

BENEVOLENT ASSISTANCE OR BUREAUCRATIC
BURDEN?: PROMOTING EFFECTIVE HAITIAN
RECONSTRUCTION, SELF-GOVERNANCE, AND
HUMAN RIGHTS UNDER THE RIGHT TO
DEVELOPMENT

JEFFERY M. BROWN

ABSTRACT

This Article examines the capacity of regional organizations to coordinate foreign assistance and development programs in underdeveloped states, and in doing so, to promote the transformation of the Right to Development (RTD) - which stresses the right of nations and their people to progress in a manner that insures their ability to meet basic material, security and social needs - from conceptual template to a binding normative framework under international law. As the poorest state in the western hemisphere, but also the recipient of significant influxes of foreign aid, Haiti exemplifies the underdevelopment dilemma. For despite the large sums of aid allocated toward her reconstruction, there is mounting evidence that the current foreign assistance architecture as structured cannot ensure either long-term sustainable

· Associate Professor of Law, Florida A&M University College of Law, Orlando, Florida; B.A., Philosophy, Davidson College; J.D., University of Michigan Law School. I extend a warm thanks to Associate Dean Jeremy Levitt and everyone at the FAMU College of Law Center for International Law and Justice (CILJ) for their support, and a special thanks to my research assistant, Ms. Donna Robinson, for her hard work. I also wish to thank Professor Ron Griffin for his thoughtful observations and suggestions, and Professor Marvin Klein, whose comments to my symposium presentation helped immensely. Of course, I attribute none of the missteps herein to my research assistant or to my readers, all of whom have assisted me ably and competently, but instead to hubris and personal errors in judgment.

development nor promote the growth of democratic institutions in Haiti.

Ironically, the reasons behind this failure - donor/stakeholder bias, donor fatigue and recipient government incapacity - also explain the failure of the RTD, at least as it stands thus far, to facilitate the reconstruction and development of post-earthquake Haiti. In this sense, Haiti represents an important test case for states, and international and regional organizations, an opportunity to articulate precise, unambiguous doctrinal guidelines under the RTD, and to back up doctrine with solid, consistent practice. Because of their geographic proximity to Haiti and joint membership in the organization, the OAS member states enjoy a shared interest in the former's reconstruction especially as it relates to broader regional security and economic integration issues, the very hallmarks of the OAS' existence. The OAS itself possesses the institutional means to overcome the donor/stakeholder bias and donor fatigue problems through its ability to coordinate the actions of its member states in support of the RTD in Haiti (called "integral development" under the OAS Charter). What the organization has lacked is the imagination and institutional will to fulfill this mandate. Drawing from the growing normative recognition of the important coordinative role regional organizations can play in responding to global crises, this Article sketches a human rights-based model of foreign assistance coordination centered on the activities of the Organization of American States to ensure long-term sustainable development and democratic consolidation in post-earthquake Haiti.

Introduction: Post-Earthquake Haiti and the Persistence of Underdevelopment

If any one thematic constant has come to define Haiti in the post-Duvalier era, it is the narrative of underdevelopment. One commentator has poetically characterized Haiti (officially *La République d'Haïti*) as the world's "unluckiest country,"¹ and with good reason. This impoverished island nation, the poorest in the Western hemisphere, and one of the poorest on the planet,² has weathered a series of both natural and man-made disasters during her 200-year history. These disasters have rendered sustainable economic growth and political stability largely unattainable.³ Beset by a parade of despotic and allegedly murderous political leaders,⁴ invaded belligerently by hostile powers near and far, often under the facade of benevolent intervention,⁵ and pummeled by earthquakes

¹ Joshua Keating, *The Unluckiest Country*, FOREIGN POL'Y, Jan. 14, 2010, available at http://www.foreignpolicy.com/articles/2010/01/14/the_unluckiest_country.

² *Central America and Caribbean: Haiti*, THE WORLD FACTBOOK, U.S. CENTRAL INTELLIGENCE AGENCY (Mar 16, 2011) <https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html> (follow "economy" hyperlink) (last visited May 18, 2011).

³ See Erica Caple James, *Raptures, Rights, and Repair: The Political Economy of Trauma in Haiti*, 70 SOC. SCI. & MED. 106 (2009) (assessing the impact of various humanitarian and development interventions in Haiti, and the subsequent failure of the same to engender long-term stability and sustainable development there). See also Ian Martin, *Haiti: Mangled Multilateralism*, 95 FOREIGN POL'Y 72 (1994) (assessing the failure of various multilateral efforts to engender sustainable development in Haiti and to improve her capacity for effective self-governance).

⁴ Some of Haiti's most notorious dictators include Papa "Doc" Duvalier and his equally despotic son, Baby "Doc." Accused of committing grave human rights violations, the Duvalier's have also been accused of embezzling hundreds of millions of dollars from Haiti during their respective dictatorships. In a surprising turn of events, Baby "Doc" Duvalier recently returned to Haiti after spending over 25 years in exile following a popular revolt, which ousted his government in Haiti in 1986. Keating, *supra* note 1, at 1-3.

⁵ See James, *supra* note 3, at 107 (describing recent attempts to provide humanitarian and development assistance to Haiti as a form of "intervention"); see generally RANDAL ROBINSON, AN UNBROKEN AGONY: HAITI, FROM REVOLUTION

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and hurricanes, Haiti has seen her share of conflicts and catastrophes. But, the devastating January 12, 2010, earthquake definitively reduced Haiti to true failed state status.⁶

Haiti's development woes – or perhaps more appropriately, *underdevelopment woes* – run deep. From a largely ineffectual central government,⁷ to a deficit of democracy and fractured political

TO THE KIDNAPPING OF A PRESIDENT (2007) (describing in vivid detail the various humanitarian, pro-democracy and economically-driven interventions that have occurred throughout Haiti's history, and the disastrous results that have followed).

⁶ See Mark Weisbrot, *Haiti's Election: a Travesty of Democracy – The OAS's attempt to Rehabilitate a Fatally Flawed Process Would be Laughable if it Were Not a Tragic Injustice for Haitians*, THE GUARDIAN, Jan. 10, 2011, <http://www.guardian.co.uk/commentisfree/cifamerica/2011/jan/10/haiti-oas-election-runoff>; Mark P. Jones, *Calamity in Haiti: Consequences of a Failed State*, BAKER INSTITUTE BLOG (Jan. 15, 2010, 8:55 AM), http://blogs.chron.com/bakerblog/2010/01/calamity_in_haiti_consequences_of_a_failed_state.html. See also Organization of American States [OAS] Secretary-General, *Inter-Am. Comm'n H.R., Haiti: Failed Justice or the Rule of Law? Challenges Ahead for Haiti And the International Community*, ¶ 6 - 7, OEA/Ser.L/V/II.123, doc. 6 rev. 1 (Oct. 26, 2005), available at <http://www.cidh.org/countryrep/HAITI%20ENGLISH7X10%20FINAL.pdf>, for a scholarly pre-earthquake assessment that reaches the same conclusion, and analyzing the normative impact of the "failed state" designation and the "failed state" theory under international law as they pertain to Haitian reconstruction and law reform efforts implemented by the OAS.

