THE HUMAN RIGHT TO DEVELOPMENT: Historical and Contemporary Linkages to Colonialism

Norman R. Kimber,

Supervisor: Professor Michael Lynk, The University of Western Ontario

A thesis submitted in partial fulfillment of the requirements for the Master of Studies in Law degree in Law

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Abstract

This thesis concerns the Right to Development (the R2D), which was declared an inalienable human right by the United Nations General Assembly (UNGA) in the non-binding Declaration on the Right to Development (the DR2D) in 1986. It asserts that the R2D was not declared in a realizable manner, explaining the causes of identified doctrinal shortcomings. It explores the emergence of the R2D within the confluence of two post-1945 movements, being decolonization and the international human rights project, asserting that these movements were closely intertwined and substantively influenced by jurists from the Global South. The thesis then examines the political evolution of the R2D within the UNGA, asserting that shortcomings of the DR2D were the result of politicization and resistance to the acceptance of accountability with respect to R2D realization by powerful states, led by the USA. It argues that the R2D ought to be framed as a central component of the binding Right to Self Determination (the R2SD), such that the R2D ought to be interpreted as a binding right to the process of self-determined development. This assertion is illustrated through examination of R2D (non)realization and R2SD (non)observance in the occupied Palestinian Territories, a situation of settler colonization characterized by economic de-development, and deprivations with respect to ‘development as freedom’, a lens suggested by the work Amartya Sen.

Keywords

Summary for Lay Audience

The Declaration on the Right to Development (the “DR2D”) is a non-binding UN declaration, concerning the human right to development (the “R2D”). The DR2D states that the R2D is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development, in which all human rights and fundamental freedoms can be fully realized. Domestically, states accept a duty to establish appropriate national development policies to constantly improve the well-being of their entire population and of all individuals, ensuring their right to freely participate in the process of development, and to enjoy the benefits of that development. Internationally, states accept a duty to cooperate with each other in ensuring development and eliminating obstacles to development, and to formulate international development policies that facilitate full realization of the R2D. The DR2D states that the R2D implies the full realization of the human right of peoples to self-determination (the “R2SD”), which is considered a primal, legally binding right under the international bill of human rights that should not be denied under any circumstances.

This thesis examines the origins of the concept of the R2D, which came about in the context of two intertwined fundamental movements following the second world war – decolonization of the Global South and the international human rights project. It shows that legal thinkers from decolonized countries heavily influenced both movements, and not just the decolonization movement as one might intuitively expect. The emergence of the R2SD and the R2D are examples of that influence, reflecting their desire to reverse the detrimental legacy effects of colonization. The thesis critically examines the DR2D
to assess whether the R2D is realizable as it was written. It identifies shortcomings related to a lack of international community accountability and ambiguity regarding definition of the process of development, concluding that the R2D should be interpreted as a binding right to the process of self-determined development. This is illustrated in a case study of the situation in the occupied Palestinian Territories (the West Bank including East Jerusalem, and the Gaza Strip), which is a situation characterized by settler colonization, versus legal occupation, where the R2SD and the R2D are not being realized. The same brand of colonization that the R2SD and the R2D were meant to address.
Acknowledgments

I wish to thank my supervisor, Professor Michael Lynk, for his guidance and encouragement, as well as his inspiration with respect to the research topic of this thesis. I also want to acknowledge the support of Professors Botterell, Carmody, Sandomierski and Trosow, who also guided my approach to undertaking legal studies and research.

And thank you to my spouse Olga, who has been a constant source of moral support throughout my graduate studies since 2018. Patience is a virtue, which she clearly possesses in abundance.
<table>
<thead>
<tr>
<th>Abbreviation</th>
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<tbody>
<tr>
<td>Charter</td>
<td>Charter of the United Nations</td>
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<tr>
<td>CHR or Commission</td>
<td>UN Commission on Human Rights</td>
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<tr>
<td>CPR(s)</td>
<td>Civil and Political Right(s)</td>
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<tr>
<td>DR2D</td>
<td>Declaration on the Right to Development, 1986</td>
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<tr>
<td>DGICCP</td>
<td>Declaration on the Granting of Independence to Colonial Countries and Peoples</td>
</tr>
<tr>
<td>ESCR(s)</td>
<td>Economic, Social and Cultural Right(s)</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<td>GNI</td>
<td>Gross National Income</td>
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<td>HDI</td>
<td>Human Development Index</td>
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<td>HRC</td>
<td>Human Rights Council</td>
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<tr>
<td>HLTF</td>
<td>High-level Task Force on the Implementation of the Right to Development</td>
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<tr>
<td>IBHR</td>
<td>International Bill of Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>IHRL</td>
<td>International Human Rights Law</td>
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<td>IL</td>
<td>International Law</td>
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<td>ILO</td>
<td>International Labour Organization</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>Abbreviation</td>
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<tr>
<td>MAS</td>
<td>Palestine Economic Policy Research Institute</td>
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<td>MDGs</td>
<td>Millennium Development Goals</td>
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<td>NAM</td>
<td>Non-Aligned Movement</td>
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<td>NIEO</td>
<td>New International Economic Order</td>
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<tr>
<td>OCHA</td>
<td>UN Office for the Coordination of Humanitarian Affairs</td>
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<tr>
<td>oPT</td>
<td>The Occupied Palestinian Territories, or Occupied Palestine</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>PA</td>
<td>Palestinian Authority</td>
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<td>PDR2D</td>
<td>Penultimate Declaration on the Right to Development (1984)</td>
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<td>PLO</td>
<td>Palestinian Liberation Organization</td>
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<tr>
<td>R2D</td>
<td>Right to Development</td>
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<td>R2SD</td>
<td>Right to Self Determination</td>
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<td>SDGs</td>
<td>Sustainable Development Goals</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNGA</td>
<td>General Assembly of the United Nations</td>
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<td>UNRWA</td>
<td>UN Relief and Works Agency</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>VAT</td>
<td>Value Added Tax</td>
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<tr>
<td>WB or WBG</td>
<td>World Bank or World Bank Group</td>
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Appendices
Chapter 1: Introduction

1.1 Thesis Overview

1.1.1 What is the Human Right to Development?

The Human Right to Development (R2D) was declared an inalienable human right by the United Nations General Assembly (UNGA) in the Declaration on the Right to Development (DR2D) of 1986 (full text in Annex A):

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

Although not legally binding as posited in 1986, considered ‘soft law’, the DR2D expressly includes human rights that are accepted as legally binding under international law. This includes the Right to Self-Determination (R2SD), which is binding and considered to be a jus cogens principle under IL, being a prerequisite to the full enjoyment of all fundamental human rights.

The R2D is expressly bound to the R2SD in Art 2 of the DR2D:

“The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

Both Covenants of the Universal Declaration of Human Rights (UDHR) are binding and agree the following with respect to the R2SD in a common Art. 1: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue

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3 UNGA, supra Chapter 1, note 1 at Preamble.

4 UNGA, The right of peoples and nations to self-determination, UN Doc A/RES/637, 16 December 1952, at Preamble. [https://www.refworld.org/docid/3b00f0791c.html](https://www.refworld.org/docid/3b00f0791c.html)

5 UNGA, supra Chapter 1, note 1 at Art. 2(2).
their economic, social and cultural development.” The reference to such forms of development is of particular note with respect to the R2D, which can be viewed as an articulation of a pre-existing economic and binding component of the R2SD, and as such ought to be considered as being of indirectly binding character on that basis. Since being declared in 1986, the R2D has been reaffirmed frequently by the UNGA, including unanimously in the World Conference on Human Rights, and many of its constituent elements are binding under IL. From this limited standpoint, that is in terms of its repeated affirmation by states, it may be that the R2D is in the process of transitioning to a point where it might one day meet the test of being considered binding as a matter of customary law, but as will be evident in this paper that test has not yet been met.

The R2D is considered, by the OHCHR and the UN Special Rapporteur on the R2D, to be anchored to legally binding instruments such as the Charter of the United Nations, which established a doctrinal foundation for the R2D in Art. 55 as follows:

“the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and by mandating the United Nations to promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions to international economic, social, health, and related problems; international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

The R2D may also be rooted in the UDHR itself, specifically Art. 28: “Everyone is entitled to a

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8 Ibid at 5.


social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”, based on the premise that entitlement to such a social and international order implies entitlement to the R2D, development being a key requisite for realization of rights and freedoms set forth elsewhere in the UDHR.

Despite its express linkages to international human rights doctrine and its developmental subject matter, the R2D is generally not well understood within human rights circles, and not well known outside of the discipline of human rights, including by practitioners of socio-economic development. The R2D is only sparingly discussed in human rights discourse, and is not commonly referenced in international development discourse, therefore being effectively absent in policies and programs that promote human rights and socio-economic development. This thesis will demonstrate that despite the R2D being heralded as a potential game changer in 1986, post-declaration enthusiasm has waxed and waned over time, with the R2D often being dismissed as elusive and more rhetorical than substantive, by some human rights proponents, also being effectively neglected by influential agents responsible for promoting development.

Such dismissal and neglect of the R2D can be especially apparent in the context of politically challenging, post-conflict situations. Notwithstanding that, in addition to adopting states affirmatively acknowledging responsibility for realizing the R2D\textsuperscript{11}, albeit selectively as this thesis will demonstrate, in Article 5 of the DR2D such states reaffirmed existing obligations to eliminate violations of the human rights of peoples affected by situations such as apartheid, racism, colonialism, foreign domination and occupation, and refusal to recognize the R2SD, which might inhibit realization of the R2D:

> “States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and

\textsuperscript{11} UNGA, supra Chapter 1, note 1 at art. 3.
occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.” \(^{12}\)

One such situation exists in occupied Palestine (West Bank including East Jerusalem, and Gaza), where it is alleged that principles and obligations pursuant to international law, including human rights law, have generally not been observed by states, and where, as this thesis will amply demonstrate, indicators of socio-economic development are poor and deteriorating.\(^{13}\)

1.1.2 Understanding the Emergence of the R2D

This thesis asserts that to understand the ideological and intellectual emergence of the R2D, and its eventual political evolution at the UN leading to its declaration as a human right in 1986, one must explore the confluence of two seemingly distinct albeit temporally correlated post-1945 global movements: the decolonization of the Global South and the international human rights project. Upon close examination, however, it will become clear in this thesis that these two movements were not mutually exclusive, being not only correlated but also synergistically intertwined. To some observers, it may appear that whereas decolonization was primarily catalyzed by colonized peoples seeking emancipation, the international human rights project was primarily and separately fueled by the ‘great powers’ that led formation of the United Nations, keen to avoid another devastating world conflict, in the process giving rise to the UDHR and later the IBHR, with incorporation of its two Covenants. However, whilst such a bifurcated distinction might have been somewhat valid in the beginning, it is today, with the benefit of hindsight, an overly simplistic characterization of the foundational relationship between these two seminal movements. This thesis demonstrates that these movements evolved in an entwined manner and that the international human rights project has evolved as it has in large part due to intellectual

\(^{12}\) Ibid, art. 5.

\(^{13}\) UNGA, supra Chapter 1, note 2.
contributions by jurists from decolonized nations, contributions that were predicated upon on their lived experience as colonized subjects.

The R2SD emerged during the early days of the decolonization movement, being declared in 1952\textsuperscript{14}, and later forming the basis of the Bandung Conference in 1955, a seminal political gathering of early decolonized peoples that gave rise to the now (thankfully) obsolete term ‘Third World’. Although the R2SD was not specifically referenced in the UDHR when it was declared in 1948, by the time the two International Covenants were finally agreed to in 1966, all three comprising the IBHR, the R2SD became a central tenet, as previously noted being affirmed in Art. 1(1) of both those complementary binding agreements\textsuperscript{15}, foreshadowing and arguably paving the way for the emergence of the R2D. It is not a coincidence that between 1948 and 1966, scores of nascently decolonized nations had achieved independence and become members of the United Nations. Against that backdrop, the R2D was first introduced in the UN forum in 1966 as a proposed economic right, in the context of the NIEO declaration of 1974\textsuperscript{16}, which was also borne of influence by formerly colonized peoples seeking a new world order to bring about justice and equity to remedy the legacy effects of colonialism. It had become clear to such peoples that a R2SD couched only in political terms was not going to be sufficient to achieve justice and equity from an economic perspective.

The R2D as an economic right would form a core element of the NIEO movement’s economic levelling proposition until the late 1970s, when it became clear there was no appetite on the part of rich developed countries for such fundamental reform of a world order that suited them quite well as it was. The R2D was then tactically recast as a human right, which was enough for it to

\textsuperscript{14} UNGA, supra Chapter 4, note 4.
\textsuperscript{15} UN, supra Chapter 1, note 6 at Arts. 1(1).
\textsuperscript{16} UNGA, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1974, A/RES/3201(S-VI). \url{https://www.refworld.org/docid/3b00f1e048.html}
take root as a concept within the human rights project. This triggered the R2D’s political emergence at the UN in 1979, under the auspices of the UN Commission on Human Rights. Although the R2D had taken root conceptually, it was not readily nor fully embraced as a right by powerful UN nations such as the USA. By 1986, the DR2D was agreed to, albeit not unanimously, and not without significant conceptual compromises having been made by developing world proponents. This thesis demonstrates that such compromises led to a posited DR2D that is not as doctrinally robust as originally envisaged by such proponents. Such compromises and doctrinal weaknesses being the result of significant ideological and political headwinds related to several factors, including discord as to how the R2D ought to be legally formulated, its close association with the NIEO, and a lack of clarity with respect to its developmental subject matter content. Such headwinds influenced how the R2D was posited in 1986, curtailing its realization in practice.

When the DR2D was being iteratively negotiated, a penultimate version of the declaration also explicitly acknowledged that flagrant violations of human rights resulting from situations such as those identified in Art. 5\(^{17}\), must be eliminated to avoid thwarting the realization of the R2D. Explicit acknowledgement of that causal linkage was dropped in the final DR2D text, but Art. 5 remained as originally proposed. It is not clear whether R2D proponents had the situation in the occupied Palestinian Territories (“the oPT”) in mind when negotiating Art. 5 inclusion, but they might well have. We do know that treatment of Palestinians, during and after 1948, was very much front of mind during the Bandung Conference. This thesis asserts, as part of an R2D case study examination, that irrespective of whether proponents of the R2D had the oPT in mind when pressing for Art. 5 inclusion, the content of that article fully exemplifies the situation of flagrant human rights violations in the oPT.

\(^{17}\) UNGA, supra Chapter 1, note 12.
Whilst many peoples in the world were emerging from the grip of colonization, the peoples of the oPT were ironically descending into colonization and associated conditions of foreign domination and occupation, also being deprived of the R2SD on a protracted basis. The effects of such colonization, as this thesis also asserts, leading to a condition of de-development as the antithesis of the brand of development the was meant to be realized pursuant to the R2D, and illustrative of multiple deprivations of freedom both in terms of the right to outcomes of development, and the capacity to pursue future development. The consequence, as this thesis will argue, has meant that the Palestinian people in the oPT are being deprived of the right to self-determined development.

In a situation such as that in the oPT, where deprivation with respect to the R2SD is so starkly evident, exemplification of the conceptual and doctrinal linkages between the R2SD and the R2D, as well as corresponding deprivation with respect to the R2D, is acutely vivid and amplified.

This thesis maintains that the way that the concept of the R2D was ultimately posited in the DR2D demonstrates the extent to which the concept had become politicized. Such politicization was in large part due to its close association to the NIEO movement and resistance vis à vis that movement by former colonial and neo-colonial countries in the Global North. The consequence was a watered-down articulation of the R2D in that declaration, impaired clarity with respect to the duty-bearer/right-holder relationship, and significant ambiguity regarding the obligations on the part of states and the international community for the realization of the R2D, in comparison to how R2D proponents had originally hoped to see that right posited. This has resulted in a lack of accountability with respect to the realization of this fundamental human right. With a specific focus on the oPT as a case study, this thesis asserts that the R2D as an integral economic component of the R2SD, will not be fully realizable until the international community accepts its obligation with respect to enforcement of the R2SD, a binding duty that it conceived and claims to hold dear.
1.1.3 Research Motivation and Objectives

The present author studied international development academically, most recently at the London School of Economics and Political Science, and previously at Dalhousie University, during the timeframe when the DR2D was being negotiated in the early 1980s. As well, the present author has engaged professionally in the field of international development, including during employment at the World Bank. Yet, notwithstanding these academic and professional experiences, he had not been aware of the R2D until recently. Therefore, a primary motivation in selecting the R2D as a research topic was to understand why such lack of awareness was the case and, more importantly, to gain a comprehensive understanding of the R2D. The present author has also spent time studying the situation in the oPT, during previous academic studies concerning humanitarianism, and in that context visited the occupied West Bank in 2019. Therefore, a complementary motivation in selecting this research topic was to better understand the situation in the oPT from a human rights and human development perspective, employing the R2D as a conceptual and doctrinal exploratory lens. These motivations were coupled with a desire to learn how to approach such research from an international law and doctrinal perspective.

The objectives of this thesis are to examine: 1) the extent to which the R2D was posited in a realizable manner, and to the extent that it was not, to understand the cause(s) of identified shortcomings; and 2) the extent to which the R2D has been observed in the oPT, and to the extent that it has not, to understand the causes of such non-observance. An ancillary objective is to identify topics for further research.

1.2 Methodology and Structure

1.2.1 Research Methodology

At its core, this thesis uses a doctrinal approach to analyze the DR2D as it was posited in 1986, to
gain an understanding of its legal construction with respect to rights and duties, as well as its sources in international law and linkages to other human rights doctrine. This is done by examining the text of the final declaration, including comparative analysis with respect to a penultimate version of that declaration, to critically assess how and why such doctrine evolved as it did during the process of negotiation. Doctrinal methodology is supplemented with an analysis of secondary literature to inform that approach, and to incorporate an understanding of the intellectual and political emergence of the R2D as a human right in the context of decolonization and the international human rights project, as well as its political evolution in the UN forum. The research methodology also employs an interdisciplinary lens in interpreting the subject matter of the R2D with reference to the capabilities approach to development, a theoretical approach developed by Amartya Sen, a Nobel Laureate in Economics. Finally, a case study approach is utilized to examine the extent of R2D realization in respect of a human population that is contemporarily coping with human rights deprivations stemming from a situation of settler colonialization and foreign occupation.

1.2.2 Architecture of the Thesis

Chapter 2 of the thesis examines the intellectual and ideological emergence of the R2D, which arose amidst the confluence of two seminal post-1945 movements, being the anti-colonial movement in the Global South and the international human rights project. The purpose of the chapter is to understand how and why the R2D emerged as a human right, and to identify conceptual headwinds that would influence its political evolution in the context of the UN negotiations that led to affirmation of the R2D.

Chapter 3 considers the political evolution of the R2D, providing doctrinal analysis of the resulting DR2D of 1986, assessing the final product in the context of the intellectual and ideological
underpinnings of the R2D, and assessing the declaration’s strengths and weaknesses from a legal and developmental theory subject matter perspective. This chapter addresses the first objective of thesis, being examination of the extent to which the R2D was posited in a realizable manner, and to the extent that it was not, to understand the cause(s) of identified shortfalls.

Chapter 4 employs findings from Chapters 2 and 3 to examine the state of observance of the R2D in the oPT as a situational case study of contemporary colonization, and foreign occupation and domination, that exhibits characteristics akin to the lived experience that ideologically and politically influenced former colonial subjects to conceive of the R2D leading to its emergence as a posited human right in the DR2D. This chapter addresses the second research objective, which is examination of the extent to which the R2D has, and has not, been observed in the oPT, and to understand the causes of any such non-observance.

Chapter 5 provides a summary of thesis’ findings. In doing so, it explores how to best interpret and implement the R2D to enhance its realization in the oPT and more broadly. As well, this concluding chapter identifies areas for further research.
Chapter 2: Decolonization and the Emergence of the R2D

This chapter of the thesis examines the ideological and intellectual emergence of the R2D, which is reflective of the confluence of two remarkable post-1945 shifts in the world order, being decolonization and the advent of the international human rights project. Historically portrayed in some discourse as discrete movements that coincided with the creation of the United Nations, these shifts are more contemporarily and meaningfully contemplated as being inextricably correlated. It is through such a contemporary and integrated lens that the emergence of the R2D is best examined.

This chapter sets the stage for Chapter 3, which examines the political evolution of the R2D at the UN, and how it was doctrinally posited in 1986, with the benefit of the contextual background that follows in this chapter. The political evolution of the R2D at the UN crystallized in 1986, when it was declared “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”\(^1\), implying “the full realization of the right of peoples to self-determination”\(^2\). As demonstrated in this Chapter 2, the ideological and intellectual emergence of the R2D as a normative concept began long before 1986, and examining such emergence is a prerequisite to understanding the R2D’s political evolution.

The chapter begins by framing the relationship between the decolonization movement and the emergence of the international human rights project, questioning a Western narrative that the latter was primarily a Western-led initiative. Such a narrative overlooks the formative contributions of

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1. UNGA, supra Chapter 1, note 1 at art. 1(1).
2. Ibid, art. 1(2). Emphasis added.
thought leaders from the developing world, contributions that were based upon lived experience under colonialism. This examination is guided by the work of Stephen Jensen, a contemporary Danish human rights expert who has studied the work of jurists such as Norman Manley, former prime minister of Jamaica, who in the 1960s influenced thinking with respect to the linkage between human rights and law, including the concept of universalism, as well as the anti-racism movement. The chapter then considers the formative impact Bandung Conference of 1955, a gathering of thought leaders from the then so-called ‘Third World’. Bandung was a watershed event that cemented ‘Third World’ unity, as well as the linkage between decolonization and human rights, given its formative contribution in advancing the case for the human right to self-determination. The R2SD would become a *jus cogens* principle under IL and a core element of the IBHR, featuring prominently in both Covenants of the UDHR.

The chapter then turns to the contributions of Doudou Thiam, a jurist and political thinker from Senegal, who was the first to propose a R2D as an economic right in 1966. As an economic right, the R2D would conceptually fuel the NIEO movement leading into the 1970s. Proponents of the NIEO aimed to influence a refashioning of the world economic order to eliminate the widening gap between developed and developing countries in terms of economic justice and equity, in an attempt to ameliorate the persistent ill effects of colonization. With Mohammed Bedjaoui, a jurist and political thinker from Algeria, as one of its principal architects, the NIEO movement inspired corrective momentum that would not be sustainable because of political resistance on the part of the USA and former colonial powers. The then prevalent world economic order suited those powers quite well as it was. However, the concept of a R2D would emerge as a surviving remnant of the NIEO movement, being sagely recast as a human right in the late 1970s, under the thought leadership of Keba M’Baye, another influential Senegalese jurist.

This chapter concludes by examining a jurisprudential roadmap to the legal formulation of the
R2D, comprehensively prescribed by Georges Abi-Saab, a jurist from Egypt. The works of M’Baye and Abi-Saab provide a foundation for critical doctrinal analysis of how the DR2D would be posited in 1986 (analysis to be presented in Chapter 3), also identifying other ideological headwinds that would influence such negotiations as the human R2D evolved politically in the UN forum, as well as prospects for R2D realization post-1986.

2.1 Decolonization and the International Human Rights Project

“The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live ... In this normative world, law and narrative are inseparably related.”

In The Making of International Human Rights, Stephen Jensen concludes, in examining narratives concerning the genesis of the international human rights project, that “historical narratives have not been representative of how human rights actually gained significance as a legal, political and moral imagination in the increasingly interdependent world from 1940 and onward”⁴, overlooking formative contributions in the 1950s and 1960s by legal thinkers from what had or would become decolonized nations.

When the United Nations was founded in 1945, some 750 million people, nearly a third of the world's population⁵, lived in territories that were dependent on and controlled by colonial powers. Since 1945, eighty former colonies have gained their independence, beginning in the late-

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1940s and 1950s, later accelerating in the 1960s, pursuant to the DGICCP\(^6\). The latter explicitly affirmed the right of all peoples to self-determination, as entrenched in Art. 1 of the Charter, and proclaimed that colonialism should be brought to a speedy and unconditional end.\(^7\) The emergence of so many newly independent states fundamentally transformed the character and arithmetic composition of the international community and voting membership of the UNGA, respectively.

A prevalent yet over-simplified Western narrative concerning the emergence of the international human rights project would have us believe that the human rights movement began with a supposed ‘big bang’ event, marked by the UDHR in 1948, conceived by Western thinkers and affirmed by the then nascent United Nations, masking a historical reality that the conceptual origin of human rights predates the UDHR by centuries\(^8\). The Western narrative then skips to agreement of the ICCPR and ICESCR in 1966, all three comprising the IBHR, together presented in matter-of-fact chronological manner as logical and cumulative steps in the evolution of a Western-led human rights project\(^9\). Despite the Covenants having taken eighteen years to agree, and a further ten years to enter into force in 1976, there can be a tendency to view them as elements of a planned continuum that naturally materialized as they did because of Western stewardship. Such a narrative implicitly omits evolutionary intellectual maturation that occurred in the interim, substantially influenced by non-Western contributors. As Jensen asserts, based on extensive discoursal analysis, “the 1960s has remained almost a forgotten decade in human rights historiography”\(^10\).

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\(^6\) UNGA, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV). [https://www.refworld.org/docid/3b00f06e2f.html](https://www.refworld.org/docid/3b00f06e2f.html)

\(^7\) Ibid at Preamble.


\(^10\) Jensen, supra Chapter 2, note 4 at 6.
Within a selective narrative, the Covenants are appropriately depicted as important milestones, yet “the ‘legal imagination’ that was at play in international diplomacy”¹¹ during the 1960s tends to be treated as incidental. Jensen disagrees with Samuel Moyn’s contention that the 1970s was the period where human rights had their breakthrough, emerging “in the 1970s seemingly from nowhere”¹², asserting that the “the completion of the human rights Covenants in the 1960s is not just an irrelevant steppingstone somehow linking the 1940s and the 1970s”¹³, and that more attention needs to be paid to the “fundamental reshaping of the human rights work [that] took place in the 1960s”¹⁴. Such reshaping having been based on the thought leadership and influence of proponents from recently decolonized nations.

Much discourse explaining the almost thirty-year hiatus between the UDHR in 1948 and the two Covenants entering into force in 1976, tends to disproportionately focus on east-west power relations emanating from the Cold War. Such relations did lead to procedural and political delays and, ultimately, bifurcation of political and economic human rights in two respective Covenants, rather than one comprehensive covenant as originally envisaged. Western countries, led by the USA, were fixated on civil and political rights, with democracy and free market ideology underpinning its flagship message. Whereas Eastern countries, being far less, if at all, concerned with concepts such as democracy, fixated on economic and social rights which resonated more closely with their socialist ideologies. Whilst examination of the bifurcating impact of east-west power relations is warranted, such examination reveals only one dimension of the real story.

The east-west narrative over-shadows the effect of north-south power relations between developed and emerging decolonized nations, masking the influential role that decolonized nations played,

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¹¹ Ibid at 12.
¹³ Jensen, supra Chapter 2, note 4 at 13.
¹⁴ Ibid at 14.
as international human rights thinking continued to mature during the late 1950s and 1960s. Whilst decolonized nations of the Global South certainly had more affinity with respect to civil and political rights than those of the East (see discussion of Bandung which follows), they arguably had even more reason to primarily focus on social and economic rights. They understood through lived experience that colonization had resulted in a sharp divide, with most socio-economic wealth and prosperity being concentrated in the Global North, much of which had been gleaned at the expense of the Global South. For decolonized states, paying at least as much attention to economic and social human rights in IHRL, was seen as a way of remediating such inequity and injustice.

A fundamental demonstration of Global South influence on human rights doctrine is evident in a common Art. 1 of both the ICCPR and ICESCR: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Whilst Art. 1 of both Covenants serves to anchor the Covenants to Art. 1 of the UN Charter, all three positing the R2SD, it also serves to anchor the Covenants to Art. 2 of the DGICCP, which proclaims the R2SD, clearly reflecting the negotiated interests of decolonized nations in the Covenants. The common language with respect to the R2SD in Art. 1 of the Covenants serves to integrate the two binding documents, arguably mitigating the impact of the bifurcation of political and economic rights in two versus one instrument, in addition to cross referencing the Covenants to both the UN Charter and the DGICCP. Moreover, Art.1 of the ICESCR goes on to posit that “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”, directly addressing economic equity and justice priorities of decolonized nations.

It is doubtful that the Covenants would have been posited the way they were, without the
intellectual and ideological contributions of the Global South. Nor without the emerging requisite that more powerful states meaningfully negotiate with, rather than superficially and paternalistically assuage the interests of, the growing number of decolonized voting states within the UNGA. The seeds of what would later be known as the human R2D had been sowed with the central positioning of the R2SD in human rights doctrine.

Jensen portrays the era of decolonization as a catalytic, tectonic shift in the context of international law elaboration, where the influences of “the colonial, the anticolonial and the postcolonial met and overlapped … a large number of new subjects of international law had emerged with the creation of so many new states”\textsuperscript{15}, in turn propelling emergence of human rights concepts such as universality. As one example, Jensen cites the influence of Norman Manley, under whose political leadership Jamaica had become the first nation to introduce a trade embargo against Apartheid South Africa in 1957 (interestingly, whilst Jamaica was still a British colony). Manley and other ‘third world’ leaders influenced future approaches to address legal forms of racial discrimination, beginning with the ICERD, which was adopted in 1965 and entered into force in 1969.

As a prominent legal thinker, in the wake of the ICERD, and as the Covenants were being finalized in mid-1960s, Manley influentially and succinctly explained the linkage between human rights and the law, speaking to the concept of universality, as a central tenet of human rights and, semantically at least, the UDHR:

“\textquote{The fact is that there is a close relationship between law and civilization, between law and all concepts of human rights … What is unique about the ideas that are common among lawyers is the fact that those ideas and ideals are intimately concerned with human relationships – with the authority of the State as against the rights of the individual and with the rights of men as between themselves. And it is that fact that makes it inevitable that the lawyer should reach out in this anxious and troubled world to find a basis for thought and action which can apply the world over.”}\textsuperscript{16}

\textsuperscript{15} Ibid at 4.
\textsuperscript{16} Norman Manley cited in Jensen, supra Chapter 2, note 4 at 219.
Manley sought to strengthen the principle of universality as a legal concept, which had been textually introduced in the UDHR, but without such elucidation. Jensen asserts that ‘third world’ lawyers such as Manley conceived much of the thought leadership regarding human rights that Western nations would later present as their own moving into the 1970s, when the Covenants finally entered into force and when Western interests would position themselves as the face of human rights advocacy. In fact, these advocacy tools were delivered to their doorstep by Global South thought leaders.

