

**THE RIGHT TO DEVELOPMENT IN AFRICA AND THE  
REQUIREMENT OF DEVELOPMENT COOPERATION FOR  
ITS REALISATION**

Submitted in Fulfilment of the Requirements for the Degree  
Doctor of Laws (LL.D)

By

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## **SUMMARY**

In this thesis, I make a conceptual analysis of the right to development in Africa with a focus on the requirement of development cooperation for its realisation. I do so, on the one hand to account for the fact that development is retarded in Africa due to the lack of an operational model and on the other hand, to determine whether and to what extent development cooperation could be seen to function as such a model. As a point of departure, I state the claim that conceptually, development cooperation is opposed to the African conception of the right to development, which guarantees an entitlement to self-determination in making policy alternatives. To justify this claim, I provide a historical overview of the origins of the right to development in Africa. In tracing its origins in this way, I illustrate how the right to development has evolved in Africa not as a solicitation for assistance but as an assertion of self-determination against development injustices perpetuated through various forms of domination, including through development cooperation. I point out that by nature; the right to development in Africa is formulated on the one hand, as a human right concept to ensure that development processes are regulated by the principles of justice and equity and on the other hand, as a development paradigm intended to achieve improved well-being for the peoples of Africa. Pertaining to the central enquiry whether the right to development in Africa is achievable through development cooperation, I argue that the probability is minimal, especially considering the motives behind prevailing patterns of development cooperation, which is inherently lopsided, paternalistic in nature and aims primarily to safeguard the interests of foreign stakeholders. In the alternative to development cooperation, I propose that achieving the right to development entails the fulfilment of three normative requirements: sovereignty in domestic development policy making; the obligation to eliminate obstacles to development; and the need to establish an enabling environment to ensure that the right to development is achieved. Through an in-depth analysis of the range of instruments that establish the right to development dispensation in Africa, I point out that effective implementation remains problematic due on the most part to the dominant influence of foreign stakeholders, which in spite of evidence of violations of the right to development resulting from their actions, remain insulated from legal accountability. I then further examine the dimensions of the right to development as a development paradigm, which I argue is yet to be explored. On this note, I make the argument for a shift in paradigm from development cooperation to a new reading of the

right to development as a development model, which I define as *the right to development governance*. I then highlight its relevance in transforming the development landscape in Africa. In conclusion, I make a number of recommendations on priority measures that need to be taken to advance the right to development governance as a home-grown functional model to drive the process of radical transformation envisaged for Africa.

## DECLARATION

I hereby declare that this thesis submitted in fulfilment of the requirements for the award of the degree Doctor of Laws (LLD) on the Right to Development at the Department of Public Law, University of Pretoria is my original work. It has been carried out primarily through desktop research, which entailed the analysis of primary and secondary sources. The thesis includes literature and information available to the author up until December 2018. Parts of chapter two and chapter five have been published as an article in the *Journal of Human Rights* with the title: 'Towards a Right to Development Governance in Africa' (2018) vol. 17:1 pp. 107-122. Where other people's works have been quoted or cited, due acknowledgement and reference has been provided. It is in this regard that I declare the dissertation my own original work. It has not been submitted for the award of a degree at any other university or institution of higher education.

Signed: \_\_\_\_\_  
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Date: \_\_\_\_\_

The thesis is submitted for examination with our approval as Supervisor and Co-Supervisor

Signed \_\_\_\_\_  
SUPERVISOR: **Prof Danie BRAND**

Signed \_\_\_\_\_  
CO-SUPERVISOR: **Prof Serges A KAMGA**

## **DEDICATION**

To my father, Bernard NGANG AMUNGWA of blessed memory  
He wished that I should attain the highest level in education but unfortunately, he did not live  
long enough to see that dream come true.

And also

To my beloved mother, Grace ALIEH NGANG for her tender love and care.

