The 13th session of the Expert Mechanism on the Right to Development

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Consideration of thematic studies
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An interactive chapter-by-chapter discussion on the draft international covenant on the right to development

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Unofficial transcript of the oral statements by
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Mr. Mihir Kanade's reply about collective dimension

To address a question that has been raised in writing, I would like to return to an issue that has already been discussed yesterday and in several other sessions of the Expert Mechanism, namely the collective dimensions of the right to development.

In my view, this is not a question that remains open to legal debate, as international law is clear: States have accepted the right of all peoples to development. This follows from Article 1, common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In that provision, States have unanimously affirmed that all peoples have the right to self-determination, and that by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development. Accordingly, the existence of the collective dimension of the right to development is firmly grounded in existing treaty law.

Concerns are sometimes expressed that collective rights may be invoked in a manner that undermines individual rights, for example by curtailing individual rights in the name of the public interest. However, the existence of such concerns is not a tenable reason to deny the existence of collective rights. The potential misuse of any human right cannot justify its exclusion from the legal framework. Individual rights may also be misused in ways that affect other individual rights, yet this does not call into question their validity. The same logic applies to collective rights.

International law already provides sufficient guidance on how to reconcile potential tensions between collective and individual rights where they arise. As an Expert Mechanism, we have previously submitted a study to the Human Rights Council and the General Assembly examining this issue in detail. There is also extensive jurisprudence, particularly from the African and Inter-American human rights systems, on balancing these dimensions in practice.

In certain cases, individual rights have been preferred over collective rights. In other cases, collective interests have been given priority over individual rights. The experience of the COVID-19 pandemic illustrates this balance, where the individual right to freedom of movement was restricted through lockdown measures in the public interest. Similarly, the International Covenant on Civil and Political Rights contains several provisions that explicitly allow for limitations in pursuit of legitimate public interests, providing further guidance on this balance.

Allow me to make a final personal observation, given that we are approaching the concluding phase of this process concerning the 1986 Declaration. Based on my experience of several years of negotiations in Geneva, there has been a persistent effort to clarify the relationship between individual

and collective dimensions of the right to development. In this regard, I recall that during the negotiations, whenever colleagues from the European Union stated that they recognized the right to development only insofar as it was considered as an individual right, this was perceived by many delegations particularly from the African Group, but also from other regions as an implicit rejection of the collective dimensions of human rights as recognized in regional instruments such as the African Charter on Human and Peoples' Rights.

So, every time they would hear a statement from the delegation of the European Union that we do not recognize collective dimensions, what the African delegations, the delegations from the Inter-American system, from Asia, are hearing is that only the European idea of human rights is worthy enough to be accepted at the international level. Your ideas, your collective rights ideas, should not be. They are not meritorious enough to be recognized at the international level.

Such perceptions are avoidable. As demonstrated in the study submitted last year to the Human Rights Council, there are well-established ways in international law to reconcile collective and individual dimensions of human rights without denying either. These approaches are already embedded in existing international law and practice.

Mr. Mihir Kanade's reply about self-determination

Article 5 addresses the relationship between the right to development and the right of peoples to self-determination. In this regard, I would like to address a concern that has been raised previously. There is a general misunderstanding that the right to self-determination is limited to secession from existing States or territories. While secession may represent an extreme manifestation of self-determination, the concept is significantly broader in scope.

International jurisprudence provides clear guidance in this respect. The Supreme Court of Canada in the Quebec case distinguished between internal and external self-determination. We have the Katanga case from the African system, which has explained the circumstances at the extreme end of the spectrum, where secession becomes a part of self-determination.

In drafting this provision, we were fully attentive to the evolution of international law on self-determination. Accordingly, following the reference to the right to development as implying the full realization of the right of all peoples to self-determination, the sixth paragraph draws directly on existing international law, in particular the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

That paragraph provides that nothing contained in the present Covenant shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a government representing the whole people belonging to the territory, without distinction of any kind. It further provides that each State party shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State.

It is important to emphasize that this is not new language. It was not created by the expert drafting group but is firmly grounded in existing international law. The commentaries to the draft Covenant provide detailed references to the relevant sources.

