

# The Human Rights Dimension in Debt-for-Development Exchanges

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There are two principal aspects to the human rights dimension in debt-for-development exchanges. The first relates to the beneficial potential of the exchanges: they can be a useful mechanism to enhance the realisation of human rights, especially economic and social rights. The second arises where a particular development project or the broader scheme under which it operates impacts adversely on some human rights in the debtor country.

Development is a variable and contested concept. That said, improving people's social and economic situation, by moving towards higher levels of human health, education, employment and standards of living generally, will comprise a large part of the process of development under most definitions. Likewise, improvements in systems of law and governance, such as greater participation in government, guarantees of free and fair elections and impartial systems of law enforcement, will form a large part of most conceptualisations of development. These understandings of development focus on improvements in human well-being, as distinct from, say, narrower notions of industrial or technological development.

Human development goals of this kind are also guaranteed human rights under international law. Indeed, there is a high level of interaction and interdependence between the process of development and the realisation of human rights. The following chapter considers debt-for-development exchanges from this perspective. It looks, first, at the human rights obligations of states in the context of development and at what is meant by the term 'development.' It then explores the capacity for debt-for-development exchanges to support or undermine human rights and considers whether the human rights-based approach to development might give useful guidance to parties negotiating exchanges.

## 1. Human rights obligations of states in the context of development

As with any activity, countries embarking on development initiatives under debt exchanges must comply with the obligations imposed on them under the human rights treaties to which they are signatories. The principal sources of states' international human rights obligations are the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR). The human rights guaranteed under ICESCR include the rights to education, the highest possible standard of physical and mental health, an adequate standard of living (including adequate food, water and shelter), work and social security, and cultural expression.<sup>1</sup> The corresponding obligation imposed on states under ICESCR is to take progressive steps towards the realisation of these rights, to the maximum of available resources.<sup>2</sup> Although this seems a somewhat inchoate and deferrable obligation, the ICESCR does include some immediate

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<sup>1</sup> *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR), articles 13, 12, 11, 6-8, 9 and 15.

<sup>2</sup> ICESCR article 2(1).

obligations too. A state cannot be passive: at all times, it must actively be taking expeditious, deliberate, concrete and targeted steps to improve realisation of the rights.<sup>3</sup> The state must also ensure that whatever realisation of rights is occurring is taking place on a non-discriminatory basis.<sup>4</sup> Finally, a state must not take retrogressive steps regarding rights, except in the most dire circumstances and temporarily.<sup>5</sup>

By contrast, states' obligations under ICCPR are expressed in terms which are immediate and absolute ('states shall'), without any express deference to resource constraints. The human rights which must be assured include the right to life, to freedom of movement, to freedom of thought, conscience, religion and expression, to associate and form trades unions and to take part in public affairs, including through voting.<sup>6</sup> The ICCPR also guarantees a number of freedoms, including freedom from slavery, torture, arbitrary arrest and incitement to racial hatred.<sup>7</sup> Similarly to ICESCR, states must carry out their obligations under ICCPR in a non-discriminatory manner.<sup>8</sup>

A glance through existing debt-for-development schemes reveals that they concern themselves almost exclusively with social and economic development, as opposed to political or governance-related development. The two exceptions are schemes which exclude from participation debtor countries which have not made commitments to protect human rights or which are engaging in gross violations of human rights<sup>9</sup> - usually unlawful state killings, torture and the like - and schemes intended to show support for a way of life which facilitates democratic, political and civil freedoms.<sup>10</sup>

Debtor countries negotiating debt-for-development exchanges will ordinarily be signatories to ICESCR and ICCPR. With the focus of most debt-for-development schemes being on key economic and social fields like health, education, poverty-reduction and rural livelihoods, debtor countries bring to the negotiations legal obligations to move forward, without retrogression, in the realisation of economic, social and cultural rights and to do so in a way which is not discriminatory.

In the current context, this latter requirement of non-discrimination is to ensure that the benefits of new initiatives are not restricted by gender, race, religion or other irrelevant difference. Importantly, it also has the purpose of ensuring that historically disadvantaged groups, typically women and minorities, are not *indirectly* excluded from the benefits.<sup>11</sup> In fact, the non-discrimination obligation in the principal conventions extends to a requirement that states take positive steps to ensure that historically disadvantaged groups are not left behind the more privileged sectors of the population in

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<sup>3</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3, *The Nature of States Parties' Obligations*, para 2.