⁷ See Neil MacFarquhar, *Haiti's Woes Are Top Test for Aid Effort*, N.Y. TIMES, Mar. 31, 2009, at A5, available at <http://www.nytimes.com/2009/03/31/world/americas/31haiti.html?adxnnl=1&adxnnlx=1301410968rA1fuSN1XXx/8Y01XJ/TQ&pagewanted=print>. A number of competing narratives vie for primacy in explaining Haiti's underdeveloped capacity for effective self-governance. See *id.* Many assign blame to poorly coordinated foreign aid programs that waste millions if not billions of taxpayer dollars on poorly implemented projects that deliver little if any pragmatic results, other than to transfer wealth to a limited class of domestic contractors on the U.S. side, and to an entrenched and irredeemably corrupt Haitian political establishment on the other. See Brett Stephens, *To Help Haiti, End Foreign Aid*, WALL ST. J., Jan. 19, 2010, <http://online.wsj.com/article/SB10001424052748704541004575010860014031260.html>. More problematic for international lawyers, development experts and on-the-ground activists is the possibility that Haiti's government perennially underperforms not because of resource limitations, but because political elites within the government— those actors that control the levers of political and economic power there – actually benefit from weak central governance and are therefore loathe to alter the behavior

system unable to manage effectively power transitions from government to government, to an economy that perennially functions at sub-optimal levels, underdevelopment on the island persists.⁸ Haiti's underdevelopment manifests in other important ways. Because she boasts no manufacturing sector of significance, the Haitian people must rely on pricey foreign imports to meet many of their basic needs.⁹ As a result, her balance of trade deficit, the measure of imports to exports, remains high.¹⁰ This means that credit-financing from available sources of global capital to support new industrial or agricultural ventures remains costly and therefore difficult to obtain.¹¹

Haiti's agricultural base, historically an important sector of the economy, has contracted significantly following the 2010 earthquake, and will likely continue to underperform without massive infusions of aid, including urgent reforestation efforts.¹² This contraction follows on the heels of robust expansion during the 2008 to 2009 growing seasons.¹³ The development of a modern

of government organs that interact with foreign donor states, local and international NGOs, and international and regional organizations. See Christian Whiton, *Don't Subsidize Haitian Corruption*, FOX NEWS, Jan. 19, 2010, <http://www.foxnews.com/opinion/2010/01/19/christian-whiton-haiti-obama-aid-corruption/print>.

⁸ See Ian Martin, *supra* note 3. See also Paul Collier, *Haiti: From Natural Catastrophe to Economic Security: Report for the Secretary-General of the United Nations*, FOCAL (Jan. 2009), <http://www.focal.ca/pdf/haiticollier.pdf>.

⁹ Nikhil Aziz, *Feeding Dependency, Starving Democracy...Still*, GRASSROOTS INTERNATIONAL, Mar. 2, 2010, available at <http://www.grassrootsonline.org/news/articles/feeding-dependency-starving-democracy-still>.

¹⁰ See HAITI, THE WORLD BANK (2011), <http://data.worldbank.org/country/haiti> (featuring data on Haiti from the World Bank). See also THE WORLD FACTBOOK, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ See *First Shoots of Haiti's Agricultural Renaissance*, FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS (Aug. 20, 2009) <http://www.fao.org/news/story/0/item/29457/icode/en/>; THE WORLD FACTBOOK, *supra* note 2 (noting that nearly two-thirds of Haitians depend on some form of subsistence farming to survive, but also noting that agricultural production remains imperiled due to massive deforestation and the ongoing the risk of natural disasters

economy supported, at least in part, by a functioning agriculture sector demands that Haiti modernize her property, land use and planning frameworks, if not the entire legal system.¹⁴

In human capacity terms, Haiti also underperforms. Unemployment levels remain amongst the highest of all nations in the western hemisphere,¹⁵ and this situation is exacerbated by high illiteracy levels.¹⁶ Further undermining reconstruction and development efforts in the wake of the 2010 earthquake, many of Haiti's best and brightest have fled the country in search of greater opportunities abroad, a classic display of the "brain-drain" phenomenon.¹⁷ For those that remain, the lack of basic utilities, the

like hurricanes).

¹⁴ See *Modernization of Cadastre and Land Rights Infrastructure in Haiti: Project Proposal*, ORGANIZATION OF AMERICAN STATES, 5, 27 (Mar. 2010), <http://www.ifud.org/wp-content/uploads/2010/05/Modernization-of-Cadastre-and-Land-Rights-Infrastructure-in-Haiti-Project-Proposal-v9-2010.pdf>.

¹⁵ THE WORLD FACTBOOK, *supra* note 2 (estimating that nearly two-thirds of the Haitian labor force remain unemployed or underemployed after the 2010 earthquake).

¹⁶ Federal Research Division, *Country Profile: Haiti*, LIBRARY OF CONGRESS, at 11, (May 2006) available at <http://lcweb2.loc.gov/frd/cs/profiles/Haiti.pdf>.

¹⁷ See The U.N. Conference on Trade and Development, Rep., *The Least Developed Countries Report 2007*, UNCTAD/LDC/2007 (2007), available at http://www.unctad.org/en/docs/ldc2007_enpdf; see also Dilip Ratha, *Helping Haiti through Migration and Remittances*, THE WORLD BANK BLOG (Apr. 20, 2010, 2:09 PM), <http://blogs.worldbank.org/peoplemove/helping-haiti-through-migration-and-remittances> (explaining that the flip-side to the brain-drain problem is that by conservative estimates, remittances from Haitian immigrants to friends and relatives back home amounts to anywhere from 1.5 to 1.8 billion/USD per year; by some calculations, this means that remittances account for nearly half of Haiti's national income, a staggering figure. This makes these remittances the most important source of hard currency in country); Alan Simmons, Dwaine Plaza & Victor Piche, U.N. Secretary, Dept. of Economic and Social Affairs, *Expert Group Meeting on International Migration and Development in Latin America and the Caribbean: The Remittance Sending Practices of Haitians and Jamaicans in Canada*, delivered to the Canadian International Development Agency (CIDA) UN/POP/EGM-MIG/2005/01 (Nov. 14, 2005), http://www.un.org/esa/population/meetings/IttMigLAC/P01_ASimmmons (examining the remittance practices of immigrant communities in Canada, including Haitian immigrants, and noting the

ongoing threat of physical violence from organized gangs, and increasing levels of violence against women, including rape,¹⁸ further mitigate against long-term sustainable economic, political, and social development.¹⁹ More recently, the outbreak of cholera has further undermined human health, welfare, and development efforts.²⁰ In short, Haiti's reconstruction and development needs impact virtually every aspect of social, political, and economic life.

importance this practice plays in promoting the well-being and development of their countries of origin). It is worth noting that the legal actions undertaken by developed states to promote greater remittances by expats living in their territories to their countries of origin may very well play an important role in promoting the full exercise of the RTD. When viewed in this light, administratively simple actions such as extending to Haitian immigrants living in the United States TPS or temporary protected status by the Department of Homeland Security and making it easier for such persons to apply for same, might very well lead to binding practice if followed by other states out of a sense of legal obligation under the RTD. The important practical point to note here is that the grant of TPS to qualified persons (a) poses little political risk to policy makers and government agencies in the eyes of their domestic constituents, and (b) does not cost very much in monetary or resource terms. Increasing the number of Haitians entitled to seek TPS and coupling that freedom from deportation with the right to seek gainful temporary employment could also create a more favorable environment whereby Haitian immigrants could send remittances back home. As noted above, the development benefits in doing so could be significant.

¹⁸ See U.N. Secretary-General, *Rep. of the Secretary-General on the U.N. Stabilization Mission in Haiti*, U.N. Doc. S/2010/446 (Sept. 1, 2010) (observing that rapes, kidnappings, domestic violence, crimes against children and other outrages remained a major security risk and an impediment to long-term sustainable development in Haiti).

¹⁹ See Athena R. Kolbe & Royce A. Hutson, *Human Rights Abuse and other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households*, in THE LANCET, Vol. 368, 870-72 (Sept. 2, 2006), available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(06\)69211-8/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(06)69211-8/abstract), (noting that widespread criminal and human rights abuses, particularly crimes against woman and children, have had a profound impact on Haiti's economic development, necessitating a robust legal and medical response from the international community).

²⁰ See, Report of the Pan-American Health Organization, *Cholera Outbreak*, PAN-AMERICAN HEALTH ORGANIZATION (Jan. 9-15, 2011), http://new.paho.org/hq/imges/Atlas_IHR/-CholeraHispaniola/atlas.html. As of January 19, 2011, nearly 195,000 Haitians have contracted cholera, and another 3,889 have died from the disease.

Above and beyond the pressing resource demands noted above, Haiti desperately needs a more responsive foreign assistance model to ensure long-term sustainable economic development, to promote the growth of democratic institutions, and to facilitate Haiti's capacity for effective self-governance.²¹ To address these needs, the international community has erected a plethora of foreign aid programs to help Haiti reach her reconstruction and development goals, both pre and post-earthquake.²² From powerful and relatively wealthy foreign donor states like the United States, to influential international and regional organizations like the United Nations (UN) and the Organization of American States (OAS),²³ to support from neighbor states like Venezuela,²⁴ the global response has, at least on paper, been impressive.²⁵ Nevertheless, the question remains

²¹ See Collier, *supra* note 8.