Mr. Mihir Kanade's reply about concern that the draft Covenant prioritizes development rights over other rights

It is often stated that the right to development should not be used as a pretext for violating civil and political rights. This is, of course, correct. The right to development cannot and must not be used as a pretext to undermine other human rights. The draft Covenant guarantees that such an outcome is not possible.

Article 6, entitled "Relationship with other human rights", addresses this concern directly. It provides that States Parties reaffirm that all human rights, including the right to development, are universal, inalienable, interrelated, interdependent, indivisible and equally important. States Parties further agree that the right to development is an integral part of human rights and must be realized in conformity with the full range of civil, cultural, economic, environmental, political and social rights.

Accordingly, the Covenant makes clear that development cannot be pursued in a manner that undermines civil, political, economic, social or cultural rights. This point is explicitly embedded in the text and should not give rise to any ambiguity in its interpretation or application.

Article 7 addresses the relationship between the Covenant and the responsibility of all actors to respect human rights under international law. I would encourage delegates to consult the relevant commentary in this regard. While I will not elaborate further unless questions arise, it is important to recall that international law recognizes obligations on States to respect, protect and fulfil human rights. In addition, there exists a general obligation on all actors to refrain from causing harm and to respect the human rights of others.

Every legal person, whether State or non-State actor, has an obligation to do no harm, to respect the human rights of others. The commentaries on Article 7 provide a comprehensive and detailed explanation of this principle and represent one of the most extensive sections of the explanatory material. Delegates are therefore encouraged to refer to them for further clarification.

Mr. Mihir Kanade's reply about debated topics in negotiating process

Regarding the question raised by the distinguished colleague from Cuba concerning the process of negotiations over the past four years, this has already been addressed at the outset of the session, and Ambassador Akram has also provided a comprehensive overview of the process. I will therefore focus on highlighting the main thematic areas that were the subject of discussion and debate in Geneva.

The first key issue was the relationship between individual and collective rights. As is well known, this issue has generated differing views, including from the European Union. Considerable effort was devoted to clarifying the legal basis of collective rights, which is not limited to Article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. There is extensive jurisprudence from regional human rights systems, including cases concerning indigenous peoples, which has consistently recognized peoples as rights holders. In this sense, both the individual and collective dimensions constitute an integral component of the right to development.

The historical development of collective rights must also be understood in its proper context. In the post-colonial period, the assertion of individual property rights by colonial elites was, in some instances, used to justify the denial of collective ownership over natural resources in newly independent States. The recognition that peoples have rights over their natural resources therefore emerged as a corrective response to such historical imbalances. It is important to acknowledge this trajectory and the legal and conceptual foundations from which collective rights have developed, including communitarian conceptions of rights reflected in various cultural traditions.

Accordingly, when positions are expressed that reject the collective dimensions of the right to development, it is important to be clear about what is being contested, as this touches upon long-standing legal, historical and philosophical understandings of rights in a post-colonial context. From my perspective, based on experience in these discussions, much of this controversy is avoidable. The tensions between individual and collective dimensions of human rights can be addressed through established principles of international law, without denying either dimension.

The second issue discussed was the question of coercive measures. This issue was comparatively less controversial among participating delegations. As is well established in resolutions of the Human Rights Council and the General Assembly, unilateral coercive measures not in accordance with international law are prohibited; they constitute a violation of human rights. In the context of treaty drafting, reference was made to the definition of coercive measures contained in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. This instrument has been widely recognized as reflecting customary international law, as confirmed in the jurisprudence of the International Court of Justice. The source of this language was clearly set out in the commentaries and was generally accepted without difficulty.

A further area of discussion concerned the relationship with other human rights. In this respect, the approach adopted throughout the drafting process has been that no trade-offs are permissible between human rights. All human rights are interdependent and mutually reinforcing, and the realization of one right cannot come at the expense of another. For example, a development project intended to improve access to water in rural areas cannot be considered consistent with the right to development if it involves forced displacement, lack of consultation, or uncompensated loss of land for affected communities. The objective of the Covenant is precisely to prevent such contradictions in the implementation of development policies.