Roland Burke asserts that the Bandung Conference of 1955, which predated wholesale decolonization and is regarded as the birthplace of the ‘Third World’ and its Non-Aligned Movement (NAM), invigorated the concept of universality and breathed new life into the UDHR, which up to then had not been a major factor in international politics. Burke also debunks a previous assertion made by Glendon, whilst she was lauding Eleanor Roosevelt’s role in drafting the UDHR, that Third World unity at Bandung had been unconstructively premised upon supposed anti-Western sentiments to the effect that universality and the UDHR were neocolonial in nature and counter to the R2SD. Contrary to Glendon’s apparent implication that the UDHR as a Western contribution survived despite Bandung and such anti-Western sentiments, Burke’s

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17 Jensen, supra Chapter 2, note 4 at 280.
18 The 1955 Asian-African Conference in Bandung, Indonesia, marked a watershed in the development of Third World identity and voice. It brought twenty-nine nations that shared a legacy of colonialism and the ongoing problems of global economic disparity together to demand an equal footing in the international order. In the conference’s Final Communiqué, the assembled states issued “a renunciation of colonialism and demands for decolonization; a call for dialogue between North and South in relation to economic issues, with an emphasis on the need to promote economic development”. Cited in Burke, supra Chapter 2, note 20 at 308.
19 Virtually all African and Asian states that were independent in 1955 attended Bandung and as a group would later become known as a non-aligned movement (NAM). The term “non-aligned” signifying that NAM participants has chosen not to align with the West, nor the East, the latter being the camps that would advocate and successfully establish separate Covenants. Some draw parallels between the NAM and current day G-77 states. Interestingly, and quite apart from the subject of this thesis, there has been a resurgence in references to the NAM in the context of geo-political stances adopted by nations in response to the Russia-Ukraine conflict.
exhaustive study of Bandung discourse, and contributions of decolonized states to human rights evolution more broadly, concludes that such sentiments were not, as a matter of fact, prevalent in Bandung rhetoric. Burke convincingly identifies Bandung as “a key point of origin for the human rights agenda that would be pursued by decolonized states in the General Assembly,” catalyzing “mainstays of that post-colonial agenda including anti-racism, self-determination and the plight of the Palestinian people.” Okafor refers to what he terms a “Bandung ethic”, partly inspired by Ajami’s conclusion that the “men (and women) who met at Bandung were dreamers … who wanted their societies to enter the world on more equitable terms.” The phrase ‘entering the world’ being a euphemism for ‘decolonization’. According to Okafor, the Bandung ethic can be thought of as one that “weaves together the aspects of anti-imperialism, independence, agency, global equality, respect for fundamental human rights … [and] … the uplifting of the material, political, and even psychological conditions of Afro-Asian peoples, and Third World solidarity”, the dominant strain being “global equality, Third World independences/agencies, and the improvement of the conditions of Third World peoples.” Bandung was more about how to move forward in a post-colonial world, than it was about striking out at the West, with the international human rights project as a key vehicle of agency for doing so with the objective of achieving global equality. It was also about promoting universality in the application of human rights, such as the right to self-determination, over-turning a previously selective approach to such application, as had prevailed.

22 Burke, supra Chapter 2, note 20 at 34.
23 Ibid at 13.
24 Ibid at 34.
 https://digitalcommons.osgoode.yorku.ca/scholarly_works/2646/
in the decades preceding establishment of the United Nations, during which the League of Nations had instituted the Mandate system, in Palestine for example.

It is important to note that the concept of a R2SD was conspicuously absent in the final text of the UDHR, despite the concept having been a central one in textual negotiations. It had been rejected by “then preponderant Western Group”\(^27\), which had disingenuously linked the concept of the R2SD to Nazi Germany, with one Belgian delegate, in the context of Covenant negotiations, going so far as to argue against recognition of that right in a covenant to the UDHR on the basis that “Hitler had invoked the right to self-determination in all the successive stages of his dismemberment of central Europe”\(^28\). The actual intent of resisting inclusion of the R2SD in nascent human rights doctrine was telegraphed clearly enough when delegates from Belgium, France and Great Britain argued on the record that ‘backward’ indigenous inhabitants were not ready for ‘Western’ human rights\(^29\), as they argued for a territorial clause that would exclude peoples in colonies from claiming rights in any eventual covenant\(^30\).

Even René Cassin, co-architect of the UDHR, inauspiciously warned in 1950 that failing to include a ‘territorial clause’ in a human rights covenant, a clause intended to exclude peoples in colonized territories from ‘universal’ application of such a covenant, would “run the risk of retarding human progress”, since not including such an exclusion would subject “different peoples to uniform obligations”, and would extend applicability of the R2SD to include peoples “in the lowest stage

\(^27\) Jensen, supra Chapter 2, note 4 at 37.
\(^29\) Burke, supra Chapter 2, note 20 at 40.
of development”


Burke, supra Chapter 2, note 20 at 37.

Cover cited in Jensen, supra Chapter 2, note 4.
concerning how and why such doctrine came to be. Among these was the dominant Western narrative that would have us believe that the international human rights project itself was conceived and emerged with decolonized peoples as a selective object of that project, rather than as influential agents in such conception and emergence, as in the narrative proffered by Jensen and Burke. Similarly, when contemplating the meaning and efficacy of specific international human rights, the analytical starting point ought to be objective examination of narratives concerning the genesis of such specific rights. Otherwise, to the extent that such narratives have tended to be Western centric, interpretations of such specific rights will be biased accordingly. Moreover, such interpretations may inhibit effective and impartial elucidation and implementation of international law pertaining to such rights, perpetuating unjust power relations that affirmations of such rights are supposedly meant to address. This thesis concerns one such specific human right, being the right to development, the genesis and affirmation of which was inherently rooted in the decolonization movement, with the objective of enabling the *full realization of the right of peoples to self-determination*\(^\text{34}\).

### 2.2 Intellectual and Ideological Emergence of the R2D

Although a *human* right to development was eventually declared as such in the DR2D of 1986, and notwithstanding that the concept of a right to development intellectually emerged as a derivative of the post-1945 decolonization movement, which as discussed previously also fueled the international human rights project, the actual genesis of the R2D was not situated in that project, nor did the R2D originally emerge as a human right.

#### 2.2.1 The R2D as an Economic Right

Daniel Whelan notes that the first time that the concept of the R2D was articulated in an

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\(^{34}\text{UNGA, supra Chapter 2, note 1.}\)
international setting was during a UNGA session in 1966, by Doudou Thiam, then foreign minister of Senegal. Thiam, who was a member of the International Law Commission for 29 years, did not introduce the R2D as a proposed human right, but rather as a socio-economic right and post-colonial gauntlet:

“What is our task? We must lay the foundations for a new world society; we must bring about a new revolution; we must tear down all the practices, institutions, and rules on which international economic relations are based, in so far as these practices, institutions and rules sanction injustice and exploitation and maintain the unjustified domination of a minority over the majority of men. Not only must we reaffirm our right to development, but we must also take the steps which will enable this right to become a reality. We must build a new system, based not only on theoretical affirmation of the sacred rights of peoples and nations but on the actual enjoyment of these rights. The right of peoples to self-determination, the sovereign equality of peoples, international solidarity—all these will remain empty words and, forgive me for saying so, hypocritical words, until relations between nations are viewed in the light of economic and social facts.”

Thiam was calling for developing countries to act by organizing an 'economic' Bandung Conference. Whereas the previously discussed 1955 Afro-Asian summit represented “a newly emerging spirit of postcolonial unity and solidarity”, as “a pivotal moment in the creation of a Third World identity, marking the foundation of the decolonized states as a major political force in international affairs”, Thiam’s proposal was to organize a subsequent Bandung that would do for economic rights what the original Bandung had done for the political rights of decolonized states. He portrayed an economic right to development as a demand for economic justice, and legitimacy of that demand as a proposed fundamental outcome of such a conference: “We must define a new revolutionary attitude which, starting with the somber realities of today, will guide us toward realities that are more in keeping with the ethics of the United Nations. This means that

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37 Jensen, supra Chapter 2, note 4 at 93.

38 Whelan, supra Chapter 2, note 35 at 33.
the Bandung we are proposing will not be a Bandung of hatred; it will be a Bandung of justice, balance and reason; it will be a Bandung held under the aegis of man”39.

Thiam’s speech in 1966 was the inaugural reference to the R2D, eventually serving as a foundational, albeit not referenced, treatise for what the NIEO would become, pursuant to the Declaration on the Establishment of a New International Economic Order in 197440, under which states proclaimed “united determination to work urgently for [the establishment of a NIEO] based on equity, sovereign equality, interdependence, common interest and cooperation … to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development”41. Most notably, Thiam did not raise the idea of developed countries owing developing countries anything beyond justice and equitable treatment, and he did not speak about financial support, reparations, or charitable transfers. Thiam’s focus, like the eventual focus of NIEO proponents (such as Bedjaoui, discussed below), was on revision of international legal and economic constructs as a means of rebalancing the relationships of power between more developed and post-colonial states.

During the years between 1966 and 1974, Thiam’s version of the R2D as a socio-economic right also featured prominently in North-South deliberations, including at the first meeting of the G-77 in October 1967, known as the Algiers Summit, in preparation for UNCTAD II in 1968. The ‘Charter of Algiers’, next to Thiam’s speech in 1966, became the “second significant normative ancestor of the NIEO”42 and according to Thiam, “was not a tale of woes; it was a genuine declaration of rights of under-developed countries”43. Whilst the Charter of Algiers fundamentally

39 Thiam, cited in Whelan, supra Chapter 2, note 35.
41 Ibid at Preamble.
42 Whelan, supra Chapter 2, note 35 at 99. Charter of Algiers can be found at https://www.g77.org/doc/algier-1.htm

Although Thiam’s inaugural articulation of the R2D in 1966 was not a complete success, in that it did not culminate in explicit declaration of an \textit{economic} right to development, he was successful in introducing a moral conception of a R2D as a means of achieving economic justice. Under Thiam’s tutelage, the concept of the R2D had taken root, including within UNCTAD rhetoric, even if not explicitly posited in the latter's formal doctrine. Thiam’s articulation of the R2D as a moral concept, set the stage for next the phase of the R2D emergence, as a human versus economic right. And mostly because of Thiam’s thought leadership, the R2D as a human right would later remain closely associated with the NIEO, through the backdoor as it were, given that for a time at least, the international human rights project would embrace the NIEO, despite NIEO doctrine falling
short of referencing human rights at all.

2.2.2 The R2D as a Human Right

As Whelan describes the next phase of the R2D emergence, the concept of the R2D “jumped the tracks” from the NIEO movement to the “very willing arms” of the Commission on Human Rights in the 1970s\(^\text{49}\). The R2D was recast as a human versus economic right, in a 1972 speech\(^\text{50}\) and seminal follow up paper\(^\text{51}\) by Senegalese ICJ vice-president and jurist, Keba M’Baye, in 1978. Intellectually, the shift of the R2D from the realm of economic rights to that of human rights, and quick acceptance of this notion by the Commission, was facilitated by close ideological alignment of the R2D and the R2SD, each sharing a common normative purpose, the latter already having been declared a legally binding human right. Especially to legally trained Commission members, approaching this issue like M’Baye had, this shift would have seemed intuitive, because in so far as the emergence the R2SD was a matter of justice and equity in civil and political terms, so was the emergence of the R2D in social and economic terms, as originally suggested by Thiam.

In essence, M’Baye and other R2D proponents continued to promote the R2D on the same grounds as Thiam had, simply seeing a clearer way forward under the international human rights project, having observed the challenges of promoting the R2D as an economic right. Their respective assertions formed a normative continuum, both motivated by the achievement of equity and justice in the post-colonial era. In some ways, recasting the R2D as a human right could be seen to have been an opportunistic versus conceptually driven alternative, and one is left wondering whether Thiam and M’Baye colluded in this respect, both being Senegalese jurists with a shared objective.

\(^{49}\) Jensen, supra Chapter 2, note 4 at 94-95.
\(^{50}\) Normand and Zaidi, supra Chapter 2, note 30 at 289.
M’Baye was ‘leading with his chin’, given the prominence of positivist legal critics at that time, by stating that “It must be admitted that the association of ‘development’ and ‘right’ is somewhat venturesome … Yet a new right is being fashioned before our very eyes”\(^{52}\). If one were taking a positivist position in asserting that the R2D lacks a visible jurisprudential basis in law, M’Baye’s forthright statement would not refute such a supposition. However, he was not attempting to satisfy the standards of a positivist, but rather those of a natural law jurist, stating that development “certainly appears to us a right, in so far as we abide by the definition of a right proposed by a philosopher rather than a jurist, as in the case of Saint Thomas Aquinas for example, for whom ‘a right is what the virtue of justice attempts to establish’ … development is a right of every man … it is directly related to the most fundamental of all rights, the right to life”\(^{53}\).

M’Baye’s ideological approach to justifying the R2D was more that of a jurisprudential naturalist than positivist, but not without well thought out argumentation. In his paper\(^{54}\), he provides a structured, five-point (economic, strategic, political, moral, and juridical) justification for the R2D being considered a human right, which is designed to appeal to intellectuals coming from the decolonialized world vantage point. In that argumentation M’Baye most notably does not suggest that justice and equity can simply be achieved through the transfer of financial support, arguing instead that what is required on the part of developed states is a shift in moral and strategic thinking, and recognition of the notion that economic and political solidarity is in everyone’s interest. Although he did not pretend that there was a ‘bright line’ legal basis for the R2D in human rights or other international law doctrine, he did assert that the Charter (arts. 55 and 56) “was the first to bring the centre of the international political stage and overall codification of human rights which went beyond the scope of traditional civil and political rights and encompassed economic,

\(^{52}\) Ibid at 1.
\(^{53}\) Ibid at 5.
\(^{54}\) Ibid at 6-12.
social, and cultural rights, set up as ‘aims’ on an equal footing with peace and security”.

The shift to positioning the R2D as a human right, versus economic right, triggered fundamental intellectual and ideological debate. As will be discussed in Chapter 3, even in the final stages of negotiations regarding the DR2D by the UNGA, when the R2D was clearly an emerging human rights norm, such a declaration was not fully accepted as a jurisprudentially intuitive next step in legal doctrine development. This was because a ‘bright line’ legal basis for the R2D was not readily available to support the case for its portrayal as a human right. This alleged shortcoming served as a lightening rod for critical intellectual debate concerning that matter.

M’Baye’s work was nonetheless formational, setting the R2D firmly on course as an emerging human right. That said, he identified significant headwinds without fully elucidating practical solutions. For example, with respect to legal formulation, he identified the challenge of how to appropriately position and align the roles of duty-bearers and right-holders. On the one hand, the practical reality that for a R2D to be realized there would need to be full application of national and international duties on the part of states. And on the other, reconciling whether development ought to be viewed as a collective versus individual right, being intuitively challenging to realize with individuals being the only right-holders. Another headwind according to M'Baye, from a multi-disciplinary perspective, being the challenge of reaching agreement on a definition of development, which varies from discipline to discipline (and as the present author later notes, even within the discipline of economic development).

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55 Ibid at 12.
56 The reader may wish to consider an entertaining discoursal debate that highlights the intellectual divide between positivist and naturalist jurisprudential thinking regarding the legal basis of the R2D in the following works: Jack Donnelly, “In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development” (1985) 15:3 Cal W Int'l LJ at 473; and Philip Alston, “The Shortcomings of a Garfield the Cat Approach to the Right to Development” (1985) 15:3 Cal W Int'l LJ at 510.
57 M’Baye, supra Chapter 2, note 51.
58 Ibid.
being whether a human R2D could be disassociated from the controversial NIEO, which was bound to be resisted by former colonial powers.

2.3 Significant and Persistent Conceptual Headwinds

Whilst it might prove easier to promote the R2D as a human right, versus an economic right, there would nonetheless be formidable conceptual and ideological challenges along the way. It is important to identify these headwinds, not just to laud the commitment of persistent R2D proponents who knew full well how formidable they would be, but also to set the stage for discussion of the political evolution of the R2D at the UN in Chapter 3. These same headwinds would in turn affect how the R2D would be advanced at the UN and posited in the DR2D, as well as its realization post-declaration.

2.3.1 Legal Formulation of the R2D

In 1979, Georges Abi-Saab presented a paper on the legal formulation of the R2D in the context of a Hague Academy workshop on the subject, “as an exercise in legal feasibility”59. At that time, the DR2D had not yet been drafted, but it had been indicated by the Commission that the R2D was entering that stage of normative evolution. Abi-Saab is an Egyptian lawyer and professor of international law. He was twice appointed judge ad hoc on the ICJ, also serving the Secretary-General of the UN as an advisor regarding NIEO matters. His paper provided a blueprint for the transformation of the R2D, as an example of “yet unshaped or legally uncrystallized trends or building-blocks, which are sometimes called the ‘material sources’ of law – into a clearly defined and legally binding right”60, based on his legal expertise and lived experience as an jurist from the

59 Georges Abi-Saab, “The Legal Formulation of the Right to Development, Hague Academy of International Law” Workshop, Dupuy, René-Jean, United Nations University, (1980) Le droit au développement au plan international: Académie de droit international de La Haye colloque, La Haye, 16-18 octobre 1979 Sijthoff & Noordhoff, at 159-174. [The paper is challenging to source online and was accessed in a reading list for an IHRL course at LSE.]

60 Ibid at 159. Emphasis added to highlight points discussed in the following paragraphs.
decolonized world. In doing so, Abi-Saab foreshadowed critiques of the R2D that will be discussed in Chapter 3.

2.3.1.1 Justiciability

Abi-Saab begins by addressing the issue of future R2D justiciability, whether the R2D ought to be a *legally binding right*, or ‘hard law’, asserting that whilst justiciability may be the end goal of legal transformation under international law, the formulation of a normative social value, is a more important first step. According to Abi-Saab, with respect to:

> “the passage or transition from a right to development postulated *de lege ferenda* to a possible *lex lata* or positive law … such a transformation usually follows the process of the ‘emergence of values’: new ideas take hold in society; they harden into values which become more and more important, more and more imperative in the social consciousness, to the point where an overwhelming social feeling develops to the effect that they have to be formally sanctioned. This is the threshold of law”\(^{61}\).

In referring to ‘emergence of values’ and ‘new ideas of society’, Abi-Saab is referring to values and ideas that had emerged in the context of decolonization and the NIEO. In that context, some rights such as the R2SD may undergo such transformation quickly, whilst others take more time, albeit significantly more time in the case of the R2D. Abi-Saab reminds readers that:

> “in reality, law does not come out of social nothingness, nor does it come into being with a “big bang”. In most cases, it is a progressive and imperceptible growth over a large grey zone separating the emerging social value from the well-established legal rule; a zone which is very difficult (and sometimes even impossible) to divide *a posteriori* between the two. In other words, the boundaries of positive law (or between “law” and “pre-law”) cannot always be clearly defined”\(^{62}\).

In considering the R2D through the lens suggested by Abi-Saab, the pertinent question is not whether the R2D should be declared as soft or hard law, but rather whether it is grounded in values that are strong enough for it to navigate the “grey zone” between the two.

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\(^{61}\) Ibid at 160.

\(^{62}\) Ibid at 162.
2.3.1.2 Correlation with Other Rights

Abi-Saab then addresses the question as to whether the R2D can be clearly defined. At that time, it was clear that the R2D would inevitably be an ‘umbrella right’ incorporating and overlapping with numerous other human rights, of the hard law and soft law variety, and that the R2D might be considered redundant in the context of the R2SD, which was already deemed to be hard law. Abi-Saab contends that with respect to the R2D, as in the case of many emerging norms when they are in statu nascendi, it is not uncommon for them to be composed of multiple, both positive and normative, “building blocks”, and that we should not be overly fixated on the fact that some such blocks are of the hard versus soft law variety. According to Abi-Saab, and with respect to the R2D:

“it is an analysis de lege ferenda, although many of its building-blocks are of the nature of lex lata … We should not, however, exaggerate the divide between the two. It is true that - as law teachers - most of us insist on the radical distinction between ‘law’ and ‘non-law’ (or rather ‘pre-law’), as a useful educational device. However, most analytical tools applied to the social universe prove usually to be sharper than reality. This distinction is no exception; it corresponds more to a view of the mind than to legal reality. For it is indeed rather simplistic and reductionist, pace Kelsen, to represent the process of legal creation as the passage … from ‘nothingness’ into ‘being’.”

Abi-Saab asserts that the possibility that the R2D might incorporate and overlap with multiple other human rights is an attribute that is to be expected, also suggesting that making categorical distinctions between hard and soft law is somewhat artificial, especially in the context of IHRL, because such distinctions overlook the natural process under which normative law emerges to become positive law, which can take time as in the case of the R2D.

2.3.1.3 Right-Holders and Duty-Bearers

Abi-Saab also addresses future critiques of the DR2D in the context of its subjects, being active subjects (right-holders) and passive subjects (duty-bearers). With respect to right-holders, he notes

63 Ibid.
that, if we consider the R2D to be an individual right, the identification of its subjects is relatively straightforward as “the individual as beneficiary or active subject on one side, and the State as passive object on the other”\(^{64}\). However, Abi-Saab predicted that if the R2D was to be also posited as a collective right, identification of its subjects would be more complex. First, he noted that “peoples” as right-holders implies that “societies, communities, countries and States” are interchangeable designations as right-holders. This is clearly not the case, as will become clear when this thesis examines the DR2D in Chapter 3. He was cautioning that whilst, as in the case of the R2SD, collectivity in the context of right-holders makes sense, specificity with respect to what is meant by “peoples” would be critically important from an the R2D realization perspective. Echoing earlier suppositions from NIEO advocates, reading between the lines of Abi-Saab’s paper to some extent, Abi-Saab concurred with the notion of the individual and peoples being the ultimate right-holders with respect to the R2D, but he also contended that States themselves ought to be and would need to be at least recognized as proxy right-holders in eventual positing of the R2D, in so far as they would be in the best position to act as agents of individuals and peoples “within the purely inter-State and self-regulatory system of traditional international law”\(^{65}\).

With respect to passive subjects, or duty-bearers, of the R2D, Abi-Saab contrasts the R2D with the R2SD, noting that in the case of the latter the answer to the question as to which entity is the duty-bearer is usually clear: “it is the State or community which is denying or preventing a ‘people’ from exercising this right”\(^{66}\). In other words, an entity that is usually and readily possible to identify. For example, with respect to the construction of the wall in the West Bank, the ICJ opined that it is the State of Israel that has the obligation to respect the right of the Palestinian people to

\(^{64}\) Ibid at 169.

\(^{65}\) Ibid at 170.

\(^{66}\) Ibid.
self-determination⁶⁷, by not denying such right through such construction. With respect to the R2D, according to Abi-Saab and on the other hand, identification of a specific entity that is denying the R2D in respect of a developing peoples is not likely to come down to one distinct entity being the denier. Although some specific entities might be more prominent in such denial than others, it is inescapable that duties to uphold the R2D must be shared by all entities operating within a particular international system, including international organizations.

Abi-Saab contends that the passive subject or duty-bearer under the R2D can only be the international community, including but not limited to specific States in respect of its own peoples⁶⁸. He then adds, though, that such a collective duty-bearer arrangement based on cooperation “needs more than the self-regulatory mechanisms, which are barely adequate for the purposes of the legal laissez-faire of the law of coexistence”⁶⁹. There would need to be a more formal overhaul of the international legal system. In other words, a transformative restructuring of the international economic order to provide for more definitively R2D compatible regulatory mechanisms, along the lines of the NIEO as advocated by Bedjaoui (see below), and Abi-Saab himself. Abi-Saab stops short of categorically endorsing the NIEO as the only way forward, perhaps realizing it was already in decline as an IL movement, but he is adamant that “it is very unlikely that the right to development will emerge exclusively through the spontaneous process of custom-formation, or out of one legal instrument which covers all facets … rather the whole will emerge from its parts”⁷⁰. Here we see the seeds of an assertion to be elaborated in Chapter 3, that the R2D represents a right to the process of development, rather than a right to a basket of commodities, a holistic process that requires mechanisms to promote international community

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⁶⁷ ICJ, Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004. [https://www.refworld.org/cases,ICJ,414ad9a719.html](https://www.refworld.org/cases,ICJ,414ad9a719.html)

⁶⁸ Abi-Saab, supra Chapter 2, note 59 at 170.

⁶⁹ Ibid at 171.

⁷⁰ Ibid at 168.
collaboration to establish that process in the interest of justice\textsuperscript{71}.

Abi-Saab’s blueprint was visionary, if not prophetic, as it underlined challenges related to legal formulation that would be decidedly relevant in DR2D negotiations, and foreshadowed critiques of the DR2D that have persisted since 1986. Resolving issues surrounding legal formulation of the R2D would be a formidable headwind.

2.3.2 Narrowly Focused Economic Development Theories

As M’Baye had noted in 1978\textsuperscript{72}, intellectually agreeing on a definition of development, which varies from discipline to discipline, was challenging in the context of the R2D emergence. This was especially so given, as we can now see especially well in hindsight, the narrowly focused theories of economic development that were prevailing at the time. Prior to the early 1990s, a predominant theory of development was based on the stages of economic growth paradigm introduced in 1960 by Walt Rostow\textsuperscript{73}. Rostow was an economic historian, and his paradigm was based on observations of how industrialized nations had developed, mainly Western nations, some of which had benefited from low-cost access to colonial resources, comparatively limitless capital, and a wide-open playing field from a competitive perspective. Rostow’s paradigm was informative at the time, and even so today from a critical historical analysis perspective, but not reflective of the concept of development as conceptualized by proponents of the R2D as a human right. The prevailing economic thinking at that time was that through capitalistic economic growth, as observed by Rostow, all countries should be able to replicate the same development path as Western countries, without the need for a specific R2D. Such thinking is today regarded as flawed by contemporary economic thinkers.

\textsuperscript{71} Sengupta and Salomon, supra Chapter 3, notes 36, 38 and 39.
\textsuperscript{72} M’Baye, supra Chapter 2, note 51.
There was no recognition in Rostow-inspired thinking that the way in which the international economic system had developed was not equitable, nor that levels of access to markets and requisite financing historically available to new entrants were time specific and not available to contemporary new entrants, such as decolonized economies. The main goal of and metric for measuring development at that time was income generation, versus more holistic and humanistic factors. As decolonized nations raised demands for the R2D, that narrow lens suggested they were simply demanding access to incremental financial handouts, and access to a right that was unnecessary.

The World Bank had embraced Rostow’s thinking, as had developmental agencies of developed countries. World Bank programming and key performance indicators when the R2D was emerging as a concept focused almost exclusively on income per capita metrics, those being deemed both instrumental and constitutive of development. It was Rostow’s thinking that led to what Easterly has coined the *legend of the big push*\(^\text{74}\) in the 1960s and beyond – premised upon the notion that “the poorest countries are in a *poverty trap* (they are poor only because they started poor) from which they cannot emerge without an aid-financed *Big Push*, involving investments and actions to address all constraints to development, after which they will have a *take-off* into self-sustained growth, and aid will no longer be needed”\(^\text{75}\). We now know that the Big Push was not enough to pull developing economies out of the so-called poverty trap. The R2D also emerged in the heyday of structural adjustment, where aid and loans from entities such as the World Bank and IMF (the so-called Washington Consensus) were conditional upon implementation of imposed policy reforms, led by privatization and government policies focused on supporting the private sector. Although such reforms may be of some value if employed selectively and on a complementary

\(^\text{74}\) William Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (Oxford: Oxford University Press, 2006) at 33-49.

\(^\text{75}\) Ibid at 33.
and voluntary basis, obligatorily and narrowly applied imposition of such measures is rightfully perceived by developing countries as paternalistic, undermining sovereignty and perpetuating neo-colonialism.

The proponents of the R2D were dealing with development theories and thinking that were narrow, predating contemporarily prominent ideologies had not yet been coherently formulated, such as the capabilities approach to development and the concept of human development, which did not gain prominence until the 1990s (and will be discussed in Chapter 3). Conceptually, articulating a right to ‘development’ was intellectually challenging, because of the narrow definitional basis of that concept within the discipline of international development itself. For R2D proponents, it was inevitably going to be difficult to negotiate for a right pertaining to development as a concept that, as defined at the time, fell intellectually short of what that concept ought to address, being human freedom and elimination of human capability deprivations.

Proponents faced attitudes entailing questions such as: Why would a right to development be necessary when all that should be required is investments that are already being made? Are we not investing enough with all the aid we are already providing … is the R2D about gleaning obligations to provide more financial transfers? Such questions are representative of the headwinds that would complicate political negotiations and impact how the R2D would be posited in the DR2D.
2.3.3 *R2D Association with the NIEO*

“The complaint of the poor nations against the present state is not only that we are poor both in absolute and relative terms in comparison with the rich nations. It is also that within the existing structures of economic interaction we must remain poor, and get relatively poorer, whatever we do … the demand for a New International Economic Order is a way of saying that the poor nations must be *enabled to develop* themselves according to their own interests, and to benefit from the efforts they made.”\(^{76}\) - Julius Nyerere, 1974

Although as previously noted the R2D jumped tracks from the NIEO track to a human rights track as it emerged intellectually and ideologically, the R2D would remain closely associated with the NIEO. Julius Nyerere (cited above), an anti-colonial activist and political theorist who was president of Tanzania from 1964 to 1985, illustrates the source of this association very well. Anticolonial activists such as Nyerere of course pointed to economic disadvantages as the reason for change, how could they not do so, and financial reparation in respect of such disadvantages was easily misinterpreted as a narrowly and inherently proposed solution to such inequity. Whereas activists such as Nyerere, and other NIEO proponents, were actually seeking to be *enabled* to remediate such disadvantages themselves, through *development*, opponents of the NIEO initiative misinterpreted the R2D as being an economic right predicated upon a demand for financial reparation, which was not the point at all. Because of this misinterpretation such opponents would inevitably resist the R2D as a human right even after it had jumped tracks. That association acting as a serious ideological headwind, as will be seen in Chapter 3. An understanding of the NIEO will be useful in that context.

The work of Mohammed Bedjaoui, as a primary architect of the NIEO, is where one can most readily see the inherent intellectual linkages between the NIEO of the 1970s and emergence of the R2D. His legal and socio-economic justice insights, especially as expressed in *Towards a New International Economic Order* of 1979, which he wrote prior to being appointed to the ICJ, were

born of lived experience in the struggle for the right to self-determination in Algeria. Bedjaoui’s ideology was based on global universalism as its primary guiding principle, and the way of achieving that being transformational reconstruction of IL economic frameworks to reposition the notion of sovereignty within those frameworks to foster justice and equity.