<sup>4</sup> ICESCR article 2(2). The unlawful grounds are: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' A further ground is disability.

<sup>5</sup> Committee on Economic, Social and Cultural Rights, above note 3, para 9.

<sup>6</sup> *International Covenant on Civil and Political Rights* 1966 (ICCPR), articles 6, 12, 18-19, 22 and 25.

<sup>7</sup> ICCPR articles 8, 7, 9 and 20.

<sup>8</sup> ICCPR article 2(1). The unlawful grounds are the same as those under ICESCR.

<sup>9</sup> Examples include the Italian *Measure for the Stabilisation of Public Finance 1977* and *Measure to Reduce External Debt of Lower Income and Highly-Indebted Countries 2000*; the US *Tropical Forests Conservation Act 1998* (TFCA).

<sup>10</sup> See, for example, the 1991 'debt-for-democracy' exchange by Paris Club countries of a large amount of Poland's debt: S Freeland and R Buckley, *Debt-for-Development Exchanges: Using External Debt to Mitigate Environmental Damage in Developing Countries*, University of New South Wales Faculty of Law Research Series, Year 2010 Paper 14, at page 10.

<sup>11</sup> The prohibition on discrimination in the ICCPR and ICESCR has been interpreted to include a prohibition on indirect discrimination.

the process of progressive realisation of rights.<sup>12</sup> The obligations are especially strong in international law in relation to racial discrimination, the prohibition on which is widely considered to be a peremptory norm.<sup>13</sup>

### ***The right to development***

The often-cited 'right to development' is not expressly recognised in the ICCPR or ICESCR as a human right, nor as a clear legal obligation imposed on states<sup>14</sup>. Although a resolution adopting the *Declaration on the Right to Development* was passed by the United Nations General Assembly in 1986,<sup>15</sup> the *Declaration* has not progressed to treaty stage and seems unlikely to do so in the foreseeable future. In part, this is because it is unclear what the precise meaning of the right would be and, as a matter of law, who the right-bearers and the obligation-holders would be, if such a right were to be expressly recognised in international law. A further reason the *Declaration* is unlikely to become a treaty is that there is much disagreement as to what is meant by the term 'development' as a process or, more precisely, what the exact steps are which ought to be taken in order to achieve development as an outcome.

### ***Differing ideas about development***

Development is a contested and politicised field. What Bjorn Hettne and Robert Potter call 'development thinking'<sup>16</sup> has been dominated for at least the past quarter century by market-oriented thinking focused on development as primarily an economic process, measured by rates of economic growth. Development economists favouring this approach seek to improve welfare in developing countries through their fuller integration into the global economy. The influence of this approach does not appear to have been particularly strong in the selection of development projects negotiated in debt exchanges to date, possibly because the majority have focused more on environmental protection and conservation than on traditional development activities. Some more recent debt-for-development exchanges do, however, display the influence of this type of development thinking. For example, the US *Tropical Forests Conservation Act* 1998 (TFCA) sets out eligibility criteria which relate to the economic policies of the debtor countries, including having

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<sup>12</sup> There is an obligation on states to take positive action to correct historical discrimination. This is explicit in the *Convention on the Elimination of All Forms of Racial Discrimination* 1966 (CERD) and the *Convention on the Elimination of All Forms of Discrimination Against Women* 1976 (CEDAW), each convention anticipating that states will introduce temporary special measures for the purpose of securing advancement of certain groups and aimed at accelerating de facto equality: CERD article 1(4) and CEDAW article 4.

<sup>13</sup> The predominant view is that the prohibition on sex discrimination has not yet acquired the status of a peremptory norm of internal law. Moreover, a large number of reservations have been entered by signatory countries to CEDAW, significantly reducing its reach in practice.

<sup>14</sup> The *African Charter on Human and Peoples' Rights* 1981 is the only instrument which expressly recognises a right to development: article 22.

<sup>15</sup> United Nations General Assembly, *Declaration on the Right to Development* (A/RES/41/128) (1986). The United States was the only UN member country to vote against its adoption by the General Assembly.