Regarding the duty to cooperate, several provisions draw on established frameworks in international law, including the Charter of the United Nations, particularly its provisions on international cooperation. There is nothing novel in reaffirming these obligations. Similarly, elements of the text are informed by the 2030 Agenda for Sustainable Development, including its means of implementation, which are based on consensual language adopted by all States.

The relevant provisions are designed as obligations of conduct rather than quantified obligations of result. They do not establish numerical targets or rigid benchmarks but rather reflect a best-efforts standard. Within this framework, the duty to cooperate remains a central element for the realization of the right to development.

Mr. Mihir Kanade's reply about Article 13 on duty to cooperate

We were asked by a specific delegation, I believe the delegation from Colombia, whether Article 13 on the duty to cooperate is an obligation of conduct or an obligation of result. And this question is very interesting because the International Law Commission has rejected the idea of responsibility of States being understood in the context of obligations of conduct or obligations of result.

In fact, in 1977, when the debate took place on the Articles on State responsibility, as you know, it took over 40 years for the Articles on State responsibility to be debated. Roberto Ago, who was the Special Rapporteur of the Commission at that time, had proposed the introduction of the language of obligation of conduct and obligation of result into the Articles on State responsibility. And many of the lawyers, particularly from the Anglo-Saxon tradition, such as James Crawford, who is one of the most important legal scholars of our times, were very vociferous in their rejection of the idea of obligations of conduct and obligations of result. The long story short is that, because of this lack of

agreement, the International Law Commission rejected that. They did not accept and incorporate the idea of obligation of conduct and obligation of result.

When we look at the duty to cooperate under Article 13 of the draft Covenant, it is important to go back to the study of this Expert Mechanism, which we prepared last year, elaborating on the scope, nature and content of the duty to cooperate. And what we pointed out there is that it is extremely important that each case is taken on a case-by-case basis, precisely because what the duty to cooperate would mean in a particular instance would vary.

To give you an example, unilateral coercive measures are also a failure to abide by the duty to cooperate. That is a much simpler question to answer in terms of whether there is a violation or not, as compared to the obligation to cooperate with each other to negotiate the elimination of harmful provisions in the intellectual property rights agreement. That is a different thing altogether. Obviously, it is not a unilateral duty to cooperate or a bilateral duty to cooperate, but a multilateral setting, which requires reciprocity. The more multilateral the setting is, obviously the duty to cooperate needs to be contextualized in that, because there is more reciprocity necessary.

Mr. Mihir Kanade's reply about concern over sexual and reproductive health and reproductive rights

The final point I will make, and I again think this is important to answer certain concerns of colleagues from certain parts of the world, is the provision relating to gender equality and empowerment of women and girls. And we did hear a particular objection to this last year as well from an NGO here in New York. And this specific objection comes to paragraph G of Sub article 3, which talks about ensuring equal and equitable access to sexual and reproductive health and reproductive rights. Now, this is an objection which we have heard before, obviously, in Geneva as well. But it was clarified to delegations that this is different language from what they otherwise find to be objectionable language based on their own ideas or ideologies.

The common term SRHR refers to sexual and reproductive health and rights. And when this concept is framed in this way, it basically means that the words "health" and "rights" qualify both the terms sexual and reproductive. So, we are talking about sexual health and rights, and reproductive health and rights when the framing is sexual and reproductive health and rights. Please take a careful look at the language in this paragraph, which is exactly identical to the language in the 2030 Agenda, which borrows from the Beijing Declaration, because there has been an agreement, a consensus that the wording should not be "sexual and reproductive health and rights", but "sexual and reproductive health and reproductive rights". We are not talking here about sexual rights, which may be controversial to some countries. We are not talking about sexual rights. It is sexual and reproductive health and reproductive rights. It is consensual language from the 2030 Agenda.

Last year in December, I had the opportunity to be invited by the Permanent Human Rights Institution of the OIC, the Organization of Islamic Communities in Jeddah. And I had the opportunity to explain this issue to the commissioners.

This is one area which I really wanted to clarify. Last year, one of the civil society organizations somehow wanted to interpret this as permitting child pornography or somehow permitting abortion. None of it is said here.