The fundamental objective the NIEO was to promote legal and economic structural change to reverse the effects of the model of colonial domination. The NIEO was based on the premise that, under colonialism, such powers legally deprived colonies of sovereignty, appropriating natural resources rightfully owned by the peoples of those colonies, thereby denying access to the process of economic development. Bedjaoui did envisage a transfer of financial support from developed countries to developing countries, but that was not his fundamental aim – such transfers would be instrumental in achieving justice and equity, rather than being constitutive of such objectives.

The NIEO movement sought to level the economic playing field on which developed and developing states would play in the era of post-decolonization. It was originally intended that recognition and implementation of Thiam’s version of the R2D, as an economic right, would be integral to the playing field levelling process. When the R2D was repositioned as a human versus economic right, NIEO rhetoric moved away from the language of the R2D, albeit it remained challenging for rich countries to bifurcate the two concepts intellectually. Nyerere’s quote at the opening of this section of the paper illustrates the natural intellectual fit between the objectives of NIEO and the R2D ideological schools of thought. Both were inherently and entirely concerned with freedom and the right to develop to mitigate the ongoing legacy effects of colonial impoverishment, through enablement and empowerment, and not conditional handouts.

In terms of sovereignty, Third World jurists such as Bedjaoui recognized that whilst decolonization might have resulted in *de jure* sovereignty for decolonized states, and hence political autonomy in
theory at least, such emancipation would do little to advance the development objectives of newly independent states without ‘economic sovereignty’: to ensure an ability to practically realize self-determination with respect to beneficial control of natural resources, as well as free and equitable access to the international trading system. The NIEO was about altering how IL functions in respect of sovereignty and was not aimed at outright abrogation of IL. To the extent that IL had previously been designed to support the objectives of great powers, for example the disproportionate degree of authority that had been granted to the Security Council vis-à-vis the UNGA, the NIEO was about extinguishing elements of and correcting omissions in IL that might otherwise support neo-colonialism going forward. So, in the context of that example, granting more authority to an expanded UNGA that would inherently reflect the majority interests of decolonized states, empowering them to make changes to international legal and economic frameworks. Hence, in the relation to the R2D, making it possible to posit legally binding status to a right to development attributable to states, as the legal possessor of rights associated with sovereignty (if NIEO proponents had had their way, the R2D would have been explicitly granted binding, *jus cogens* status as an economic right in the same way that the R2SD had).

Former colonial powers might have gone along with decolonization, arguably more out of self-interested necessity than an interest in equity and justice but agreeing to fundamental changes in how they had designed IL was another matter altogether. Bedjaoui would later note that although the R2D had been credibly “invented” in the formative phase of the NIEO in the 1960s, at that time “the question of establishing it on firmer [legal] ground remained” unresolved, because such resolution would have required a sharper alteration of IL than rich countries had appetite for in that decade. Bedjaoui would also assert that M’Baye’s solution of placing the R2D “firmly among

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human rights”, meant that observers “were unwilling to see in the rediscovered right to development any more than, at best, an individual right recognized as belonging to the human being in relation to the national community of which he was part”. The cost of reinvigorating the R2D as a human right, according to Bedjaoui, was ambiguity with respect to whether the R2D should, or indeed could, be viewed as a right of sovereigns as well as individuals. He understood why M’Baye had reframed the R2D as a human right, but with chagrin.

Despite the UN resolution and declaration regarding NIEO in 1974, the NIEO eventually met its demise, some say as fallout of the oil crisis in 1973, which sharpened developed countries’ awareness of the threat of losing access to previously ‘owned’ and still controlled natural resources (the prospect of more ‘OPECs’ was alarming), and the debt crisis in the early 1980s, which gave rise to corresponding and overshadowing Washington Consensus structural adjustment-oriented austerity measures in that decade. Margot Salomon, a human rights legal professor at LSE, argues that although such factors likely played a role in its demise, the NIEO failed simply because “industrialized States did not want any such thing”, which seems the most plausibly acute causation from the present author’s perspective.

The legacy effect of having been originally conceived as an economic right and foundational principle of the NIEO, would significantly affect how the R2D as a human right would be posited in the 1986 declaration, as well as how, and perhaps whether, it will be realized. Rich countries, led by the USA, would continue to contemplate the R2D and the NIEO as being one in the same,

78 Ibid at 1180.
https://www.researchgate.net/publication/276937973_In_the_Interests_of_Mankind_as_a_Whole_Mohammed_Bedjaoui%27s_New_International_Economic_Order
and would factor such conflation in negotiating stances in respect of the DR2D. Salomon notes that the R2D serves as a remnant of the NIEO, as a tributary plea for economic justice, and wonders whether it will be like the NIEO in that it will remain an unfinished story81.

2.4 Summary: The R2D as an Emerging Human Right?

Decolonization represented a monumental step towards the achievement of universal justice and equity in the new world order, coinciding in an intertwined manner with the emergence of the United Nations in the post-war period. Stepping out from under the domination of colonial powers gave the thought leaders of newly independent states a voice that could be heard, and no longer ignored. Starting with Bandung, and later in the G-77, such states found the means to coordinate that voice, in solidarity. The nascent but rapidly expanding United Nations forum provided an arena for that voice, and the international human rights project provided such leaders with a much needed intellectual and ideological platform from which to influence. And influence they did, as is clear in the preceding sections of this chapter, debunking the narrative that the human rights project is primarily a Western conception. The R2SD emerged from that process, as a *jus cogens* principle of IL, cemented in most key human rights doctrine. But it did not take long to realize that the R2SD as a political concept would not be enough to achieve comprehensive justice and equity, inclusive of socio-economic considerations.

Transformational legal and economic change was also perceived to be necessary, giving rise to the aspirational NIEO and, more succinctly, the R2D as an aspirational economic right, which it was argued would be necessary to fully realize the R2SD. Economic externalities, including the oil crisis and a looming debt crisis in the Global South, as well as politically and ideologically motivated opposition to the R2D by some developed countries in the Global North, began to drown

81 Ibid at 52.
out the voice of the NIEO movement. The R2D was pragmatically recast as a human right, some
would argue more out of tactical convenience than in response to an intellectual need to reposition
the R2D on more sound conceptual and moral footing. The intellectual essence of the R2D, after
all, remained justice and equity to reverse the legacies of colonization. The R2D mantle was
passed from Thiam to M’Baye, both Senegalese ICJ jurists, with the latter proclaiming the R2D a
human right in late 1970s. Bedjaoui and Abi-Saab, who were also jurists with lived experience as
former colonial subjects and proponents of the NIEO, would also become influential intellectual
contributors.

Intellectual debates concerning R2D positioning as a legal right, versus a moral aspiration,
underscore key conceptual questions that are especially relevant in the context of human rights.
How does a right become a right and does a right need to be justiciable to be effectively posited as
a right (or in other words, for a right to be deemed viable, does that right need to be reinforced by
an unambiguous remedy)? Whilst it might be convenient for there to be an identifiable bright line
between a claimed right and an unambiguous source for such a right in existing law, and for such
an emerging right to be posited in a binding manner from the outset, these are not hard and fast
prerequisites in the emergence of a viable human right. The R2SD did emerge in such a convenient
manner, whereas the R2D has not. However, that does not mean that the R2D ought to be
considered any less viable as a bona fide right in the long run, albeit the more circuitous path that
a right such as the R2D has taken requires more patience and persistence on the part of proponents.

Abi-Saab, later supported by discourse of Salomon and Sengupta to be discussed in Chapter 3,
provided juridical guidance with respect to the above questions in the context of the R2D, with
which the present author concurs. He asserted that the R2D was at the time of his writing emerging
as de lege ferenda, a postulation of what law ought to be or might eventually be, in response to
values initially suggested by decolonized peoples, such as M’Baye. Normative concepts that were
hardening into values that were taking hold in social consciousness, within the UN community facilitated by the HRC, the result being sufficient international community will to posit such values in a non-binding declaration such as the DR2D. This development was not in a hard law fashion as was the case with the R2SD, but rather in a more normative soft law manner, with the goal of positing such values being that the R2D might eventually transition to *lex lata*, or in other words positive law, in future.

Abi-Saab acknowledged that under such an approach there will inevitably be a grey zone in which such transition takes place, sometimes short and sometimes longer, and that the goal posts of that zone might be challenging to identify. However, even in the early stages of such transition, Abi-Saab asserted that the “threshold of law” is being crossed, because such a social value has not come out of “social nothingness”, and the process of sanctioning such a value must begin somewhere. If one were to wait until a bright line legal source of a right such as the R2D can be identified, or until it becomes feasible to posit such a right in a justiciable manner, that right and its underlying normative values might never be posited at all, and the transition might never be permitted to occur. In the context of the R2D, the pertinent question is not whether the R2D needs to be justiciable to be treated as a right, posited as hard law versus soft law, but rather whether it is grounded in values that are broadly enough accepted that it ought to be given a chance to navigate the ‘grey zone’ between the two. The R2D was put on a path to such acceptance by jurists from the decolonized world, and its eventual political emergence in the UN would later substantiate such broad acceptance.

Nonetheless, the effects of close association with the NIEO, and resistance with respect to that movement by rich developed countries, many of which had been colonial powers, would remain a significant intellectual headwind. Despite the R2D having jumped the tracks from being cast as an economic right to form part of the international human rights project, and Thiam and Bedjaoui
having stepped aside because of their prominence as leading proponents of the NIEO movement. Headwinds related to how to best legally formulate the R2D, including issues such as justiciability, correlation with other rights, and proper alignment of right-holders and duty-bearers, would remain challenging, despite formative intellectual contributions by Abi-Saab and others. In addition, as originally acknowledged by M’Baye, the discipline of economic development was not at that time sufficiently mature, being based on theories that were narrowly focussed on development through income growth, based on the views of Rostow, versus human development. These headwinds would prove challenging, but the concept of the R2D as a human right had successfully emerged from the decolonization movement thanks to contributions by jurists from the Global South, as a surviving remnant of the NIEO movement.
Chapter 3: The Political Evolution of the R2D

As discussed in Chapter 2, the emergence of the R2D, initially as a proposed economic right and then as a human right, was firmly rooted in and catalyzed by decolonization during the 1950s and 1960s, and it can be considered a legacy of the ensuing NIEO movement in the 1970s. Its intellectual proponents, being from newly independent decolonized states seeking justice and equity, catalyzed steps to be taken within the UN forum, leading to the DR2D in 1986. The first purpose of this chapter is to examine how that declaration evolved politically to assess the extent to which it reflects its intellectual origins and the objectives of its proponents. A second purpose is to assess the extent to which the R2D was effectively posited as a realizable inalienable human right, from both an international law and socio-economic development policy perspective. The aim is to establish a conceptual lens through which to consider the past and future role of the R2D in the context of oPT in Chapter 4.

The first half of the chapter begins by providing a brief overview of the procedural emergence of the R2D in UN fora between 1977 and 1986, as well as in the decades following the 1986 declaration. It then provides a critical assessment of the DR2D, from a doctrinal perspective. This is achieved by comparing the final declaration to a penultimate version of the same document from 1984, inspired by the jurisprudential insights of Georges Abi-Saab, and partly guided by the works of Arjun Sengupta and Margot Salomon, human rights legal experts that have focussed extensively on the DR2D and prospects for realization of the R2D. Such comparative doctrinal analysis highlights the weakening effects of the ideological headwinds identified in the latter part of Chapter 2, which came into playing during the two-year period of negotiations leading up to 1986.

The second half of the chapter synthesizes themes that will be relied upon in Chapter 4, which examines the extent of and prospects for R2D realization in the oPT. One over-riding theme is the
impact of politicization concerning the premise of a R2D and, stemming from that, a lack of accountability with respect to R2D realization. Such lack of accountability was a direct result of R2D politicization manifest in faulty doctrinal logic and clarity with respect to the right-holder and duty-bearer elements of the DR2D. A second theme is unclear positioning of the R2D in international law, and a mostly missed opportunity to more pragmatically align the R2D with the R2SD. This chapter asserts that the R2D should have been framed as the economic component of the R2SD, the latter being considered a *jus cogens* principle of IL, as opposed to being framed as a separately posited human right. As a final theme, this chapter points to the need to align the subject matter of the R2D with a theory of development that is more nuanced and holistic than was available in 1986 when the DR2D was affirmed. The theoretical work of Amartya Sen in *Development as Freedom* is proposed as an appropriate means of doing so. A thematically conflated conclusion of this chapter is that the R2D ought to be reframed as a *right to a self-determined process of development*, one that aims to hold states accountable for enhancing human capabilities internationally through the removal of deprivations that inhibit self-determined political, economic, and social development.

### 3.1 R2D Emergence at the UN

From a UN procedural perspective, movement towards the DR2D commenced in 1977, when the Commission requested that the Secretary-General prepare a study on the R2D as a human right in relation to other human rights\(^1\), leading to issuance of such a report at the Commission’s thirty-fifth session in 1979\(^2\). It was during that two-year period that M’Baye had presented his 1978

\(^1\) UNCHR, Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission, E/CN.4/RES/4(XXXIII) Thirty-Third Session, on 21 February 1977.  [https://www.refworld.org/docid/3b00f09943.html](https://www.refworld.org/docid/3b00f09943.html)

\(^2\) UN Secretary-General Report entitled: “The international dimensions of the right to development as a human right in relation with other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs: Report of the Secretary-General” (E/CN.4/1334, 2 January 1979).  [https://digitallibrary.un.org/record/6652?ln=en](https://digitallibrary.un.org/record/6652?ln=en)
paper to the Commission, reiterating, and expanding upon concepts he had first introduced during a speech in 1972. As well, Abi-Saab’s paper on the legal formulation of the R2D was presented in 1979. The R2D had transitioned from being a proposed economic right stemming from the NIEO, to being recast within the UN as a human right. Although the work of M’Baye and Abi-Saab ostensibly informed the 1979 Secretary-General report, neither is referenced in that report.

In 1981, the Commission established a working group of government experts on the R2D, which was tasked with drafting an R2D declaration. The working group met repeatedly until the DR2D was eventually adopted under General Assembly resolution 41/128 on 4 December 1986. The United States voted against the DR2D, and eight states abstained\(^3\). During this period of negotiation, the effect of politicization and related consensus building was evident, even up to the latter stages of that process (see next section).

In 1989, the Commission requested a Global Consultation on the Right to Development as a Human Right, which took place in 1990. Annual resolutions regarding the R2D have been adopted by the UNGA since 1987. In 1993, pursuant to the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, the R2D was reaffirmed with unanimous consensus, notably including affirmative support by USA:

> “The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights … As stated in the Declaration on the Right to Development, the human person is the central subject of development … States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.”\(^4\)

Such unanimous reaffirmation was a key milestone in cementing the R2D as a recognized human

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\(^3\) Denmark, the Federal Republic of Germany, Finland, Iceland, Israel, Japan, Sweden and the UK.

right, at least on paper. The R2D was reaffirmed as a universal and inalienable right, with the human person as the subject of the R2D, as it has been in annual UNGA resolutions. States and the international community reaffirmed normative, albeit conditional, commitments by agreeing that they “should” cooperate in ensuring development and “should” promote such international cooperation to realize the R2D and remove obstacles to development. It appeared in 1993, pursuant to the Vienna Declaration, that commitment to the R2D had been reinvigorated and arguably bolstered, having gained the unanimous support of all UNGA states.

Despite such reinvigoration in 1993, it was not until eleven years later, in 2004, that a high level task force (HLTF) on R2D implementation was formed⁵, ostensibly prompted by a perceived need to incorporate the R2D in the MDG initiative. The HLTF met annually between 2004 and 2010, with deliberations culminating in publication of a 25th anniversary collection of commemorative DR2D essays in 2013⁶. The theme of that essay collection was realizing the R2D in the 21st century, including consideration of a goal of pursuing a binding Convention on the R2D. In 2015, the R2D was explicitly acknowledged as having informed the 2030 Agenda for Sustainable Development⁷, in the text of that seminal doctrine. Most recently, the HRC released a draft binding Convention on the R2D, in January 2020⁸, which was discussed with formal commentary at a meeting of the R2D working group in November 2021⁹. Discussions to this end are ongoing, albeit

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there has been little measurable progress made in moving towards such Convention.

Almost 45 years after first being introduced as a human right in the UN forum in 1977, triggering a frustratingly protracted timeline of procedural advancement, the R2D continues to gradually evolve as a normative, and increasingly positive, legal fixture within the international human rights landscape. Brought to the attention of Commission, UNGA and Secretary-General by an expanded population of UN sovereign states following widespread decolonization, as a derivative of the NIEO movement, the R2D initially took its place in that landscape as ‘soft law’ in 1986, albeit not with unanimous support by all states. Pursuant to continuous reaffirmation in annual UNGA resolutions since then, including unanimous reaffirmation by all states in the Vienna Declaration, it may be that the R2D is in the process of transitioning to the point where it will one day meet the test of being considered binding as matter of customary law. However, meeting such a test is challenging and mere repetition in a rhetorical manner is not enough to do so. In its current form, it is most appropriately viewed as an enabling right, an umbrella right that is normatively laid down to potentially set the stage for the realization of other more specific rights, with predominantly natural law versus positive law qualities. The R2D is more recently poised to potentially transition to the next level of legal evolution as an explicit element of ‘hard law’ within the UN human rights landscape, given that a draft Convention concerning the R2D is now under discussion. It can be said, at a minimum, that the R2D has persevered as established, normative doctrine, and as a lasting remnant of the now defunct NIEO movement.

3.2 Doctrinal and Critical Assessment of the Legal Formulation of the DR2D

This section of the chapter provides an assessment of how the R2D was legally formulated in 1986, in comparison to how the R2D had been conceived by its proponents. Doctrinal examination of what the DR2D says, versus what it might have said, sheds light on why the R2D has taken so long
to emerge politically, and the extent to which the DR2D reflects the ambitions of its developing world, intellectual proponents. A comparative doctrinal analysis of the actual 1986 declaration (the “DR2D”), versus a penultimate technical discussion draft of the declaration tabled by the Commission in 1984 (the “PDR2D”), is informative in that regard, illustrating the extent to which the R2D had become politicized over the course of UN deliberations. Such politicization resulted in significant watering down of the concept of the R2D by the time it was declared in 1986.

3.2.1 *Basis in Law and Justiciability*

The preamble of the DR2D anchors the human right to development to key pillars of the human rights landscape. It begins by referencing the U.N. Charter and its purposes and principles with respect to cooperation in solving international economic, social, and cultural problems. The third paragraph of the preamble provides an express tie-in to the UDHR, the fourth paragraph to the ICCPR and ICESCR, and the fifth paragraph to other agreements, conventions, resolutions, and instruments of UN agencies:

> “… concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter”11.

In comparison to the PDR2D, corresponding text in that previous draft was more direct, specifically naming doctrine such as the DCICCP and the ICERD. Most notably, however, the DR2D fails to reference the 1974 declaration and programme on the establishment of the NIEO12, which the PDR2D had explicitly referenced. This omission would have been considered highly detrimental by NIEO-motivated proponents of the R2D and constituted a win for NIEO opponents.

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11 UNGA, supra Chapter 1, note 1 at Preamble, para. 5.

12 UNGA, supra Chapter 2, note 40.
such as the USA.

To be clear, the DR2D is not lacking in important linkages to, and an immediate degree of pedigree under, international law and although not posited in an expressly binding manner, being introduced as ‘soft law’ in and of itself, the R2D is expressly tied to human rights that are legally binding, including the right of peoples to self-determination (art. 1), the elimination of foreign domination and occupation (art. 5), the prohibition against discrimination and flagrant abuse of human rights (art. 6), the full enjoyment of all human rights and fundamental freedoms, including socioeconomic rights (arts. 6 and 8), full sovereignty over one’s natural resources (art. 1), and participatory decision-making in public affairs (arts. 2 and 8). All such linkages would have been more doctrinally expressive had the more specific wording of PDR2D not been diluted between 1984 and 1986, but that does not fundamentally take away from the fact that the DR2D expressly ties the R2D to such human rights. Conspicuous absence of an express linkage to the NIEO is arguably more indicative of the politicization of the R2D, than the fact that references to specific human rights lack some of the specific doctrinal detail originally proposed in the PDR2D, but the latter does serve to illustrate the diluting impact of R2D politicization.

In addition to the UN formulation of the R2D not being expressly binding, the DR2D is not directly justiciable, and neither is the R2D as a human right in most jurisdictions. This is because on a direct basis the DR2D does not give rise to a legally recognizable cause of action. However, the OHCHR asserts that the R2D is justiciable in so far as many of the elements of the R2D “are reaffirmed in binding international law, including international treaties, customary law and regional instruments” and that to “the extent that these constituent elements of the right to

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13 UNGA, supra Chapter 1, note 2 at 14.
14 Exceptional jurisdictions include states that have adopted the African Charter, under which that formulation of the R2D is binding. On that basis, the African Commission on Human and Peoples’ Rights does consider the R2D to be justiciable.
development are justiciable, so too is the right to development itself\(^{15}\). This does not appear to be a widely held view among prominent R2D commentators, and such indirect justiciability has not been tested to date.

A positivist legal thinker might argue that a right without a remedy is not a legal right at all. If one accepts this maxim, does that mean that because a human right such as the R2D is not legally binding or justiciable, therefore not entailing remedies, that such a right should not be regarded as a human right at all. Amartya Sen wryly suggests that such a skeptical, positivist viewpoint might be expressed as follows: “Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring.”\(^{16}\) Arjun Sengupta argues that such a positivist view “confuses human rights with legal rights”, the former preceding law and “not derived from law but from the concept of human dignity … there is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.”\(^{17}\) Moreover, as Sen himself argued in later work, human rights constitute more than legal entitlements, such that justiciability is only one way of making such rights effective\(^{18}\). His view is that the imperfection of obligations, owing to lack of justiciability for example, does not mean that there is a lack of obligation or legitimacy\(^ {19}\). In the case of a right such as R2D, which is not justiciable as posited, it is inherently necessary for duty-bearers to accept such obligations and legitimacy, as well as possess sufficient political will to act upon such duties, in order for that right to be realizable (a point that the thesis returns to in section 3.2.4).

\(^{15}\) OHCHR, supra Chapter 1, note 7, at 8-9.

\(^{16}\) Amartya Sen, Development as Freedom (Oxford: Oxford University Press, 1999), at 228.


\(^{19}\) Ibid at 10.
3.2.2 Linkages to the Right to Self Determination

Express linkages to the R2SD, which is not only binding but is also considered to be a *jus cogens* principle under IL, did at least survive the doctrinal watering down of the DR2D between 1984 and 1986, stating that the R2D implies the full realization of the R2SD. That said, drafters of the PDR2D had taken greater care to reinforce that linkage, also positing more emphatic explanation of what full realization of the R2SD means:

“by virtue of which all peoples freely determine their political status and freely pursue their economic, cultural and social development and may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.”

In omitting this full qualification, except as noted below, the linkage to the R2SD had been diluted in the 1986 DR2D.

Nonetheless, Article 1 of the DR2D incorporates two salient and inter-linking implications with respect to the R2D (as did the PDR2D):

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

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

Firstly, as previously noted, the R2D is posited as an inalienable human right entitling every person and all peoples to participate in economic, social, cultural, and political development. This is salient because of the interlinked inclusion of all forms of development, suggesting an inherent bridge between ESCRs and CPRs as human rights contemplated in each of the 1966 Covenants, respectively, also reinforcing the comprehensive nature of development contemplated under the

\[\text{CHR, Supra Chapter 3, note 10 at art. 1(3).}\]
R2D as being more than would be the case under a more narrow and traditional interpretation of
development as a primarily economic process. Additional wording in subparagraph (1) posits that
such broadly conceptualized development can enable full realization of all human rights and
fundamental freedoms, arguably strengthening the instrumental importance of the R2D as a human
rights and freedom enabler. In short, the R2D is posited as both a connector and enabler with
respect to other human rights.

Secondly, subparagraph (2) explicitly posits that the R2D has direct implications with respect to
full realization of the R2SD. The principle of the R2SD was introduced in the Charter and later
posited in Article 1 of both Covenants, expressly signifying a high degree of significance with
respect to both the R2SD, and by implication the R2D, in forming a bridge between historically
competing ESCR and CPR ideological human rights camps. Margot Salomon notes parallels
between the R2D and the R2SD, in addition to the express linkages, given that both have national
and international dimensions, and in that they share a similar trajectory, albeit offset by a couple
of decades, “which began to take shape as a result of the most recent wave of economic
globalization and the remonstrations by developing states against particular forms of
subjugation”\(^{21}\), the latter of course referring to such states’ emergence as a result of decolonization.
Although they differ given that the R2D was posited as ‘soft law’, whereas the R2SD was not and
is a \textit{jus cogens} principle under IL, both are similar in that they include internal and external
dimensions, and both were borne of decolonization agitation. Further, as noted by Roland Rich
in commenting on the R2SD in 1983, in so far as the R2SD is considered a pre-requisite to
satisfaction of other human rights, unless peoples can develop through realization of the R2D, they
will not be able to practically realize the R2SD and be in a position to realize such other human

\(^{21}\) Margot E. Salomon, “Legal Cosmopolitanism and the Normative Contribution of the Right to Development”, LSE
Law, Society and Economy Working papers 16/2008 (London: London School of Economics and Political
rights\textsuperscript{22}. In that sense the R2D and the R2SD are inextricably linked, and both are equally indispensable as prerequisites for the realization of other human rights\textsuperscript{23}. Whereas political self-determination was the meta-right of the twentieth century, the right to ‘self-determined development’ is becoming the meta-right of the twenty-first century\textsuperscript{24}.

According to the ICJ, the R2SD, which includes the inalienable right to full sovereignty over all their natural wealth and resources, is especially of legal relevance in the case of the oPT\textsuperscript{25}, which should mean that the R2D by implication is also especially important and legally relevant in the context of the oPT, an idea that will be explored in more detail in Chapter 4 of this paper. What is important to note presently is that the DR2D was expressly posited with direct linkages to the R2SD, ostensibly in a neutral manner with respect to, and with the intention of bridging, the ideological and geopolitical divide between ESCR and CPR proponents. A divide that had evolved in the timeframe between acceptance of the UDHR of 1948, and subsequent normative bifurcation with respect to how human rights ought to be manifested, as reflected in the ICESCR and ICCPR of 1966. From a doctrinal perspective, through its express linkages to the R2SD in the preamble of the DR2D alone, and through its resulting express connection to Art. 1 of the Covenants, there ought to be a strong argument that the R2D is securely founded in IHRL with binding implications, irrespective of whether it is regarded as soft or hard law, in and of itself.

3.2.3 Right-Holders

One key difference vis-à-vis the articulation of the R2D in Art. 1 of the DR2D and that of the earlier PDR2D, is that such earlier drafting more explicitly recognizes the assertion of Abi-Saab

\textsuperscript{23}Ibid.
\textsuperscript{24}Salomon, supra Chapter 3, note 21 at 13.
\textsuperscript{25}ICJ, supra Chapter 2, note 67 at 155–156.
that the R2D ought to be formulated as a “collective” right. As noted above the DR2D posits that “every human person and all peoples” are entitled to participate in, contribute to and enjoy development, perhaps leaving room for interpretation that the R2D is both an individual and collective right and that, accordingly, human persons and all peoples are the right-holders with respect to the R2D. But the PDR2D explicitly spoke of the R2D being a “collective” right\(^{26}\), versus the approach taken in the DR2D where the R2D is more vaguely said to be a right of “peoples”. Although the PDR2D stopped short of recognizing states as right-holders, it did expressly posit that “Equality for opportunity is a prerogative of nations and of individuals within nations”\(^{27}\). The PDR2D was more closely aligned with Abi-Saab’s conjecture that the R2D ought to be formulated as not only a collective right, but also one of nations, or better yet, one of “states”\(^{28}\).

This shift in wording with respect to right-holders, towards the R2D being posited as more of an individual right in the DR2D, represents a dilutionary compromise bridging differences between developed countries, favouring the R2D being posited as an individual right, and less developed countries, favouring the R2D being posited as a right of states, presumably on behalf of their peoples. The compromise was to opt for “peoples” versus “states” or “nations” in the DR2D wording, which was intended to entice developed countries, led by the USA, to support the DR2D, to no avail as it turned out in 1986 (recalling that despite wording dilution, the USA voted against adoption of the DR2D).

Article 2 of the DR2D arguably undermines that compromise in stating that “the human person is the central subject of development and should be the active participant and beneficiary of the right to development”, seemingly attributing priority to individual persons over peoples in terms of

\(^{26}\) CHR, supra Chapter 3, note 10 at Art. 1(2).
\(^{27}\) Ibid at Art. 1(1).
\(^{28}\) Abi-Saab, supra Chapter 2, note 59.
‘centrality’, reflecting a typical view of the individualistic nature of human rights viewed through a Western lens. The inertial tendency to view human rights as individual versus collective rights, coupled with the actual wording directly above, has contributed to confusion concerning practical identification of right-holders in the context of the R2D. The key point is that the R2D was expressly posited in the DR2D as an individual and vaguely a collective right, with “human persons and all peoples” as explicit right-holders under the DR2D, versus also including nations, as would have been an easier case to assert under PDR2D wording. R2D proponents in negotiating the PR2D clearly wanted states to be explicit right-holders, so that it might be a more straightforward matter for states to claim such a right in the UN forum, where matters such as this are more readily settled between states. As it stands in the context of the DR2D, states cannot claim a right as a direct right-holder but can nonetheless pursue the rights of their peoples pursuant to the principle of diplomatic protection, as would normally be the case in other similar contexts. Assuming of course that the state in question chooses to do so in the context of the peoples concerned, which is not a certainty. In either case, since the R2D is not binding nor justiciable, such matters would need to be handled politically, irrespective of whether states are direct right-holders, so the decision to not include states a direct right-holders should not be considered a fatal flaw in the DR2D. The fact that states did not end up being direct right-holders, is simply an illustration of a negotiated compromise that proponents had to make in the run up to 1986.