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I sincerely appreciate every person whose assistance has in one way or the other contributed to the realisation of this project. I owe profound gratitude to Dr Wanki Justin, Dr Fred Sekindi, Dr Solomon Tekle, Mr Nyondo James of blessed memory and other friends and well wishers whose support was quite encouraging. I gratefully acknowledge the funding support provided by the University of Pretoria, the Cegla Centre for Interdisciplinary Research in Law at Tel Aviv University, Israel as well as the Law and Development Research Group at the University of Antwerp in Belgium, which enabled me to carry out this research to its completion.

I am most grateful to my family; wife, Mrs Ngang Mercy and kids, Forghang Joey, Ngang Thericy and Ngang Myra for standing by me with full support and encouragement in the course of this project. Above all, I exalt the almighty heavenly Father for His abundant blessings.

## ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACP	African, Caribbean and Pacific countries
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Report
AU	African Union
BSAC	British South Africa Company
CAPPE	Centre for Applied Philosophy and Public Ethics
CEMIRIDE	Centre for Minority Rights Development
CFA	Communauté Financier Africaine
CIA	Central Intelligence Agency
CJDHR	Cameroon Journal of Democracy and Human Rights
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
DRtD	Declaration on the Right to Development
EAU	East African Union
ECCAS	Economic Community of Central African States
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
GDP	Gross Domestic Product
HRW	Human Rights Watch
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IMF	International Monetary Fund
MDGs	Millennium Development Goals
MINEPAT	Ministry of the Economy, Planning and Regional Development
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation

NIEO	New International Economic Order
NQHR	Netherlands Quarterly of Human Rights
ODA	Official Development Assistance
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commission for Human Rights
SADPA	South African Development Partnership Agency
SAIFAC	South African Institute for Advanced Constitutional, Public, Human Rights and International Law
SAIIA	South African Institute of International Affairs
SAP	Structural Adjustment Programme
SADC	Southern Africa Development Community
SAHRC	South African Human Rights Commission
SDGs	Sustainable Development Goals
SERAC	Social and Economic Rights Action Centre
SRSR	Special Representative of the United Nations Secretary General
TST	Technical Support Team
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNHCHR	United Nations High Commissioner for Human Rights
UN	United Nations
UNEP	United Nations Environment Programme
UNDP	United Nations Development Programme
UNICEF	United Nations International Children's Fund
UNU	United Nations University
US	United States
USAID	United States Agency for International Development
WIDER	World Institute for Development Economics Research
ZANU-PF	Zimbabwe African National Union Patriotic Front



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# CHAPTER ONE

## Introduction

*The right to development is the measure of the respect of all other human rights. That should be our aim: a situation in which all individuals are enabled to maximise their potential, and to contribute to the evolution of society as a whole.*

Kofi Annan, former UN Secretary-General, 2005.

### 1. The Problem

In this thesis, I provide a conceptual analysis of the right to development in Africa with a focus on the requirement of development cooperation for its realisation. I do so to account for the fact that Africa has remained backward and underdeveloped because of the lack of an operational model for development. In spite of the right to development that originated from and has evolved in Africa as a potential remedy to historical and prevailing development injustices, attention is rather reverting to paternalistic models, which I contend, only perpetuate dependency. Although the African Charter imposes an obligation on states parties to create the conditions for the realisation of the right to development,<sup>1</sup> the promise of development assistance through cooperation has instead largely been propagated,<sup>2</sup> as the mechanism through which to achieve

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<sup>1</sup> African Charter on Human and Peoples' Rights adopted in Nairobi on 27 June 1981 preamble & art 22(2).

