involved in the project; particularly, the right to control one's health and body, including sexual and reproductive health. The programme moreover secured health services for sex workers, most notably through improving their acceptability and accessibility.[56]

47. Similarly, the experience of the UNIFEM South Asia Partnership with the Positive Women Network (PWN+) and Centre for Advocacy and Research (CFAR) is a good example of how a rights-based, gender-sensitive response to HIV added significant value to pre-existing programming strategies in this area. The PWN+ has over 5,000 members throughout India, and works to support women living with HIV/AIDS by destigmatizing the illness; educating affected women; and establishing support, referral and empowerment systems.[57] The partnerships' activities included initiation of national consultations of HIV-

[53] D. T. Swendeman, et.al., "Evidence for the efficacy of the Sonagachi project in improving condom use and community empowerment among sex workers: results from a cohort-control study", paper prepared for the International Conference on AIDS, (July 2004), pp. 11-16.

[54] S. Jana, I. Basu, et. al., "The Sonagachi Project: a sustainable community intervention program," AIDS Educ Prev. , vol. 16, No. 5, (October 2004), pp. 405-14.

[55] Dallas Swenderman et. al., "Empowering sex workers in India to reduce vulnerability to HIV and sexually transmitted diseases" Social Science & Medicine, vol. 69, No. 8 (October 2009), p. 1165.

[56] Smarajit Jana et al, "The Sonagachi Project: A Sustainable Community Intervention Program" *AIDS Education and Prevention*, vol. 15, No. 5 (October 2004), pp. 408-409.

[57] P. Kousalya et. al, "Using Rights-Based Processes Towards Building Gender-Sensitive Responses for Women Living with HIV/AIDS: The UNIFEM South Asia Partnership with the Positive Women

positive women; establishment of partnerships to support research, advocacy and lobbying; documentation of the experiences of HIV-positive women; engagement with the media around gender-sensitive reporting concerning HIV; creation of mechanisms of accountability through public hearings; and formulation of targeted strategies to address the vulnerability of women to HIV/AIDS at national and international levels.

48. The major improvements in the outcomes of the project attributable to the adoption of a human rights-based approach were largely due to the efforts around facilitating and securing the agency of women living with HIV/AIDS, which led to significant improvements in monitoring and accountability, a core element of the right to health framework. This is particularly evident in the continuing high-level participation of positive women in national and international initiatives relating to HIV, and the strong networks formed within India to allow for provision of technical assistance to these women. Ultimately, the advantage of this programmatic design is not only evident in terms of improved development outcomes; the changes in process demonstrate the inherent benefits in recognizing the dignity and equality of these women in the context of pursuing a broader development aim. Nevertheless, in not only ensuring their empowerment through participation, but in further utilizing it to achieve meaningful policy change, the practical benefits of adoption of various elements of a right to health framework in the development context are also seen. The approach taken also facilitated the identification of relevant national human rights laws, norms and standards that should be utilized in order for the State to respect, protect and fulfil the right to health of women living with HIV/AIDS, and the role of those women in holding the State accountable in this regard. This example demonstrates that United Nations agencies are in a unique position to facilitate capacity-building and education around human rights in pursuance of particular development aims.

D. Benefits of human rights-based approaches to development

49. One key benefit of integrating human rights into development is the way it re-frames development, presenting its constituent components as entitlements and embracing the indivisibility and equal importance of all human rights.[58] This has also been described as a creation of "claims and not charity".[59] In redefining the nature of the problem through incorporation of human rights, and the right to health framework in particular, a shift occurs to a more self-sustaining approach that imbues the former targets of development with genuine agency, and allows for realization of rights previously considered secondary, or less realizable. Member States of the United Nations have directly observed the value added by human rights in respect of development, noting, for instance, that development efforts "had become more systematic and meaningful, contributing to the enhancement of human dignity by encouraging people to become active participants in the development process".[60]

50. Another benefit which human rights bring to development is guidance concerning the design and practical implementation of development programmes. For instance, one of the core requirements of a human rights-based approach is the requirement that processes are guided by human rights principles, as stated in the Common Understanding. For

Network, India and the Centre for Advocacy and Research in India" in UNDP & OHCHR, *Lessons Learned From Rights-Based Approaches in the Asia-Pacific Region*, Upala Devi Banerjee ed. (Bangkok, OHCHR, 2005), p. 176.

[58] Paul Gready, "Rights-based approaches to development: what is the value-added?" *Development in Practice*, vol. 18, No. 6 (November 2008), p. 737.