²² It is important to note at the outset that the observations expressed in this Article speak only to those long-term structural assistance programs designed to improve Haiti's capacity for self-governance and to promote the organic growth of democratic Haitian institutions, not to the delivery of short-term emergency aid such as assistance to combat the recent cholera outbreak.

²³ John C. Pierce, *The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance*, 27 *LAW & POL'Y INT'L BUS.* 477, 482-502 (1996) (offering an assessment of UN and OAS involvement in Haiti during the Duvalier regime with an emphasis on the economic sanctions imposed against the dictatorship. The author concludes that regional sanction regimes are appropriate responses to threats to democracy).

²⁴ See Chavez Writes off Haiti's Oil Debt to Venezuela, HAITI NEWS.NET, Jan.26, 2010, <http://www.haiti-news.net/story/593414>.

²⁵ See René Préval, *The Decree of The Interim Haiti Recovery Commission*, REPUBLIC OF HAITI, Apr. 21, 2010 available at <http://www.cirh.ht/sites/ihr/en/about%20us/Pages/default.aspx> (follow "Read the Decree of the IHRC") (the Interim Haiti Recovery Commission (IHRC) was created to coordinate aid efforts to rebuild Haiti in the wake of the 2010 earthquake. The IHRC Decree states that "[t]he mandate of the CIRH [IHRC] shall be to conduct strategic planning and coordination and implement resources from bilateral and multilateral donors, non-governmental organizations, and the business sector, with all necessary transparency and accountability. The CIRH [IHRC] shall work to optimize the investments and contributions of these entities."); see also S.C. Res. 1542, ¶1, U.N. Doc. S/RES/1542 (Apr. 30, 2004) (authorizing the deployment of an international stabilization force to Haiti known heretofore simply as "MINUSTAH" after the United Nations Stabilization Mission in Haiti (MINUSTAH), deployed in-country

whether and to what extent the foreign assistance architecture erected to aid Haiti has promoted, or can *continue* to promote long-term sustainable development and democratic governance on the island nation?

Despite global enthusiasm for increased reconstruction and development aid in the wake of the devastating January 2010 earthquake, there is growing consensus that the extant foreign assistance model does not work well.²⁶ Relatively weak supporting normative frameworks and a weak Haitian government – the legal and institutional glue required to hold any successful foreign aid architecture together – plus a lack of project coordination and execution²⁷ have all undermined prospects for better self-governance and democratic consolidation in Haiti.²⁸ Indeed, while the foreign assistance architecture erected to assist Haiti looks impressive on paper, more often than not, the resultant structures have proven inherently flawed: impracticable, difficult to maintain, and in many cases, outright unsustainable.²⁹

by the U.N. Security Council, was originally charged with the task of stabilizing political, social and economic life in Haiti following the political upheavals there dating back to the 1990s).

²⁶ See Elizabeth Whitman, *Haiti: Haphazard Aid Hindering Long-Term Recovery*, GLOBAL ISSUES, Jan. 10, 2011, <http://www.globalissues.org/news/2011/01/10/8130> (citing Emmanuelle Schneider, a spokesperson for the U.N.'s Office for the Coordination of Humanitarian Affairs (OCHA) in Haiti and noting that organizations like the IHRC that were created to coordinate reconstruction and recovery efforts in Haiti have failed to do so and also concluding that these ongoing failures dampen donor enthusiasm for and interest in Haitian reconstruction and development assistance in the long term); see also Press Release, Oxfam International, *A Year of Indecision Leaves Haiti's Recovery at a Standstill* (Jan. 6, 2011), available at <http://www.oxfam.org/en/pressroom/pressrelease/2011-01-06/year-indecision-leaves-haiti-recovery-standstill>.

²⁷ Whitman, *supra* note 26.

²⁸ See Press Release, Oxfam International, *supra* note 26 (noting that at the outset, these observations address only those long-term structural assistance programs designed to improve Haiti's capacity for self-governance and to promote the organic growth of democratic Haitian institutions, not to the delivery of short-term emergency aid such as assistance to combat the recent cholera outbreak).

²⁹ See generally Jean Max Bellerive, *Haiti Earthquake PDNA: Assessment of Damage, Losses, General and Sectoral Needs*, ANNEX TO THE ACTION PLAN FOR

One thing seems indisputable: Haiti needs not just more development, but more *effective* development.³⁰ What is lacking and what continues to impede progress in the reconstruction and development of Haiti is a clearer, more coherent articulation of the institutional and normative means to that elusive end, backed by correspondingly deep and consistent state practice and implementation.³¹ The most widely accepted explanations why the traditional foreign assistance architecture in Haiti has failed to promote long-term sustainable economic, social and political development, namely a lack of foreign donor coordination,³² donor fatigue,³³ and a weak Haitian central government unable to fulfill its obligations, are widely known. What these narratives fail to address is the transformative role that clearly articulated normative frameworks coupled with reconfigured institutional arrangements

NATIONAL RECOVERY AND DEVELOPMENT OF HAITI (Mar. 2010) (stressing the need for aid in various economic and human welfare sectors and the need to better coordinate aid delivery frameworks).

³⁰ See generally Academy International Affairs Working Paper Series, *Why Foreign Aid to Haiti Failed: Summary Report of the National Academy of Public Administration*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION 15 (Feb. 2006). The authors note that foreign assistance programs in Haiti have failed over the past two decades because of (1) poor project coordination and (2) a weak Haitian central government unable to utilize or effectively deploy foreign aid resources. These implementation problems lead to “donor fatigue,” that is, donor frustration with events and actors on the ground. Donors then move to fulfill reconstruction and development obligations originally undertaken by the Haitian government and its attendant administrative organs, resulting in weary donors and missed opportunities for Haitian agencies and Haitian workers to learn valuable skill sets, which would increase their capacity for self-governance.

³¹ *Id.* See also Stephen P. Marks, *A Legal Perspective on the Evolving Criteria of the HLFT on the Right to Development*, in IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW, 11, 14-15, (Stephen P. Marks ed., Friedrich-Ebert-Stiftung 2008) (advocating a treaty-based solution to the challenge of transforming the RTD from a soft law concept to a binding normative framework under international law. Dr. Marks’ work was prepared to assist the U.N. High Level Task Force in ascertaining the most productive avenue toward implementing the RTD as a “legal standard of binding nature”).

³² See generally Academy International Affairs Working Paper Series, *supra* note 30.

³³ *Id.*

can play in shaping pragmatic solutions to Haiti's development challenges. This article attempts to address this shortcoming.

The most obvious doctrinal candidate for this task, the Right to Development (RTD), recognizes the right of nations and their people to enjoy unfettered participation in democratic structures of governance, the full measure of fundamental human rights and freedoms, and access to basic material essentials such as food and shelter.³⁴ First, enshrined in the Declaration on the Right to Development,³⁵ is an entitlement framed categorically as a basic human right, recognizing the central importance that effective social, economic, political, and cultural enhancement plays in securing human wellbeing (and the wellbeing of underdeveloped states as well).³⁶ And yet, for all of its broad conceptual appeal, including the powerful hold the RTD has on the legal imaginations of development experts and human rights advocates far and wide, the right remains

³⁴ See Declaration on the Right to Development, G.A. Res. 41/128, Annex, 41 UN. GAOR Supp. (No. 53) at 186, U.N. Doc. A/RES/41/128 (Dec. 9, 1986) [hereinafter Declaration].