<sup>2</sup> Arts K & Tamo A 'The right to development in international law: New momentum thirty years down the line?' (2016) 63:3 *Neth Int'l Law Rev* 239-242; De Feyter K 'Towards a framework convention on the right to development' (2013) *Friedrich Ebert Stiftung* 17; Salomon ME 'Legal cosmopolitanism and the normative contribution of the right to development' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 17; Sengupta A 'Development cooperation and the right to development' (2003) *Copyright © 2003 Arjun Sengupta* 20; Sengupta A 'On the theory and practice of the right to development' (2002) 24:4 *HRQ* 880; Hausermann J 'A human rights approach to development: Some practical implications for WaterAid's work' (1999) *Rights & Humanity* 5; Siitonen L 'Political theories of development cooperation: A study of theories of international cooperation' (1990) *UNU WIDER* 15-16.

the right to development.<sup>3</sup> It is noted that developed countries have refused to acknowledge that they owe any legal obligation to fulfil the right to development in developing countries.<sup>4</sup>

These divergent standpoints show evidence of a functional disconnect, which has meant that instead of advancing, the right to development is rather retrogressing.<sup>5</sup> For this reason, I subject the requirement of development cooperation for the realisation of the right to development to critical analysis. The grounds on which I frame my arguments are twofold: First, that the right to development in Africa is conceptualised as an expression of self-determination rather than a solicitation for foreign assistance. Second, that development cooperation is primarily intended to promote the geopolitical interests of donor countries and not necessarily to advance the right to development. Central to this enquiry is the question whether development cooperation can for all purposes ensure the realisation of the right to development in Africa?

## 2. Research Questions

The research problem as described above raises the following specific questions:

1. Is there a right to development in Africa?
2. Whether the right to development can be achieved through development cooperation?
3. To what extent is the right to development guaranteed as a legal entitlement to the peoples of Africa?
4. How appropriately could the right to development be conceptualised as an alternative model to development cooperation in Africa?

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<sup>3</sup> Declaration on the Right to Development adopted by Gen Ass Res 41/128 4 December 1986 art 3(3) & 4(2); Vienna Declaration and Programme of Action adopted by the UN Conference on Human Rights UN Doc A/CONF.157/24 25 June 1993 art I(10); Charter of the United Nations adopted in San Francisco on 26 June 1945 arts 1(3), 55 & 56; Mahalu CR 'Human rights and development: An African perspective' (2009) 1:1 *Leiden J Int'l L* 16; Felice WF 'Right to development' in Forsythe DP (ed) *Encyclopaedia of Human Rights* (2009) 21.

<sup>4</sup> Tadege MA 'Reflections on the right to development: Challenges and prospects' (2010) 10 *AHRLJ* 339.

<sup>5</sup> Nagan WP 'The right to development: Importance of human and social capital as human rights issues' (2013) 1:6 *Cadmus Journal* 30.



5. What concrete policy measures are required to make the right to development a reality to the peoples of Africa?

In responding to these questions I seek to provide clarity on the nature of the right to development in Africa and by so doing, propose a shift in the discourse from development cooperation to a new thinking of the right to development as a home-grown model entailing greater collective action among African countries. This is anchored in my central argument that the essentially paternalistic nature of development cooperation runs counter to the concept of the right to development in Africa, which presupposes a claim ‘to be allowed the freedom and the opportunity’ to make the development policy choices to enable Africa to ‘advance beyond prevailing circumstances’.<sup>6</sup>

Considered severally, the response drawing from the first question provides justification to the argument that in spite of opinions to the contrary, the right to development is established to have originated from Africa as an assertion of emancipation from colonial rule, foreign domination and external influences. Thus, the right to development is presented as formulated to accomplish two main purposes; on the one hand, to ensure that development is achieved with justice and equity and on the other hand that the well-being of the peoples of Africa is guaranteed.

With this conception of the right to development, I argue with regard to the second question that prevailing patterns of development cooperation neither provide assurance for development to be achieved with justice and equity nor guarantee well-being for the peoples of Africa. This is explained by the fact that development cooperation is designed to promote the interest of donor countries, which is underlined by the desire to dominate global politics through the mechanism of aid dependency. The correlation is difficult to establish and it is therefore hard to locate how the right to development could realistically be achieved through development cooperation.