<sup>16</sup> The study of development became a discipline in its own right after the Second World War and, today, there are many perspectives on how to stimulate and advance development, an area of enquiry which Bjorn Hettne and Robert Potter have named 'development thinking.' B. Hettne, *Development Theory and the Three Worlds: Towards an International Political Economy of Development* (Essex: Longman Group Ltd, 1995) and R. Potter, 'Theories, Strategies and Ideologies of Development,' in: V. Desai and R. B. Potter (eds), *The Companion to Development Studies* 61-62 (London: Hodder Arnold, 2002).

established a relatively open investment regime.<sup>17</sup> The 2006 Italy-Kenya debt-for-development scheme seeks to foster economic growth and increase employment, amongst other goals.<sup>18</sup>

Non-government international aid agencies and the development community overall have opposed the dominance of the narrow, economically-focused approach which has long guided the provision of official development and financial assistance by the industrialised countries and international agencies. They have fought to substitute, instead, an approach which views development as a broader social and cultural process, in which economic development is but one part and in which there is an emphasis on equitable distribution of the benefits of development. The human rights community has stood beside the aid and development community in this struggle. Indeed, the 1986 *Development Declaration* can be seen as a political move by the UN to place an expansive, equality-focused definition of development in the key international instrument:

[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.<sup>19</sup>

This definition presents development as a broad process which extends well beyond the economic sphere to include beneficial change in society, culture and the political realm. The definition leaves relatively open the question of what exact steps should be taken to achieve development as an outcome, but it does suggest norms which should guide whatever is done, such as, that it must be participatory, inclusive and equitable.

With this *Declaration*, the UN also intended to tie the development process tightly to the realisation of human rights. Article 1(1) declares an inalienable human right to development. It also adds to the definition that, through the right to development, "... every human person and all peoples are entitled to ... [a form of] development in which all human rights and fundamental freedoms can be fully realized." Thus, the *Development Declaration* both identifies development as a human right in itself and defines it as a broad, participatory, inclusive and equitable process through which all people may claim the realisation of their human rights and fundamental freedoms.

Debt-for-development negotiations cannot avoid taking place in the context of this political struggle over how development should be defined and approached – a struggle which is ongoing in development theory, policy and practice. They also cannot avoid taking place in the context of the very close relationship between the process of development and the realisation of human rights, particularly in the operational sense. To date, debt-for-development exchanges have varied in their human rights impacts.

## **2. The potential for debt exchanges to enhance human rights**

Debt exchanges can divert government funds into human rights-enhancing development initiatives, such as building public schools or medical services, thus supplementing national public expenditure

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<sup>17</sup> US *Tropical Forests Conservation Act* 1998, paragraph 805(a)(2).

<sup>18</sup> Ross' footnote 333.

<sup>19</sup> Preamble to *Declaration on the Right to Development*. The preamble further states 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."

and official aid funding in these sectors. A great improvement would be if ‘odious debt’<sup>20</sup> were automatically excluded; such debt should be written off, releasing funds for general public expenditure by developing country governments *in addition to* any funds released through debt exchanges. Debt exchanges may also be beneficial where they are developed in line with well-designed, human rights-supporting national development programs of debtor nations, such as the German debt-for-development exchanges in Jordan and Indonesia.<sup>21</sup> Debt-for-development exchanges also promote human rights-enhancing development when funding favours initiatives which *expressly* support the realisation of human rights.

Some debt-for-development schemes impose rights-supporting prior conditions for any negotiation of exchanges. For example, the Italian scheme requires that a prospective recipient nation be actively working towards enhanced social and human development, particularly poverty-reduction, have made significant commitments towards human rights protection, presumably including signing and ratifying the principal human rights treaties, and have renounced war as a means of solving controversy.<sup>22</sup> Similarly, the US TFCFA requires that an eligible developing country must have a democratically elected government, a track record of cooperation in the elimination of international drug trafficking and international terrorism and not be a gross or consistent violator of human rights.<sup>23</sup>

Clearly, debt-for-development exchanges, particularly those which require a track record of reasonable human rights compliance or which direct funds to projects which positively support the realisation of human rights, have the potential to be beneficial. So, why do debt-for-development schemes sometimes work against the realisation of rights? What are the pitfalls and traps which might cause otherwise beneficial debt exchanges to affect human rights adversely?