³⁵ *Id.* The Declaration provides in pertinent part:

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, ... Concerned at the existence of serious obstacles to development, as well as to the complete fulfillment 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. *Id.*

³⁶ *Id.*

doctrinally underdeveloped.³⁷ More telling, states, as well as regional and international organizations, that have promised vital assistance to post-earthquake Haiti and her people, rarely, if ever, frame the obligations they undertake as actual binding commitments undertaken pursuant to the RTD.³⁸

This article sketches a dynamic theory of regional organizational foreign assistance coordination and facilitation centered on the activities of the OAS to better ensure long-term sustainable development and democratic consolidation in post-earthquake Haiti. This includes a more focused enumeration of the specific norms and obligations of states via both treaty-based, domestic policy, and legislative frameworks in order to ensure that underdeveloped states, like Haiti, and their peoples enjoy the full exercise of the RTD. Under the OAS Charter, development aspirations are subsumed under the regional concept of “integral development,” a model that stresses the importance of development as part of wider goal to integrate the economies of the OAS Member States.³⁹

Part I of this article traces the origins of the RTD, outlines its essential doctrinal parameters, and identifies the primary region where the right itself remains underdeveloped: the realm of state practice. In Part II, this article examines the basic institutional and

³⁷ Nicolaas Schrijver, *Many Roads Lead to Rome: How to Arrive at a Legally Binding Instrument on the Right to Development*, in *IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW* 126 (Stephen P. Marks ed., 2008).

³⁸ See Report of the Private Sector Economic Forum, *Vision and Roadmap for Haiti*, FORUM ECONOMIQUE DU SECTEUR PRIVE, 5 (Mar. 23, 2010) (report prepared for the government of Haiti by the ICHR, yet not once does the document mention that the vast sums of aid pledged to assist in Haitian reconstruction and development efforts is forthcoming as a matter of right. The document speaks in terms of “spirit of cooperation” and asserts that all reconstruction and aid frameworks erected to assist Haiti must be guided by a sense of accountability, promote wide-sector economic growth, show a commitment to modernization, be Haitian-led, and undertaken with an aim toward rendering Haiti aid-independent. Yet no mention of key rights and obligations appears anywhere in the document).

³⁹ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, Chap. VII, art. 30 [hereinafter OAS Charter].

doctrinal underpinnings that would permit the OAS and its member states to promote the progressive enhancement of the RTD through coordinated action. This involves a detailed examination of the Charter of the OAS to ascertain precisely what the organization and its member states are capable of doing, ever mindful of the material and financial limitations of the organization.

Part III summarizes the insightful observations of political scientists Felix Kirchmeier, Monika Lüke, and Britt Kalla in connection with the Kenya-Germany Development Partnership. Kirchmeier and associates advocate a human rights-based approach (HRBA) to promoting the RTD in underdeveloped a states.⁴⁰ This article recasts the HRBA as a hybrid model, one that stresses the implementation of basic human rights, transitional justice, and regional economic integration initiatives as core structural pillars of the RTD that should be erected with robust Haitian participation under the organizational aegis of the OAS.⁴¹ This approach has the capacity to clarify in a concrete normative context the specific rights recognized by, and obligations undertaken by both donor and beneficiary states under the RTD, an approach that could greatly benefit Haitian reconstruction and development efforts. While the OAS has made modest headway in this regard, much more needs to be done.

I. The Right to Development: A Conceptual and Normative Overview

As noted above, the RTD recognizes the right of nations and their people to enjoy unfettered participation in democratic structures of governance, the full measure of fundamental human rights and freedoms, and access to basic material essentials such as food and shelter.⁴² Enshrined in the Declaration on the Right to Development

⁴⁰ See Felix Kirchmeier et al., *Towards the Implementation of the Right to Development: Field-testing and Fine-tuning the U.N. Criteria on the Right to Development in the Kenyan-German Partnership*, FRIEDRICH EBERT STIFTUNG (2008).

⁴¹ *Id.*

⁴² See Declaration, *supra* note 35.

(hereinafter: the Declaration), the RTD, an entitlement framed categorically as a basic human right, recognizes the central importance that effective social, economic, political, and cultural development plays in securing human well-being.⁴³

Although no specifically enumerated definition of “development” appears in the Declaration, nor has the international community agreed on a universally accepted understanding, the emphasis the Declaration itself places on three core bundles of rights does suggest the broad contours of the RTD.⁴⁴ First, and perhaps foremost, the Declaration attaches primacy to basic human rights and fundamental freedoms, including freedom from all forms of discrimination, gender and racial bias, religious oppression, and other forms of bias.⁴⁵ Second, the RTD, as framed in the Declaration, stresses the importance of respecting fundamental civil and political rights and fundamental freedoms, self-determination, and the right of people to live freely from colonial domination, and other forms of external domination.⁴⁶ Finally, the Declaration stresses the centrality of reasonable access to the material indicia of human well-being, including reasonable access to food, safe drinking water, and shelter.⁴⁷ Together, these three sets of entitlements – respect for basic human rights and fundamental freedoms, democratic governance and self-determination, and the material necessities of life, encapsulates in the broadest terms what is meant by the RTD, at least as framed

⁴³ *Id.* art 1.

⁴⁴ *Id.* art. 1, 2, 5, 8.

⁴⁵ *Id.* art. 5.

⁴⁶ *Id.* art. 5-6.

⁴⁷ *Id.* art. 8. Suggesting only that states “should undertake” measures needed to secure these rights for the most underdeveloped states and their peoples. The Declaration leaves to subsequent progressive development and state practice consistent with same to give binding effect to the aspirational template laid out in the document. It is in this context that the supportive actions of regional organizations like the OAS and their member states can play a central role in shaping enhancement of the aspirational frameworks articulated in the Declaration. See generally Paul Martin, *Regional Efforts at Preventive Measures: Four Case Studies on the Development of Conflict-Prevention Capabilities*, 30 N.Y.U. J.INT’L L. & POL. 881 (1998).

under the Declaration.⁴⁸

And yet, for all of its broad conceptual appeal, including the powerful hold, the RTD has on the legal imaginations of development experts and human rights advocates far and wide, the right remains doctrinally underdeveloped.⁴⁹ Part of this underdevelopment stems from ambiguities within the Declaration itself. On the one hand, the Declaration identifies both underdeveloped states, *and* their citizens as the core beneficiaries of the various RTD entitlements.⁵⁰ In a similar vein, the Declaration charges beneficiary states and their citizens on the one hand, and more developed states and international and regional organizations on the other, both individually *and* collectively with the obligation to ensure the full exercise of the RTD via its progressive development under international law.⁵¹

Under a normative architecture that some feel verges on incoherence,⁵² beneficiaries become obligees and vice-versa, making it difficult to determine precisely who should do what, and how.⁵³ In

⁴⁸ Beyond the broadly articulated conception of “development” contained in the Declaration, the idea itself has exerted a powerful hold on the imaginations of scholars, historians and activists, especially when examining how global economic and trade policies have promoted development in some quarters, while hindering it in others. *See generally* WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1973), *available at* http://www.blackherbals.com/walter_rodney.pdf (examining how Europe’s comparative advantage in exploration and shipping enabled the colony powers to accelerate their economic and institutional development at the expense of African development).

⁴⁹ Schrijver, *supra* note 37, at 126.

⁵⁰ Margot E. Salomon, *Part I: The Right to Development as a Legal Norm: Chapter I: Legal Cosmopolitanism and the Normative Contribution of the Right to Development*, in *IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW* 24 (Stephen P. Marks ed., 2008).

⁵¹ *Id.*

⁵² Marks, *supra* note 31, at 11, 14-15.

⁵³ Dante M. Negro, *Chapter 7: Article 17 and Chapter VII of the Revised OAS Charter and Relevant Experience of OAS Institutions*, in STEPHEN P. MARKS (ED.), *IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW*, 64, 66-68 (2008), <http://library.fes.de/pdf-files/bueros/genf/05659.pdf>. Dante M. Negro is Director of the Office of International Law of the Organization

practical terms, what is presently lacking then is the necessary legislative and treaty-based policy focus to clarify what actions states (and international and regional organizations) must take in order to ensure the full exercise and progressive development, or enhancement of the RTD,⁵⁴ and the institutional will to see this process through.⁵⁵

Importantly, and by its own admission, the Declaration recognizes that the RTD has yet to attain the status of a binding normative framework under international law.⁵⁶ Accordingly, it falls to states and international and regional organizations, actors that in theory possess the necessary material resources and institutional capacity, to ensure the full exercise of and “progressive enhancement” of the right via effective policy and legislative formulation and subsequent implementation.⁵⁷ To the layperson, the “progressive enhancement” of the RTD, that is, the transformation from doctrinal concept to binding norm must occur through the formulation of clear, transparent rules *and* consistent state practice pursuant to those rules, such activities facilitated by the coordinating support of international and regional organizations.⁵⁸

of American States, Washington, D.C.