In response to the third and fourth questions relating to the actual dimensions of the right to development, I describe on the one hand the context within which the right to development is established by law to apply as a human rights concept and as a development paradigm. I describe

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<sup>6</sup> Ngang CC ‘Towards a right to development governance’ (2018) 17:1 *Journal of Human Rights* 113.

this context as the right to development dispensation on the basis of the range of legal instruments that guarantee self-determination in formulating domestic policies and in setting development priorities that are relevant to Africa. I further draw attention to the fact that because of the dominant influence of foreign stakeholders within the framework of development cooperation, which in itself lacks the potential to drive development in Africa, the context necessitates a radical shift from prevailing patterns of development cooperation that only create dependency on foreign stakeholders to fostering collective action among African countries. From this perspective, and drawing from propositions to move away from economic growth models to rights-based approaches to development, I make the argument in favour of exploring the right to development not only as a claimable entitlement but essentially as a development model for Africa, which I propose could be conceptualised as *right to development governance*.

The analyses and the accompanying arguments ultimately draw to the conclusion that the right to development in Africa is not an objective required to be achieved through development cooperation but rather the means by which Africa's development aspirations could be realised. As a justification for this claim, I explain why it is relevant to prioritise the right to development governance as a home-grown model for development in Africa. The policy recommendations outlined in the concluding chapter are intended to ensure practical application of the right to development governance model in driving the agenda for development in Africa.

### **3. Background and Motivation**

#### **3.1. Background**

My purpose in this section is to sketch the background to my research problem and so my thesis. I briefly explain how Africa came to be where it is today and how the right to development has evolved in that process as a potential remedy to the problem of underdevelopment, which supposedly is envisaged to be redressed through development cooperation. As far back as 1949, in his presidential inaugural speech, United States (US) President, Harry Truman drew world attention to the fact that certain parts of the world were 'underdeveloped' and needed some form of 'civilisation', which according to him was only possible through the charitable assistance of

the industrialised world.<sup>7</sup> Truman's statement established a biased barometer for gauging society as either 'developed' in terms of industrial advancement or 'underdeveloped'/'backward' in terms of the lack thereof. By this estimation, underdevelopment can only be redressed through the benevolence of developed countries, the basis on which development cooperation eventually became structured as illustrated in chapter three.

The parts of the world that Truman referred to as underdeveloped of course did not choose to be so; they were rendered underdeveloped by the industrialised countries.<sup>8</sup> Widespread campaigns for decolonisation and subsequent demands for a more equitable global system challenged Truman's preconceptions that the peoples in underdeveloped countries only needed to be rescued from misery and sufferings. The decolonisation campaign demonstrated the capabilities of the 'underdeveloped' peoples to seek justice and freedom from domination rather than charitable assistance.<sup>9</sup> The idea of wanting to be free to develop began to materialise following the massive acquisition of independence in the 1960s.<sup>10</sup> The right to development evolved from this background, marked by a number of initial public proclamations in the late 60s and early 70s.<sup>11</sup>

However, a protracted debate ensued, characterised by contestation as to the existence of such a right and a misconception as to what it actually embodies or what its realisation entails.<sup>12</sup> Despite

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<sup>7</sup> Truman HS 'Inaugural address' (1949) available at: [www.bartleby.com/124/pres53.html](http://www.bartleby.com/124/pres53.html) (accessed: 14 October 2015) paras 44-45.

<sup>8</sup> See generally Rodney W *How Europe Underdeveloped Africa* (1973).

<sup>9</sup> Ougergouz F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 298; Felice (n 3 above) 21.

<sup>10</sup> Kirchmeier F 'The right to development—where do we stand?: State of the debate on the right to development' (2006) *Friedrich Ebert Stiftung – Occasional Paper No 23* 8.

<sup>11</sup> Ware A 'Human rights and the right to development: Insights into the Myanmar government's response to rights allegations' (2010) *Conference paper 3*; Laurent M 'Le droit au développement et les Nations Unies: Quelques réflexions' (2003) 34 *Droit en Quart Monde* 14; Rich RY 'The right to development as an emerging human right' (1983) 23 *Virg J Int'l L* 290 see footnote 10; M'baye K 'Le droit au développement comme un droit de l'homme: Leçon inaugural de la troisième session d'enseignement de l'Institut International des Droits de l'Homme' (1972) 5 *Revue des Droits de l'Homme* 503.