### **3. The potential for debt exchanges to impact adversely on human rights**

It is highly unlikely that a debt-for-development scheme would be framed so as deliberately and directly to negate human rights. On the other hand, not many schemes expressly support the realisation of human rights either. Where human rights are mentioned in the terms of a negotiated exchange, it is usually in the context of excluding countries with records of egregious human rights violations from schemes. For example, the US *Enterprise for the Americas Initiative* 1991 imposes a prior condition that debtor countries ‘not engage in a consistent pattern of gross violations of internationally recognized human rights.’<sup>24</sup>

Even those schemes which are evidently intended to support the realisation of social rights, such as exchanges which tie project funding to education and health initiatives, may have some adverse rights consequences. Projects may, for example, incidentally entrench existing discrimination and disadvantage by exacerbating economic and social disparities. Where discrimination and inequality are entrenched, there is the likelihood that new initiatives will, so to speak, build on the same grid unless they are deliberately and carefully structured so as not to do so.

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<sup>20</sup> The term ‘odious debt’ is used here to refer to debt which is incurred not for the benefit of a country as a whole and its people but of a despotic regime.

<sup>21</sup> **Ross part 2 chapter 6: 1 – Berensmann.**

<sup>22</sup> See above note 9.

<sup>23</sup> TFCFA, paragraph 805(a)(1), referring to paragraph 703(a)(1) – (5) and (7) of the US *Foreign Assistance Act* 1961.

<sup>24</sup> *Enterprise for the Americas Initiative*, 22 U.S.C. § 2430b(a)(4)

Moreover, adverse human rights consequences may also result from prior conditions applied in some debt exchange schemes, particularly where the conditions are directed more towards advancing aspects of the creditor country's own external affairs policies or commercial interests than advancing human rights in the debtor country. Both the US TFCA and the US EAI, for example, require that a developing country have instituted 'major investment reform' or have made 'significant progress towards an open investment regime' before a debt exchange will be considered.<sup>25</sup> While the US will no doubt benefit from this condition, a developing country deregulating and liberalising its investment laws in order to qualify for a debt exchange may experience adverse human rights consequences from the adjustment which it is not in a financial or regulatory position to constrain.

This is not to suggest that requiring investment reform as a prior condition will necessarily affect human rights adversely. The UN High Commissioner for Human Rights has noted that,

[i]t is difficult to generalise the effects of investment [reform] on the enjoyment of human rights.... Today, most developing countries seek investment as a means of promoting development..... From a human rights perspective, it is important .... to attract investment and promote national development....<sup>26</sup>

She added, however, that it is equally important '... to achieve economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised.'<sup>27</sup> She also warned that, while,

...well-managed investment has the potential to promote and protect human rights,[a] human rights approach emphasises that [investment reform] ... should not go so far as to compromise state action and policy to promote and protect human rights. To the extent that investment agreements concern human rights issues, *states have a duty to regulate*....<sup>28</sup> (emphasis added).

The duty, she explained, requires that states retain the capacity to regulate some forms of investment, 'particularly short-term and volatile investments' which have the capacity to 'reduce the available resources needed to promote human rights,' and that they retain the flexibility to use certain economic development measures, to withdraw deregulation commitments in the light of experience and to introduce new regulations to promote and protect human rights.<sup>29</sup> While it is unclear exactly what investment reforms are required under the TFCA and the EAI, either scheme could potentially trigger adverse human rights consequences in a developing country seeking debt relief through an exchange.

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<sup>25</sup> *Enterprise for the Americas Initiative*, 7 USC § 1738 (1994), § 1738b(a)(3); TFCA paragraph 805(a)(2).

<sup>26</sup> Report of the UN High Commissioner for Human Rights, *Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003. Page 8, para 6, and page 2. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/148/47/PDF/G0314847.pdf?OpenElement>

<sup>27</sup> *Id.*

<sup>28</sup> UNHCHR, above note 27, page 3.

<sup>29</sup> UNHCHR, above note 27, pages 3-4.