⁵⁴ Statute of the International Law Commission, G.A. Res. 174 (II), at 4 Art. 15, U.N. Doc. A/RES/174(II) (Nov. 21, 1947). Article 15 of the Statute of the International Law Commission defines “progressive development” as the “preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States.” *Id.* It defines “codification” as “meaning the more precise formulation and systemization of rules of international law in fields where there already has been extensive state practice, precedent, and doctrines.” *Id.*

⁵⁵ See generally Marks, *supra* note 31, at 11, 14-15.

⁵⁶ Declaration, *supra* note 34, at 3-4. Under Article 3, “[S]tates have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development;” and Article 4 “[S]tates 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.” *Id.*

⁵⁷ *Id.* at Arts. 4-5.

⁵⁸ *Id.*; see also Stephen Marks, *The Human Right to Development: Between*

In a state like Haiti, one whose development needs run the gamut, from governmental incapacity to political fragmentation, to a broken physical infrastructure and a chronically underperforming economy, the progressive enhancement of the RTD (or “integral development”) will require a high degree of coordination of state action, as well as, international and regional organizational coordination.⁵⁹

When viewed in this light, state action and the coordinating activities of international and regional organizations must address: (1) what specific bundle of rights the RTD’s beneficiaries enjoy, and (2) the precise institutional obligations that the subjects of international law operate under pursuant to the RTD’s broad conceptual frameworks.⁶⁰ Vis-à-vis Haiti, foreign donor assistance efforts must emphasize the responsibility of states as well as regional

Rhetoric and Reality, 17 HARV. HUM. RTS. J. 137 (2004) (noting the lack of global, regional, and state coordination in support of the RTD).

⁵⁹ See Declaration, *supra* note 34; see also Marks, *supra* note 58; see generally Press Release, Press Department, Organization of American States [OAS], Chief of OAS-CARICOM Observation Mission to Present Update on Upcoming Haiti Elections, OAS Press Release (Oct. 25, 2010), http://www.oas.org/en/media_center/press_release.asp?sCodigo=AVI-265/10 (brief press advisory of the Joint OAS-CARICOM Observation Mission to Haiti). In late October 2010, the author had the privilege to attend an extraordinary meeting convened by the Joint OAS-CARICOM Observation Mission to Haiti at OAS headquarters in Washington, D.C. to apprise members of the press, the academy, and development experts as to the progress of OAS-supported reconstruction and development efforts in Haiti. While hardly dispositive of institutional thinking, the session was noteworthy for the failure of any party in attendance, especially the OAS representatives, to talk in terms of Haiti’s right to development assistance. This is particularly significant, indeed ironic, given the central role assigned to the concept of “integral development” as defined in Chapter VII of the OAS Charter. OAS Charter, *supra* note 39. The session was also noteworthy in that it was apparent, at least to the author, that a wide gulf separated what the Haitian activists in attendance wanted from the OAS-CARICOM Observation Mission (and OAS more generally) and what the Mission was actually doing. The author’s anecdotal observations seem to bear out the scholarly observations of Professor Marks surrounding the failure of regional organizations to coordinate the actions of their member states in fulfillment of the RTD, or even to recognize the doctrine’s relevance to the activities.

⁶⁰ See Marks, *supra* note 58.

and international organizations⁶¹ to provide the necessary legislative and treaty-based guidance to ensure the full exercise and progressive enhancement of the RTD. Haiti therefore represents an important test case for ascertaining both the boundaries of the RTD, and the specific obligations that it imposes on the relevant subjects of international law charged with its progressive enhancement and full exercise.

Yet, if history – both near and distant – provide any clues, then it is not at all clear that key donor states such as the United States or potentially France, possess the necessary political will to do what is needed to ensure the erection of a more effective reconstruction and development architecture in Haiti under the RTD. For its part, U.S. involvement in Haiti has been defined by consistent racial bias and essentialism.⁶² In comparative terms, the U.S. has engaged in discriminatory treatment of Haitian refugees seeking political asylum versus comparable favorable treatment for Cuban refugees.⁶³ According to one commentator, U.S. involvement in Haiti has also involved outright breaches of international law with respect to the CIA supported activities therein.⁶⁴ On the domestic front, political inaction and donor inconsistency has led to the failure of Congress to deliver promised aid to the Haitian people.⁶⁵

⁶¹ *See id.*

⁶² *See generally* Jordan E. Dollar, *Involvement in the 2004 Removal of President Aristide*, 20 ST. THOMAS L. REV. 642 (2008) (explaining that the U.S. involvement in Haiti from 1804 until 2004 has been motivated by racist “essentialism”).

⁶³ *See* Juan Montes, *Haitian Interdiction on the High Seas: A U.S. Policy of Bias and Inconsistency*, 5 ST. THOMAS L. REV. 557-558, 572 (1993) (providing a useful comparison of U.S. immigration practices toward Haitians and Cubans, and highlighting those specific policy preferences that favor Cuban refugees over their Haitian counterparts).

⁶⁴ *See* Kathleen Marie Whitney, *Sin, Fraph, and the CIA: U.S. Covert Action in Haiti*, 3 SW. J. L. & TRADE AM. 303, 304 (1996) (Synopsis of CIA activities in Haiti that violated international laws).

⁶⁵ *See generally* Mary Beth Sheridan, *U.S.-Sponsored Conference Pledged Billions to Rebuild Haiti, but Little Paid Out*, WASH. POST, July 19, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/18/AR2010071801838.html>.

To be charitable, France, the former colonial power that exercised sovereign control over Haiti prior to the latter's declaration of independence in 1803, has behaved toward her former Haitian slaves in a manner more befitting a petty principality than a mature democracy.⁶⁶ Following an international conference convened in October 2003 to assess the validity of claims that France should pay reparations to Haiti, then-French foreign minister, Dominique de Villepin sent an envoy to Haiti requesting that her democratically-elected president, Jean-Bertrand Aristide, step down from power.⁶⁷ France also denied President Aristide's wife the right to attend a global AIDS conference in France, and snubbed Haiti's president on the eve of the island nation's 200th anniversary.⁶⁸

The author should point out that this discussion is not an attempt to paint the relationship between Haiti and France in purely black and white terms. Indeed, France, like many other wealthy states, pledged promptly and generously to aid Haiti in the wake of the January 2010 earthquake.⁶⁹ The point to take away from this discussion is simply that France, much like the United States, despite the sometimes generous promises of assistance each has made toward Haitian reconstruction and development, cannot be expected to follow through with their promises, and certainly not in a way that promotes the progressive enhancement of the RTD as regards Haiti because they remain fundamentally biased actors, both institutionally and historically.⁷⁰

On the European side of the equation, foreign policy efforts

⁶⁶ See ROBINSON, *supra* note 5, at 59.

⁶⁷ *Id.* Haiti's claim against France for reparations is based on (1) French exploitation of Haitian slave labor prior to Haitian independence in 1803, and (2) the crushing reparations imposed on Haiti as the price for France recognizing the new black state after the successful rebellion against French rule.

⁶⁸ *Id.* It is worth comparing and contrasting France's response to the 200th anniversary marking Haiti and the Haitian people's freedom from enslavement and foreign tyranny.

⁶⁹ See Press Release, Foreign and European Affairs Ministry Spokesman, Statement of the Embassy of France in Washington, Summary of French Humanitarian Aid for Haiti, Jan. 15, 2010, <http://ambafrance-us.org/spip.php?article1493>.