<sup>12</sup> Marks SP 'The politics of the possible: The way ahead for the right to development' (2011) *Friedrich Ebert Stiftung* 3; Felice (n 3 above) 21.

the arguments of proponent scholars in favour of the right to development as an instrumental human right<sup>13</sup> and a host of opponents who deny its legal foundation,<sup>14</sup> the right to development eventually gained universal recognition as an inalienable human right.<sup>15</sup> However, its realisation remains constrained by the absence of an acceptable modality for implementation.<sup>16</sup> Although recognised as an inalienable right, which means it ought to respond to universal human rights standards entailing the duties to respect, to protect and to fulfil, a rather less compelling standard is envisaged for its achievement through the mechanism of development cooperation.

A concrete meaning of development cooperation might be necessary to be able to determine to what extent it could be relied on to ensure the realisation of the right to development. The difficulty in constructing such a definition is that development cooperation is driven by a variety of reasons relating to issues of an economic, technical, security and environmental nature among others, and achievable through various strategies **ranging from the provision of foreign aid to**

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<sup>13</sup> Chowdhury SR & De Waart P 'Significance of the right to development in international law: An introductory view' in Chowdhury SR, Denters MG & De Waart P (eds) *The Right to Development in International Law* (1992) 10; Bedjaoui M 'The right to development' in Bedjaoui M (ed) *International Law: Achievements and Prospects* (1991) 1177 & 1182 Salomon (n 2 above) 17; Sengupta (n 2 above) 857-867.

<sup>14</sup> Whyte J (2007) 'Book review: Development as a human right edited by Bard A Andreassen and Stephen P Marks Harvard University Press, London, England, 2006' 1:1 *Elect J Sust Dev't* 1-3; Rosas A 'The right to development' in Eide A, Krausus C & Rosas A (eds) *Economic social and cultural rights* (2001) 251; Bello E 'Article 22 of the African Charter on Human and Peoples' Rights' in Bello E & Ajibola B (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992) 462; Shivji IG *The Concept of Human Rights in Africa* (1989) 82; Ghai Y 'Whose human right to development?' (1989) *Commonwealth Secretariat Occasional Papers*; Rich R 'The right to development: A right of peoples?' in Crawford J (ed) *The Rights of Peoples* (1988) 17-38; Donnelly J 'The right to development: How not to link human rights and development' in Welch CE & Meltzer RI (eds) *Human rights and development in Africa* (1984) 261.

<sup>15</sup> UN Human Rights *Realizing the Right to Development* (2013) iii; Baxi U 'The new international economic order, basic needs and rights: Note towards development of the right to development' (1983) 23 *India L J* 227; Alston P 'Development and the rule of law: Prevention versus cure as a human rights strategy' in International Commission of Jurists (eds) *Development, Human Rights and the Rule of Law* (1981) 106; United Nations Gen Ass Res A/RES/34/46 of 23 November 1979 para 8.

<sup>16</sup> De Feyter K 'The right to development in Africa' (2013) *Law & Development University of Antwerp* 7; Sengupta A *et al* 'The right to development and human rights in development: A background paper' (2004) *The Norwegian Centre for Human Rights – Research Notes 07/2004* 2.

external capital flows and military cooperation.<sup>17</sup> For the purpose of this thesis, even though reference is consistently made to the provision of development assistance, development cooperation is used in its broadest sense, involving a range of external state and non-state actors, which I refer to as ‘foreign stakeholders’ because of their vested interests in Africa. This generality draws from the bottom-line, as I argue in the subsequent chapters that development cooperation is generally not favourable to Africa. Despite being one of the most favoured destinations for development assistance, the global narrative on aid ineffectiveness illustrates that there is little evidence of the development gains resulting from such assistance to Africa.<sup>18</sup> This is so largely because of the dominant self-seeking interests of foreign stakeholders within the framework of development cooperation, which in reality is not designed to achieve the right to development. A discussion on the actual dimensions of development cooperation is given more precision in chapter three.