### ***Economic, social and cultural rights***

In addition to the above general concern about the regulatory impact of investment reforms required under debt exchanges, a particular concern arises regarding essential services following deregulation and liberalisation of investment. Most economic and social rights are 'delivered' through the medium of services, including health, education, water and sanitation, and income safety nets. Investment liberalisation often results in at least partial privatisation of such services, where they have previously been government-owned, frequently using the structure of public/private partnerships. Human rights concerns arise when newly-privatised essential services are operated on a more commercial basis than in the past. The introduction or raising of fees and/or eroding of universal service obligations which often follow privatisation may make essential services less accessible to the poor (the majority of whom in developing countries are women and minorities) or to those in remote areas and may have adverse human rights consequences. Projects designers need to be aware that regulatory changes can result in new barriers to access arising. Indeed, it may be that relatively simpler projects, which reduce access barriers for *existing* essential services, would deliver greater development gains than schemes which, while increasing the overall quantity of essential service provision through greater private participation, end up pricing the most vulnerable consumers out of the market.

### ***Civil and political rights***

It is unlikely that a debt-for-development scheme would be structured so as directly to violate civil or political rights. More likely is that a scheme would simply not concern itself either with the human rights impacts of its projects or with whether the debtor state intended to pay appropriate attention to compliance with its ICCPR obligations in implementing those projects. An example might be development projects which adversely affect people who were not adequately consulted. ICCPR article 25 requires that citizens 'shall have the right and the opportunity [without discrimination] and without unreasonable restrictions, ... to take part in the conduct of public affairs, directly or through freely chosen representatives....' This article has been interpreted to include, if not a right to participate *directly* in *all* public affairs (which includes local decision-making such as development infrastructure and employment projects), then at least a right to participatory state practices which are not in contrast or conflict with article 25.<sup>30</sup> Either way, debtor states are obliged to respect and protect this right, including when they are negotiating and implementing debt-for-development projects.

### ***Indigenous rights***

A problem may arise where a development project interferes with the customary practices or statutory entitlements of the indigenous peoples of an area. Probably the starkest example of this occurring is the 1987 debt-for-conservation exchange involving the Beni Biosphere Reserve in Bolivia and the US-based NGO, Conservational International, the negotiations for which failed to include the

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<sup>30</sup> C. Dommen, 'The WTO, international trade, and human rights,' in Michael Windfuhr (ed.) *Mainstreaming Human Rights in Multilateral Institutions*. Available at [http://www.3dthree.org/pdf\\_3D/WTOmainstreamingHR](http://www.3dthree.org/pdf_3D/WTOmainstreamingHR)

local indigenous people. The exchange acted to extinguish any statutory opportunity for the Moxo Indians to claim legal recognition of their traditional land rights over the Chiamese Forest.<sup>31</sup>

Under the various domestic laws currently in place, many indigenous peoples enjoy a procedural right to be consulted, which may extend from a mere right of notification to a right of veto. In some formulations, the right could ensure traditional owners a high degree of control over the outcome of negotiations over debt-for-development proposals which might affect them. For example, the Australian *Native Title Act 1993* recognises and protects a right to negotiate, held by traditional owners as defined under that Act.<sup>32</sup> In this sense, indigenous peoples may enjoy a more strongly defined right than others in a community to participate in public affairs affecting them, a fact of which debtor country governments should be fully aware in negotiating debt-for-development exchanges.

Under international law, however, both the status of many other rights asserted by indigenous peoples and the nature of states' obligations with respect to them are not particularly clear or are contested. For example, while 'all peoples have the right of self-determination,'<sup>33</sup> it is by no means certain that indigenous peoples within a sovereign state possess this right independently. The right is asserted in article 3 of the *Declaration on the Rights of Indigenous Peoples*, a 2007 resolution of the UN General Assembly, but is not (yet) expressed in treaty form as binding law. It has also been stated that indigenous peoples possess 'sovereignty' rights.<sup>34</sup> While such rights may be correctly asserted from the traditional perspective of the indigenous people themselves, international law has yet to recognise a separate indigenous right to sovereignty.