⁷⁰ See Declaration, *supra* note 35, art. 5.

in the 1990s to extend preferable trade terms to banana exporting states in the Caribbean (including Haiti), Sub-Saharan Africa, and the Pacific, efforts that actually began in the 1970s,⁷¹ resulted in a bitter multi-year trade dispute.⁷² The dispute pitted European states against one another, and forced Latin American exporting states to side against their Caribbean, Africa, and Pacific counterparts on economic grounds.⁷³ The history of the so-called “bananas war” highlights the normative challenges that the international community faces in promoting the economic and social development of underdeveloped states via targeted trade preferences, which fail to consider their broader pragmatic impact on other developing states.⁷⁴

In other words, while one can credibly argue that the trade preferences provided for under the Lomé Convention were erected to facilitate the economic development of former European colonies in Africa, the Caribbean and the Pacific,⁷⁵ these efforts largely failed because the donor states (the European supporters of the trade preferences)⁷⁶ failed to coordinate their actions with regional players,

⁷¹ African, Caribbean and Pacific States – European Economic Community: Final Act, Minutes and Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990) [hereinafter Convention of Lomé]. The EEC implemented the so-called banana protocol to provide the ACP States broader, but also easier, access to European banana markets by improving local marketing and production conditions for the exporting states. The specific portion of the “banana protocol” that led to prolonged litigation was Council Regulation (EEC) 404/93 of 13 February 1993 on the Organization of the Market in Bananas. Council Regulation 404/93, 1993, O.J. (L 047) (EEC), (1993).

⁷² Convention of Lomé, *supra* note 71. The EU complainants argued that the Lomé-ACP provisions violated the rules and objectives of the Treaty of Rome on economic integration, violated basic property rights and the concept of nondiscrimination in international economic relations, and violated the concept of nondiscrimination enshrined in the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) frameworks. *See* Case C-280/93, Federal Republic of Germany [F.R.G.] v. Council, 1994 E.C.R. I-5039, 34 I.L.M. 154 (1995).

⁷³ *Id.*

⁷⁴ *See* Michelle Williams, *Comment: Caribbean Shiprider Agreements: Sunk by Banana Trade War?* 31 U. MIAMI INTER-AM. L. REV. 163 (2000).

⁷⁵ *Id.* at 167.

⁷⁶ *Id.* at 167-68. The banana protocol’s strongest European supporters

and in other parts of the world, namely, in Latin America and the United States.⁷⁷ Effective development frameworks require not just sound normative glue to succeed. They require thoughtful global coordination and implementation as well.

But, at the regional level, there may yet be cause for cautious optimism. Because of their geographic proximity to Haiti, and joint membership in the OAS, the organization's member states enjoy a shared interest in the former's reconstruction, especially as it relates to broader regional security and economic integration considerations, the hallmarks of the OAS' existence.⁷⁸ The OAS itself potentially possesses the institutional means to overcome the kinds of donor/stakeholder bias, and donor fatigue problems noted above through its ability to coordinate the actions of its member states in

included France, Spain, and the United Kingdom. It is worth noting that while France strongly supported the protocol as both a developmental assistance and a "reparational" trade structure, her historic behavior toward Haiti, one of the ACP beneficiary states, has proven inconsistent at best, and highly biased at worst.

⁷⁷ Williams, *supra*, note 74. The United States, several Latin American banana exporting states, and those European states that did not support the banana protocol challenged its legality before the World Trade organization and ultimately prevailed. *See* First Submission of the United States, *European Communities – Regime for the Implementation, Sale and Distribution of Bananas*, 1996 WL 397092 (July 9, 1996); U.S. interests were implicated in this dispute because U.S.-based banana producers, corporations, originally complained to the United States Trade Representative (USTR) that the banana protocol effectively operated as an unfair subsidy that rendered ACP-produced bananas cheaper than their Latin American-produced counterparts. *See generally Trade Act of 1974* §§ 301-09, amended by 19 U.S.C. §§ 2411-15 (1996); *see also* Case C-280/93, *F.R.G. v. Council*, 1994 E.C.R. I-5039, 34 I.L.M. 154 (1995); *see also* Jeffery M. Brown, *Black Internationalism: Embracing an Economic Paradigm*, 23 MICH. J. INT'L L. 807 (2002).

⁷⁸ OAS Charter, *supra* note 39, at § VII, Art. 30. The Charter provides in pertinent part: "The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved." *Id.*

support of the RTD in Haiti.⁷⁹ What the organization has lacked is the imagination and institutional will to fulfill this mandate based on a sanguine assessment of its unique, but also limited institutional capacities, at least in material and monetary terms.⁸⁰ Drawing from the growing normative recognition of the important institutional and coordinative role regional organizations can play in responding to global crises,⁸¹ this article sketches below a dynamic theory of regional organization foreign assistance facilitation, centered on the activities of the OAS, to ensure long-term sustainable development, and democratic consolidation in post-earthquake Haiti.

II. The Right to Development and the OAS: Exploring the Doctrinal Scope of the RTD under the OAS Charter

Ascertaining the degree to which the OAS recognizes the RTD, as a binding normative construct, under the organization's Charter is not as straightforward a task as one would hope. Any discussion of the RTD and the depth of its acceptance as binding under the Charter of the OAS must begin with a brief analysis of the organization itself, followed by a discussion of Chapters IV and VII of the OAS Charter.

⁷⁹ *Id.* at § VII, Art. 30.

⁸⁰ See Marks, *supra* note 58.

⁸¹ See Jeremy Levitt, *The Peace and Security Council of the African Union*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 109, 113 (2003); see also Paul Martin, *supra* note 46, at 932-37 (detailing how regional organizations - especially the OAS and OAU- and the efficiency of their activities regarding preventive measures in their respective regions have promoted regional peace and stability. Martin also discusses instances of cooperation between the UN and regional organizations, and concludes that decisions in favor of this type of cooperation should continue to be made on an *ad hoc* basis); see generally Pierce, *supra* note 23, at 496-98 (assessing UN and OAS involvement in Haiti during the Duvalier regime with emphasis on the economic sanctions that were imposed and concluding that regional sanction regimes are appropriate responses to threats to democracy); but see Benjamin Manchak, *Comprehensive Economic Sanctions, the Right to Development, and Constitutionally Impermissible Violations of International Law*, 30 *B.C. THIRD WORLD L.J.* 417, 430-35 (2010) (arguing that sanctions against undemocratic but also underdeveloped states like Cuba may violate the RTD).

The OAS is the oldest organization of its type in the world, predating even the European Union, a sly irony given that all of the OAS' Member States were themselves former colonies of the major European powers.⁸² In some quarters, the OAS enjoys a reputation as perhaps the best-organized, and most effective of all the regional organizations of its type.⁸³ The Inter-American Commission on Human Rights, along with the Inter-American Court of Human Rights, has produced an enviable body of human rights jurisprudence that has resulted in the widespread human rights normative compliance throughout the region.⁸⁴

In the very broadest terms, Chapter IV outlines the fundamental duties undertaken, and the rights enjoyed by all sovereign states.⁸⁵ Article 10 of the Charter recognizes one to another that "states are juridically equal, enjoy equal rights and equal capacity to exercise those rights, and have equal duties."⁸⁶ Article 11 imposes on all OAS member states the fundamental duty to respect the political and territorial sovereignty and rights of every other state "in accordance with international law."⁸⁷

The Charter further ensures the inviolability of these mandates, stating unequivocally that "these fundamental rights may not be impaired in any manner whatsoever."⁸⁸ Stated more

⁸² See Christoph G. Benedict, *Organization of American States*, in 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 810, 810-811 (Rudolf Bernhardt, ed., 1997). The Charter of the OAS was signed in Bogotá, Columbia in 1948, incorporating into the corpus of the new organization the remnants of the International Union of American Republics (1890) and the Pan-American Union (1910).

⁸³ See Paul Martin, *supra* note 47, at 904, 905.

⁸⁴ See Santiago Canton, *The Inter-American Commission on Human Rights: 50 Years of Advances and the New Challenges*, AMERICAS QUARTERLY, (2009), <http://www.americasquarterly.org/Inter-American-Commission-Human-Rights> (last visited Apr. 29, 2011).

⁸⁵ See generally OAS Charter, *supra* note 39, at § IV (outlining the fundamental duties and rights of states); *Id.* at intro-note (Heidi v. Jimenez).

⁸⁶ OAS Charter, *supra* note 39, at § IV, Art. 10.

⁸⁷ *Id.* at § IV, art. 11.