Sexual and reproductive health and reproductive rights. And as we know, this is language already existing in international law. Countries are at liberty, even within countries, States, if they have a federal structure, are at liberty to determine whether they want to allow abortion or not. International law does not impose any such requirements. It is for States to interpret this the way they want to.

Prof. Dr. Diane Desierto's reply about ambiguity and an attribution of international responsibility

Let me just preface my remarks on reservations and harmonious interpretation with a technical clarification that must be made and that might assist with everyone's deliberations on the text of the treaty. The concerns that are articulated here echo very much concerns that were initially raised in Geneva, and we made the same clarifications at that point in time, so this might be helpful.

I point first and foremost to the concern about ambiguity and how there could be an attribution of international responsibility.

I think we have to unpack this concept first because it is a long stretch to get to any conclusion of international responsibility. We must first characterize an internationally wrongful act, which is why the text is supremely important in what it calls upon States to do. The verbs that were used in terms of what States were expected to do here were purposely patterned after human rights treaties that already contain these undertakings, and so they did not create new undertakings that were not already what States themselves embraced, but even to try and get to a conclusion of international responsibility, which I understand is always a legitimate concern.

International responsibility presupposes that none of the interpretive, the factual, the jurisdictional, the secondary defences available to States, which is extensive, will ever be applicable and so to make any inference from text alone that there will be international responsibility in the legal sense is quite premature. The text itself is flexibly structured to provide enough room for interpretation within the sphere of international human rights practices. And that is something that we anticipate. That's why in the provision in Article 25, I think on harmonious interpretation, we do expect that there will be extensive reference to what States themselves are already practicing and will call for harmonious interpretation of what States are already practicing, that is why the emphasis on indivisibility and interdependence is present.

I will also add that even from a conclusion of international responsibility, it's also not so easy to get to the point of any conclusion of international liability, because then it enters into the question of any concept of reparative measures that are available for any potential or adjudicated international responsibility. In the spectrum of international human rights law, in particular, there has not been a significant preponderance of reparations that have been insurmountable or in themselves have not had the support of States themselves. So, this leads me also to the questions regarding reservations that were raised on Article 33.

Prof. Dr. Diane Desierto's reply about reservations

It (Article 33) confirms what is on the Vienna Convention on the Law of Treaties that reservations can be entered into treaties at any time, unless the treaty itself specifically prohibits entering a reservation. We make it more explicit that reservations could be entered. They could also be withdrawn at any time, but the minimal requirement that is also found in the Vienna Convention on the Law of Treaties is that a reservation must be compatible with the object and purpose of the treaty. If it's incompatible, it's an invalid reservation. That is why it's also helpful that we pointed out the object and purpose of the treaty itself.

Prof. Dr. Diane Desierto's reply about framing of the entire context behind the treaty

Finally, I think one thing that I do want to respond to is on the framing of the entire context behind this treaty considered global practices as they have emerged in the international system, the regional system, national systems.

I also will add, as to the tension on individual and collective dimensions, common Article 1 of the ICCPR and ICESCR has two aspects. The language says, first, its free determination of political status, but the next language says the free pursuit of economic, social and cultural development. It's very different: the language of "determine" is very different from the language of "pursuit," and no less than the International Court of Justice, in its recognition of the right to self-determination as a jus cogens norm itself, made that difference, separating out that first phrase in common Article 1 from the second phrase of common Article 1. It is not, therefore, an outcome-based determination because we're looking at free pursuit of economic, social and cultural rights and the right to self-determination.

And finally, just on the question with respect to elevating this right over other rights, I actually think the harmonious interpretation provision, coupled with the context of the general principles as well as the preamble, make it very clear that this is not creating another jus cogens norm, but rather reconciles what is already extant in international human rights law: civil, political, economic, social and cultural rights, individual as well as collective rights, for the three acts that I referred to in Article 4, paragraph 1: participation, contribution and enjoyment.