Failure to respect and protect the different cultural and customary law heritage of indigenous peoples might be unlawful where it constitutes racial discrimination, which is prohibited under multiple international law instruments and under customary international law.<sup>35</sup> The *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) prohibits racial discrimination with regard to participation in political and public life<sup>36</sup> (as well as in relation to the other human rights and freedoms guaranteed under the covenants, including any property-related rights). The legal basis for many references to the rights of indigenous peoples (as distinct from human rights generally) will be found in equality concepts and guarantees of non-discrimination.

#### **4. A human rights-supporting approach to debt-for-development?**

It is clear that developing countries have human rights obligations which accompany them in their negotiations over the broad focus and finer details of debt-for-development exchanges. It is also clear that the process of development and the realisation of human rights are closely and intricately connected. Debt-for-development schemes ought to support the realisation of human rights, as

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<sup>31</sup> **Ross' text: II 'First Generation' Debt Exchanges – A. Bolivia (1987) - 'Debt for Conservation.'**

<sup>32</sup> *Native Title Act 1993*, Subdivision P.

<sup>33</sup> ICESCR and ICCPR, common article 1(1).

<sup>34</sup> See, for example, David M Leon, 'Expanding the Scope of the Tropical Forest Conservation Act: Exchanging Foreign Debt for Sustainable Development,' *University of Miami International & Comparative Law Review* 11 (2003) Issue 1 – Summer, at page 141; Amanda Lewis, 'Swapping Debt for Nature,' *Colorado Journal of International Environmental Law and Policy*, Vol. 10:2 (1999), 431-467, at page 436.

<sup>35</sup> The international instruments include ICESCR article 2(2), ICCPR article 2(1) and the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD).

<sup>36</sup> CERD, article 5.



should any development initiative. At the very least, they ought not to have retrogressive effects on rights.

The concept of a human rights-supporting approach to development has been operationalised in recent years, principally by the United Nations in its work on the Human Rights-Based Approach to Development (HRBAD). Building on the work of Amartya Sen and Mahbub ul Haq,<sup>37</sup> the UN has taken steps to incorporate into its development work new understanding and knowledge about how the process of development can be steered to facilitate the realisation of human rights and freedoms for all. From the late 1990s, many UN agencies attempted to adopt a human rights-based approach to their development cooperation work, but each 'tended to have its own interpretation of approach and how it should be operationalised.'<sup>38</sup> In 2004, the *UN Statement of Common Understanding on Human Rights-Based Approach to Development Cooperation and Programming* drew them together in a relatively consistent approach. Under the *Common Understanding*, all UN programmes of development co-operation and assistance must aim to "contribute directly to the realization of one or several human rights."<sup>39</sup> The United Nations Development Group has observed that the human rights-based approach to development,

"leads to better and more sustainable outcomes by analyzing and addressing the inequalities, discriminatory practices and unjust power relations which are often at the heart of development problems. It puts the international human rights entitlements and claims of the people and the corresponding obligations of the State in the centre of the national development debate."<sup>40</sup>

In light of the brief survey in this chapter of human rights-related traps and pitfalls for debt exchanges, could the *Common Understanding* provide guidance for negotiating countries seeking to avoid adverse human rights outcomes? One possibility might be for domestic legislation authorising debt exchanges, or the terms of exchanges individually, to include a reference to guidance provided by the human rights principles set out in the *Common Understanding*:

'Human rights are universal and inalienable .... indivisible .... interdependent and interrelated .... All individuals are equal [and] .... are entitled to their human rights without discrimination.... Every person and all peoples are entitled to ...participation [in development] in which human rights ...can be realised.... States and other duty-bearers are answerable for the observance of human rights.'<sup>41</sup>

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<sup>37</sup> In 1990, led by Amartya Sen and Mahbub ul Haq, the UNDP introduced the notion of development as 'human development,' measured by human indicators, in contrast to the dominant, but more limited, notion of development as economic development, measured by economic growth. Their ideas grew into a concept of human development which fully accepts an indivisible relationship between itself and human rights: R. B. Potter, T. Binns, J. A. Elliott and D. Smith, *Geographies of Development 12* (Essex: Pearson/Prentice Hall, 2004).

<sup>38</sup> United Nations, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies*, 2004, Introduction. [http://www.undg.org/archive\\_docs/3069-Common\\_understanding\\_of\\_a\\_rights-based\\_approach.doc](http://www.undg.org/archive_docs/3069-Common_understanding_of_a_rights-based_approach.doc).