[59] Peter Uvin, *Human Rights and Development* (2004), p 129.

[60] E/CN.4/2005/WG.18/2, para. 18.

example, an increase in the number of people undergoing HIV testing may be a good outcome, but if achieved through coercive testing rather than a voluntary campaign, it is clear that human rights have failed to be integrated into the strategy.[61] Moreover, simply achieving a positive result in a given field, such as health, will not automatically promote respect for the corresponding right, and thus imbue rights-holders and duty-bearers with a long-term "guarantee [or] set of structural claims".[62] Put simply, more needs to be done to ensure that long-term realization of rights occurs as a result of any development interventions. In respect of health, this is best achieved through undertaking the process of identifying the relevant human rights laws, norms and standards that apply, as part of the right to health framework, and continuing on to identify rights-holders and duty-bearers in that context. It has been noted that the "quality, legitimacy and sustainability" of outcomes depend on the process used to achieve them, and human rights may help secure those desirable elements,[63] as well as addressing structural problems that ultimately perpetuate the very conditions that development programming seeks to address.

51. Moreover, participation of those that development programming seeks to assist should be increased through adoption of human rights within existing approaches to development. Although it is certainly true that participation has been frequently utilized in development without adoption of a human rights-based approach – its benefits even being acknowledged by the World Bank during the 1970s[64] – and thus "participation" as a concept is not exclusive to human rights or new to development, there is no doubt that sustainable, quality outcomes are clearly linked to ownership and empowerment by affected communities, and that those who have the greatest stake in development are those who form the subject of that development itself. Nevertheless, the substantial difference lies in the fact that the right to health views participation as an entitlement, rather than a privilege occasionally granted. Drawing further attention to the importance of participation throughout all stages of development can only be beneficial. Human rights-based frameworks and approaches address participation alongside other essential elements of accountability, capacity-building, and so forth; as such, mainstreaming of human rights in programming may not pioneer the use of participation, but has the potential to improve upon the ad-hoc use of such concepts.

52. Evidence of the positive effects of human rights at the practice level of development ultimately provides an additional impetus for reframing both human rights and development as described above. Ultimately, shifting the process through which development actions are implemented, even if goals and outcomes are only subtly altered, may prove the defining means through which the potential of human rights-based approaches become most apparent, even in the absence of rigorous empirical evidence. In fact, a relentless pursuit of evidence for human rights-based approaches has its own shortcomings, as will be discussed presently.

E. Remaining challenges

53. Harmonizing the practical and operational aspects of human rights and development without compromising the essential values and philosophies of both domains is a challenge.

[61] Sofia Gruskin et. al, "Rights-based approaches", p. 139.

[62] Peter Uvin, *Human Rights and Development* (2004, Kumarian Press, Connecticut), pp. 52-53.

[63] Ghalib Galant and Michelle Parlevliet, "Using rights to address conflict – a valuable synergy" in *Reinventing Development?: Translating rights-based approaches from theory into practice*, Paul Gready and Jonathan Ensor, eds. (London, Zed Books, 2005), p. 111.

[64] Andrea Cornwall, "Historical Perspectives on Participation in Development" *Commonwealth & Comparative Politics*, vol. 44, No. 1 (March 2006) pp. 63-65.

Divergence stems from a number of factors, including practical disciplinary differences; development is largely the domain of economists and human rights that of lawyers and advocates. Additionally, there exists the long-standing contention that human rights are more prescriptive than operational, while development projects have focused on implementation and are more programmatic in nature.

54. These issues are partly addressed by the work of actors such as the Office of the High Commissioner for Human Rights (OHCHR), which developed, at the request of the human rights treaty bodies, a framework for indicators to monitor compliance with international human rights instruments, which takes into account the various ways in which human rights relate to development. The framework establishes three sets of indicators: structural, process, and outcome, and a list of illustrative indicators on the right to health have been developed.[65] However, monitoring and evaluation of human rights-related issues in the development field has thus far been largely limited to outcome indicators. This raises some key concerns with respect to the way indicators are used in development and their impact on human rights.

55. Effective monitoring and evaluation is a core component of any human rights-based approach, and like other phases of the programming process it should be guided by human rights principles.[66] Moreover, rights-based approaches, including those concerning the right to health, require transparency and accountability in decision-making processes, actions or omissions, for which effective monitoring and evaluation are necessary requirements. However, monitoring and evaluation must be undertaken carefully, to avoid the potential pitfalls associated with a "culture of evaluation",[67] wherein an overreliance on the use of easily quantifiable data and evidence-based evaluation practices can lead to neglect or disregard of development strategies whose effects are more difficult to quantify: for instance, those relating to capacity-building.