3.2.4 Duty-Bearers

Art. 3(1) of the DR2D posits that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development” and Art. 3(3) posits that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development”. The former establishes a positive obligation upon states to create conditions that are favourable to development, and to co-operate to ensure development,
and arguably implies a negative obligation with respect to development in so far as states have a
duty to eliminate obstacles that are unfavourable to development, thereby implying an additional
duty to not impede development. And, of particular note, there is a national and international
component with respect to the duty to create conditions favourable to development, meaning that
such duty applies to development with respect to persons and peoples within a specific duty-bearer
State, as well as those within other States. The cross-border component is ostensibly reinforced
by the duty to cooperate with other States in ensuring development and eliminating obstacles. The
key point being that whereas states are the duty-bearers under the DR2D, states are not explicit
right-holders under the D2RD, which potentially represents a practical and conceptual mismatch,
although as noted in the previous section of this chapter, this is not a fatal flaw of the DR2D. At
the end of the day, seeking recourse under a non-binding instrument such as the DR2D comes
down to a matter of political will, both on the part of the individual state in choosing whether to
represent the rights of its peoples on the basis of diplomatic protection, and on the part of other
states in choosing whether to respond as the duty-bearers that are presented with a soft law ‘claim’
under the DR2D.

In the PDR2D of 1984, states’ obligations are much less ambiguous: “States have the right and the
primary responsibility to ensure development both within their territory and internationally taking
into account their responsibilities to the human beings and to the international community” 29. Here
we see inclusion of national and international duties within the same phrase, rather than the
relatively vague language “creation of national and international conditions favourable to the
realization of” the R2D, that appears separately in the 1986 DR2D, which led to watering down of
international duties in that final version. Most notably, in the context of international cooperation,
recalling that Art. 3(3) of the final 1986 version posits that: “States have the duty to co-operate

29 CHR, supra Chapter 3, note 10 at art. 3(2).
with each other in ensuring development and eliminating obstacles to development. States should … fulfil their duties in such a manner as to … encourage the observance and realization of human rights”, the 1984 version did not include conditional language such as “should” or “encourage”, stating that it is “a duty of all States to co-operate … observing the following principles of international law and fundamentals of international economic relations …”30, going on to expressly name seventeen such previously UN posited principles.

DR2D wording with respect to rights and duties is certainly not without ambiguity, especially with respect to the cross-border duties on the part of States. There is a lack of specific guidance in the wording as it is posited in the DR2D as to what it means to be obliged to create “conditions favourable to the realization of the right to development”, which may be more intuitive in respect of a specific state’s obligations domestically but is far from intuitive, and open to debate, in the context of that state’s obligations internationally. The PDR2D, in contrast, clearly stated that:

“it is necessary to take, as a matter of priority, adequate measures towards the establishment of a new international economic order, as envisaged in the Declaration on the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order, the Charter of Economic Rights and Duties of States and in other relevant United Nations resolutions”31.

That version of the declaration also posited that “Sustained action is required to ensure more rapid progress of developing countries. As a complement to the efforts that the developing countries make, individually and collectively, for their development, it is essential to provide them with effective international assistance”32. The DR2D instead spoke loosely of “effective international cooperation”, failing to speak of what form such cooperation should take. And in contrast to the DR2D, the PDR2D specifically indicated duties on the part of international organizations: “The United Nations, the specialized agencies. States and international non-governmental organizations

30 Ibid at art. 3(3).
31 Ibid at art. 8.
32 Ibid at art. 4.
should co-operate in promoting and implementing the right to development as a human right and
could consider this Declaration as an important basis for action”33. The DR2D made no mention
of such organizations, a ‘last minute’ omission that would be a fundamentally unfortunate one
from an the R2D realization perspective, because states most often act through international
organizations, such as the World Bank for example, as a delivery mechanism in realizing
international development.

Although in comparison to the PDR2D elucidation of duty-bearers’ obligations in the DR2D is
relatively vague, neither version of declaration speaks to remedies, and neither was meant to be
binding. Can an express right effectively exist if there is no corresponding remedy? Or conversely,

Sengupta points to historically inflexible approaches to understanding human rights and
obligations, where rights “would be acceptable only if they were realizable, and that would require
matching rights claims with corresponding duties along with identifiable methods of carrying out
the obligations by the duty-bearer”34, suggesting that inflexible approaches have been supplanted
by a broader understanding of the rights-duty relationship. Sengupta references Amartya Sen’s
description of the Kantian view of ‘perfect’ and ‘imperfect’ obligations35 whereby instead of
perfectly linking rights to precise obligations of duty-bearers, ‘claims are addressed generally to
anyone who can help’ and rights become ‘norms’ of behaviour on the part of duty-bearers, and
other parties. Extending such thinking to human rights, in general, human rights can be viewed as

33 Ibid at art 13.
34 Sengupta, supra Chapter 3, note 17 at 67.
35 Ibid.
standards of achievement and norms of behaviour for all potential duty-bearers. As noted previously, potential duty-bearers in respect of imperfect obligations do need to accept the legitimacy of such duties, and choose to act upon them, which requires political will. In hindsight with respect to the formulation of the DR2D, such an approach might have been more intuitive if both right-holders and duty-bearers were States, leaving room for political obligations to play a more straight-forward role. The previously proposed PDR2D text might have addressed this, given that language related to duties and obligations was more definitive. However, the DR2D as agreed does establish norms of behaviour and even if obligations are imperfect per se, there is value in the doctrine itself in that it reinforces normative expectations that can, if sufficient will exists, support political deliberations.

Moreover, as previously noted, a lack of justiciability with respect to the DR2D impedes legal remedy seeking, as does the inherent power imbalance between persons as right-holders and states as duty-bearers in terms of normative remedy seeking. This would have also been the case under the PDR2D formulation of the R2D as soft law. In any event, as Sengupta points out, for a claim to be recognized as a right, the feasibility of realizing that right needs to be established, and feasibility does not necessarily result in actual realization. Such realization requires a functional process, one which could potentially assist in overcoming the implications of the right-holder, duty-bearer mismatch in the DR2D, as well as strengthening the bridging role that the DR2D might potentially play vis-à-vis the ESCR versus CPR divide. Certainly, including international organizations as duty-bearers, as proposed in the PDR2D, would have made a key difference.

3.2.5 DR2D Subject Matter: ‘Underdeveloped’ Theories of Development

As previously mentioned, a key headwind faced by proponents of the R2D was narrowly defined economic development theory in the mid-1980s. The subject matter of development was fixated
on financial and material matters, and such narrowly defined theoretical thinking naturally led to narrowly influenced R2D negotiations with respect rights and duties, fixated on the financial and material redistributions accordingly. Doctrinal analysis of the DR2D suggests that, intentionally or inadvertently, its drafters were cognizant of this limitation and may have been trying to rise above such narrowly defined developmental thinking, as suggested below.

Arjun Sengupta in his earlier work (1999-2004)\textsuperscript{36}, as the Independent Expert on the R2D to the Commission and HRC, later endorsed by Margot Salomon in discourse with Sengupta (2003)\textsuperscript{37} and in her own subsequent work (2005 and 2008)\textsuperscript{38}, make the case that the R2D as posited in the DR2D implies a right to the \textit{process} of development predicated upon equity and justice. The second paragraph of the DR2D preamble defines development as “a comprehensive economic, social, cultural and political \textit{process}, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom”, also recognizing in the preamble that “the human person is the central subject of the development \textit{process} and that development policy should therefore make the human being the main participant and beneficiary of development” (italicized emphases added). Salomon and Sengupta assert that references to \textit{process} in both instances is intentional and that the R2D can “thus be understood as


entailing the right to a particular *process* of development”\(^{39}\).

If one accepts the above assertion, which the present author is inclined to do at least in so far as what the posited doctrine says (not commenting on intentionality), the DR2D therefore quite clearly posits that the R2D refers to the right to a process of well-being improvement for entire populations and all individuals that is comprehensively reflected in “economic, social, cultural and political” development and based on “free and meaningful participation” in and “fair distribution of benefits” of such development. In other words, a process of development aimed at improving universal “well-being” requires instrumental rights that are economic and social (as in the ICESCR), as well as constitutive rights related to participation and distribution that are political and civil (as in the ICCPR) to ensure equity and justice with respect to the outcomes of development. That the R2D emphasizes a right to the process of development may be one the clearest aspects of the DR2D as posited, but it is far from clear how such a process is to be rendered realizable, apart from Sengupta’s proposal regarding development compacts\(^{40}\).

The DR2D posits appropriate words and concepts regarding the R2D as a right to a process, but it is not clear whether this notional implication was posited intentionally, nor whether references to ‘process’ should be regarded as merely rhetorical or incidental. The present author is of the view that the R2D ought to be regarded as a right to a process, notwithstanding whether that was the intention.

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39 Salomon and Sengupta, supra Chapter 3, note 37 at 6-8.
40 A development compact, as proposed by Sengupta, is a mechanism for ensuring the recognition among all stakeholders of the “mutuality of the obligations”, so that the obligations of developing countries to carry out these rights-based programmes are matched with reciprocal obligations of the international community to co-operate to enable the implementation of the programmes. The purpose of development compacts is to assure the developing countries that if they fulfill their obligations, the programme for realizing the right to development will not be disrupted owing to a lack of financing.
3.3 R2D Realization: Key Success Factors

The R2D as it was posited in the 1986 declaration is not likely to be fully realizable in its current doctrinal form. Politicization of the R2D due to its linkages to the NIEO set the stage for the most fundamental weakness of the DR2D as posited, that being an effective lack of accountability on the part of states, especially with respect to development outside of their own borders, in other states. Rich countries were not prepared to accept such accountability, and the cost of achieving consensus with respect to DR2D text was inlayed ambiguity with respect to the obligations of states to an extent that meaningful duty-bearer accountability was effectively stripped out of the final version of DR2D. In addition, states were not included as right-holders, states being better placed under UN constructs to pursue political versus legal recourse under non-binding international law.

A second weakness of the R2D from a realizability perspective was the result of a strategic error on the part of R2D proponents when the R2D jumped the tracks from the realm of economic rights to that of human rights, that weakness being related to doctrinal positioning within the body of international human rights law. It was decided to position the R2D as a standalone right, albeit with clear doctrinal linkages to other elements IL including the R2SD, rather than more explicitly framing the R2D as an essential sub-component of the R2SD, which was already a binding human right as a *jus cogens* principle of IL, and one that clearly entailed an economic component when it was originally posited.

A third weakness, which was arguably unavoidable at the time, was a lack of specificity with respect to what development was meant to entail in the context of the R2D. The DR2D makes clear that the R2D pertains to the right to the process of development, but what is precisely meant by such a process is not explained.

Addressing the above weaknesses will be key success factors if the realizability of the R2D is to
be enhanced going forward.

3.3.1 Politicization of the R2D: Enhance Accountability

Negotiation of the DR2D was always going to be highly politicized, given the R2D’s linkages to the NIEO, which had already been widely rejected by developed countries, especially the USA, as well as R2D proponents’ assertion that the R2D ought to span the ESCR to CPR chasm, favouring the former. Writing in 2008, Normand and Zaidi⁴¹ express a highly critical view of the impact of politicization of the emergence of the R2D, albeit their conclusion as an epilogue may be unduly pessimistic (given that discussions regarding a binding Convention are now underway):

“The trajectory of the right to development mirrors the broader trajectory of human rights as a whole. It burst into prominence with high expectations but quickly ran aground in the face of opposition from the world’s most powerful states. Just as human rights impinged on the sovereign prerogatives of the great powers and their hegemony over the new world body, the right to development threatened the economic order the United States and Europe constructed to maintain their dominant global position. The Third World majority turned to human rights only after their bold ideas for a New International Economic Order stalled at the rhetorical level in the UN General Assembly and collapsed at the material level with the onset of the global debt crisis. They demanded enforceable legal remedies to undo the scourge of colonialism and to offer protection from an unjust economic system … They obtained neither through the right to development, and from that perspective it must be judged a failure. The right was allowed to come into being only in a muddled state and lacking strength.”⁴²

The politicization of the R2D crystallized in 1985, when there was mounting pressure to finalize the DR2D by 1986, and consensus agreement was deemed to be required. As demonstrated in the previous section of this chapter, the final declaration was sufficiently watered down to potentially accommodate most opposing views, the result of which according to some critics was that the DR2D “was not so much a new human right as an affirmation of existing rights in the particular context of development with an emphasis on its social and economic aspects”⁴³. Western states did not want the R2D to be posited as a right of states and did not want duties incumbent upon

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⁴¹ Co-founders of the Center for Economic and Social Rights in New York. [https://www.cesr.org/](https://www.cesr.org/)
⁴² Normand and Zaidi, supra Chapter 2, note 30 at 314.
⁴³ Ibid.
states to be affirmative enough to oblige them to provide resources to the Global South\textsuperscript{44}. In short, such states did not want accountability for realization of the R2D, and in the context of negotiations the price of reaching consensus on the DR2D was a lack of such accountability.

Commenting on the framing of right-holders in the DR2D in 1991, Bedjaoui (architect of the NIEO) provided the following critique regarding the omission of states as right-holders:

“It was by no means a matter of indifference whether the possessor of the right to development was the State or the individual. In fact, its beneficiaries can only be both at the same time. But for it to be meaningful in international law, in other words within a legal order which remains strongly marked by its inter-State character, the right to development had to, and must still, be approached in its international dimension as it is only through such an approach that the true nature of the problems and of the required solutions can be seen in context. One should not, however, see a hard and fast opposition between the State as a possible subject of the right to development and the individual as its beneficiary. In fact, and as I emphasized in 1969 in envisaging the right to development at an international level, in terms of the relations between States, the surest way of attaining the ultimate goal, which is the development of the individual, is for the State to which the individual belongs to be able to assert its own people's right to development”\textsuperscript{45}.

Although Bedjaoui understood why M’Baye had recast the R2D as a human right, versus an economic right, he also understood that this had meant that it would be inevitable that the R2D could not then be deemed a right of states, since states are not typically nor intuitively viewed as being right-holders in the context of human rights doctrine.

With respect to duty-bearers, Stephen Marks, a now emeritus Harvard professor of law, notes that in 1981, when the DR2D drafting group was established, the USA made its position on the R2D clear enough\textsuperscript{46}. It did not want to see the R2D used as a means of breathing new life into the NIEO, and it would not agree to text that might create financial obligations on its part. He also asserts that the USA, and specifically the Republicans (Reagan was President at the time), had fundamental ideological differences with the concept of a ‘right’ to development, stressing the idea

\textsuperscript{44} Ibid at 303-306.
\textsuperscript{45} Bedjaoui, supra Chapter 2, note 77 at 1179.
that “development occurs thanks to economic liberties and private enterprise rather than a claimed right to development”\textsuperscript{47}. The USA also claimed that conceptually, the “formulations and definitions used [in the DR2D] were not clear”\textsuperscript{48} enough, which ironically was more the result of attempted consensus building, than a lack of drafting skills.

Although in 2008, the fate of the R2D may have seemed as dismal as expressed above by Normand and Zaidi, new momentum has developed with respect to the R2D since then, beginning in 2013 as work towards a new binding Convention on the R2D commenced\textsuperscript{49}, resulting in a draft of such a Convention being produced in 2020\textsuperscript{50}. Whilst the DR2D has fallen far short of what proponents had in mind originally, its normative values continue to endure in the context of IHRL, and it appears that it will continue to do so going forward, irrespective of whether the R2D is eventually posited in hard law form under a binding Convention.

As previously suggested by the present author, the R2D may be in the process of transitioning to the point where it will one day meet the test of being considered binding as matter of customary law, having been reaffirmed repeatedly in UN fora and doctrine since its declaration in 1986. However, meeting such a test in the context of the R2D will be challenging and mere repetition in a rhetorical manner will not be enough to do so, because other criteria need to be met. Firstly, in terms of state practice, not all states are able or willing to apply the R2D consistently and universally in respect of all of their own peoples, and some do not ostensibly believe they are normatively obliged to do so, as will be seen in Chapter 4 of this thesis. Secondly, with respect to states obligations regarding peoples in other states, many states do not believe that the right to development is an unambiguous obligation and, furthermore, are not prepared to take on such an

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} OHCHR, supra Chapter 3, note 6.
\textsuperscript{50} OHCHR, supra Chapter 3, note 8.
obligation. Further, meeting the stringent customary law test is especially challenging in the case of a broadly posited enabling right such as the R2D, versus more specific rights where realization is more readily and objectively measurable, such measurability being inherently required to demonstrate customary state practice. Given its firm correlation with the R2SD, which is unquestionably hard law, demonstrating that the R2D meets such the customary law test need not be a first order priority (see section 3.3.2). And as also noted by the present author, pointing to the assertions of Abi-Saab\textsuperscript{51}, the R2D has been following a trajectory that one would expect as emerging normative doctrine in transition from soft to hard law, even if more slowly than its proponents would have liked. In reference to the above assertions of Normand and Zaidi, there is no getting away from the fact that from a doctrinal perspective the DR2D is indeed somewhat ‘muddled and lacking strength’. However, the R2D’s shelf-life has surpassed that of the NIEO, as an ongoing remnant of what might have been a watershed movement.

Making suggestions as to what a binding Convention could entail is beyond the scope of this paper. However, to protect against individual states disregarding the R2D duties nationally, where at least state duties are more clearly prescribed in the current DR2D, peoples’ claims against their states would ideally be rendered explicitly justiciable in a binding Convention, to ensure a balanced state-citizen power relationship. A more balanced power dynamic among states internationally would be achieved by positing that states are both right-holders and duty-bearers, which would rationalize the legal inter-state relationship with respect of the R2D. Even if state claims against other states were not necessarily justiciable, instead relying on principles of IL with respect to soft law, states being right-holders as well as duty-bearers would support more effective governance of an inter-state relationship with respect to the R2D. Similarly, a Convention that only entails binding state duties, nationally versus internationally, would be sufficient, if states were right-holders with

\textsuperscript{51} Abi-Saab, supra Chapter 2, note 59.
respect to the R2D. Clearer doctrine with respect to international duties would at least enhance political accountability, even if not in a legally binding manner, in addition to positing practical guidance to inform official development assistance decision making, and governance of organizations such as the World Bank. For certain, international organizations ought to be explicitly deemed to be duty-bearers, as development agents of states.

As discussed in Chapter 2, once R2D proponents realized that casting the R2D as an economic right, and central tenet of the NIEO as proposed by Thiam in 1966, was not likely to be successful, the R2D was recast as a human right by M’Baye in the 1970s. Jumping the tracks in that manner, breathed new life into the R2D cause, and that shift was tactically shrewd, because it served to mitigate to some extent, the effects of R2D politicization. It is not clear why it was decided to frame the R2D as a distinct right in its own declaration, versus positioning the R2D as an integral component of already existing human rights doctrine. For example, by augmenting interpretation of existing doctrine with respect to the R2SD, which is considered a *jus cogens* principle in IL and, therefore, already accepted as being jurisprudentially robust. Rather than attempting to reinvent the wheel, it might have been shrewder to frame the R2D more explicitly as an integral component of the R2SD, which the present author asserts it already was, albeit implicitly. Contemporarily, it would be more constructive to focus on that strategic objective, as opposed to investing time, effort and political capital in pursuing a binding Convention that may stand as little chance of consensus-based acceptance as the DR2D did in 1986.

### 3.3.2 Right to Self-Determination: Incorporate the R2D

As previously noted, the R2SD is unequivocally considered binding as a *jus cogens* principle under IL, which was first declared in 1952 and later cemented as a universal right in a common Art. 1 of both Covenants as a right of peoples to “freely determine their political status and freely pursue
their economic, social and cultural development”. It has been characterized as a “platform right that that enables the realization of many other rights”\textsuperscript{52}, composed of two “intertwined components”\textsuperscript{53}; a political component being the “capacity of a people to choose its own Government and govern itself without interference”\textsuperscript{54} and an economic component, the “people’s collective right to enjoy their natural wealth and resources as an expression of permanent sovereignty over them. This is pivotal to realizing and preserving the independent existence of a people through their own means of subsistence”\textsuperscript{55}. Arguably, as suggested above, when the R2D jumped the tracks from the NIEO movement to the human rights project, it could have and should have simply been positioned as an instructive articulation of the economic component of the R2SD, obviating the supposed need for a separate declaration in respect of the R2D. Further elucidation regarding the specific legal formulation of the R2D, including how to achieve its realization, would have been much easier with the R2D being deemed binding from the outset, especially as a component of a primal principle under IL.

Notwithstanding what could have or should have transpired, the DR2D was in fact firmly anchored to the R2SD in its Art. 1(2): “The human right to development also implies the full realization of the right of peoples to self- determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”. The present author would argue that the R2D ought to be considered sufficiently integral to the R2SD that it ought to be afforded similar


\textsuperscript{54} Ibid.

\textsuperscript{55} Ibid.
treatment under IL. This is true if not doctrinally, at least normatively, and hence politically if the international community were compelled to accept such accountability. To the extent that the R2SD is implemented in a manner that stops at self-determination with respect to civil and political rights, without respect for economic and social rights as reinforced under the R2D, such realization of the R2SD can only be viewed as a half measure approach. Decolonized states and the NAM movement understood this, which is why we are even contemplating the R2D as a human right.

As suggested by Salomon, in so far as political self-determination was the meta-right of the twentieth century, the right to ‘self-determined development’ ought to become the meta-right of the twenty-first century\(^6\). The way forward for the R2D, as it continues to transition from soft to hard law on paper, if in fact it even needs to do so to be realized, is for the R2D and the R2SD to be treated as one in the same by the international community. Chapter 4 of this thesis will demonstrate that the case for such treatment is most acutely intuitive in situations where the R2SD is not being observed in any respect.

3.3.3 Development Theory: Clarify the Meaning of ‘The Process of Development’

As previously discussed, Salomon and Sengupta have made a convincing doctrinal case that the R2D was clearly posited as a right to the process of development\(^7\), and not just a more simplistic right to the outcomes of development. It is not so clear that this nuance was intentional on the part of the authors of DR2D, and if it was then this should be considered somewhat prophetic, given that at the time development theory was in an immature state, being focused more on outcomes of development in the style of Walt Rostow. In any event, the concept of the ‘process of development’ is not well defined in the DR2D, which is ironic given that it forms the subject matter content of that right. But at the same time understandable, given that the discipline itself was still

\(^{56}\) Salomon, supra Chapter 3, note 21.

\(^{57}\) Salomon and Sengupta, supra Chapter 3, notes 36 and 38.
emerging on a normative level.

Sengupta separately asserts that whilst the process of development and the outcomes of that process are not the same thing, in a broader human rights context they are interdependent, whilst also being distinct human rights\textsuperscript{58}. As the “central subject” of the R2D, a person can realize separate rights, such as the right to food or education without there necessarily being an established, comprehensive process of development, because certain states observe human rights on a piecemeal basis. Similarly, even if such individual rights are not realized by all individuals, the right to an effective process of development can be first satisfied on a state level, which may then lead to outcomes of such a process being realized and eventually shared more evenly by individuals and peoples. It is true that rights with respect to the outcomes and the process of development are interdependent in the long run, but they are not necessarily inseparable on a conceptual level and may not need to be realized simultaneously.

It is important to distinguish between rights to the outcomes and the process of development for another reason, irrespective of whether enjoyment of all outcomes is realized at the level of a specific individual from the outset, which might not happen even when outcomes are available and the right to the process has also been satisfied. The process enables capabilities, which is not the same as actual experience, given that not all individuals will choose to avail themselves of specific outcomes, because they have reason to value them differently and individuals ultimately need to make choices\textsuperscript{59}. It is the process that enables an individual to make such choices, so one could argue that it is the process of development that is of a first order of importance. If states and peoples can realize the right to the process, then individuals may then be capable of exercising choice, in other words achieving freedom.

\textsuperscript{58} Sengupta, supra Chapter 3, note 36 at 868.
\textsuperscript{59} Sen, supra Chapter 3, note 16.
The R2D in and of itself is not a prevalent feature in international development programs and discourse. The present author worked in international development at the World Bank for six years and did not come across explicit mention of, let alone consideration of, the R2D during that experience. The present author also recently studied international development at the post-graduate level, and the subject of the R2D as an intellectual concept and human right was not explicitly referenced in discourse covered during such studies. However, the work of Amartya Sen and the human capabilities approach to development was a central feature of those studies, which arguably represents implicit consideration of the R2D from a conceptual perspective. Similarly, the capabilities approach informs UN development policies and programmes, including the Human Development reports of the UNDP\textsuperscript{60}.

Not long after becoming president of the World Bank Group in 1995, James Wolfensohn invited economist and philosopher Amartya Sen to give five lectures to senior Bank staff concerning his capabilities approach to development. The lectures eventually provided the basis of his book \textit{Development as Freedom}\textsuperscript{61,62}, even if the lectures and book did not apparently serve to substantively change the way the Bank approaches development. The Bank tends to approach development based on the traditional school of thought that policies and programs ought to be designed to maximize economic growth that can in turn be measured in terms of GDP, or per capita GDP. Its country development categorizations, which determine funding envelopes and eligibility for financing, as well as its poverty and equity key performance indicators, are primarily based on GDP data. In contrast, whilst Sen’s capabilities approach acknowledges the importance of GDP

\textsuperscript{60} Arjun Sengupta, “Conceptualizing the Right to Development for the twenty-first century”, in supra Chapter 3, note 6 at 71.

\textsuperscript{61} Sen, supra Chapter 3, note 16 at 36.

\textsuperscript{62} Sen would, in 1998, be awarded the Nobel Prize in Economic Sciences for his contributions to welfare economics. \textit{Development as Freedom} was a crowning intellectual synthesis of his views on development and poverty, based on a lifetime of academic work in that field.
growth as an output of development, it instead emphasizes that development ought to be viewed as the process of expanding the freedoms that people can enjoy. The expansion of capabilities, the degree of freedom that people have, to lead the kind of life they value and make choices, thereby enhancing human well-being⁶³, ought to be the goal of development and the basis upon which its results are evaluated.

The expansion of freedoms can be viewed as both (1) the primary end and (2) the principal means of development. Representing the constitutive and instrumental roles of freedom in development, respectively. “The constitutive role of freedom relates to the importance of substantive freedom[s] in enriching human life … elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on.”⁶⁴ The process of development, as referred to in the DR2D, can therefore be viewed as the removal of deprivations. Constitutive freedoms “are part in parcel of enriching the process of development”⁶⁵, and represent the outcomes of development. The instrumental role of freedom “concerns the way different kinds of rights, opportunities, and entitlements contribute to the expansion of freedom in general, and thus to promoting development”⁶⁶. The creation and expansion of instrumental freedoms, or mitigation of deprivations, is what both Sen in his work, and Sengupta in the context of the R2D, mean by the process of development.

Sen has resisted the temptation to posit a definitive list of freedoms because he believes that to do so would be counter intuitive, asserting that defining such a list is, in and of itself, an expression

⁶³ Ibid.
⁶⁴ Ibid.
⁶⁵ Ibid at 37.
⁶⁶ Ibid.
of freedom that ought to be reserved for people themselves. But he was willing to suggest a typology of such freedoms including political freedoms, economic facilities, and social opportunities\(^\text{67}\). Martha Nussbaum, also a proponent of the capabilities approach, has built upon Sen’s typology with examples\(^\text{68}\), asserting that such specificity is necessary to advance capabilities approach discourse. An amalgamation of the work of Sen and Nussbaum for the purpose of framing the process of development in this thesis is follows:

Political freedoms, including what are frequently called civil rights, refer to the opportunities people have to determine who should govern and on what principles, including the freedom to criticize authorities, and to freely express such critiques in uncensored media\(^\text{69}\). Having “control over one’s environment” … being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association\(^\text{70}\).

Economic facilities, referring to the opportunities that people respectively enjoy in utilizing economic resources for the purpose of consumption, or production or exchange; in so far as the process of development determines the wealth and income of a country, they are reflected in corresponding entitlements of the population; distributional considerations being just as important as aggregative ones\(^\text{71}\). And protective security arrangements, to ensure that when economic facilities fail, there are fixed and ad hoc safety nets available to avert temporary deprivations\(^\text{72}\). Having “control over one’s environment” … being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason, and entering into meaningful relationships of mutual recognition with other workers\(^\text{73}\). Being able to move freely from place to place\(^\text{74}\) to take advantage of economic facilities.

Social opportunities, referring to the arrangements that society makes for education, health care and so on, which influence quality of life; not only a healthy life, but also to facilitate meaningful life through more effective participation in political freedom and economic facilities\(^\text{75}\). And through freedom of affiliation, being capable of living with and toward others, engaging in various forms of social interaction; such capability means protecting institutions that constitute and nourish such forms of affiliation, and protecting the freedom

\(^{67}\) Ibid at 38.


\(^{69}\) Sen, supra Chapter 3, note 16 at 38.

\(^{70}\) Nussbaum, supra Chapter 3, note 68 at 42.

\(^{71}\) Sen, supra Chapter 3, note 16 at 39.

\(^{72}\) Ibid at 40.

\(^{73}\) Nussbaum, supra Chapter 3, note 68 at 42.

\(^{74}\) Op cit at 41.

\(^{75}\) Ibid at 39.
of assembly and political speech. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others, entailing provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin. Being able to move freely from place to place, secure against violent assault.

Sen’s typology of capabilities also includes an overarching requirement for transparency, pursuant to which there is a reasonable expectation that freedoms will be transparently laid out, offered on a consistent and predictable basis, and that what people are offered is what they can expect to get.

Sen notes, as might be evident as the reader considers the description of freedoms above, that it might be easy to conflate such capabilities with certain human rights. He contends that capabilities and human rights “go well with each other, so long as we do not try to subsume either entirely within the other.” Some human rights can be viewed as rights to specific capabilities, whilst other “process rights,” should not be viewed as a right to a specific underlying freedom or capability, but rather an entitlement to the process of obtaining access to such capabilities, and the freedom to choose among them. The human right to development is an example of this. As demonstrated previously the R2D is analogous to the human right to exercise instrumental freedoms required to achieve development, clearly rather than the R2D being constitutive of development. In other words, a right to the process of development, being able to exercise political, economic, and social freedoms, pursuant to which such freedoms may be expanded, and other specific human rights may be realized.

An example of the influence of Sen’s conceptual thinking is the Human Development Index (HDI).