<sup>39</sup> UN, *ibid*, para 1.

<sup>40</sup> United Nations Development Group, 'Human Rights-Based Approach to Development Programming,' <http://www.undg.org/index.cfm?P=221>

<sup>41</sup> UN, above note 39, para. 2.

These principles provide guidance for the respect of human rights in development projects. They are open to being used for violation-avoidance, exhorting respect for human rights without turning debt-for-development schemes into human rights programs. They give guidance on avoiding traps, such as under-estimating the interrelated and inter-dependent nature of rights, or implementing development projects which are insufficiently participatory or discriminatory in their effects. They also remind states that their human rights obligations apply in all their activities. If a reference to these principles were, say, adopted as a standard for Paris Club agreements, it could be phrased as a simple statement:

The human rights principles set out in paragraph 2 of the United Nations' *Human Rights Based Approach to Development Cooperation: Common Understanding* guide all development programming funded under debt exchanges.

An alternative path might be to encourage the channelling of funds through a third party which has its own operational principles and systems which are respectful of human rights principles. An example is the Debt2Health initiative of the Global Fund, established to enable debt swaps to free up domestic resources for investment in Global Fund programs to fight HIV/AIDS, malaria and tuberculosis. While the Global Fund is 'a financing institution [which] does not provide normative guidance, ... [nor is it] an implementing agency,' it has developed a gender equality strategy to guide its funding decision-making. The Fund believes that it can act as a useful catalyst in this way, 'supporting country's efforts to take the gender dimensions of the three epidemics into account in their proposals and subsequent programme implementation....'<sup>42</sup> The Fund has justified the taking of this step by pointing out that,

'[i]n the majority of countries applying for funding, ... the government has committed to realising gender equality and women's empowerment through the adoption of various human rights instruments, including the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).'<sup>43</sup>

The Global Fund also applies general principles to its work and funding decisions which broadly support human rights principles, including participation, poverty-reduction, non-discrimination and adherence to international law obligations.<sup>44</sup>

There is, of course, a risk that creating operational links between debt exchanges and human rights would deter countries from negotiating exchanges at all. This would be a damaging development, as the number of debt-for-development exchanges is even now too small. Although some have criticised his view,<sup>45</sup> the UN Independent Expert on Debt and Human Rights considers (human rights-supporting) debt-for-development swaps as largely beneficial and has called for more, as one partial

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<sup>42</sup> *The Global Fund Strategy for Ensuring Gender Equality in the Response to HIV/AIDS, Tuberculosis and Malaria*, Part 1, para. 2. [http://www.theglobalfund.org/documents/strategy/TheGenderEqualityStrategy\\_en.pdf](http://www.theglobalfund.org/documents/strategy/TheGenderEqualityStrategy_en.pdf)

<sup>43</sup> *Ibid*, Part 2, para 1.

<sup>44</sup> *Framework Document of the Global Fund*, Section III: Principles. [http://www.theglobalfund.org/documents/TGF\\_Framework.pdf](http://www.theglobalfund.org/documents/TGF_Framework.pdf)

<sup>45</sup> See, for example, Melik Özden, Europe-Third World Centre (CETIM), *Debt and Human Rights: Consequences for human rights of the debt of the countries of the South and the current state of its treatment within the United Nations bodies*, page 18.

solution to developing countries' heavy debt burdens.<sup>46</sup> While some debt-for-development exchanges do adversely affect human rights and while there is considerable under-utilisation of their human rights-promoting potential, any human rights statement or linkage which might have a chilling effect on this sector should be very carefully considered.

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<sup>46</sup> *Statement of Mr. Bernards Mudho, Independent Expert of the Commission on Human Rights on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, United Nations General Assembly, Sixty-first session, Third Committee, New York, 25 October 2006, para. 10.*  
<http://webcache.googleusercontent.com/search?q=cache:6WzE4iAgaLcJ:www2.ohchr.org/english/bodies/chr/special/docs/foreigndebtAG2006.doc+swaps+independent+expert+on+the+effects+of+Foreign+Debt+on+the+Full+Enjoyment+of+all+Human+Rights.&cd=2&hl=en&ct=clnk&gl=au>