⁸⁸ *Id.* at § IV, art. 12.

succinctly, the Charter affirms the traditional notion of state equality and sovereignty, and recognizes the inviolability of these rights in all instances.⁸⁹ As part of this overarching bundle of rights and protections, the Charter also recognizes as inviolable, the right of each state to develop culturally, socially, politically, and economically in a free and natural manner.⁹⁰ Concomitant with the recognition of the state's right to self-development (or development), the Charter imposes on each state the obligation to recognize and to protect individual human rights.⁹¹ Echoing this set of human rights constraints, the Charter prohibits its members from interfering with the right of any other state to develop its cultural, political, social, and economic life and attendant institutions.⁹²

Unfortunately, while the OAS does recognize the right of Member States to pursue their individual development agendas free from undue interference by other states – and ideally with the support of the latter – the Charter does not actually articulate the precise meaning of the term “development.”⁹³ Chapter VII of the Charter does, however, articulate a very broad conceptual framework whereby the Member States are urged to facilitate, both individually and collectively, efforts to ensure social justice, and “integral development” for their peoples.⁹⁴ Not unlike the Declaration on the Right to Development, Article 30 of the OAS Charter views “international social justice” in foreign relations and “integral development” as necessary preconditions to global and regional peace and security.⁹⁵

While arguably no more precise in formulation than the definition of “development” provided in the Declaration, the OAS Charter's definition of “integral development” and surrounding conceptual structure, are telling. The Charter provides: “Integral

⁸⁹ *Id.* at § II, art. 3(b).

⁹⁰ *Id.* at § IV, art. 17.

⁹¹ *Id.* at § IV, art. 30.

⁹² *Id.* at § IV, art. 19-21.

⁹³ *See generally id.* at § VII.

⁹⁴ *Id.* at § VII.

⁹⁵ *Id.* at § VI Art. 30.

development encompasses the economic, social, educational cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it [integral development] should be achieved.”⁹⁶ Additionally, the content and structure of Chapter VII strongly suggests that each state’s development goals should ideally be seen, and acted upon, as part of an integrated strategy to promote regional peace and security in the political, human rights, and health and welfare arenas.⁹⁷

When viewed in this light, each state’s development goals should best be understood as part of larger regional effort to eliminate poverty,⁹⁸ promote peace and security, democratic governance, social justice, wage equity, and broader Member State economic, trade, political, and security integration. Indeed, these aims are the very hallmarks of the OAS’ existence.⁹⁹ In this sense, the OAS Charter does not recognize expressly the RTD as a distinct human right, but rather promotes the “integral development” of the Member States and their peoples as a conceptual means to a particular organizational end, namely, the integration of all Member States around a set of shared values: social justice, democratic governance, respect for fundamental human rights and freedoms, greater economic integration, and the adoption at both the state and regional levels of vital security frameworks to better ensure regional peace and stability.¹⁰⁰

When understood in these terms, it becomes a bit clearer, if not abundantly so, that the duty which each Member State owes to its (1) citizens both individually and collectively, *and* (2) to the other Member States, is the obligation to cooperate institutionally to fulfill the broad goals articulated in the Charter and under Chapter VII in particular.¹⁰¹ Indeed, it would not be inaccurate to suggest that the provisions contained in Chapter VII represent the essence or soul of

⁹⁶ *Id.*

⁹⁷ *Id.* at § VII.

⁹⁸ *Id.*

⁹⁹ *See id.* at § I Art. 2.

¹⁰⁰ *See id.* at § VII Art. 30.

¹⁰¹ *See generally id.* at § VII.

the document, and that the concept of “integral development” along the axes spelled out therein represents the conceptual architecture upon which the entire OAS superstructure rests.¹⁰²

Added organizational and normative clarity in connection with Haitian reconstruction and development efforts under the OAS umbrella unfortunately represents a double-edged sword. For while Chapter VII broadly identifies the kinds of frameworks around which Member State action should coalesce, those provisions do not identify with sufficient clarity what values enjoy primacy under the Chapter VII architecture, nor where the process of “integral development”¹⁰³ should begin with a state like Haiti. That task falls to Part III of this Article.

*III. The OAS and the Progressive Enhancement of the RTD (and
“Integral Development”) via a Hybridized Approach Human
Rights-Based Approach*

As noted above in Part II, the Declaration emphasizes three core bundles of rights (at a minimum). First and foremost, the Declaration attaches primacy to basic human rights and fundamental freedoms, including freedom from all forms of discrimination, gender and racial bias, religious oppression, and other forms of bias.¹⁰⁴ Second, the RTD as framed in the Declaration, stresses the importance of democratic governance, self-determination, and the right of peoples to live freely from colonial domination and other forms of external domination.¹⁰⁵ Third, the Declaration stresses the centrality of reasonable access to the material indicia of human well-being,

¹⁰² *See generally id.* Although conceptually distinct, these bundles of rights or entitlements are treated as doctrinally related under the existing international human rights normative frameworks.

¹⁰³ *See generally id.* at § VII. Moreover, Article 33 states that “[d]evelopment is a primary responsibility of each country and should constitute an integral and continuous *process* (emphasis added) for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of the individual.” *Id.* at § VII, Art. 33.

¹⁰⁴ *See Declaration, supra* note 34, art. 5-6.

¹⁰⁵ *See id.* art. 5.

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including reasonable access to food, safe drinking water, and shelter.¹⁰⁶ Together these three sets of entitlements, what one might collectively refer to as the pillars of development – respect for basic human rights and fundamental freedoms, democratic governance and self-determination, and the material necessities of life – encapsulate in the broadest terms what is meant by the RTD.

It is worth noting that in broad conceptual strokes, the emphasis that the Declaration attaches to the three core pillars of development described above, closely mirror those areas that enjoy prominence under the OAS Charter’s “integral development” framework, including the Charter’s appeal to its Member States to take the steps necessary, individually and collectively, to formulate and implement regional and international development policies with a view to facilitating the full realization of the right to development.¹⁰⁷

This suggests that in order to facilitate effectively the right of “integral development,” the OAS ideally should urge the Member States to restructure their foreign assistance initiatives toward Haiti in line with this type of normative coordination.¹⁰⁸ This involves the creation and implementation of (1) domestic policy and legislative initiatives in that direction,¹⁰⁹ and also (2) bi-lateral and multilateral agreements between the Member States, individually and collectively, and Haiti to facilitate the latter’s full realization of the right to development globally and the right to “integral development” regionally.¹¹⁰ It is of course axiomatic to suggest that such legislative and treaty-based efforts must explicitly reference the RTD, and/or the right to “integral development” as the doctrinal

¹⁰⁶ See *id.* art. 8.

¹⁰⁷ OAS Charter, *supra* note 39, at § VII Art. 30-32.

¹⁰⁸ *Id.*

¹⁰⁹ One such example is the United States-sponsored Trade and Development Act of 2000, 19 U.S.C. § 3701 (2001) or AGOA, a domestic free trade bill designed to promote stronger trade ties between the recipient states in Sub-Saharan Africa and the U.S.

¹¹⁰ See Kirchmeier et al, *supra* note 40, at 29-30.

foundation upon which the particular framework in question rests.¹¹¹

The value of facilitating the full realization of the RTD (and the right to “integral development”) by assigning implementation primacy to human rights frameworks has begun to receive wider recognition from scholars, development experts, and even states themselves.¹¹² Indeed, some commentators advocate the implementation of a human rights-based approach (HRBA) to the broader development question as the best way to ensure the progressive enhancement of the RTD.¹¹³ In pragmatic terms, initial developmental emphasis on creating structures to ensure compliance with existing human rights frameworks also addresses some of the most pernicious on-the-ground impediments to effective Haitian reconstruction and development, such as gender-based violence and crimes against children.¹¹⁴

While the author generally approves of a HRBA to facilitate the full exercise of the RTD and the right to integral development, it is crucial to remember that Haiti’s pre and post-earthquake foreign assistance needs encompass virtually all spheres of endeavor, meaning that it requires aid in the human rights, democratic entitlement, and economic integrations spheres with equal urgency. This article recasts the HRBA as a hybrid approach, one that places the implementation of basic human rights, transitional justice, and regional economic integration initiatives on equal footing under the RTD. Furthermore, the right to integral development involves the robust participation of the Haitian people as part of the development process. This approach has the capacity to clarify in a concrete normative context the specific rights recognized by, and obligations undertaken by both donor and beneficiary states under the RTD, an approach that could greatly benefit Haitian reconstruction and development efforts.