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76 Nussbaum, supra Chapter 3, note 68 at 41-42.
77 Op cit at 41.
78 Ibid at 39-40.
80 Ibid.
In 1990, the UNDP introduced the HDI as a way of quantifying human development that goes beyond more simplistic indicators of development that had prevailed historically. HDI “is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living. The HDI is the geometric mean of normalized indices for each of the three dimensions.”\footnote{UNDP website. Human Development Reports. \url{https://hdr.undp.org/data-center/human-development-index#/indices/HDI}} Previously, development was primarily measured based on measures of per capita income. Gross national income per capita is one factor in HDI determination, to capture the standard of living dimension\footnote{Gross national income, or “GNI”, equates to gross domestic product, or “GDP” which is the value of income generated within the borders of a territory, plus the value of income generated external to those borders. As a result, GNI tends to exceed GDP in most cases.}. To achieve a more holistic assessment of human development, that income indicator is augmented with data on life expectancy at birth to capture the health dimension, and two measures related to schooling (mean of years of schooling for adults aged 25 years and expected years of schooling for children of school entering age) to capture the education dimension\footnote{Ibid.}.

UNDP reports HDI values annually for 191 countries\footnote{Ibid.}. In 2021, for example, Switzerland ranked highest with an HDI of 0.962 and South Sudan ranked lowest with an HDI of 0.385. HDI for the World on a composite basis was 0.732. Canada’s HDI was 0.936 and the USA’s was 0.921. As will be seen in Chapter 4 of this thesis more nuanced versions of HDI have also been introduced to also capture developmental factors such as inequality.

Sen’s capabilities approach to conceptualizing development as freedom does not, and nor does it purport to provide development practitioners with a magical roadmap to achieving development. In the same way, the R2D as a human right does not provide human rights practitioners with a
definitive legal roadmap to realization of such a right. And although it is important to emphasize the legal aspects of the R2D, at the end of the day its realization is as much a political matter as it is a matter of law, being just as much about power and policy. As a result, accountability in the context of the R2D should also be considered in both a legal and political context. In so far as the R2D is a right to the process of development as illustrated in Sen’s capabilities approach, Sen’s work serves as a useful lens in considering whether the R2D has been or can be realized in situations characterized by power imbalances such as those that were posited as being especially relevant to the R2D, in Art. 5 of the DR2D, “situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination”. Just as the R2D should serve as a lens in considering how to address power imbalances and injustice in such situations once the international community decides to accept political and legal accountability for doing so.

3.4 Summary: Accountability and Development Practice

The genesis of the R2D was rooted in a desire for equity and justice on the part of decolonized peoples, as a human rights offshoot of the NIEO, wherein the R2D had been first and unsuccessfully proposed and promoted as an economic right. Given the demise of NIEO, and the politics that it entailed which regrettably rubbed off on the R2D, it is perhaps a wonder that the concept of the R2D as a human right even made it to the point of being posited as soft law in the UNGA declaration of 1986. Reaching that milestone came at a substantive negotiated cost that is readily visible in comparing the R2D as posited in the final declaration, to what the R2D proponents originally had in mind. The DR2D as posited has significant weaknesses.
First, with respect to a lack of intuitive clarity vis à vis its definition of, and the relationship between, rights-holders and duty-bearers. Right-holders do not include ‘States’, which are better positioned to effectively claim rights under international law than individuals and ‘peoples’, especially when recourse inevitably needs to be political versus legal due to lack of justiciability under the DR2D. And whilst duty-bearers are definitively identified as being States in the context of domestic the R2D obligations, States are vaguely posited as duty-bearers when it comes to identifying States’ obligations concerning the R2D for peoples in other nations. That vagueness with respect to international obligations regarding the R2D, limits the extent to which decolonized peoples can seek justice and equity by claiming access to the process of development from the ‘international community’, which was not even defined under the DR2D to include international organizations such as the World Bank, being a primary developmental instrument of States internationally.

And second, whilst the DR2D is relatively clear in establishing that the R2D is a right to the process of development on paper, that process was not defined and neither was development as a practice, which is a fundamental weakness of the DR2D from an the R2D realizability perspective. This was understandable in 1986 and in the lead up to the R2D declaration, because within the discipline of development itself, conceptualization of a process of development was in an immature state. Fortunately, this has changed, and the work of Amartya Sen provides a conceptual lens through which to consider the R2D in a case study scenario in the next chapter of this thesis, one based on instrumental and constitutive freedoms as depicted under the capabilities approach to development.

The R2D may be poised to take the next explicit step in the transitional process pursuant to which
soft law transitions to hard law, as explained by Abi-Saab\textsuperscript{85}, with efforts underway to posit the R2D with treaty status under a recently proposed Convention, which would serve to explicitly render the R2D to hard law status. This would not arguably be necessary, if it were possible to demonstrate that the R2D has met the test to be considered binding as a matter of customary law. Given the number of times that it has been reaffirmed in UN fora and doctrine, the R2D may be in the early stages of such a soft-to-hard law transition, moving towards being able to meet that test, but as previously discussed such merely rhetorical repetition is, at best, a foundational starting point. Universal and consistent state practice with respect to the domestic and international R2D application is far from being customarily evident, and demonstration of common belief in respect of states’ R2D obligations is also a long way off. Moreover, the R2D’s doctrinal linkages to the R2SD under IL alone, should arguably have already rendered the R2D closer to being regarded as a \textit{jus cogens} principle of IL by association. This is certainly not a widely accepted view, primarily due to the degree of politicization associated with the R2D, the same brand of politicization that led to the DR2D being watered down in its final form. This chapter has questioned the decision to posit the R2D as a distinct human right, versus framing the R2D as an adjunct and amplifier of the R2SD, representing its economic component. As suggested by Salomon\textsuperscript{86}, and as discussed previously, the relationship between the R2D and the R2SD is doctrinally, normatively, and intuitively, an integrated relationship. Such that we ought to regard both in a conflated manner as the \textit{right to self-determined development}\textsuperscript{87}, or more specifically through the lens provided by the thinking of Amartya Sen in this chapter, the right to \textit{the process} of self-determined development.

Irrespective of whether the R2D is eventually deemed binding under customary law or becomes explicitly justiciable as hard law, its realizability will come down to a more normative factor,

\begin{footnotesize}
\begin{itemize}
\item[85] Abi-Saab, supra Chapter 2, note 59.
\item[86] Salomon, supra Chapter 3, note 21.
\item[87] Ibid.
\end{itemize}
\end{footnotesize}
which is acknowledged accountability, if not in a legal context, perhaps more importantly in a political context. Notwithstanding the evolution of the legal status of the R2D under IHRL, will the international community step up and be accountable for realizing the normative values associated with the R2D, those being justice and equity for peoples less fortunate, in many cases so because of the legacies of colonialism and ongoing foreign domination? And what will be the trigger for acceptance of such accountability?

The international community rallied to take a united stand against racial injustice under the apartheid regime in South Africa, in part influenced by thinkers of decolonized nations, such as Jamaica’s Norman Manley, as noted earlier in this paper. In so far as the R2D and the R2SD are results of the thought leadership by decolonized peoples, perhaps the international community needs another acute catalyst to embrace accountability with respect to the R2D. As will be demonstrated in the next chapter, occupied Palestine represents a contemporary example of deprivation with respect to the R2SD, and situation of settler colonization and foreign domination, and arguably apartheid, and is a useful case study to apply what has been discussed thus far regarding the human right to development.
Chapter 4: Occupied Palestine

This purpose of this chapter of the thesis is to examine the extent of and prospects for R2D realization in the oPT, as a case study. At the time when the R2D was emerging intellectually during the 1960s, and evolving politically at the UN in the late 1970s and early 1980s, the peoples of the oPT were descending into a situation of subjugation and containment that can be (at best) be characterized as one of settler colonialization, and (at worst) one of apartheid. A ‘temporary’ occupation of the territories by Israel, that formally commenced in 1967, has long since surpassed any semblance of impermanence. Whereas during a short-lived occupation precipitated by extreme, widespread physical insecurity, deprivation with respect to an occupied peoples’ R2SD might be temporarily justifiable, such deprivation in a protracted occupation of more than fifty-five years certainly is not, especially one that entails an extensive settlement project, as is the case in the oPT. The same brand of colonialism that inspired the emergence and eventual affirmation of the human R2D, is blatantly prevalent and intensifying in the oPT, under the watchful eye of a thus far passive international community, from an IL accountability and political perspective. This irony makes the oPT a fascinating case study in respect of the R2D, which as demonstrated in the previous chapter is integral to the R2SD, reflecting the latter’s economic component.

The first section of the chapter establishes context for the case study by providing an introductory overview of the territories, as well as a historical and contemporary overview of the geo-political situation in Palestine, using Art. 5 of the DR2D as a doctrinal lens in doing so, which also demonstrates the specific relevance of the oPT as a case study in that context of that declaration. It is necessary to understand the history of how domination of the Palestinian people came about, and how such domination has been enabled by certain elements of the international community. The first section concludes with an examination of the significance of the Oslo Accords and Paris Protocol, which served to formalize historical approaches to such domination that existed prior to
their enactment in the first half of 1990s. Although ‘agreed’ almost thirty years ago, they established physical and economic foundations that contemporarily enable containment strategies employed by Israel in the oPT. The next section examines of the chapter examines the state of socio-economic development in the oPT, using Sarah Foy’s thinking with respect to ‘de-development’ as a lens to examine the effects of oPT containment, and Amartya Sen’s capabilities approach to human development as a conceptual lens to relate the situation in the oPT to the process of development, as envisaged under the DR2D. The chapter then integrates findings from the previous two chapters of the thesis, with case study findings regarding the extent of and prospects for R2D realization in the oPT.

4.1 Contextualizing the oPT as a Case Study

4.1.1 Overview of the oPT

Geographically, occupied Palestine consists of two non-contiguous areas, being the West Bank including East Jerusalem (5,655 km²), and the Gaza Strip (365 km²)\(^1\), with populations of 3.19 million and 2.17 million, respectively\(^2\). Almost 45% of the total population of the oPT are refugees registered with the UNRWA\(^3\).

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3 UNRWA IN FIGURES 2020-2021. [https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2021_eng.pdf](https://www.unrwa.org/sites/default/files/content/resources/unrwa_in_figures_2021_eng.pdf)
The West Bank “has been divided by Israel into an archipelago of small islands of densely populated areas”\(^4\) (depicted as Areas A and B in orange in the figure above) disconnected from one another by a 465 km physical separation wall, and a system of 150 Israeli settlements and 128 outposts connected to each other via exclusive Israeli bypass roads\(^5\). In addition, mobile roadblocks and armed patrols, exclusive zoning laws, restricted areas and military exclusion zones\(^6\) serve to further fragment the West Bank. Area C, comprising 61% of the land area of the West Bank (depicted in green above), is under the complete civil and military control of Israel and is essentially off-limits for Palestinian use\(^7\). East Jerusalem has been unilaterally annexed by Israel.

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4 UNGA, supra Chapter 1, note 2 at para 41.
6 UNGA, supra Chapter 1, note 2 at para 41.
7 OCHA, supra Chapter 4, note 5.
(depicted in red above), such annexation being deemed illegal by the UNSC. Politically, the Palestinian Authority (PA) maintains some administrative control over Areas A and B, although Israel controls Area B with respect to security matters. In practice, Israel exercises de facto control over Areas A and B, given that its military regularly patrols those areas to counter perceived challenges to its occupation by Palestinian armed forces.

The Gaza Strip is not governed by the PA, which notionally governs at least parts of the West Bank, Gaza being under the de facto political control of Hamas, a political party founded in 1987 that some countries including Canada have bilaterally designated as a terrorist organization. Gaza has been the subject of a comprehensive land, sea, and air blockade by Israel since 2007, coinciding with the emergence of Hamas.

Despite such geographic fragmentation and political splintering, Palestine was accorded non-member observer State status by the UNGA through resolution in 2012, in which members reaffirmed the right of the Palestinian people to self-determination and to independence in their State of Palestine on the Palestinian territory occupied since 1967. Notwithstanding this UNGA acknowledgment of an aspirant fully independent State of Palestine, the legal status of the oPT under international law remains that of occupied territory. The oPT has been occupied by Israel since 1967, which means that IHL, and specifically the Fourth Geneva Convention, is fully applicable. This legal determination has been affirmed by the Security Council on a consistent and regular basis, starting at the outset of the occupation in 1967, and restated more recently in

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8 As cited in Chapter 1, note 2, The Security Council has stated that Israel’s annexation of East Jerusalem is contrary to international law, and that East Jerusalem is deemed to be part of the Occupied Palestinian Territory, pursuant to Security Council resolution 476 (1980) and resolution 478 (1980).
December 2016\textsuperscript{11}. Whether or not such occupation ought to be contemporarily viewed as legal is a matter that will be discussed later in this chapter. Irrespective of one’s perspective on that matter, the laws of occupation under IHL have evolved to the extent that whilst temporary suspension of a peoples’ right to self-determination may be justifiable at the very outset of an occupation triggered by acute security concerns, as a matter of IHL an occupying state “has the duty to refrain from any forcible action which deprives peoples … of their right to self-determination and freedom and independence”\textsuperscript{12}. Palestinians in the oPT are entitled to all the protections of IL and IHL, including \textit{inter alia} the R2SD, especially given the 55-year prolongation of that occupation, which can hardly be considered temporary.

The peoples of the oPT as refugee subjects, recalling that almost half of that population have refugee status, and as subjects of foreign occupation, have been marginalized and neglected by the international community, and unjustly treated by Israel, both historically and contemporarily\textsuperscript{13}. As noted by Richard Falk: “The clarity of international law and morality, as pertaining to Palestinian refugees, is beyond any serious question. It needs to be appreciated that the obstacles to implementation are exclusively political – the resistance of Israel and the unwillingness of the international community, especially the Western liberal democracies, to exert significant pressure in support of these Palestinian refugee rights”\textsuperscript{14}. Falk’s point is that such (mis)treatment is due to politically motivated obstacles as opposed to obstacles related to a lack of legal clarity, an assertion

\textsuperscript{11} UNGA, supra Chapter 3, note 52 at para 25.
\textsuperscript{14} Richard Falk, Preface to “Right of Return”, \textit{Joint Parliamentary Middle East Councils Commission of Enquiry - Palestinian Refugees} (London: Labour Middle East Council, Conservative Middle East Council, Liberal Democrat Middle East Council, March 2001) at 6. \url{https://prrn.mcgill.ca/research/papers/returnbook.pdf}
that is pertinent to the subject matter of this thesis. Many of the peoples of the oPT are refugees whose lived experience, and liminal status as such, has been influenced by politicization. The politicization of the R2D as discussed in Chapter 3, has been a key headwind with respect to the R2D realization. In considering realization of the R2D in the oPT, therefore, one is considering the application of a politicized human right, in respect of a population of that is at the same time subject to the ill effects of politicization in respect of their treatment as refugees under international law.

Through an exhaustive examination of key legal texts and historical records pertaining to the question of Palestinian more broadly, Ardi Imseis identifies a condition and structural deformity in the application of IL in that context, the effects of which have afflicted the Palestinian people. A condition and deformity that Imseis refers to as ‘international legal subalternity’, stemming from protracted (mis)management of their lingering question at the United Nations\textsuperscript{15}. He concludes:

\textquotedblleft The principal attribute of the ILS condition is that those disenfranchised by it are continually presented with the promise of a more just and equitable future though the application of international law, bolstered by the unrivaled political legitimacy of the purveyor of that promise, the organized international community of states as represented at and by the UN. Yet despite the lengths to which such groups go in reliance on this promise, its realization is perpetually kept out of reach in one form or another through the actions of the very same international community of states which all too often either do not pay sufficient heed to the full array of international law’s precepts, abuse them or completely overlook them in practice.\textsuperscript{16}\textquotedblright

Imseis’s assertion is that despite the presence of ample binding international law that ought to be available to mitigate the plight of Palestinians, such laws are applied selectively, or not at all, pursuant to the non-legal, and most often political, objectives of influential actors of the international community, such as the USA, acting and/or failing to act, in accordance with such laws. At the risk of over-simplifying the implications his conclusion, the present author notes that

\textsuperscript{15} Ardi Imseis, \textit{The United Nations and the Question of Palestine: A Study in International Legal Subalternity} at 201. Dissertation submitted for the degree of Doctor of Philosophy, University of Cambridge, September 2021. \url{https://www.repository.cam.ac.uk/handle/1810/290775}

\textsuperscript{16} Ibid.
such a deformity would not be as likely to persist if such international law, coupled with UN constructs, entailed sufficient mechanisms to ensure accountability. The reader will recall that in Chapter 3 it was demonstrated that the DR2D was watered down as it was negotiated, inlaying ambiguity with respect to obligations on the part of the international community vis à vis realization of the R2D. The result was a lack of mechanisms to ensure R2D accountability on the part of the international community. In considering the R2D in the context of the oPT, a reasonable hypothesis, drawing upon Imseis’ observations, is that application of the R2D in the oPT is, at best, likely selective or, at worst, completely overlooked in that case. This is true especially given that limiting accountability of the international community in positing the DR2D in 1986, was an obvious objective of international actors such as the USA.

4.1.2 *Historical and Contemporary Linkages to the DR2D*

The reader will recall from discussion in Chapter 2, that the intellectual emergence of the R2D as an economic and then human right was substantively influenced by representatives of nascent UN states that were at the same time emerging from colonialism. It is paradoxical that when the R2D was emerging as a human right, the oPT was itself descending into a situation that is at best a contemporary example of settler colonization, versus temporary legal occupation, and at worst a contemporary case of apartheid. As Francesca Albanese notes in her inaugural report as Special Rapporteur for human rights in occupied Palestine:

“In a tragic irony, Palestinians have experienced an entrenching settler-colonialism at a moment in history when the rest of the world was slowly progressing towards decolonization. Worldwide, national resistance movements, symbolically enabled by the United Nations, challenged their colonizers and succeeded in ending their rule. However, in the occupied Palestinian territory, including East Jerusalem Israeli expansionism consolidated into an apartheid regime through the longest occupation in modern history”\(^{17}\).

This irony ought to be contextually considered as one embarks on examination of R2D realization

\(^{17}\) UNGA, supra Chapter 3, note 53 at para 42.
in the oPT, as a case study.

In positing the DR2D, the UNGA chose, in Article 5, to explicitly reaffirm commitments to taking steps to eliminate violations of the human rights of peoples affected by situations such as those resulting from apartheid, colonialism, foreign domination, and occupation, as well as the refusal to recognize the right of peoples to self-determination:

“States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.”\(^\text{18}\)

States were ostensibly recognizing that such violations could inhibit realization of the R2D, albeit this is not explicitly stated in the DR2D, a bright line that should have been drawn when Art. 5 was posited. In contrast, the 1984 draft version of the DR2D, discussed earlier in this paper, had included a direct statement that the elimination of such violations would be “propitious to the development of a great part of mankind”\(^\text{19}\). That version also included ‘neo-colonialism’ as a specific situational example, and the word ‘apartheid’ was underscored\(^\text{20}\). It is unclear whether states had explicitly pointed to the situation in the oPT when negotiating inclusion of Art. 5 in the 1986 final DR2D text, but we do know from previous discussion of Bandung that Palestinians were front of mind for delegates at that milestone event in the process of decolonization\(^\text{21}\). It would seem likely that the situation in the oPT at least implicitly influenced the inclusion of Art. 5 in the DR2D at the insistence of the R2D proponents. In any case, in so far as the indicative situations referenced in that text have historically applied and contemporarily apply to the oPT, Art. 5 of the DR2D provides a useful reference in contextually framing the situation in the oPT as a case study.

\(^{18}\) UNGA, supra Chapter 2, note 1, art. 5.

\(^{19}\) OCHR, supra Chapter 3, note 10 at Annex II, para 8.

\(^{20}\) Ibid.

\(^{21}\) Okafor, supra Chapter 2, note 26.
4.1.2.1 Foreign Domination and Aggression

“The notion that statelessness is primarily a Jewish question was a pretext used by all governments who tried to settle the problem by ignoring it … After the war it turned out that the Jewish question, which was considered the only insoluble one, was indeed solved – namely by means of a colonized and then conquered territory – but this solved neither the problem of the minorities nor the stateless. On the contrary, like virtually all other events of our century, the solution of the Jewish question merely produced a new category of refugees, the Arabs, thereby increasing the number of the stateless by another 700,000 to 800,000 people.”\(^{22}\)

In the immediate aftermath of the World War II, the better part of one million indigenous Palestinians were forcibly expelled from their historical homeland, subjected to extreme aggression, and rendered stateless, to make room for the creation of Israel as a nation state. As suggested by Arendt in 1951, who herself was a European refugee and Zionist, a supposed solution to address statelessness in respect of European Jewish refugees, merely created a new population of stateless Palestinian Arabs. It was in the context of examining the effects of her own statelessness, along with that of peoples such as Palestinians, that Arendt coined the oft-cited concept of the right to have rights:

“We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.”\(^{23}\)

Arendt’s observation was that the idea that the Rights of Man were somehow inalienable was not valid in her experience, and that being reduced to a ‘mere human’ exposed the reality that being human was not enough to guarantee access to the 'right to have rights’\(^{24}\). Her assertion, taking into account her lifelong body of work, was that possessing the right to have rights means having the right to exercise collective agency, to live in a community where one has the right to act and speak,

\(^{23}\) Ibid at 388.
\(^{24}\) In all of Arendt’s voluminous discourse she only explicitly referenced the phrase “right to have rights” once, yet it is possible to identify implicit incorporation of the concept itself throughout her body of work. Discussed in Norm Kimber, *Citizenship-Based Durable Solutions: Hannah Arendt Revisited*, LSE Thesis 2020 at 11-12. [https://www.compas.ox.ac.uk/wp-content/uploads/LSE-Dissertation-2020-Norm-Kimber.pdf](https://www.compas.ox.ac.uk/wp-content/uploads/LSE-Dissertation-2020-Norm-Kimber.pdf)
being seen and heard, as part of that community\textsuperscript{25}. This was a right that was taken away from Palestinians when they were rendered stateless in 1948, ironically in the same year that the UDHR was proclaimed, and one that predates, but closely resembles the R2SD.

One prominent, traditional Israeli historiography of the events of 1947-48, depicted by Howard Sachar, suggests that Palestinian displacement was a direct result of, and defensively justifiable, because of the Arab Israeli War\textsuperscript{26}. Such historiography at the same time attributes the genesis of the idea of Palestinian displacement to establish a Jewish state in the historical homeland of the Jewish people to Thomas Herzl\textsuperscript{27}, a founding father of Zionism, who in 1895 foretold of such an event:

\begin{quote}
“We must expropriate gently the private property on the estates assigned to us. We shall try to spirit away the penniless population across the border by procuring employment for it in transit countries, while denying it employment in our own country. The property owners will come over to our side. Both the process of expropriation and the removal of the poor must be carried out discreetly and circumspectly.”\textsuperscript{28}
\end{quote}

As early as 1919, popular Western discourse proclaimed that Palestine was rightfully and biblically destined to become an exclusively Jewish state, lauding the support of Britain in setting the stage for such a destiny through the Balfour Declaration\textsuperscript{29}. That traditional historiography clearly entails inherent temporal contradictions.

Critical Israeli historiography notes that by the early twentieth century “most of the leaders of the Zionist movement associated this national revival with the colonization of Palestine”\textsuperscript{30}. Benny Morris, a leading figure in the so-called ‘New Historians’ movement in Israel, based on extensive

\textsuperscript{25} Ibid.
\textsuperscript{27} Ibid.
discoursal analysis concerning Zionism, concluded that that the expulsion was not explicitly pre-
planned, but that it “was inevitable and inbuilt into Zionism – because it sought to transform a land
which was ‘Arab’ into a ‘Jewish’ state and a Jewish state could not have arisen without a major
displacement of Arab population … a hostile Arab majority or large minority could not remain in
place if a Jewish state was to arise or safely endure”\(^{31}\). Another Israeli new historian, Ilan Pappe,
has more recently asserted that to bring this colonization “project to fruition, the Zionist thinkers
claimed the biblical territory and recreated, indeed reinvented, it as the cradle of their new
nationalist movement. As they saw it, Palestine was occupied by ‘strangers’ and had to be
repossessed. ‘Strangers’ here meant everyone not Jewish who had been living in Palestine since
the Roman period”\(^ {32}\). Such Israeli historiographers differ somewhat in their views regarding the
extent to which the Palestinian expulsion was part of a master plan but agree with respect to its
inevitability.

The ‘removal of the poor’ would not in the end be carried out discreetly and circumspectly, as
Herzl had foreseen. Modern Palestinian historiography points to Plan Dalet, a brutally conceived
and definitive solution designed to carry out Palestinian expulsion, which was ordered by Ben
Gurion and implemented by British-trained paramilitary forces commencing commenced in 1947,
arguably precipitating the 1948 war (and not the other way around):

> “These operations can be carried out in the following manner: either by destroying villages
(by setting fire to them, by blowing them up, and by planting mines in their rubble), and
especially those population centres that are difficult to control permanently; or by mounting
combing and control operations according to the following guidelines: encirclement of the
villages, conducting a search inside them … in case of resistance the armed forces must be
wiped out and the population expelled outside the borders of the state.”\(^ {33}\)

\(^{31}\) Benny Morris, *The Birth of the Palestinian Refugee Problem Revisited*, 2nd ed, Cambridge Middle East Studies
(Cambridge: Cambridge University Press, 2003) at 60.

\(^{32}\) Op cit at 11.

\(^{33}\) Walid Khalidi, “Plan Dalet: Master Plan for the Conquest of Palestine”, *Journal of Palestine Studies*, 18/69,
Autumn 1988, at 4-20.
Herzl’s original vision of expropriation and removal was realized, but likely not as he might have imagined, having been subsumed by the vision of what Arendt considered to be revisionist Zionists such as Ben Gurion. This revisionism was motivated by opportunism that was inspired by the logic of settler colonialism, based on an assertion that the taking of Palestinian lands was justified because they had been the historical homeland of the Jewish people, and that Arab occupants had never had a particular attachment to those lands\textsuperscript{34}. The international community, led by Britain and the USA, enabled such revision (see below), and stood by silently as such violent foreign aggression took place. Such action foreshadowed future international community appeasement with respect to flagrant violations by Israel of IL with respect to Palestine and the rights of Palestinians.

The Balfour Declaration of 1917 and the Mandate for Palestine as granted to colonial Britain by the League of Nations in 1922, had played a key role in an ongoing planned continuum that led to the exclusion of Palestinians and colonization of Palestine:

\begin{quote}
“the Mandatory should be responsible for putting into effect the declaration originally made on November 2nd, 1917, by the Government of His Britannic Majesty, and adopted by the said Powers, in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country”\textsuperscript{35}.
\end{quote}

It may be that the extreme aggression instigated by Ben Gurion in 1947 did not reflect what Balfour and other architects of the Mandate would have had in mind, hopefully at least, but they were nonetheless enablers. It was clear in the declared Mandate as posited that national aspirations of the Jewish people were to take precedence over those of others, albeit they should not prejudice,


\textsuperscript{35} League of Nations, Mandate for Palestine, Nineteenth Session of the Council, Thirteenth Meeting, Held at St James’ Palace, London on July 24th, 1922 at Preamble. \textit{Emphasis added.} https://unispal.un.org/UNISPAL.NSF/0/2FCA2C68106F11AB05256BCF007BF3CB
the ‘civil and religious rights of non-Jewish communities’ in Palestine. Indigenous Palestinian Arabs were apparently not considered worthy of national treatment and were not even worthy of being explicitly mentioned, in a manner reminiscent of discovery doctrine that formed the basis of marginalization and abuse of indigenous peoples the world over in the heyday of British colonialism. This silence is not surprising given that the Mandate was conceived by colonial British officials, that had seemingly not yet realized that their colonial empire was destined to collapse.

The Mandate itself arguably represents phase one of the foreign domination of the Palestinians to make way for the establishment of Israel, inspired by colonialism and enabled by colonizers. Plan Dalet was simply a more brutal than hopefully envisaged step in a predetermined continuum that had been conceived by colonial Britain and endorsed by other colonial powers that dominated the international community at that time. The same brand of colonialism that, as discussed earlier in this paper, was the subject of the decolonization movement that inspired the emergence of human rights doctrine, such as that posited in the DR2D.

Fast forwarding to the aftermath of the Six Day War in 1967, stateless Palestinians taking refuge in present day West Bank, including East Jerusalem, and Gaza, would eventually be subjected to direct Israeli domination, under the guise of supposed occupation. Whether domination of peoples in the Palestinian territories constitutes ‘foreign’ versus ‘domestic’ domination is today a matter of perspective, and a subject of considerable debate that is beyond the scope of this paper. Palestinians have long been dominated by exogenous powers, and from the perspective of the present author, Arab inhabitants of the oPT are the subject of ‘foreign’ domination by Israel contemporarily, in summary correlating their situation to those referenced in Art. 5 of the DR2D given the extent of foreign domination and aggression alone.
4.1.2.2 Occupation versus Settler Colonialism

Israel’s direct domination of ‘occupied’ Palestine commenced fifty-five years ago in the aftermath of Six Day War of 1967. As Lynk noted in 2017, when the occupation was ‘only’ thirteen years old, the Security Council adopted resolution 476 in 1980, reaffirming an overriding necessity to end the prolonged occupation of Arab territories by Israel, because it was already “sufficiently alarmed by the duration and severity of the occupation and Israel’s defiance of prior resolutions”\textsuperscript{36}. That resolution was forty-two years ago, and despite numerous explicit UN acknowledgments that Israel has been in breach of international law as an occupant since then\textsuperscript{37}, including in a 2016 Security Council resolution “condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, \textit{inter alia}, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians”\textsuperscript{38}, there are no indications that Israel has any intention of bringing the occupation to an end. Lynk asserts that while a “lawful occupant approach” may have been an “appropriate diplomatic and legal portrayal of the occupation in its early years, it has since become wholly inadequate … as an accurate legal characterization of what the occupation has become”\textsuperscript{39}. The prevailing occupation narrative became a convenient means for the international community to appease Israeli domination of Palestinians in the territories, domination planned well prior to the overt events that allegedly triggered that occupation.

From a practical and historical perspective, the ‘occupation’ has become a contemporary example

\textsuperscript{36} UNGA, supra Chapter 3, note 52 at para 15.
\textsuperscript{37} Ibid at para 18.
\textsuperscript{38} Security Resolution 2334 (2016), Adopted by the Security Council at its 7853rd meeting, on 23 December 2016 at Preamble. \url{https://www.un.org/webcast/pdfs/SRES2334-2016.pdf}
\textsuperscript{39} Lynk, supra Chapter 4, note 36 at para 18.
of settler colonialism, as an extension of a systematic series of events inspired by Herzl’s vision of 1895, enabled by the 1922 Mandate administered by colonial Britain, and eventually exacerbated by implementation of Plan Dalet in 1947. The 1967 war simply provided an opportunity to recast an ongoing colonial project as an occupation. More than fifty-six years later, this is an occupation that entails an accelerating illegal settlement project, having gone on for so long with increasing intensity that it is difficult to accept that it is or ever was meant to be temporary. In the words of the Security Council itself in 2016: “the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law”\(^\text{40}\). Note the use of the phrase ‘flagrant violation’ as it appears in Art. 5 of the DR2D.