56. In many cases, it is very difficult to conduct evidence-based evaluations of human rights-based health interventions with the same level of methodological rigour applied to, for instance, clinical drug trials. As evaluation unavoidably feeds back into, and threatens to dictate, strategy, this can lead to distortion of prioritization in relation to interventions that can be more easily based on available evidence. Human rights-based interventions may be especially susceptible to this distortion precisely because they are less amenable to evidence-based evaluations. Given the difficulty of plainly illustrating the cause and effect relationship between the realization of human rights and intended health outcomes (for instance, the empowerment of sex workers, their increased use of condoms, and the resultant lower levels of HIV infection) it is imperative that a broad range of evidence-informed practices are used when evaluating human rights-based interventions.[68]

57. Thus, overreliance on easily quantifiable data threatens to erode the core concept of the realization of human rights as ends in and of themselves. The instrumental value of the incorporation of human rights into development practice must not overshadow the proper understanding of human rights as constitutive components of human development. The United Nations Secretary-General Ban Ki-Moon has noted that the MDGs "embody basic

[65] HRI/MC/2006/7; HRI/MC/2008/3.

[66] United Nations, "The Human Rights Based Approach to Development Cooperation – Towards a Common Understanding Among UN Agencies", p. 2.

[67] Paul Gready, "Reasons to Be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation", *Journal of Human Rights Practice*, vol. 1, No. 3 (2009), p. 380.

[68] Swarup Sarkar, "Community Engagement in HIV Prevention in Asia: going from 'for the community' to 'by the community' – must we wait for more evidence?", *Sexually Transmitted Infections*, vol. 86, No. 1 (February 2010), i2-i3.

human rights," including the right to health.[69] An understanding of the intrinsic value of human rights and the promotion of human dignity as a necessary end of development must not be sacrificed in order to facilitate data-intensive evaluation.

58. Nevertheless, these concerns and challenges do not detract from the potential for human rights, and specifically the right to health, to provide a set of norms for development to reorient itself further in a more "human-centric" manner, drawing on legal and institutional frameworks that are crucial to human rights. They have potential not just to "add value", but to achieve the core goals of development itself, as it has been most recently conceived in terms of the right to development and of human development as reflected in the MDGs. In this way development and human rights function symbiotically, as achieving gains in development through methods which utilize human rights will also achieve realization of rights.

IV. Conclusions and recommendations

59. **The need to incorporate human rights into development is important for the long-term sustainability and legitimacy of development as an enterprise. Many models of development failed to address basic human needs, and further, neglected the rights of people whilst pursuing development outcomes supposedly designed to benefit them. Human rights-based approaches to development are particularly useful in this regard, and their use should be promoted. The right to health can be a particularly powerful reference in that regard because of its close links to a full range of other rights and the crucial role that health plays in development, both human and economic.**

60. **The Special Rapporteur recommends that:**

(a) States take steps to ensure that the right to health framework is integrated into health-related development programming, particularly in respect of the health-related MDGs and social determinants of health;

(b) States take measures to ensure that information on the right to health framework, including the need for transparency, accountability and participation of individuals and communities in decision-making that has a bearing on their health, is disseminated and its use promoted in development-related areas;

(c) The United Nations continues its efforts to provide more guidance in respect of human rights-based approaches and to provide best-practice examples of operationalization of human rights-based approaches;

(d) The United Nations continue to design and implement human rights-based approaches to development issues, and build its own capacity and that of States and other actors to incorporate human rights, and the right to health framework, into their development operations;

(e) Organizations adopting a human rights-based approach in respect of development make use of independent, well-designed qualitative evaluation to assess the outcomes of their interventions, and publicize these evaluations to encourage dialogue and cooperation amongst agencies working at the intersection of development and rights;

[69] United Nations, "Millennium Development Goals: Background". Available from http://www.un.org/millenniumgoals/bkgd.shtml.

(f) Efforts be made to improve tools to measure the impact of human rights-based approaches to development interventions with the support of relevant international bodies such as UNDP and OHCHR, taking into account that to achieve realization of rights is an end in itself;

(g) Measures be taken to ensure that human rights priorities and goals are not neglected as a consequence of an overreliance on easily quantifiable data in the evaluation of development interventions.