¹¹¹ Marks, *supra* note 31, at 67.

¹¹² See generally Kirchmeier et al, *supra*, note 40.

¹¹³ *Id.*

¹¹⁴ See U.N. Secretary-General, *supra* note 18 (read accompanying text also).

Under this specific reconstruction and development model, I explore two ways by which the OAS and its Member States can fulfill their obligations under the RTD in Haiti. In addition to the primary areas where the OAS presently operates in Haiti, (interestingly in collaboration with another regional organization, the Caribbean Community and Common Market (CARICOM),¹¹⁵ namely coordinating efforts to ensure free and fair elections, and reforming property laws and property registration frameworks, this article identifies (1) the creation of transitional justice mechanisms to address gross human rights violations, and (2) the deeper integration of Haiti into regional and global trade and investment structures as core objectives that the OAS must promote under the RTD.

A. Human Rights and Transitional Justice

Addressing adequately the full range of human rights challenges confronting post-earthquake Haiti lies well beyond the institutional capacities of the OAS and its Member States. The prevalence of rapes, kidnappings, crimes against children, and other outrages unfortunately requires a robust police presence, something organizations like the United Nations seem better equipped to provide given the shortcomings of Haiti's so-called caretaker government. However, efforts to promote broader human rights compliance, and ultimately, adequate modes of transitional justice via the courts are areas where the OAS and its Member States boast both considerable expertise, and where solid legal precedent exists both domestically and regionally.

At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights represent institutional success stories that compare favorably to similar efforts undertaken anywhere else in the world, including the

¹¹⁵ In 2001, the OAS and its Caribbean counterpart, the Caribbean Community and Common Market or CARICOM created a Joint Mission to better integrate regional reconstruction and development efforts in Haiti. See Press Release, Joint OAS/CARICOM Initiative on Haiti (May 9, 2001), available at <http://www.oas.org/OASpage/press2002/en/press2001/May01/050901.htm>.

European Union.¹¹⁶ The depth of the Court's jurisprudence is impressive, and the regional level of compliance it dictates is notable.¹¹⁷ The international community mobilized considerable resources to Rwanda following the country's brief, but bloody civil war, to train novice lawyers and judges and to create mobile circuit courts to try indicted war criminals.¹¹⁸ The essentially non-functioning Haitian judiciary sorely needs this type of expertise to assist in its redevelopment.

At the domestic level, many of the OAS Member States boast useful expertise in the implementation of post-conflict transitional justice mechanisms,¹¹⁹ having seen firsthand the destructive impact that internal armed conflict has had on developing nations. These states could provide invaluable assistance to Haiti under either a bilateral or multilateral judicial reform assistance framework that targets the creation of special human rights courts in Haiti to prosecute responsible parties.¹²⁰ Again, the emphasis here is on matching specific recipient state needs with the unique capabilities of the donating Member States, and the coordinating regional organization, here, the OAS.

¹¹⁶ Marks, *supra* note 31, at 64. Acknowledging that the OAS remains perhaps the most successful regional organization of its type in the world.

¹¹⁷ Tara J. Melish, *The Inter-American Court of Human Rights*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW* 372, 73-74 (M. Langford, ed., 2008).

¹¹⁸ *Development Programs In Rwanda*, USAID.GOV, <http://www.usaid.gov/press/factsheets/2004/fs040405.html>, (last visited Mar. 30, 2011); Gregory P. Joseph, *Terrorism and U.S. Law*, 29 NAT'L L.J. 14 (2006).

¹¹⁹ *Truth Commissions*, AMNESTY INTERNATIONAL.COM, <http://www.amnesty.org/en/international-justice/issues/truth-commissions> (last visited on May 18, 2011).

¹²⁰ The author offers no personal opinion as to whether Baby "Doc" Duvalier, recently returned to Haiti from years in exile, should be prosecuted in a Haitian criminal court or should face prosecution before a special human rights tribunal. The author does note that the use of such transitional justice mechanisms can do much to legitimize transitional governments and government elites in the eyes of jaded constituents.

B. Haiti, the OAS, and Regional and Global Economic Integration

Potentially useful models of trade-based economic development and integration do exist. One such model is the preferential trade regime erected by the European Union in the 1990s, to assist small banana exporting states in the Caribbean, Africa, and the Pacific.¹²¹ In concept, the so-called “banana protocol” represented precisely the kind of trade-based development initiative that many underdeveloped agricultural export-dependent states require.¹²² The banana protocol framework failed to deliver its intended benefits, not because of conceptual flaws, but because of implementation shortcomings.¹²³

Specifically, the failure of the European states that supported the initiative to *coordinate* their efforts with the development goals of other states, particularly banana producers in Latin America, and with states hosting corporate actors that relied on Latin American bananas as part of their core business model, placed the latter two stakeholder classes (the Latin American producers and the United States) in direct competition with the former class of stakeholders (the ACP states).¹²⁴ This was a failure of normative coordination, one rendered all the more troublesome, given that organizations like the European Union (EU) possess the specific institutional capacities to overcome these problems by providing a forum for interested parties

¹²¹ See generally Convention of Lomé, *supra* note 71.

¹²² See Council Regulation 404/93 *supra* note 71 (The specific portion of the “banana protocol” that led to prolonged litigation was Council Regulation (EEC) 404/93 of 13 February 1993 on the Organization of the Market in Bananas.).

¹²³ See Brown, *supra*, note 77.

¹²⁴ See First Written Submission of the United States, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, 1996 WL 397092 (G.A.T.T.) (July 9, 1996). Tensions arose when U.S.-based banana producers realized that the banana protocol had the effect of marginally but significantly increasing the cost of their bananas over and above the cost to smaller producers in the ACP states who paradoxically did not enjoy corporate economies of scale. The USTR challenged this arrangement as a violation of fundamental fair trade principles. See *Trade Act of 1974* §§ 301-09, amended by 19 U.S.C. §§ 2411-2415 (1988). See also Case C-280/93, F.R.G. v. Council, 1994 E.C.R. I-04973, 34 I. L. M. 154 (1995).

to agree on a common course of action before conflicts arise.¹²⁵

The Bananas War therefore serves as a cautionary tale to trade and development experts who advocate the use of targeted trade preferences to promote economic growth, stabilization, and development in underdeveloped states. The lesson is that such initiatives have the potential to reap substantial economic benefits to the recipient states, but the donor states must ensure effective coordination of the specific trade framework with both the recipient states, and other developing economies that might suffer competitive economic harm as a result.

The author is not unmindful of, nor insensitive to the waves of criticism directed against the United States claiming that its behavior in the Bananas war reeked of neo-colonialism.¹²⁶ But, the broader normative issue here involves the capacity of regional organizations, like the OAS, to assist its Member States in overcoming these kinds of trade-based hostilities. This can be done via the institution of broad trade negotiating forums so that their collective efforts might lead to further facilitate the full exercise of the RTD, and the right to integral development.

Conclusion

The RTD represents a potentially invaluable normative tool for mobilizing state action in support of efforts to facilitate the development goals of the least developed, most beleaguered states in the world, states like Haiti. There is little question that wealthy donor states, like the United States, and regional organizations, like the European Union, have the resource capacity to assist in this process. Yet, their efforts are routinely undermined by internal historical biases toward states like Haiti, and by Haitian institutional shortcomings as well. Regional organizations, like the OAS, on the other hand, can potentially bridge this institutional divide by

¹²⁵ See Vahe Heboyan, et al., *U.S.-E.U. Banana War: Implications of Retaliatory Tariffs on Pecorino Cheese*, AGECON FS 00-18 (Nov. 2000).

¹²⁶ Williams, *supra* note 74, at 185.

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providing the type of normative support and coordinative expertise needed to overcome the bias challenges and institutional inefficiencies that plague larger donors.

What is needed then is a more concerted effort to facilitate the progressive enhancement of the RTD, and the right to integral development via robust regional organizational coordination activities in the human rights and economic integration spheres. This article has modestly proposed a few discreet ways to facilitate this task. Haiti seems like the perfect place to begin.