In his 2017 report, Lynk compellingly describes a fact pattern and highlights legal jurisprudence that would most likely support a finding that the occupation is illegal and thereby likely constitutes a breach of the Geneva Conventions\(^\text{41}\). He recommended that the UNGA commission a study on the legality of the occupation, also recommending consideration of the advantages of seeking an advisory opinion from the ICJ on that same question\(^\text{42}\). It has taken five years, but the UNGA has finally acted upon this recommendation, in late 2022, requesting that the ICJ render an advisory opinion on “the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967”\(^\text{43}\) and to “determine how this affects the legal status of the occupation, and what are the legal consequences that arise for all States and the United

\(^{40}\) UNSC, supra Chapter 4, note 38 at para 1. *Emphasis added.*

\(^{41}\) UNGA, supra Chapter 3, note 52 at 7/22.

\(^{42}\) Ibid at 22/22.

\(^{43}\) UNGA, Resolution 77/247: Israeli practices and settlement activities affecting the rights of the Palestinian people and other Arabs of the occupied territories, UN Doc A/RES/77/247, 30 December 2022 at para 18(a).
Nations from this status\textsuperscript{44} and \textsuperscript{45}. Pursuing such a path to begin addressing the problem represents ‘low hanging fruit’ that, with cautious optimism, signals that international community may be sincerely interested in holding Israel at least partly accountable for its transgressions under international law. If, that is, the ICJ confirms Lynk’s findings, and if the international community decides to hold itself accountable for observing and enforcing self-prescribed laws, accordingly, commencing to mitigate the deformity referred to by Imseis\textsuperscript{46} with respect to the application of laws that community has itself posited and claims to hold dear.

Even if one were to accept that the situation in ‘occupied’ Palestine is a bona fide occupation, and especially if one accepts that ‘occupation’ of the Territories is illegal and more akin to settler colonialism, one ought to inherently accept that the situation in the oPT represents a situation envisaged by proponents of Art. 5 of the DR2D. In a more recent report, posited by Lynk in 2022, he doctrinally demonstrates that:

“the political system of entrenched rule in the occupied Palestinian territory which endows one racial-national-ethnic group with substantial rights, benefits and privileges while intentionally subjecting another group to live behind walls, checkpoints and under a permanent military rule “sans droits, sans égalité, sans dignité et sans liberté” satisfies the prevailing evidentiary standard for the existence of apartheid”\textsuperscript{47}.

Human Rights Watch\textsuperscript{48}, Amnesty International\textsuperscript{49}, and B’Tselem\textsuperscript{50}, among other credible observers, also assert that the situation in the oPT is one of apartheid. Art. 5 of the DR2D explicitly refers to

\textsuperscript{44} Ibid at para 18(b).
\textsuperscript{45} A useful overview of this development is available is provided by The Diakonia International Humanitarian Law Centre available at https://www.diakonia.se/ihl/news/qa-icj-advisory-opinion-iotp/
\textsuperscript{46} Imseis, supra Chapter 4, note 15.
\textsuperscript{47} UNGA, supra Chapter 3, note 53 at para 55.
\textsuperscript{50} B’Tselem, The Israeli Information Centre for Human Rights in Occupied Palestine, “A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid” (January 12, 2021). https://www.btselem.org/publications/fulltext/202101_this_is_apartheid
situations of apartheid, which represents another posited correlation between the situation in Palestine and the R2D.

Albanese in her first report as special rapporteur has called for a paradigm change, with respect to how the international community views and deals with the situation in Palestine, summing up that situation and pointing to a way forward as follows:

“For more than 55 years, the Israeli military occupation has prevented the realization of the Palestinian right to self-determination attempting to “de-Palestinianize” (i.e., diminish the presence, identity and resilience of Palestinians in) the occupied Palestinian territory, attempting to transform most of it into a permanent extension of Israeli metropolitan territory, with as few Palestinians as possible. This behaviour, reminiscent of a colonial past that the international community firmly rejected decades ago, has become more entrenched with the acquiescence of the international community and failure to hold Israel accountable … This must change; a paradigm shift is needed as the only possible way to overcome this situation by opting for a solution premised on respect for history and international law. This can only be resolved by respecting the cardinal norm of peoples’ right to self-determination and the recognition of the absolute illegality of the settler-colonialism and apartheid that the prolonged Israeli occupation has imposed on the Palestinians in the occupied Palestinian territory … A prolonged occupation maintained for ostensible “security reasons” disguising Israeli settler-colonial intentions to extinguish Palestinian people’s right of self-determination while acquiring their receding territory as its own, as explicitly indicated by Israeli political figures, is something that the international community can no longer tolerate.”

In essence, Albanese proposes renewed and concentrated action with respect to Israel’s failure to observe the R2SD, also asserting that the very existence of the occupation entails an unlawful use of force and therefore can be seen as an act of aggression. Israel clearly has no intention of voluntarily observing its legal obligations with respect to the R2SD, any more than it can be expected to take action to end the illegal occupation without being compelled to take such action. Therefore, such a paradigm shift will require that the international community enforce the laws that it has instituted, acting upon its own legal accountability to do so.

4.1.2.3 Doctrinal and Conceptual Correlation Between the R2D and the oPT

The preceding assessment of the historical and contemporary situation in ‘occupied’ Palestine

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51 UNGA, supra Chapter 3, note 53 at paras 67, 70 and 71.
52 Ibid at 71.
demonstrates both doctrinal and conceptual correlation between the R2D and that situation. In his initial report as special rapporteur in 2016, Lynk asserted that “Israel’s occupation … has been seriously deficient in its respect for the legal principles and obligations embedded in the right to development”\(^53\). That report and the opportunity to examine such correlation was the inspiration for this present thesis.

Doctrinally, the indicative situations posited in Art. 5 of the DR2D include multiple reflections of the situation in the oPT. Irrespective of whether proponents of the inclusion of Art. 5 had specifically contemplated the oPT during DR2D negotiations, it is almost as if Art. 5 was drafted with ‘occupied’ Palestine as its subject. To the extent that the situation in the territories is one of ‘occupation’, legal or illegal, there is a clear linkage to Art. 5 as posited. There is a compelling argument that the situation in the oPT represents a version of colonialism, another situation explicitly referenced in Art. 5, especially given the settler component of Israeli presence, its duration, and its semblance of permanence. If one also considers historical expressions of intent with respect to Palestinian land and resource expropriation, as well as Arabic people expulsion, coupled with colonial British and League of Nations enablement, the situation in the oPT can be considered the result of a planned neo-colonial continuum. There is also a direct linkage to Art. 5 of the DR2D based on the situation in the oPT representing one that the ICJ would quite possibly deem to be apartheid. In any event, there should be no doubt that the situation in the oPT is one of foreign domination and aggression, the overarching theme of Art. 5, especially given the brutal way expulsion was initially carried out in 1948, the way the occupation materialized in 1967, and how it has been continued by Israel over the 55 years since.

Conceptually, as noted in Chapter 3 of this thesis, accountability of the international community

\(^53\) UNGA, supra Chapter 1, note 2 at 24/26.
with respect to the R2D realization, as well as accountability of specific states, regarding the R2D realization in other states, is intentionally ambiguous in the DR2D. Accountability with respect to observance and enforcement of international laws in respect of the oPT is also an issue, including inter alia the R2SD, as noted in the preceding sections of this Chapter. Both the R2D and the situation in the oPT are subject to a considerable degree of politicization. These parallel conceptual circumstances serve to correlate challenges with respect to both IL observance in the oPT, more generally, and realization of the R2D, more specifically. Moreover, a common theme with respect to the R2D and the situation in the oPT is the centrality of the R2SD. As demonstrated in Chapter 3, the R2D is an integral component of the R2SD, and non-observance of the R2SD in the oPT is of primary concern from an overall IL perspective. Correlation between the R2D and the situation in the oPT is multi-faceted and, moreover, according to the present author, plain to see.

4.1.3 Oslo Accords and Paris Protocol – ‘Legalizing’ Domination

A comprehensive analysis of the Oslo ‘peace’ agreements of 1993 and 1994, together referred to as the Oslo Accords, as well as the complementary Paris ‘economic’ protocol of 1994/5, is beyond the scope of this paper. However, a selective introduction is necessary to contextualize discussion of socio-economic development in the oPT, because these mechanisms have set the stage necessary to enable Israel’s domination and containment of the Palestinian people from a physical and security perspective, as well as Palestinian leadership from an economic policy bandwidth perspective, in a sense ‘legalizing’ or at least ‘sanctioning’ that domination.

Oslo triggered a so-called political peace process that only lasted until the second intifada in 2000, but even today influences international policy considerations regarding the oPT. From a governance perspective, the Oslo Accords gave rise to the creation of the PA in 1994, which would effectively replace the PLO as the governing authority of the oPT, also representing the oPT in
future Palestinian-Israeli negotiations. Oslo also laid the groundwork for the geographical, demographic, and eventual economic fragmentation of the West Bank into three areas of control (depicted as the beginning of this chapter), or enclaves, known as Areas A, B and C\textsuperscript{54}. As previously described, Area C is under full Israeli civil and security control, is populated by some 500,000 Israeli settlers and anywhere between 180,000 to 300,000 Palestinians (only capturing a fraction of the Palestinian population of the West Bank, yet 62% of its landmass), and mainly lies in areas of abundant natural resources and arable lands\textsuperscript{55}. Area C fully surrounds Areas A and B, demarcated by growing numbers of Israeli settlements and military infrastructures\textsuperscript{56}, as well as the containment wall, which together are strategically located to reinforce Israeli control, supported economically by harvesting of Palestinian natural resources, utilizing cheap Palestinian labour\textsuperscript{57}. This arrangement disrupts “the natural, spatial, demographic, social and economic continuity among the West Bank’s towns and villages as well as between the West Bank, Gaza Strip and East Jerusalem”\textsuperscript{58}, and is reminiscent of colonial border creation schemes of ‘yesteryear’. These contribute to, and arguably enable, denial of the Palestinian right to self-determination, as well as the closely associated right to development.

The Paris Protocol of 1994/5, or Protocol on Economic Relations between the Government of the State of Israel and the PLO\textsuperscript{59}, the latter then representing the Palestinian people, serves as an

\textsuperscript{54} Area A consists of 55% of the population and accounts for 18% of the land area of the West Bank and is under PA civil and security control. Area B is under PA civil control and Israeli security control, accounting for 41% of the population and 20% of the land area of the territory. Area C accounts for only 5% of the population, but 62% of the territory from a land mass perspective and is under full Israeli control. Source immediately below.


\textsuperscript{56} Ibid.

\textsuperscript{57} Ibid.

\textsuperscript{58} Ibid.

economic annex of the Oslo Accords, formalizing Israel’s ongoing economic domination the economy of the oPT. The Protocol established a customs union between the oPT and Israel, obliging the PA to “formulate trade policy and tax system in accordance with the Israeli system, which is more appropriate for an economically developed state than for a de-developed and colonized economy”\(^{60}\), granting Israel “exclusive power to shape the general macroeconomic framework in the oPT [including] monetary policies, trade, fiscal revenues, industrial zoning and agricultural planning”\(^{61}\). Another option that was considered but was in the end explicitly rejected by Israel and implicitly rejected by states such as the USA, was a free trade agreement, which would have entailed a greater degree of Palestinian sovereignty and, most importantly, a greater degree economic autonomy. The customs union approach allowed Israel to continue to dominate the oPT economy, much as it had prior to the Protocol\(^{62}\), on a more formalized basis. In a critical assessment of the Protocol by B’Tselem, it is asserted that this “kind of [customs union] relationship – unlike economic separation or establishment of a free-trade area – was preferable to Israel, which did not want to establish an economic border with the Palestinian Authority, an act that would give a clear flavor of sovereignty and create a binding precedent. The relations established in the Paris Protocol emphasized the disparity in power that had existed between the two sides from the start”\(^{63}\), commencing with the onset of occupation in 1967.

Under the Protocol, pre-1994 economic domination of the oPT by Israel was in effect ‘legalized’, with practical economic controls being formalized in a referential agreement that had been

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60 Mandy Turner, “Peacebuilding as Counterinsurgency in the Occupied Territory”, *Review of International Studies* 41 (1) at 73-98.
61 Tariq Dana, supra Chapter 4, note 55.
62 or analysis of the pre-Oslo economic management framework pre-Oslo, see Roberta Coles, “Economic Development in the Occupied Territories”, *American-Arab Affairs*, Vol. 25 (Summer 1988) at 75-85. [https://epublications.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1152&context=socs_fac](https://epublications.marquette.edu/cgi/viewcontent.cgi?referer=https://www.google.ca/&httpsredir=1&article=1152&context=socs_fac)
endorsed by factions of the international community, led by the USA. With respect to fiscal management, Israel is entitled to collect customs duties, VAT and other taxes, and revenues on imports from or via ports and borders controlled by Israel, as well as income taxes from Palestinian workers in Israel. The preceding revenues notionally account for about two thirds of the PA budget, when Israel decides to pass them on; such transfers can and have been used as a negotiating leverage by Israel in respect of other aspects of the oPT ‘national’ policy formulation and foreign policy. When Israel decides to withhold such remittances, this ties the PA’s hands as a governing authority “severely undermining the functioning of public services in the West Bank and Gaza Strip” and the tenuous nature of such revenue flows thwarts effective ongoing economic planning.

Israel also directly controls the oPT’s access to international markets for inward and outward trade purposes, maintaining effective customs control of oPT economic borders, in addition to transportation corridors that are practically necessary to access such markets. Such controls also inhibit potential for inward flows of foreign investment that might otherwise fuel economic growth, to the extent that they prevent the PA from creating an attractive foreign investment climate. In short, the Paris Protocol restricts the oPT’s right to self-determined economic development, depriving the oPT of economic facility freedoms as described by Amartya Sen, and rendering the oPT incapable of engaging in a systematic process of development.

4.2 (De)Development in the oPT: The Impact of Israeli Containment Strategies

Occupation and settler colonialization of the oPT is achieved and maintained through two interrelated strategies of containment, which are enabled by the Oslo Accords and the Paris Protocol.

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64 Tariq Dana, supra Chapter 4, note 55.
65 Ibid Chapter 4, note 63.
66 Sen, supra Chapter 3, note 71.
respectively. Physical containment is overt and readily visible in the West Bank, characterized by the Wall itself, but even more ominously and intrusively by the extensive network of settlements, which appear to represent fenceposts for future extension of the Wall. Settlement infrastructure is supported by road networks exclusively designated for the use of Israeli citizens, and roving military patrols that disrupt Palestine life in all areas of the West Bank. These mechanisms, together with the Wall, form a vast and complex web of physical containment, one that is arguably enabled by the geographically fragmenting Area scheme formalized under the Oslo Accords, as discussed previously. Gaza has been physically contained pursuant to a blockade since 2007, taking on the appearance of an open air prison. A less overt but equally detrimental strategy of containment in respect of the oPT relates to political economy, manifest in repressive policy formulation and implementation constraints that are explicitly enabled by mechanisms formalized under the Paris Protocol, as discussed in the previous section of the thesis.

This section of the chapter draws upon the concept of (de)development, as suggested by Sarah Roy, to characterize the impact of Israel’s strategies of containment on, or in effect strangulation of, development in the oPT. It then relates Sen’s thinking with respect to the capabilities approach to development, as a way of interpreting what the R2D should mean in terms of being a right to a self-determined process of development, to the situation in the oPT. Strategies of containment that reinforce occupation and settler colonization of the oPT by Israel, ultimately thwart realization of that inalienable right.

4.2.1 De-Development as a Function of Occupation and Settler Colonialism

In a 2021 article, Leila Farsakh presents a literature review of discourse documenting the political economy of Palestine spanning fifty-years, concluding that “the settler-colonial paradigm is the
most useful analytic for understanding the Palestinian economic predicament.”67 Within that study, she identifies the work of Sarah Roy as being seminal, in which Roy coined the term “de-development” in 1987, prior to the Oslo Accords of 1993, to explain the process of Palestinian “pauperization” under conditions of the oPT colonialization by Israel.68 In later works in 1999 and 2016, post-Oslo, Roy describes settler colonial de-development in more detail, which she characterizes as a process of expropriation, integration, and deinstitutionalization, noting that post-Oslo, the process of de-development has accelerated (just as the process of colonization has accelerated). The resulting economic ‘enclavization’ of the oPT through closure, or the ‘sealing off’ of the territories from Israel, other external markets, and from each other, has “proved extremely damaging to the Palestinian economy”, such “partition and bifurcation” exhibiting “striking parallels to its political counterpart, Bantustanization.”69 In other words, de-development entails the disarticulation and destruction of a native economy by a settler-colonial power to prevent the development of an independent indigenous existence.70 It is a process that entails displacing the Palestinians from their land by various regulatory and economic mechanisms, rendering them dependent on Israel for employment and access to the outside world, while simultaneously stifling any possibility for sustainable indigenous economic production.71

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71 Ibid.

72 Farsakh, supra Chapter 4, note 67.

73 Ibid.
De-development is the antithesis of the process of development envisaged in the DR2D\textsuperscript{74}, and suggested by Sen’s capabilities approach. Roy has been studying the de-development of the oPT since the mid-1980s and most recently in 2014 summarizes the situation well:

“The constraints now facing the Palestinian people are formidable, among them: a fragmented geography characterized by the separation and isolation of Gaza from the West Bank and Israel; an internally cantonized and discontinuous West Bank; the continued expansion of Israeli settlements and their infrastructure, which further splinter and truncate Palestinian localities; an isolated East Jerusalem, which remains inaccessible to the overwhelming majority of Palestinians both inside and outside the occupied territories; no control over territorial borders; the existence of two internally opposed governing authorities, each incapable of ending the occupation; the continued loss of crucial economic resources, particularly land, water and a skilled labour force; the virtual destruction of normal – let alone free – trade, especially in Gaza; diminishing quality of, and access to, education and healthcare services; deepening restrictions on the movement of people; and an unresolved and worsening refugee issue, especially in light of the Syrian crisis”\textsuperscript{75}.

As opposed to meeting its obligations under the DR2D, Israel itself has taken continuous steps to thwart the right of Palestinians in the oPT to the process of development. The PA is ostensibly incapable of meeting such obligations, lacking resources, competency and sufficient policy making autonomy. And the international community has, apart from providing aid as though the oPT population is one composed of patients versus agents capable of embracing their right to development, idly observed the process of de-development take root and intensify over time. The international community has allowed settler colonialism to flourish, and an illegal occupation to continue, not just counter to its albeit watered down obligations under the DR2D, but moreover to its binding and moral obligation to compel Israel to observe the Palestinian right to self-determination.

De-development entails the stripping away of freedoms that ought to be both constitutive and instrumental of development as viewed through the lens of Sen’s capabilities approach to

\textsuperscript{74} Salomon and Sengupta, supra Chapter 3, note 37 at 6-8.
development, the result being deprivations with respect to the fruits of, and fundamental means to, development led by self-agency.

4.2.2 **Human Capabilities: Constitutive and Instrumental Freedom Deprivations**

The reader will recall that, as articulated by Sen, the capabilities approach to development entails the expansion of freedoms, or conversely the removal of deprivations\(^{76}\). Freedom enhancement, and deprivation reduction, can be viewed as both the primary end and the principal means of development, together representing the constitutive and instrumental roles of freedom in development, respectively. Many freedoms serve both roles. For example, increasing incomes and improving health are clearly objectives of development. At the same time, increased income supports the achievement of better health, and improved health increases income earning potential. Constitutive freedoms represent the outcomes of development and are, therefore, instrumental in enriching the process of development\(^{77}\). The instrumental role of freedom concerns the way different kinds of capabilities contribute to the expansion of freedom in general, and thus to promoting development\(^{78}\). The process of development, as referred to in the DR2D, can therefore be viewed as the process of removing or at least minimizing freedom deprivations, for the dual and inter-related purpose of improving lives and fueling further development.

4.2.2.1 **Constitutive Deprivations: Forgone Human Development Potential**

As discussed previously, influenced by the thinking of Sen and his capabilities approach to development, the UNDP began quantifying human development, introducing the HDI in 1990\(^{79}\), to measure 191 countries’ performance in key dimensions of human development: a long and

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\(^{76}\) Sen, supra Chapter 3, notes 64, 65 and 66.

\(^{77}\) Ibid.

\(^{78}\) Ibid.

\(^{79}\) UNDP, supra Chapter 3, note 81.
healthy life (life expectancy), being knowledgeable (years of schooling) and having a decent standard of living (gross national income per capita). In 2021, the State of Palestine achieved an HDI score of 0.715, ranking 106th out of 191 countries, just below its neighbour Jordan at 0.720, ranking 102nd. Among Arab states, Palestine ranks below oil-rich states, and better than states such as Iraq, Lebanon and Morocco. Palestine has kept pace with composite World HDI since data was first reported for that state in 2004 - its HDI value has increased by 9.8% since then, whereas World HDI value increased by 9.9% over the same period. From an HDI perspective, Palestine does not rank highly, but has been on a modestly positive trajectory. At first glance, Palestine ranks as one would expect of a country situated among many of its (non-oil producing) regional peers.

In contrast to the oPT, however, Israel achieved an HDI of 0.919 in 2021, ranking 22nd in the world, immediately following the USA at 21st, and not far behind Canada at 15th. Israel’s HDI value and ranking have been steadily converging with those of Canada since 1990. Palestine’s HDI value growth rate outpaced that of Israel’s, which has been 7.1% since 2004, but given Palestine’s relatively lower benchmark starting point in 2004, this is not a sign that Palestine is meaningfully gaining on Israel in practical terms. Palestine remains far behind Israel in terms of HDI score and performance. In fact, Palestine remains behind more than half of the countries in the world, but those other countries are not occupying Palestine, benefiting from its resources; nor are they expected to act in the best interests of Palestinians as an occupier, or as the self-proclaimed sovereign authority in respect of the territories. If one were to accept that sovereign authority claim, then one would also need to conclude that Israel is directly obliged to promote development in Palestine under the DR2D. As a quantitative measure of human development, comparative

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80 UNDP website, Human Development Reports. [https://hdr.undp.org/data-center/human-development-index/#/indices/HDI]
analysis of HDI performance in the oPT versus Israel, points to a stark degree of disparity from a human development perspective, and a failing in the context of the R2D observance on the part of Israel.

Comparatively, when one breaks down performance by HDI component, disparity between Israel’s and Palestine’s rankings in terms of life expectancy and years of schooling is notable, but such disparity is not as acute as disparity in terms of overall HDI rankings. For example, life expectancy at birth in Israel is 82.3 years (ranked 18th in the world – overall HDI ranking 22nd), versus 73.5 years in Palestine (ranked 80th in the world – overall HDI ranking 106th). Obviously, Palestinians are relatively disadvantaged compared to Israelis in the context of this population health indicator. What is most striking, however, is the differential between Israel and Palestine in terms of gross national income per capita (GNI), which is $41,524 in Israel (32nd in the world, just behind Japan and only exceeded by mainly OECD and low population, oil wealthy countries) versus $6,583 in Palestine (128th in the world, just behind India, and not far ahead of many countries in the world that are generally recognized as impoverished, such as many in sub-Saharan Africa). Disparity with respect to GNI per capita stands out as the main cause of overall HDI disparity between Israel and the oPT. If one compares the two on the basis of 2021 GDP per capita, which is not a factor in HDI determination and only measures income generated domestically, Israel at $52,171 and the oPT at $3,664, demonstrates an even greater degree of income disparity.

Basic HDI scores, being relatively simplistic, mask the inter-population reality of the human development situation in Palestine. They do not, for example, capture disparities across the oPT sub-populations. It is most likely that if HDI values were produced on a more granular sub-national basis, the value for Gaza would be considerably lower, given much higher levels of

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deprivation in that territory, owing to the effects of the blockade in effect since 2007. When adjusted for inequality, Palestine’s HDI value declines from 0.715 to 0.651, reflecting an inequality driven loss of 18.3%82, most likely driven by conditions in Gaza.

Quantitative indicators of human development, such as empirically and narrowly determined HDI values, provide a baseline benchmark for international comparative purposes, but they “can only provide a one-dimensional picture that does not capture structural and systematic barriers to development alongside the ways in which power is distributed and wielded … they cannot account for the complexities of the Palestinian context of trying to pursue development under occupation”83. For example, with respect to the oPT labour market “approximately a quarter of persons aged 15 and above (and nearly half of those aged 15 to 24) are unemployed”84. Unemployment measures are not directly captured in HDI valuations, although the effects of unemployment are reflected in lower GNI and therefore diminished GNI per capita. And recall that such statistics only capture unemployment among those officially being considered participants in the labour force, excluding those that have given up on such participation. The labour force participation rate among women in the oPT, for example, is only 16%85. All such persons being deprived of not only income generation opportunities, but also a means of personal agency as formally active participants in socio-economic society.

Education measures that feed into HDI valuation tell a relatively positive story in Palestine, but with unemployment among young graduates of almost 55%, it is obvious that “key challenges

82 Ibid.
84 Ibid at 19.
85 Ibid.
remain with regards to transitioning from education to employment”86. Similarly, HDI measures of population health, as reflected in life expectancy data, are relatively favourable in Palestine. But health indicators based solely on mortality versus morbidity offer a limited perspective. Especially in Gaza, where the blockade results in systematic healthcare delivery interruptions and fragmentation, poverty-related poor health is endemic, including with respect to PTSD-related effects on mental health87.

To the extent that human development in the oPT is lagging compared to what it might have been in the absence of the settler colonization and occupation, such unnecessary deficits are human costs that represent deprivations with respect to the outcomes of development, freedoms that Sen describes as being constitutive of development. Precise counterfactual analysis with respect to some aspects of human development (specifically measures of health and schooling) is challenging, but one can draw intuitive conclusions. Mortality rates and levels of schooling have been improving over time, despite settler colonization and occupation, as reflected in an oPT HDI value growth trajectory that mirrors that of the world composite HDI trajectory. But anecdotal evidence suggests that morbidity factors, not measured by HDI, contribute to a higher degree of poverty-driven poor health than fundamentally necessary, especially in Gaza. And as previously noted, improvement in population education indicators have not translated into appropriate employment opportunities, the latter also not directly captured by HDI values, whereas labour market stunting in the oPT is primarily caused by the effects of colonialism and occupation.

We also know that inequality adjusted HDI performance in the oPT is less favourable once accounting for inequality across the fragmented population of the oPT, such inequality and fragmentation being due to the occupation and directly stemming from the Oslo Accords. The dire

86 Ibid at 23.
87 Ibid at 22.
situation in Gaza, and severe deprivations faced by that subpopulation alone, probably drive most of the drop in HDI once adjusted for inequality.

Israel’s very strong HDI value performance compared to that of the oPT, which it claims to hold sovereignty over, demonstrates the human development cost of Israel not observing its obligations as occupier, under the Geneva Conventions, nor pursuant to Arts. 2 and 3 of the DR2D. The resulting comparative deficit in the oPT reflects the cost of occupation, and other forms of aggression, in human development terms since it ought to be reasonable to expect that HDI performance in Israel and the oPT should be similar or at least converging at a faster rate.

4.2.2.2 GDP Impact of Containment and Domination of the oPT Economy

UNCTAD does conduct counterfactual analysis with respect to GDP performance in the oPT, examining that measure on a ‘with and without the occupation’ basis. In 2019, it presented a study focusing only on the fiscal versus other economic costs of the occupation\textsuperscript{88}, measuring the impact of fiscal leakages to the treasury of Israel (for example, tax revenues that go to Israel instead of Palestine because of the occupation, linked to Paris Protocol effects). The study found that during the period 2000-2017, fiscal losses totaled $47.7 billion (for context that amount was almost three times more than GDP in 2017, in other words the equivalent of three years of GDP). In 2015, it was estimated that the economic cost of the occupation in that year alone was $1.7 billion, equal to 13\% of GDP. Job losses over that same 17-year time frame, were estimated to have averaged 110,000 jobs per year, which meant 9\% higher unemployment than there would have been without occupation. And that analysis does not capture the impact of under-employment resulting from workers taking on menial, informal sector work because of a lack of more secure, higher paying employment.

Focussing only on the Gaza Strip, and ringfencing the economic cost of the blockade alone, and not the occupation overall as it exists there and elsewhere in the oPT, UNCTAD provides the following analysis:

“Focusing on the period 2007–2018, and using econometric analysis of household survey data, the estimated cumulative economic cost of the Israeli occupation in Gaza under the prolonged closure and severe economic and movement restrictions and military operations would amount to $16.7 billion (constant 2015 USD): equivalent to six times the value of the GDP of Gaza, or 107 per cent of the Palestinian GDP, in 2018. Scenario analysis suggests that, had the pre-2007 trends continued, the poverty rate in Gaza could have been 15 per cent in 2017 instead of 56 per cent”\textsuperscript{89}.

The above findings only reflect a limited quantifiable slice of the GDP and human development impact of foreign domination and aggression in Gaza, not capturing other human costs nor the impact in future years that will result given years of non-investment in the future.

In a similar study, UNCTAD provides counterfactual analysis of the economic costs of security crackdowns during and after the second intifada in the West Bank, which occurred in 2000, focusing on the time frame of 2000-2018. The study finds that had the intifada and crackdowns not occurred “the annual GDP of the West Bank would have been, on average, 35 per cent higher than its actual level, leading to a cumulative real GDP increase of $57.7 billion (economic cost in constant 2015 dollars), equivalent to 4.5 times the GDP of the West Bank in 2019 or 3.5 times the GDP of the Occupied Palestinian Territory in 2019. In 2019, GDP per capita would have been $2,142, or 44 per cent higher than its realized, actual level”\textsuperscript{90}. Again, this analysis only captures the incremental economic costs of follow up ‘security’ actions resulting from the second intifada, and not the other ongoing costs of West Bank occupation. This incremental counterfactual


increase in GDP per capita would have led to a much higher HDI result, GDP per capita being a component of GNI per capita, not to mention an improved standard of living for people subsisting in the West Bank.