The first two, participation and contribution, are process-related aspects of development. The enjoyment part is not a process-related aspect, but an outcome-related aspect of development. But even that, as pointed out in the later parts on statistics, on impact assessments, and on the concerns about how to do an implementation mechanism, the focus on the outcome is intended to be dialogic. And that was clear in all of those years that we were discussing in Geneva, which is why the provision here is not for a treaty-based accountability mechanism, but for States themselves to create the implementation mechanism that will be part of the ongoing dialogue to realize the right to development. I very much hope these clarifications would be of assistance and would not be an impediment for the necessary political and diplomatic dialogue that, in the end, it is the States that are responsible for.

Mr. Mihir Kanade reply about tensions with other existing international obligations

In addition, I would like to address a question raised by the delegation of Mexico concerning the potential for tensions between this treaty and existing international obligations.

As my colleague Diane has already noted, Article 25 on harmonious interpretation is directly relevant in this regard. Paragraph 3 provides that, subject to the provisions of the Vienna Convention on the Law of Treaties, the provisions of the present Covenant shall not affect the rights and obligations of any State Party arising under existing rules of international law.

This formulation reflects the intention that the Covenant does not establish a hierarchy between its provisions and other applicable international legal instruments. Rather, it is designed to ensure coherence and compatibility within the broader framework of international law, in accordance with established principles of treaty interpretation.

In this context, I would also encourage delegations to consult the accompanying commentaries, which provide a detailed explanation of each provision, including its legal basis and the sources of international law from which it is derived.

Mr. Mihir Kanade's reply about treaty body

I would now like to address the question concerning the treaty bodies, which was also raised by the delegation of Egypt. The clarification sought relates to the institutional structure proposed under the draft Covenant, which differs from the conventional committee system established under existing human rights treaties.

As explained in the commentaries, the draft Covenant establishes a sui generis system of treaty bodies. This design departs from the traditional model of treaty committees, which typically perform compliance, monitoring, and reporting functions under the core international human rights treaties. The approach adopted in the present draft reflects several considerations, which are further elaborated in the commentaries.

First, the structure draws on existing practice within human rights treaty bodies as well as relevant models from other international regimes. It is designed in accordance with the duty to cooperate that underpins the right to development, and it adopts a cooperative rather than adversarial approach. This was a central consideration during the drafting process, including in response to concerns expressed by States that a further reporting burden or duplicative mechanism should be avoided, given the already extensive reporting obligations under existing human rights treaties.

Second, the proposed structure considers the continued relevance of the existing Working Group on the Right to Development, established in 1998 under the former Commission on Human Rights, as well as the work of the Expert Mechanism on the Right to Development. The Conference of States Parties is conceived as a continuation and institutional consolidation of these processes, rather than the creation of an entirely separate and duplicative body. In the same vein, the implementation mechanism is designed to build upon existing expert capacities, with the intention of ensuring continuity while avoiding fragmentation of mandates.

Third, considerations of institutional efficiency and resource constraints within the United Nations system were also considered. The objective is to make effective use of existing secretariat and financial resources, rather than establishing parallel structures that could place additional burdens on the system.

Within this framework, both the Conference of States Parties and the implementation mechanism are mandated to consider not only domestic implementation challenges, but also external factors affecting the realization of the right to development, including conduct attributable to other States and international organizations. This external dimension represents a distinguishing feature of the proposed system, as it enables a more comprehensive understanding of structural obstacles to development, including extraterritorial impacts.

The implementation mechanism may also consider requests concerning situations in which the right to development is alleged to have been adversely affected by failures to comply with the duty to cooperate. This is intended to complement, rather than replicate, the functions of existing treaty bodies, which primarily focus on domestic implementation. The emphasis here is on the cooperative dimension of international obligations.

It should also be noted that the draft Covenant does not establish an individual complaints mechanism. This decision reflects the current stage of development of the instrument, while preserving the possibility that States may, at a later stage, consider the adoption of an optional protocol should they so wish, in line with established practice under other human rights treaties.

In addition, the draft includes an inter-State procedure allowing recourse to the International Court of Justice. However, such recourse is not compulsory and is subject to the consent of the States parties to the dispute, consistent with the principle of consent-based jurisdiction under international law.