Suffice to say, the costs of the occupation in terms of foregone outcomes of development are very substantive, simply based on the limited and narrow counterfactual analysis available from UNCTAD. Such costs are important to note from an R2D and Sen-inspired constitutive freedom deprivation perspective, but are likely dwarfed in comparison to the long-run costs of the oPT being deprived of the fundamental and structural benefits of more instrumental developmental freedoms. It is in the context of the latter that costs are manifest in the future as well as the present. Whilst HDI values are more in line with Sen’s capabilities approach to development, than more traditional Walt Rostow influenced measures of development based solely on GDP per capita, in a complex environment such as the oPT, one needs a more nuanced, structural lens to understand the holistic human development situation. And, hence, to consider a more meaningfully exploration of the extent of the R2D observance as a right to the self-determined process of development.

4.2.2.3 Instrumental Deprivations: Process of Development under Occupation

Recall that from a holistic perspective, the R2D primarily implies a right to the process of development and related freedoms being instrumental to development, in addition to the R2D being a right to the constitutive fruits of development that, as discussed in the previous section of the chapter, are the subject of deprivation in the oPT. It is intuitive that 55 years of foreign occupation and intensifying settler colonization, which as previously argued has meant an unduly protracted suspension of Palestinian’s R2SD, has also retarded Palestine’s ability to structurally position itself for R2D realization from a process perspective. The R2D is an integral component
of the R2SD, and the right to a *self-determined* process of development is essential in realizing the R2D in and of itself.

An MAS study provides a detailed analysis of the key events and policy implications of the occupation and settler colonialism that shape the state of structural human (de-)development in the oPT91, echoing the observation that “the harshest and most visible constraint on Palestinian development is a half century of military occupation … [coupled with] … a network of settlements (170 settlements and 134 outposts) and a multi-layered system of physical and administrative constraints [that] have been built up by Israel in the West Bank”92. As previously noted by Lynk, that settlement project was deemed illegal under international law in 1980, resulting in a call for its dismantlement93, such also being reaffirmed by the UNSC Resolution 2334 in 201694. In that study, the MAS identifies:

> “volumes of international, Palestinian and Israeli scholarly and policy literature that has documented how the occupation impacts the movement of people and goods, fragments the territory geographically and socio-politically, stunts economic growth, and restricts Palestinian use of critical resources such as land, water and minerals. With the very same instruments, it hinders policymaking, governance and service delivery by the PA (this conclusion being acknowledged by the UNSC in 2016).”95

The MAS also echoes the assertion that the 1994 Paris Protocol “deprives Palestine of sovereign economic policy space or tools and has appended the Palestinian economy to Israel’s in a colonial dependency framework”96, leaving the oPT in a state of economic development liminality. In other words, depriving the peoples of the oPT of the R2D, from a self-determined process of development perspective, in the same way that the Wall has been deemed to deprive those same

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91 MAS, supra Chapter 4, note 83 at 34-38.
92 Ibid at 34.
93 UNGA, supra Chapter 4, note 17.
94 Ibid.
95 Ibid at 34.
96 Ibid at 35.
peoples of the R2SD\textsuperscript{97}.

A separate study published by Al Shabaka, specifically points to a flaw in the fundamental logic of Paris Protocol with respect to clearance revenues that are collected by and frequently withheld Israeli authorities, which distorts the PA’s fiscal budgetary process. That study argues that “the PA’s distorted budget is a reflection of the Israeli regime’s strategy of containing the Palestinian people”\textsuperscript{98} but more fundamentally “the PA’s lack of control over clearance revenues arises because of the contradiction of assigning it fiscal spending responsibilities without political sovereignty, a bizarre arrangement codified in the 1994 Paris Economic Protocol. With a negligible tax base to offset its unusually high reliance on clearance revenues, the PA remains unable undergo fundamental fiscal reform”\textsuperscript{99}. The withholding of such revenues by Israel is an obvious tactic to bolster its control over the PA, given that they represent an economic lifeline, but the more fundamental structural cause of containment is that the oPT lacks control over its own borders, a construct that was institutionalized by the Paris Protocol, and one that strikes at the heart of economic self-determination.

As noted previously, the occupation has since 1967 led to macro-economic distortions and lower GDP performance that represent what the MAS characterizes as lost development decades\textsuperscript{100}, during which the economy has underperformed, and the seeds of future development have not been planted. During years when GDP growth should have been fueling investment and economic transformation, the economy has been stagnating. Productive GDP growth is the engine for further growth, being both constitutive and instrumental to development as freedom, and such growth has

\textsuperscript{97} ICJ, supra Chapter 2, note 67.
\textsuperscript{99} Ibid.
\textsuperscript{100} MAS, supra Chapter 4, note 83 at 42.
been stunted in comparison to like economies in the immediate region (the oPT’s per capita GDP between 2011-2015 was less than one third of that of Lebanon and only 40 percent of that of Jordan\textsuperscript{101}). Fiscal and other economic benefits of the growth that has occurred have been substantively syphoned-off by Israel.

Security and administrative measures employed by Israel to maintain the occupation have fragmented the domestic economy. Freedom of movement, identified as a fundamental constitutive and instrumental freedom by Sen\textsuperscript{102}, is one obvious impact of such fragmentation. West Bank and Gazan economies essentially function as separate economies, preventing synergy and economies of scale, the latter completely and the former significantly isolated from the world economy. The same occurs among sub-sectors of the West Bank, given the effects of the Wall, the pattern of settlements, and road systems that are not accessible to Palestinian business enterprises. As a result, business enterprises remain small with limited immediate market potential, and limited scope for outward market expansion. The labour market is dominated by informal employment conditions that limit population skills development and inhibit social security for market participants, stunting labour market participation rates. Access to international markets is constrained because Israel controls the borders of the oPT and dominates international transportation channels. Foreign direct investment is negligible because of the uncertain investment environment. Commodity producing sectors, such as agricultural, have underperformed, limiting investment potential in related value-added activities, which has in turn thwarted the oPT transition to manufacturing sector development. The benefits of the demographic transition in the oPT have been all but missed, given youth unemployment rates of circa fifty percent.

\textsuperscript{101} Ibid.
\textsuperscript{102} Sen, supra Chapter 3, notes 74 and 77.
The oPT has been deprived of the freedoms necessary to realize the right to the process of self-determined development, as the essence of the R2D. In other words, deprivation with respect to the freedoms identified by Sen as economic facilities\(^\text{103}\), which are meant to simultaneously constitute freedoms as the outcomes of development and freedoms that instrumentally fuel the engine of future development, in turn enabling freedoms identified by Sen as social opportunities\(^\text{104}\). These are freedoms that many states sought to realize giving rise to the DR2D, and in many cases have realized, as they have emerged from colonialism. While the oPT has descended into colonial conditions akin those endured by other developing economies prior to their decolonization. Colonial conditions that, coupled with the detrimental and exacerbating effects of prolonged occupation, manifest in suspension of the R2SD and inevitable deprivation with respect to the R2D, as an integral component of that meta-right.

4.2.3 \textit{R2D Duty Bearers: States and International Organizations}

Article 2(3) of DR2D is relatively unambiguous in specifying that with respect to their own peoples, States have a “duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”. In the case of Israel with respect to the oPT, it has no apparent intention of meeting that R2D obligation, just as it does not appear willing to observe the R2SD and many other IL obligations with respect to Palestine. The PA may or may not have the will to meet such the R2D obligations, but in any event does not have the capacity to do so. The MAS notes that the “PA has not only been weakened in its internal fabric and the accountability deficit, but financially it remains barely solvent, even while being the sole or main provider for some

\(^{103}\) Sen, supra Chapter 3, note 66.
\(^{104}\) Ibid.
150,000 Palestinian civil servants, around a quarter of the employed labour force\textsuperscript{105}. Not only lacking in its own self-directed productive capacity, the PA is highly challenged in recouping taxes and customs that it is owed by Israel\textsuperscript{106}. Being deprived of such resources largely prevents the PA from living up to its the R2D obligations, albeit competence may also be an inhibiting factor.

As noted previously in this thesis, in the final version of the DR2D, States’ obligations in respect of peoples domiciled in other states are posited conditionally and more ambiguously than they would have been in earlier drafts of the declaration. And the DR2D is silent with respect to duties on the part of international organizations, such as the WBG and UN agencies. In an earlier version of the R2D declaration, duties on the part of such organizations were specified. In practical terms, as stakeholders, States would normally seek to deliver on developmental obligations through such entities, so it should in theory not matter whether international organizations are mentioned explicitly as duty bearers under the DR2D. For example, if they have the political will, powerful shareholders in the WBG do have the leverage required to compel WB entities to act accordingly. It is the lack of such political will that is the underlying source of lack of accountability.

Extensive official donor aid has made it possible for Palestinians to survive occupation, but such aid has also created dependence and provided superficial cover that has allowed Israel to continue with its colonial project unobstructed, arguably facilitating prolongation of the occupation. According to one source:

\begin{quote}
“over US$40 billion has been spent by international donors as foreign aid for Palestinians living in the occupied West Bank, East Jerusalem and Gaza Strip since the Oslo Accord was signed in 1993. This makes Palestinians one of the highest per capita recipients of non-military aid in the world. That aid was designed as development programming meant to foster conditions that Western donors considered necessary for peacebuilding with Israel. However, their development aid has failed to achieve three main objectives peacemakers envisaged: a lasting peace between Palestinians and Israelis, effective and accountable Palestinian
\end{quote}

\textsuperscript{105} MAS, supra Chapter 4, note 83 at 37.
\textsuperscript{106} Ibid.
institutions, and sustainable socioeconomic development.”

Donors are more readily able to turn a blind eye to the situation in the oPT and assuage any tendency to feel remiss for not enforcing IL in respect of the oPT by providing such aid. And such aid has not tended to be as forward looking as it could be up to now, the cost of which has been forgone structural investments that would otherwise be paving the way for strategically focussed, sustainable human development.

When it comes to the oPT, States have provided humanitarian aid to support Palestinian refugees, principally through the UNRWA in recent years. UNRWA programs in its oPT fields of operation have emphasized primary healthcare and education, which partly explains the oPT improvements in those aspects of human development. But the UNRWA is not responsible for economic development per se. UNCTAD as previously noted has been an advocate for the oPT, through its analysis and articulation of the costs of the occupation. Similarly, the HRC through its support for the special rapporteur in respect of the oPT, for example, has also been an advocate on behalf of the rights of Palestinians. UN agencies have done what they do well in terms of substituting for sovereigns when they are unable to act on behalf of populations in need of humanitarian relief and providing analysis and commentary to advocate for the rights of peoples and encourage observance of international law. With respect to the latter, in the context of the oPT, they do so rhetorically, given that they do not have the authority to do so otherwise.

As for the UN as a governing body representing the international community in respect of international laws, and especially the UNSC, it has failed to morally or legally compel states to

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108 Ibid.
109 MAS, supra Chapter 4, note 83 at 33.
observe or enforce IL in respect of the oPT. This includes Palestinians’ R2SD and the R2D, which are not being observed in the oPT. Its engagement has been limited to rhetorical commentary for the most part. This limitation is self-evident given the number of resolutions that have been issued but not followed up upon by states that have affirmed them and UN bodies that are meant to implement them.

Working elements of the UN organization are highly supportive of the R2D and human development in general. And with respect to the oPT more than 20 organizations have had ongoing activities in the territories, which can be difficult to coordinate\textsuperscript{110}. Prior to the Oslo Accords, the development agency community engaged in the oPT was limited to UNRWA, UNDP and UNICEF. That population mushroomed following Oslo because Israel let up on previous restrictions on oPT aid, and because of the notion that Oslo would lead to peace and that a ‘development for peace’ emphasis would be a facilitating complementary approach\textsuperscript{111}. The result was perhaps too many UN touch points resulting in fragmented and often conflicting approaches to the same issues. These many touch points conflict in the sense that humanitarian and development initiatives do not always mix so well in practice, since the former requires impartiality, whereas the latter can entail political aspects given differing ideological approaches among the UN states\textsuperscript{112}. Moreover, at the end of the day the UN is not a financing institution, which is a necessary class of participant in supporting development initiatives. Naively, one might expect that UN agency partnership with the WBG, which is of course a lending institution, would make for a synergistic partnership in the oPT, especially since the UN has an extensive presence on the ground in the oPT, whereas the WBG does not.

\textsuperscript{110} Turunn Laugen, “The World Bank and the UN in the Occupied Territories”, \textit{Security Dialogue}, Vol. 29, No.1 (March 1998) at 64.

\textsuperscript{111} Ibid.

\textsuperscript{112} Ibid.
Tartir and Wildeman provide an informative assessment of WBG policies with respect to the oPT\textsuperscript{113}, specifically critiquing inter alia the WBG approach of promoting increased oPT integration with the Israeli economy:

“\textit{The World Bank’s recent growth report uses oblique technical jargon that consistently ignores the framework of international law and obscures grave political, humanitarian, and legal implications. The Palestinians have been occupied, dispossessed and colonized for nearly a century now. Further integration into their occupier’s economy even as it dispossesses, de-develops and exploits them is completely counterintuitive to Palestinian needs. It is the wrong advice for what the Palestinians should be doing, which is striving to end Israel’s occupation and the violation of their civil rights, right to self-determination and right to return. It is only through challenging a racist ideology that permeates Israeli policy toward them, that real peace can be achieved, and real growth enabled. Until the World Bank begins to better understand the real conditions of occupation and the real reasons for the Palestinian condition, it will continue to provide unrealistic policy recommendations that are based on a long dead era of Oslo rapprochement that is only still alive for the donors who take advice from institutions such as the World Bank. Ultimately the only reason that counts for explaining Palestinian de-development and poverty lies with the occupation, and that occupation needs to end in order for real growth to be achieved.}”\textsuperscript{114}

These authors are making a point with a specific and subjective agenda in mind. However, having observed WB development programming with respect to the oPT firsthand, the present author can attest that reality on the ground in the oPT is conveniently overlooked in such programming. A narrow and jargon laden approach to assessing and making recommendations regarding specific funding proposals can tend to be used in skirting real impediments to development in such assessments, and program recommendations do not make it past the drawing board unless there is assurance that they will have the support of USA interests and guidance at decision time. This is most often to the chagrin of internal development experts preparing such assessments and recommendations.

As previously noted in this paper, the World Bank has not tended to embrace the R2D in its policies and programs, at best paying the concept lip service from time to time. Its development plan for

\textsuperscript{113} Alaa Tartir and Jeremy Wildeman, “Persistent failure: World Bank policies for the occupied Palestinian territories” (2012), Policy Brief, Al-Shabaka, Washington D.C. Available from LSE Research Online: https://eprints.lse.ac.uk/50333/1/Tartir_Persistent%20Failure%20World_2012_eng.pdf

\textsuperscript{114} Ibid.
the oPT was repositioned in 1993, as an “Investment in Peace”\(^\text{115}\), with all six volumes being narrowly formulated to be complementary to the Oslo Accords and Paris Protocols of 1993 and 1994, respectively. That plan can be viewed as neo-liberal in nature, based on the idea that improvement in development in the oPT would provide Palestinians with the incentive to accept political comprises required to achieve a version of peace that developed countries such as the USA assert would be best for that population. Rather than recognizing that foreign occupation, domination, and control are key impediments to development, and sources of Palestinian misery, there has been a repeated tendency in WB reports to imply that the situation of under-development in the oPT due to poor governance on the part of the Palestinians themselves\(^\text{116}\). For example, the lengthy overview volume of the 1993 development plan referred to above uses the word “occupation” only ten times, in each case as a temporal synonym for the year 1967, rather than as a continuing political issue or policy consideration. That narrowly focussed World Bank plan has dominated its development policies and programs in the oPT, as well as those of some key bilateral foreign aid donors, to this day.

Regular WBG monitoring reports with respect to development in the oPT rarely mention the occupation, and the latest in May 2022 does not even use the word\(^\text{117}\). They are useful from a statistical perspective, being primarily technocratic, but do little to acknowledge or address real impediments to realization of the R2D in the oPT, being at odds with commentary and analysis offered by UN organizations. To work effectively as a partner to such organizations would require an overhaul of the World Bank ideological culture, which is not likely to happen, unless such an


\(^{116}\) Tartir and Wildeman, supra Chapter 4, note 113 at 4.

\(^{117}\) World Bank Group, *Economic Monitoring Report to the Ad Hoc Liaison Committee*, May 10\(^{th}\), 2022
https://documents1.worldbank.org/curated/en/099446105042228837/pdf/1DU05e8be37b05ca3049ec0b5f80fecf27b07e6d.pdf
overhaul is deemed desirable one day from a USA foreign policy perspective, the USA being the primary influencer of World Bank ideology. Realization of the R2D globally and within the oPT will require a fundamental shift in political will that translates into more R2D-oriented direction being provided to the WB by powerful shareholders such as the USA, direction that entails a policy approach emphasizing self-agency, as discussed in the following section of the chapter.

4.2.4 R2D Right Holders: Collective Palestinian Self-Agency

The reader will recall from Chapter 3 of this thesis, that the DR2D did not posit the R2D as a right of States, and that rather than explicitly positing the R2D as a ‘collective’ right it was posited as a right of ‘every human person and all peoples’, watering down the collective aspect of the R2D (a negotiated approach in response to resistance by powerful UN members). Nonetheless, the reference to ‘peoples’ does connote an element of collectivity in terms of the R2D right holders. Commentators such as the MAS point to collective action, or self-agency, in respect of Palestinians as an opportunity to improve the situation of human (de)development in the oPT: “prospects depend essentially not only on the Palestinian people’s ability to create a deterrent to occupation and more settlement, but also to mobilize socially, economically and politically, and to achieve their denied national and human rights by hook or by crook”\textsuperscript{118}. As the supposed sovereign governing authorities and duty bearers under the R2D, Israel, the PA and Hamas have proven unwilling or incapable (or both) of observing the R2D, to the detriment of posited R2D right holders. And moreover, they have not sufficiently focused on promoting self-agency in the context of human development in the oPT, instead preferring to take a top-down, paternalistic approach to such matters. The same can be said of other states and the international community as duty bearers (see section 4.2.5).

\textsuperscript{118} MAS, supra Chapter 4, note 83 at 87.
The MAS suggests that enabling collective agency with respect to development ought to be a key priority going forward. Albanese emphasizes the collective right aspect of the economic component of the R2SD, referring to “the people’s collective right to enjoy their natural wealth and resources as an expression of permanent sovereignty over them”\(^{119}\), as well as the R2SD more broadly: “The right to self-determination constitutes the collective right par excellence, and the “platform right” necessary for the realization of many other rights\(^{120}\) … the exercise of the right to self-determination constitutes the beating heart of a people as a collective and as a polity\(^{121}\).” Albanese is making the overall point that so long as colonialism is permitted to prevail in the oPT, the R2SD as a collective right will be unrealizable, “In a settler-colonial context and an apartheid regime, any display of collective identity and (re)claimed sovereignty from the subjugated people represents a threat to the regime itself”\(^{122}\), by implication suggesting that other rights such as the R2D, as an integral component of the R2SD, will be unrealizable under conditions of settler colonialism.

This chapter began by noting that about half of the population of the oPT is registered with the UNRWA as refugees. With respect to collectivity, Albanese makes the point in a separate work, that the status and corresponding rights of Palestinians as refugees are conveyed on a collective basis under IHL including rights akin to self-determination for Palestinian refugees that predate codification of the R2SD under IL more broadly\(^{123}\) (unlike in the case of other refugees where such status and rights are conveyed on an individual basis, which means that as refugees Palestinians

\(^{119}\) UNGA, supra Chapter 3, note 53 at para 16(b). \textit{Emphasis added.}

\(^{120}\) Ibid, at para 15. \textit{Emphasis added.}

\(^{121}\) Ibid, at para 56. \textit{Emphasis added.}

\(^{122}\) Ibid, at para 53. \textit{Emphasis added.}

have long been accustomed to collective treatment under IHL. Exploration of Albanese’s point regarding treatment of Palestinians as refugees is beyond the scope of this thesis, but her point is worth noting in so far as it shows there is precedence for contemplation of collective rights and corresponding agency in the Palestinian context. This analogy also suggests that addressing Palestinian rights as humans under the DR2D and as refugees under IHL, could potentially be undertaken in integrated fashion, with collective self-agency as a common theme.

This chapter began with reference to Arendt’s conception of the right to have rights, arguably a conceptual precursor to the R2SD, which Arendt considered to be a right to exercise collective agency, to live in a community where one has the right to act and speak, being seen and heard, as part of that community. Palestinians were deprived of the right to have rights in 1948, and in response to the MAS assertion that collective, self-agency should be a way forward in pursuing development in the oPT, the present author suggests that emphasizing self-agency in development may also be a way to contribute to reinstatement of the Palestinian right to have rights, illuminating the concept of ‘self’ in the context of the R2SD, and by inference enhancing the prospects for realization of the R2D. Civil society and Palestinians themselves ought to be more active agents in development.

4.3 Discussion: The R2D, the R2SD and International Community Accountability

4.3.1 R2SD Considerations with Respect to the R2D in the oPT

As demonstrated in section 3.2.2 of this thesis, doctrinal and conceptual linkages between the R2D and the R2SD are inextricable. And both ought to arguably be viewed as binding rights under IHL, albeit through differing, direct and indirect, means. With respect to the R2SD this is because it

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124 This difference is elaborated in a separate paper by the author of this thesis, referred to in supra Chapter 4, note 24.
125 Arendt, supra, Chapter 4, note 22 and Kimber, supra Chapter 4, notes 24 and 25.
was posited as hard law and considered to be a *jus cogens* principle under IL, and in the case of the R2D because, as this thesis has argued, it ought to be legally and practically treated as an integral component of the R2SD itself. Arguably, because of its linkages to the R2SD\textsuperscript{126}, one could and should consider the R2D as potentially benefiting from *jus cogens* status, indirectly through its explicitly stringent doctrinal association with the R2SD\textsuperscript{127}, and potentially more directly given that it arguably constitutes the economic component of the R2SD as posited. The present author asserts that these two rights are indivisible and embraces the notion that one ought to view the R2D as a *right to self-determined development*\textsuperscript{128}. At a minimum, in any event, the R2D is a posited inalienable human right, with explicit doctrinal linkages to the R2SD. Thus, examining realization of the R2D is akin to considering realization of the R2SD, especially in the context of the oPT where deprivation with respect to the R2SD is so clearly evident.

The oPT came under occupation by Israel fifty-five years ago, in 1967. Viewed in temporal isolation, an argument that such occupation was legal and rightful in the beginning, in the immediate aftermath of the Arab Israeli War, may have been defensible to some at the time. Although as previously asserted, such initial occupation was more realistically just one step in a planned continuum of neo-colonial annexation on the part of Israel. But for the sake of discussion, let us assume that Israel’s occupation of the oPT was legally justifiable at the outset. Although the laws of occupation do not set a specific length of time for lawful occupation\textsuperscript{129}, Lynk points out that “the guiding principle that occupation is a form of alien rule which is a temporary exception to the norms of self-determination and sovereignty means that the occupying power is required to return the territory to the sovereign power in as reasonable and expeditious a time period as

\textsuperscript{126} See section 3.2.2.
\textsuperscript{127} Ibid.
\textsuperscript{128} Salomon, supra Chapter 3, note 21.
\textsuperscript{129} Lynk, supra Chapter 3, note 52 at para 33.
Thus, whilst legally justifiable occupation of a territory may entail a temporary exception to the R2SD under IL, protracted illegal occupation does not. Even under legally justifiable occupation circumstances, the demonstrated objective of the occupier ought to be a return of the territory to full sovereignty and, hence, reinstatement of the R2SD as soon as possible. Either way, observance of the R2SD is a *jus cogens* obligation in circumstances of legal or illegal occupation. In the oPT, Israel is legally obliged to observe the R2SD and, by association, the R2D with respect to the peoples of the oPT.

The ICJ opined, in 2004, on the legal consequences of the construction of a wall in the oPT\(^{131}\). In that opinion, the ICJ concludes that the wall is “an attempt to annex the territory contrary to international law” and “a violation of the legal principle prohibiting the acquisition of territory by the use of force” and that “the de facto annexation of land interferes with the territorial sovereignty and consequently with the right of Palestinians to self-determination”\(^{132}\). The wall itself is a physical manifestation of the non-observance of the R2SD and indeed international law, that right being considered binding as a *jus cogens* principle under IL. The physical fragmentation and containment effects of the wall itself, however, are only one visible component of the story.

When one encounters the wall in person and passes through it having to line up at multiple checkpoints, as the present author did in 2019, then travelling throughout the West Bank, one is not so much struck by legal implications. The wall strikes one as a physical manifestation of foreign domination and imprisonment. Such effects are palpable throughout the West Bank, irrespective of whether or not the wall is in proximity. What is most striking is that the wall is only one stark physical sign of foreign domination. Illegal settlements that serve as future fence posts

\(^{130}\) Ibid.

\(^{131}\) ICJ, supra Chapter 2, note 67.

\(^{132}\) Ibid, at paras 115-122.
foreshadowing expansion of the wall, road networks exclusively designated for the use of Israeli citizens, and roving military patrols that disrupt Palestine life in all areas of the West Bank, are all extensions of that physical wall and its dominating effects. Even as a temporary visitor, it is possible to experience the humiliating and angering effects of such constructs. Especially the roving military patrols, which can ‘pop-up’ anywhere at any time and entail spot searches as well interrogations, which the present author witnessed, disrupting daily lives in Palestinian villages, and serving as a constant reminder of who controls such lives. The Palestinian R2SD, indeed the right to lead a life in freedom, is inhibited by much more than just the wall itself. Recalling that the R2SD and the R2D are inextricably linked doctrinally, and in considering the effects of the wall and other devices of control with an economic development perspective in mind, such devices clearly inhibit development in practical terms, exacerbating deprivations with respect to self-determination in a broader context, including the right to economic self-determination with emphasis on the freedom to exercise self-agency.

In the context of Sen’s capabilities approach with respect to both economic facilities and social opportunity freedoms, being able to move freely from place to place are prerequisites\(^\text{133}\), being both instrumental and constitutive to development as freedom, in addition to being a fundamental human freedom in and of itself. The wall, settlement project and other barriers to free movement, are not only barriers to the realization of the R2SD. The wall in its physical form and its perhaps less stark but equally dominating extensions, are also a barrier to the R2D, from a legal, capabilities, and practical perspective, not to mention from a moral standpoint. Construction and expansion of the wall, as well as the settlement project, have intensified since the ICJ opinion was provided in 2004, unimpeded because of impunity on the part of its architects and impunity that flows from inaction by the international community in view of Israel’s violations of IL with respect

\(^{133}\) Sen, supra Chapter 3, notes 71 and 75.
to the R2SD.

In addition to leading to overt economic and social deprivations, the separation wall and other physical containment mechanisms are tangible demonstrations of less overt deprivation with respect to the R2SD in the oPT. They are emblematic of a more fundamental impediment to realization of the R2SD, that being colonialism. A brand of colonialism that is reinforced by mechanisms such as the Oslo Accords and its Paris Protocol, and one that is akin to the brand of colonialism that gave rise to affirmation of the R2SD, and the R2D, decades ago. If the wall were to be torn down, the settlements and other, less tangible forms of foreign domination would remain, such that the peoples of the oPT would arguably not be much closer to realizing their the R2SD. Such dismantling would obviously be a welcomed good start but “realizing the inalienable right of the Palestinian people to self-determination requires dismantling once and for all the Israeli settler-colonial occupation and its apartheid practices. International law is very clear in this regard. No solution can be just and fair, nor effective, unless it centres on decolonization, allowing the Palestinian people to freely determine their political will and pursue their social, economic, and cultural development, alongside their Israeli neighbours”\textsuperscript{134}. Tearing down less visible manifestations of colonialism, such as the Paris Protocol from an economic perspective, also needs to form a key component of decolonization in respect of the oPT.

Dismantling all constructs of colonialism will be necessary to realize the R2SD, including its economic component, as reflected in the R2D. As a prerequisite to such dismantling “the international community must embrace a more accurate diagnosis of the Israeli settler-colonial occupation in the occupied Palestinian territory and abide by its own obligations under international law to fully realize the Palestinian people’s right to self-determination.”\textsuperscript{135} So long

\textsuperscript{134} UNGA, supra Chapter 4, note 17 at para 74.
\textsuperscript{135} Ibid.
as the peoples of the oPT are deprived of the R2SD, they are inevitably going to be deprived of the R2D. They will also continue to be inherently deprived of the right to have rights, as much as they were in 1948, such deprivation being manifest in a lack of self-agency.

4.3.2 Lack of International Community Accountability and Potential Remedies

“Accountability – the institutional check on the exercise of public and private power on behalf of the common good – is the indispensable component of the rule of law. When used purposively and effectively, accountability entrenches fairness and equality, it promotes healing and resolution, it delivers justice to victims and perpetrators alike, it alleviates conflicts and prevents others from igniting, and it sews together the ten thousand threads of accommodation which nurture social trust. … Without accountability, the best designed systems of law and human governance will wither for lack of enforceability and respect. Without accountability, the possibility of political reconciliation, let alone its flourishing, is unattainable. The enemies of accountability are impunity and exceptionalism … And no international rules-based order can command the requisite compliance with its laws and directions if it allows defiance and exceptionalism to thrive unchallenged. Impunity anywhere is a danger to justice everywhere.”

As special rapporteur, Lynk selected accountability as a specific theme in two successive reports to the UNGA. This was for good reason, as he notes that in the space between international law and accountability, there is a huge gap between promise and performance. Many elements of international law have been developed by the UN, both with Palestine as the subject matter and more generally but with direct applicability to Palestine, such as the R2SD and the R2D. Yet there remains “a paucity of actual protections to the occupation’s many victims”.

136 Arendt, supra Chapter 4, notes 22 and 23.
what people are offered is not what they can actually get\textsuperscript{140}. As noted by Imseis, Palestinians are understandably disenfranchised, being “continually presented with the promise of a more just and equitable future though the application of international law … [while] its realization is perpetually kept out of reach\textsuperscript{141}.

As Lynk further notes, “an acute problem in the modern world is not the absence of laws, but the absence of political will\textsuperscript{142}, and such is most apparent where it concerns the international community’s lack of commitment to enforcing laws that this same community itself posited. A prime example of this is the R2SD, which is not ambiguously posited, and is not being observed in the oPT, demonstrating a lack of accountability on the part of the international community to enforce its own \textit{fus cogens} norm. As Albanese also points out, the R2SD is “a peremptory norm of international law … [that] cannot be derogated from under any circumstances and gives rise to obligations \textit{erga omnes} … The exceptionalism demonstrated towards Israel not only undermines the effectiveness of international law, but also tarnishes the image, trustworthiness, and role of the international community and the United Nations, including its judicial organs.”\textsuperscript{143} Such failure to hold itself accountable is due to absence of political will, as Lynk asserts above.

The reader will recall that the text of the DR2D is quite clear with respect to a state’s obligation to observe the R2D domestically. However, obligations with respect to a state’s obligations externally regarding peoples domiciled in other states, and with respect to the international community more broadly, are intentionally ambiguous. This is especially so with respect to international organizations, which are not even mentioned in the 1986 DR2D (unlike would have

\textsuperscript{140} Sen, supra Chapter 3, note 78.

\textsuperscript{141} Imseis, supra Chapter 4, note 15 at 201.

\textsuperscript{142} Lynk, supra Chapter 4, note 138 at para 30.

\textsuperscript{143} Albanese, supra Chapter 3, note 53 at para 76.
been the case under the PDR2D\textsuperscript{144}). And there are no explicitly posited remedies in the DR2D either, the result being a doctrinal lack of accountability on the part of state and international community duty bearers. Given such ambiguity with respect to accountability vis à vis the R2D as posited, and a lack of corresponding remedies, one option is to turn to accountability under other, related IL to identify avenues of recourse in respect of Israel and the international community within the broader context of IL (non)observance in Palestine.

Pursuant to requests made in UNGA resolutions 69/20, 70/12 and 71/20, UNCTAD has assessed and reported on the economic costs of the Israeli occupation for the Palestinian people,\textsuperscript{145} concluding in one such report that under international humanitarian law:

\begin{quote}
\textquote{\textsuperscript{146}“Israel bears legal responsibility for the costs it has entailed during its occupation of Palestinian territory. This responsibility is separate from Israel’s obligation to withdraw from that territory. The legal responsibility of a belligerent occupant for the negative economic consequences of actions in violation of humanitarian law survives the occupant’s departure. Israel is responsible both for economic harm it has occasioned and for unjust enrichment it has derived. It also bears an obligation under international law to further the development of the economy for the population whose territory it occupies…. [and that] international community as a whole bears an obligation to ensure that in the case of the Occupied Palestinian Territory, the belligerent occupant is held accountable for harm caused in the course of occupation.”\textsuperscript{146}"
\end{quote}

A negotiated settlement regarding the above noted compensation could and should be linked to realization of the R2D in the oPT. Whilst obligations under humanitarian law and the DR2D are legally distinct, settlement of the above claims could serve to make up for a lack of real accountability and remedies under the DR2D. Providing R2D-related financial support might also be an easier political pill for Israel to swallow than providing compensation under humanitarian law. As an area for further research, it may be possible to build upon this idea in expanding upon the concept of development compacts, generally proposed by Sengupta in the context of the R2D

\begin{footnotes}
\textsuperscript{144}CHR, supra Chapter 3, note 10.
\textsuperscript{145}UNCTAD, \textit{The Economic Costs of the Israeli Occupations for the Palestinian People and their Human Right to Development: Legal Dimensions}, UNCTAD/GDS/APP/2017/2 at iii. \url{https://unctad.org/system/files/official-document/gdsapp2017d2_en.pdf} Some of these reports were drawn upon earlier in this chapter (see notes 88, 89 and 90).
\textsuperscript{146}Ibid.
\end{footnotes}
Moreover, recourse to compensation in respect of the situation in the oPT is also relevant in the context of the Palestinian refugee situation, recalling that almost half of the oPT population are registered refugees. In response to the expulsion of Palestinians from their homeland in 1948, the UNGA resolved in paragraph 11 of Resolution 194(III)\textsuperscript{148}, that “refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or equity, should be made good by the Governments or authorities responsible.”\textsuperscript{149} The UNGA has since reaffirmed Resolution 194 annually referring to such return as an ‘inalienable’ or ‘natural’ right, suggesting that it has become “binding as a matter of customary international law”\textsuperscript{150}. The right of return has also been embraced by Palestinians as a source of identity, such that literal “return to previous homes” has become a central component of the Palestinian narrative and remains an objective of some Palestinian inhabitants of the oPT and elsewhere.

The UN refugee system has also come to view return as a durable solution for Palestinian refugees, which is potentially unhelpful and misleading to the extent that such a right is portrayed narrowly as a right to physical return\textsuperscript{151}. Such return might not have a direct bearing on the R2D realization in the oPT, but the second part of the legal right established in Resolution 194, dictating that compensation should be paid for those not returning “under principles of international law or

\textsuperscript{147} Sengupta, supra Chapter 3, note 40.
\textsuperscript{149} Ibid, para. 11.
\textsuperscript{150} Susan Akram, “Myths and Realities of the Palestinian Refugee Problem”, in Akram, S., Dumper, M., Lynk, M., Scoobie, I. (eds), International Law and the Israeli-Palestinian Conflict (New York: Routledge, 2011) at 13-44.
\textsuperscript{151} Discussed in a separate paper by the present author referenced in note 124.
equity”, could be linked to realization of the R2D. Coupling that right to compensation with Palestinian rights in respect of the DR2D, both reflecting principles of international law and equity, could form a politically digestible basis for addressing economic injustice in the oPT. Ingrid Gassner makes a case for transforming Palestinians from ‘spoilers’ to agents of development\textsuperscript{152}:

“An effective development strategy must create conditions for the social and political transformation that will end the systematic exclusion of the indigenous Palestinian people from its country. Such a strategy must reverse the measures that have prevented the return of the refugees to their homes and properties and the self-determination of the Palestinian people. It must be rights-based and guided by a new development paradigm in which the root causes of ongoing exclusion are recognized and addressed; Palestinian refugees are put centre stage as rights holders and political actors; and refugees can participate and contribute to the collective effort of the Palestinian people in pursuit of social and political transformation”\textsuperscript{153}.

Although not directly linking her commentary to the R2D or the right to compensation under Resolution 194, her conclusion supports such a linkage, given her reference to a rights-based approach, positioning refugees as active agents in collective development.

In view of the extent to which other human rights and other obligations under international law are not observed by Israel in the oPT, and not enforced by the international community, in both instances reflective of the extent of politicization and lack of accountability with respect to the question of the oPT, it could seem potentially redundant (or even futile) to enquire as to the extent to which the R2D is being observed or enforced as a legal human right, or likewise to ask to what extent and how the R2D could be more fully realized in the oPT, for that matter. Especially given, as demonstrated in Chapter 3, the extent to which the R2D became politicized due to resistance by powerful states such as the USA. But it could be that in the overall scheme of IL obligations towards the oPT, pursuit of the R2D in the oPT might be easier to contemplate by such powerful


\textsuperscript{153} Ibid at 109.
states than addressing other, relatively more politicized legal issues concerning the oPT. And if viewed as an initial means of influencing the international community to embrace its overall obligations and related accountability more fully with respect to the situation in the oPT, promotion of the R2D realization for Palestinians might be a more palatable and practical starting point in at least partly beginning to work towards achieving one component of the R2SD, being the right to self-determined development. Questions concerning development and R2D realization in the oPT are far from redundant (or futile).

4.4 Summary: R2D Realization in Occupied Palestine

The R2D has not been substantively realized in the oPT, any more than the R2SD has been realized. As for the latter, “despite the long-recognized relevance of the right to self-determination for the Palestinians, numerous endorsements by the General Assembly, the expectations raised by the proclamation of independence and successive agreements between Israel and the PLO [such as Oslo and the Paris Protocols], and widespread recognition of Palestinian statehood, the full realization of the right to self-determination of the Palestinian people, both politically and economically, and in its external and internal dimensions, remains elusive”\(^{154}\). The international community has arguably come part way in recognizing Palestine’s status as a nation state within the UN, but it has stopped short of enforcing that population’s R2SD, failing to hold itself accountable for implementing a binding law that it created and claims to hold dear. This is due to a lack of political will, ostensibly stemming from competing geo-political objectives. In addition to an inertial-like tendency to permit Israel to proceed with its settler colonial project unobstructed, a project that some powerful members of international community have arguably enabled, and others have appeased, from the outset. With respect to the R2D as posited, the obligations of the

\(^{154}\) Takkenberg and Albanese, supra Chapter 4, note 123 at 341.
international community in the DR2D are by design more ambiguous than they are with respect to the R2SD. Until the international community chooses to hold itself accountable for enforcing IL in respect of the oPT, it would seem probable that the full realization of the R2D in the oPT will also remain elusive.

The reader will recall that full realization of the R2D would imply realizing both the right to the constitutive outcomes of development and the right to the instrumental process of development. It is also worth recalling, a point made by Sengupta, drawing upon the work of Sen, discussed earlier in this thesis. Realization of freedoms with respect to the outcomes of development may in some cases precede realization of a fully mature process of development. There has been some progress made in the oPT with respect to realization of some specific human rights, as evidenced by the modestly positive growth trajectory with respect to HDI values. Mortality and education indicators have been improving in the oPT, for example, with the caveats that this does not mean that morbidity and employment following education indicators are improving at the same pace, and that we know that the oPT’s inequality adjusted HDI value lags significantly behind its basic HDI value. Nonetheless, there has been some human development progress to acknowledge and build upon. Whilst full realization of the R2D is likely far off, being dependent on concerted international community action that is not likely imminent, incremental human development freedoms for Palestinians can be achieved and are being pursued.

There is unlikely to be a big bang political solution to the situation in the oPT that would clear the way for full realization of the R2SD, along with its R2D integral counterpart. Unlike when the international community rallied to force an end to apartheid in South Africa, geo-political stakes for powerful states such as the USA are higher in the Middle East and, also unlike in case of South

\footnote{Sengupta, supra Chapter 3, note 36 at 868, and supra Chapter 3, note 58.}
Africa, such states are more complicit in the evolution of settler colonialism and apartheid in the oPT, making it difficult to contemplate an abrupt about face. It is more feasible politically to consider gradual realization of the R2D, from the bottom up, so to speak, focussing at first on specific economic and social freedoms with the hope that it later becomes possible to tackle more structural freedoms related to realization of the right to the process of self-determined development. And recalling what Arendt had to say about the right to have rights, a predecessor to the R2SD that was taken away from Palestinians in 1948, that would mean focussing on Palestinians’ right to exercise collective agency, to live in a community where one has the right to act and speak, being seen and heard, as part of that community. In other words, instead of waiting for there to be a Palestinian state that is fully endowed of the R2SD, promoting development from the ground up, engaging and empowering civil society and ordinary people in the oPT, thereby supporting self-directed development at the grass roots level, where the needs of the population are better understood, and politicization is less of an impediment to achieving freedoms one step at a time.
Chapter 5: Conclusion

5.1 Research Motivation and Objectives

The motivation in choosing the right to development (the R2D) as a thesis research topic was borne from the present author’s realization that as an inalienable human right, the R2D is largely overlooked in both international development studies and practice. This realization being remarkable given that the present author has in recent years been an active participant in these undertakings, without having come across substantive discourse or policies and programs explicitly featuring this fundamental right. A significant learning has been that the R2D is a central component of the *jus cogens* principle of the right to self-determination (the R2SD), and that although on that basis the R2D may be implicitly present in such studies and practice, the R2D ought to be more explicitly and frequently treated as a distinctly significant human right. At the same time, the R2D ought to be considered an inseparable and essential element of the R2SD. More explicit portrayal of the R2D as a right to a process of *self-determined* development would serve to enhance its visibility and realizability, as would positioning the R2D as a right best pursued through self-agency, albeit with the support of international community duty-bearers, represented by entities such as the UN and the World Bank.

The main objectives in undertaking this thesis, have been to examine the extent to which the R2D was posited in a realizable manner, and to the extent that it was not, to understand the cause(s) of identified shortcomings. And as a R2D case study, to examine the extent to which the R2D has been observed in the oPT, and to the extent that is has not, to understand the causes of such non-observance. An ancillary objective has been to identify topics for further research.

5.2 Overview of Findings and Analysis

To understand the meaning and purpose of the R2D, and hence the underpinnings of its genesis,
this thesis began, in Chapter 2, by examining its conceptual emergence within the confluence of two salient movements that arose following the second world war. Those being the international human rights project and decolonization. Traditional Western historiography might lead one to believe that these were parallel, discrete movements. However, upon close examination it becomes clear that they were not bifurcated movements that arose in tangential fashion as a reaction to that horrific event, on the one hand, and the disfigured world order that had precipitated it, on the other. Rather they arose in an intertwined fashion, entailing a tacitly conflated purpose of addressing such disfigurement in an inclusive and peaceful manner, whilst averting similar violent conflict in future, including as decolonization inevitably occurred.

Former and soon to be former colonial subjects were active and influential agents in both of the seminal movements noted above, and not just the decolonization movement as one might intuitively expect. The UDHR of 1948 was indeed a watershed moment in terms of the human rights project, but the idea of there being rights that are inalienable to humans was not a novel one, having centuries old origins. Chapter 2 demonstrated that although celebrated as being a Western marshalled initiative, the human rights project was in fact substantively influenced by thought leadership on the part of thinkers from then so-called Third World. Thinkers and influencers such as jurists and other intellects with lived experience as colonial subjects of foreign domination.

Beginning with the Bandung conference in 1955, former and soon to be former colonial subjects embraced the R2SD, which had not been explicitly referred to in the UDHR but had nonetheless been explicitly declared in 1952, at only the UNGA’s seventh session, albeit being posited with limited elucidation. Self-determination was first proffered mainly as a political right, and it would take some time before it would become apparent that self-determination is as much an economic objective as it is a political one, eventually giving rise to the NIEO movement, which would not be formally acknowledged by the international community until declared as such by the UNGA in
1974. Proponents of the NIEO would aim to revise the economic world order, to remediate injustice and inequity through structural and legal reform, to address power imbalances that had been the hallmarks of colonialism. It was in the context of the formative days of the NIEO movement that the idea of a R2D initially emerged when it was first articulated as an economic right in 1966, an idea that became a pillar in NIEO rhetoric.

Following on from the normative UDHR in 1948, it took until 1966 to notionally agree its two covenants. The ICCPR and ICESCR, together with the UDHR, are of course what are now known as the IBHR. Taking eighteen years to agree in principle, the Covenants did not have binding effect until 1976, when they came into force. It took twenty-eight years for the IBHR to come to fruition, so it only stands to reason that a lot happened in the interim. Originally there was only meant to be one comprehensive Covenant. Ideological discord in the context of East-West power relations emanating from the Cold War necessitated the delineation of rights in two Covenants, one focussed on civil and political rights, to reflect Western priorities concerning governance through democracy, and the other focussing on economic and social rights, which more squarely reflected Eastern priorities, in line with socialism. It is in those Covenants that we see doctrinal evidence of the influential effect that decolonized peoples had been bringing to bear in the context of the human rights project. The two Covenants feature identically posited affirmation of the R2SD in a common Article 1, an enhanced version of the R2SD compared to when it was first declared, that equally emphasizes peoples’ right to freely determine their political status and freely pursue their economic, social, and cultural development.

Not long after the NIEO was declared by the UNGA in 1974, it became clear that its momentum as then formalized would be short-lived. In hindsight we know that powerful nations of the international community, such as the USA and western European UN member states, had no intention of agreeing to alteration of an economic world order that suited them well as it was.
The oil crisis of 1973 had acted as a wake-up call. The West had no interest in setting the stage for more OPEC-like agents exercising control of their own natural resources. In response to this realization, the R2D, which had up to then been a central tenet in NIEO discourse as an economic right, was tactically recast by its proponents from the decolonized world as a human right in 1979. It was at that time, once it had jumped the tracks to the human rights project, that more substantive emergence of the R2D on a political level was enabled. That tactical shift in course cleared the way for the political evolution of the R2D in the UN forum, such evolution being the subject of Chapter 3 of thesis. However, as demonstrated in the final sections of Chapter 2, that evolution would encounter several key ideological headwinds.

Ideological debate concerning R2D positioning as a legal right, versus a moral aspiration, partly contributed to one key headwind regarding the legal formulation of the R2D. R2D opponents asserted that there was insufficient legal basis for the R2D in existing international law, some arguing that the R2D had seemingly been conjured up out of thin air, suggesting that the R2D ought not be the subject of legal formulation at all, since it would not be feasible nor appropriate to formulate the R2D in a justiciable manner. Proponents of the R2D asserted that whilst it might be convenient for there to be an identifiable bright line between a claimed right and an unambiguous source for such a right in existing law, and for it to be feasible for such an emerging right to be posited in a binding manner to be justiciable from the outset, these are not essential prerequisites in the emergence of a human right. Such a bright line and a case for more immediate justiciability might have been deemed appropriate in respect of the R2SD, for example, but just because that was not so with respect to the R2D, that should not mean that the R2D ought to be rejected as an emergent, normatively substantiated element of human rights law.

Georges Abi-Saab, an ICJ jurist and proponent of the R2D, asserted that the R2D was emerging naturally as de lege ferenda, a postulation of what law ought to be or might eventually be, reflecting
the interests of decolonized peoples, peoples represented by states that had emerged to form a majority in the international community. Interests that were hardening into values that were taking hold in social consciousness, the result being sufficient international community desire to posit such values in a non-binding declaration such as the DR2D. Not in a hard law fashion as was the case with the R2SD, but rather in a more normative soft law manner, with the goal of positing such values being that the R2D might eventually transition to *lex lata*, or in other words positively binding law, in future. The inevitable grey zone in which such transition takes place ought not be problematic because even at the outset of such transition the ‘threshold of law is being crossed’, because such social values have not come out of thin air, and the process of legally formulating such values needs to start somewhere. The present author agrees with Abi-Saab that the relevant question is not whether there needs to be a bright line source for a human right in existing law, nor whether that human right needs to be justiciable to be treated as a right, but rather whether that right sufficiently reflects international community values, such that it ought to be given a chance to navigate that ‘grey zone’ in time. In the case of the R2D, decolonization set the stage for that test being met.

The close association of the R2D as a tenet of the NIEO, and opposition regarding that movement on the part of powerful developed countries, would be a more formidable ideological headwind. One that may have been the real driver behind more overtly stated sources of opposition related to issues concerning the legal formulation the R2D, which in addition to the question of identifying a bright line source for the R2D in existing law, and the issue of (non)justiciability, included debates concerning how to correlate the R2D with other human rights such as the R2SD, and how to appropriately align the R2D right-holder and duty-bearer relationship.

A further intellectual headwind would be that the discipline of economic development was in an immature state in the 1980s, being based on approaches that were narrowly focussed on
development through income growth, versus more holistic human development based approaches that would be introduced in later years. As the subject matter of the R2D, such disciplinary immaturity was inevitably going to pose a challenge in positing a corresponding right in a meaningfully pragmatical matter. This and previously mentioned headwinds would prove challenging, but the concept of the R2D as a human right did emerge from the decolonization movement thanks to contributions by jurists from the Global South, as a surviving remnant of the NIEO movement.

Political evolution of the R2D in the UN forum was relatively short from a temporal perspective, commencing in 1979 and culminating in 1986, with the DR2D being agreed in that year. However, the USA voted against the DR2D, and eight developed UN member states abstained, including the UK and Germany, reflecting the extent to which the concept of the R2D as a human right had become politicized. Ideological debate and negotiations were intense, as described in Chapter 3. That chapter provided a doctrinal comparative analysis of the final DR2D versus a penultimate version of the document that more closely reflected what proponents of the R2D such as Abi-Saab had conceptualized. This comparative analysis demonstrated that R2D proponents were compelled to compromise with respect to salient intellectual and juridical points, seemingly to garner the support of the USA, to no avail as it turned out in the final vote. The result being a watered-down version of the R2D compared to how it had been proposed by its proponents. Ironically, the resulting compromises have become impediments to R2D realization, owing to how the R2D was doctrinally posited in the final DR2D.

States are duty-bearers in the DR2D as posited, but not right-holders, which is problematic given that in the UN forum relations are governed on state-to-state basis. Although states might have been expected to demand R2D realization on behalf of their peoples, the peoples themselves do not have a direct voice at the UN. State interests do not always reflect the interests of their peoples.
There is a doctrinal misalignment between R2D rights-holders and duty-bearers, which arguably perpetuates power imbalances.

Obligations on the part of duty-bearers are incomplete and ambiguous. States’ obligations with respect to the R2D domestically are relatively clear in the DR2D, but far less clear with respect to States’ obligations regarding R2D realization internationally, with respect to peoples of other states. Chapter 3 concludes that such ambiguity was not accidental. Ambiguity with respect to states’ duties internationally suited developed countries such as the USA well, leading to an intentional deficit with respect to R2D accountability.

In hindsight, when the R2D jumped the tracks from the NIEO movement to the human rights project, it would have been more tactically effective to position the R2D as an integral component of the binding R2SD, rather than as a distinct human right in the DR2D, as soft law. There is a recently instigated initiative underway to re-posit the R2D in a binding convention, but this thesis suggests that a more effective approach would be to enhance realizability of the R2D by more firmly framing that right as an integral component of the already binding R2SD, which is considered a *jus cogens* principle under IL. Afterall, the R2SD was posited with economic and social development as a central tenet and, moreover, the R2D itself was posited with direct doctrinal linkages to the R2SD, which is already viewed as a meta right. The way forward in promoting the R2D as a component of the R2SD is an already paved road, and it is not too late to adjust the framing of the R2D in the IHRL landscape as this thesis suggests.

It is not clear in the text of the DR2D what the R2D means from a subject matter perspective. It is doctrinally clear that the R2D means a right to the process of development, but there is no real guidance in the DR2D as to what that process is meant to entail. Such ambiguity might not have been intentional, given that, in 1986, theoretical approaches to development were narrowly
focused and in an immature state. However, as with ambiguity with respect to R2D accountability, lack of clarity with respect to what is meant by the subject matter of the R2D, being as asserted in this thesis a right to the process of development, also suited powerful nations such as the USA well. Chapter 3 of the thesis endorsed a way forward in defining the right to the process of development as envisaged in the DR2D, that being the capabilities approach to development as freedom, as proposed by Nobel Laureate Amartya Sen in the 1990s.

Chapter 4 entailed a case study of the status of R2D realization in the occupied Palestinian Territories (the oPT), intended to illustrate the salience of analysis from Chapters 2 and 3 of the thesis.

The oPT consists of the West Bank including East Jerusalem, and the Gaza Strip, with a combined population of about 5.4 million people, almost half of whom are refugees registered with the UNRWA. Geographically, the oPT is fragmented with an obvious non-contiguous separation between Gaza and the rest of the oPT. Gaza has been the subject of a blockade by Israel since 2007, one that has been compared to a form of imprisonment, further exacerbating that separation. East Jerusalem has been illegally annexed by Israel. The West Bank is further fragmented into islands of territory disconnected from one another by a 465 km physical separation wall and an intrusive network of more than 275 Israeli settlements and outposts, as well as a roadway system connecting such installations that is restricted to Israeli use. Area C accounts for 62% of the West Bank by land area and is totally off limits to Palestinian access and use. Roving Israeli armed patrols further add to fragmentation from a practical perspective. In short, one could credibly conclude that much of the West Bank has been de facto annexed by Israel. At the very least evidence of aggressive domination of the peoples of the oPT is indisputable.

Freedom of movement for Palestinians is highly limited, and Israel maintains control of much of
the oPT from a practical governance perspective. The Oslo Accords of the early 1990s formalized such fragmentation and containment, which had nonetheless been informally prevalent since 1967. Legally, the oPT is deemed to have been under occupation by Israel since 1967, an occupation that will most likely be deemed illegal when challenged. That occupation is now more than 55 years in existence, whereas legal occupations are expected to be temporary under IHL. In 1994, the ICJ did opine that the separation wall is an infringement on the R2SD in respect of the peoples in the West Bank. Very recently, and as recommended by Michael Lynk as UN special rapporteur on the oPT in 2017, the ICJ has been asked to opine on the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967. It is hard to imagine an outcome other than that asserted by Lynk in 2017, which is that the occupation, settlement project and annexation are illegal as infringements of the Palestinian peoples’ R2SD.

Analysis in Chapter 4 began by using Article 5 of the DR2D as a reference to contextualize the historical and contemporary situation in the oPT. Demonstrating that for all intents and purposes, the situation in the oPT is one of settler colonization, that is incredulously depicted as a legal occupation by Israel and may well constitute a situation of apartheid. Article 5 of the DR2D references situations such as occupation, colonization, and apartheid in reaffirming UN member states’ obligations to eliminate flagrant violations of the human rights of peoples affected by such conditions, as well as refusal to recognize the fundamental right of peoples to self-determination. It is not fully clear whether Article 5 was drafted with the oPT in mind, but it describes the situation in the oPT to a tee. Article 5 was ostensibly included in the DR2D because such conditions of foreign aggression and domination could thwart realization of the R2D (a penultimate draft of the DR2D said so explicitly). This comparative exercise highlighted that international community
accountability is lacking with respect to the enforcement of IL in the oPT, including with respect to the R2SD. Accountability being a corresponding theme vis à vis the DR2D as discussed in Chapter 3, where it was demonstrated that accountability with respect to the international community was intentionally watered down during DR2D negotiations.

Serving as an economic annex of the Oslo Accords, the Paris Protocol of 1994/5 formalized Israel’s economic domination and containment of the oPT, establishing a customs union between the two, obliging the oPT to formulate its economic policies in accordance with the Israeli system. In effect, the Protocol gives Israel a dominant degree of control over economic policy formulation and implementation in the oPT, for example depriving the oPT of control over its sources of revenue and access to international markets for outward and inward trade purposes. In other words, restricting the oPT’s right to self-determined economic development, leading to a condition of de-development. A condition that one expects to see in cases of settler colonialization and occupation.

Chapter 4 demonstrated that de-development in the oPT has led to freedom deprivations resulting in forgone human development, freedom to enjoy immediate benefits that are constitutive of development such as income, good health and education, as well as the instrumental elements of development as freedom, being the right to employ a self-determined process of development, entailing the ability to control its own economic, trade and public investment policies, to enhance future outcomes of development. With respect to income, for example, UNCTAD analysis shows that in comparison to Israel, GDP per capita performance in the oPT lags far behind that of Israel and is far inferior to what it would be in the absence of the effects of settler colonization and occupation. Such forgone income representing an immediate deprivation with respect to freedom enabling outcomes of development, and future deprivation, owing to such income not being available to invest in future development.
Israel claims sovereignty over the oPT, and if one accepts that claim as being valid, then one ought to accept that Israel is obliged to observe the R2D in the oPT. If one does not accept that sovereignty claim, then one is inherently accepting that the situation in the oPT is one of occupation, in which case Israel ought to be obliged under IHL to ensure that the peoples of the oPT enjoy the R2SD, including the R2D. Under IHL, the laws of occupation require that any suspension of the R2SD be temporary. In either case, Israel is not meeting its obligations under IL. And in so far as the international community does nothing about that, other states are not meeting their obligations under the DR2D, in the former case, or are failing to enforce Israel’s obligations under IHL, in the latter case. In either case, states and the international community are failing to meet their obligations under IL in respect of the situation in the oPT.

Chapter 4 concluded that the R2D has not been substantively realized in the oPT, any more than the R2SD has been realized. This conflated failure underscores the correlation between these two rights, supporting the central finding demonstrated in this thesis, that the R2D ought to be thought of as the right to the process of self-determined development, viewed through the lens of Sen’s capabilities approach to development as freedom. The root cause of these rights not being realized is the situation of settler-colonialism in the oPT, a situation that persists and will continue to prevail until the international community decides to accept and act upon its obligations to enforce IL, laws that it has elaborated and claims to hold dear.

5.3 Summary

The R2D was not posited in a realizable manner, primarily owing to poor alignment with respect to the right-holder/duty-bearer relationship and a lack of accountability on the part of states and the international community for such realization. The root causes of these intentional shortcomings were the extent of politicization regarding the R2D and a corresponding lack of willingness on the part of developed states to accept such accountability. A further deficit in how
the R2D was posited stems from a lack of clarity as to what is meant by the process of development as the subject matter of the R2D. The root cause of that inevitable shortcoming was that theories of development, in 1986, were ‘under-developed’ in comparison to today.

Ambiguity with respect to R2D accountability and what is meant by the process of development ought to be addressed in a conflated manner by approaching the R2D as a right to the process of self-determined development, the R2D being a constituent component of the R2SD, which already entails binding accountability on the part of states and the international community. Realization of the R2D ought to incorporate the capabilities approach to development as freedom, as a contemporarily accepted theory of development.

The situation in the oPT amplifies illustration of the shortcomings of the R2D, especially with respect to lack of international community accountability, being a situation in which neither the R2D nor the R2SD are being fully realized. The oPT represents a highly politicized situation where decolonization, the movement that fueled emergence of the R2D in the first place, observance of the R2SD, including the R2D, and acceptance of accountability for such observance by the international community is long overdue.

With respect to future research regarding the situation faced by the peoples of the oPT, a situation that is fundamentally characterized by a lack of regard for such peoples’ R2SD, such research ought to be designed with a view to supporting the paradigm shift suggested by Francesca Albanese, to focus on the elimination of settler colonialism as a prerequisite solution to that situation. Such research ought to entail more explicit emphasis on the R2D, as a constituent component of the R2SD. Research emphasizing the “self” in the process of self-determined development is suggested, focussing on the role of civil society and how the international community can, as a way of living up to its R2D obligations, better support self-agency in socio-
economic development. The latter ought to be an essential ingredient in promoting overall collective agency with respect to the R2SD that, as Arendt prophetically asserted, Palestinians were deprived of when they lost the right to have rights in 1948.
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Appendices

Appendix A: Text of the Declaration

Declaration on the Right to Development

Adopted by General Assembly resolution 41/128 of 4 December 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International

Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,
Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neocolonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

**Article 1**

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

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 2

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Article 3

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.
Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.

2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.

3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.

2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

Article 9

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.

2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to
engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

**Article 10**

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.
Appendix B: Author’s Curriculum Vitae

Name: Norm Kimber

Education:
1984 – Bachelor of Arts (Economics), Dalhousie University
1990 – Master of Business Administration (Int’l Business Studies), Dalhousie University
2020 – Master of Science (International Development and Humanitarian Studies), LSE

Employment:
2015-2023 – Sovereign Credit and Political Risk Insurance Underwriter, Private Sector (London)
2014 – Credit and Political Risk Underwriter, African Trade and Insurance Agency (Nairobi)
2001-2009 – Political Risk Underwriter, Export Development Canada (Ottawa)
1995-1999 – International Relations Advisor, Export Development Canada (Ottawa)