Finally, with respect to reporting and interpretative functions, the draft does not establish mandatory periodic reporting obligations. Any reporting arrangements are to be determined by the Conference of States Parties. Likewise, the scope of authority of the implementation mechanism, including any ability to issue recommendations or interpretative guidance, is likewise to be defined by the Conference of States Parties through its rules of procedure. This reflects the institutional design of a system that is intended to remain flexible, cooperative, and State-driven in its operational modalities.

Mr. Mihir Kanade's reply about including "regional mechanisms"

All these issues are addressed in the commentaries. I would urge you to rely on the commentaries, which explain, for example, that the term "international" includes "regional." The reasons for that are presented in the commentaries.

Mr. Mihir Kanade's reply about impact assessments

First, there was the question of impact assessments. The suggestion was that the draft Covenant requires that only internally could be improved by looking at the international dimensions. In fact, Article 21 on impact assessments does look at international dimensions as well.

It states that States Parties undertake to take appropriate steps, individually and jointly, including within international organizations, to establish legal frameworks for conducting prior and ongoing assessments of actual and potential risks and impacts of their national laws, policies and practices and international legal instruments, policies and practices, and of the conduct of legal persons. This includes businesses that they are in a position to regulate to ensure compliance with the provisions of the present Covenant.

These obligations therefore do arise, and obviously the obligations are to take. appropriate steps to establish legal frameworks. As my colleague Diana pointed out, the language is very important here: "to take appropriate steps to establish legal frameworks" is a relatively soft legal language.

And so that may be taken into account, especially when we characterize the Covenant as, you know, either too soft or too radical.

Mr. Mihir Kanade's reply about including "family"

I may note that it was also suggested during the drafting process in Geneva by certain delegations, particularly civil society organizations, to incorporate the family as a subject of protection, but also as rights holders, as a fundamental unit of society. However, this quickly became contentious, with different delegations holding different perspectives. One view was that the entire world is one family. Another questioned the vulnerability for those without families.

So, it becomes quickly contentious. If one wishes to look at the debates, as previously mentioned, the draft is accompanied not only by legal commentaries explaining the sources, but also by an additional commentary which explains the debates that took place. It's almost like a travaux préparatoires for any treaty process. It is negotiating history that identifies which delegation said what, on which specific word and in which article. So, there's an entire explanation of that, which is a complete record of the intensive discussions that took place over four years.

It has been noted that a lot of work was done in Geneva. In human rights matters, the Council and the Working Group are technical bodies, and it is therefore important that such a rigorous exercise was conducted over those four years.

I also understand the comments made by Ambassador Akram after having exhausted all that negotiation in Geneva. I understand the comment that the text should not be reopened here for any exhaustive negotiations. Ultimately, of course, it is for Member States to decide, but I understand where that comment comes from, because having been involved in the negotiations for so many years. Ambassador Akram led the diplomatic and political efforts, and I was obviously there, along with Diane and my colleagues leading the legal negotiations.

We are very familiar with the outcome and how the document reached its current form. I am therefore sympathetic to the view that the text should not be reopened at this stage in New York, but ultimately, it's not my role anymore. I am a member of the Expert Mechanism, and we haven't collectively taken a position on this aspect. All that I can say is that I am sympathetic to that view. Ultimately, it would be on Member States to decide what to do with the treaty.

The 40th anniversary presents a wonderful opportunity to take the Declaration into a legally binding instrument. Some of other treaties, such as the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, also began with declarations that were then converted into legally binding treaties. Forty years is a good enough time to do that.

Prof. Dr. Diane Desierto's reply about harmonious interpretation

If I may briefly add, Article 25 on harmonious interpretation was precisely placed in there so that the connectedness with all other international human rights treaties would be preserved precisely for many of these questions and concerns on the family, especially in the role of the family.

Article 10 of the International Covenant on Economic, Social and Cultural Rights already recognizes and provides for the duties of States not only to protect the family, or to create special measures of protection for families, but also for women, women who are mothers, also for children and youth.

We are cognizant that there is already an existing body of law on this subject, and therefore what will be necessary is to ensure that the participation, contribution, and enjoyment of the right to development are indeed indivisible, interdependent, and interrelated with existing international human rights law.

I hope that addresses the concern.

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