### **3.2. Significance of the Thesis**

Questions relating to human rights and development, which constitute the central focus of this thesis, have occupied contemporary debates in Africa for decades since independence. In relation to this, studies on the right to development have often narrowly focused on the conception that development cooperation constitutes the primary mechanism for its realisation. With this thesis, I provide new insight and a much broader perspective of the right to development in Africa not only as a claimable legal entitlement but indeed also as a paradigm for development that has not sufficiently been explored. The aim is to advance the academic discourse beyond the realm of theory and controversy towards finding practical modalities for making the right to development a reality in Africa. I achieve this by demonstrating how the dimension of the right to development as a development paradigm could be conceptualised to fill the gap created by the

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<sup>17</sup> Esteves P & Assunção M ‘South-South cooperation and the international development battlefield: Between the OECD and the UN’ (2014) 35:10 *Third World Quarterly* 1776; Killick T ‘The developmental effectiveness of aid to Africa’ (1991) *International Economics Department of World Bank – Working Paper Series* 646 10-17; IOM ‘International cooperation’ available at: [http://www.rcmvs.org/documentos/IOM\\_EMM/v1/V1S07\\_CM.pdf](http://www.rcmvs.org/documentos/IOM_EMM/v1/V1S07_CM.pdf) (accessed: 26 May 2015) 9-17.

<sup>18</sup> See Ake C *Democracy and Development in Africa* (1996) 103.

lack of an operational model, which has retarded progress on the continent. The concluding recommendations are thus framed to divert attention from development cooperation,<sup>19</sup> towards greater focus on the right to development as a home-grown model for development in Africa.

### **3.3. Literature Review**

The nature of the right to development raises crucial questions, some of which have been explored extensively as is evident from the wide repertoire of literature on the subject. However, a scrutiny of the available literature shows a dearth of knowledge relating to why implementation of the right to development remains problematic. This thesis provides clarity in this regard and is intended to fill the existing gap in the discourse relating to modalities for the realisation of the right to development in Africa. A range of authors hold the conviction that the right to development is achievable through development cooperation and therefore, advocate for its recognition as a mechanism for implementation.

Margot Salomon for example, believes that the right to development demands international cooperation as a means of creating an enabling environment for the achievement of human well-being through the realisation of basic human rights and freedoms for everyone.<sup>20</sup> Lauri Siitonen sees development cooperation as a means to curb global inequalities through which developing countries are strengthened in their endeavour to achieve self-determination, universal human rights and poverty eradication.<sup>21</sup> According to Julia Hausermann, a normative framework for cooperation combining domestic laws and international development policies is imperative as a

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<sup>19</sup> When the OAU was founded, African leaders mistakenly believed that development was achievable through international cooperation, and so article 2 of the OAU Charter which states the purpose of the organisation emphasised the need for cooperation in every aspect of African society. Fifty years after, African leaders come to the realisation that reliance on international cooperation has rather hindered than advance development on the continent. The African agenda for development named, Agenda 2063 adopted at the instance of the 50<sup>th</sup> anniversary of Africa's independence highlights the need to move away from aid dependency (para 72(o)) and to focus on self-reliant efforts to create development on the continent (para 19).

<sup>20</sup> Salomon (n 2 above) 17.

<sup>21</sup> Siitonen (n 2 above) 15-16.

measure of accountability for the realisation of the right to development.<sup>22</sup> In a related approach, Koen de Feyter proposes a framework convention as a binding legal regime to regulate the interaction between cooperating parties on the right to development.<sup>23</sup>

Interestingly, these affirmative views are expressed only to the extent that the right to development is seen as a problem requiring a solution. To the extent that it does not represent a problem as such, I take a contrary and a rather more critical stance with regard to development cooperation as a means to achieve the right to development in Africa. If the right to development is to be achieved, there is need to look at it from a pragmatic point of view. This resonates with Oduwole's perception that the right to development must be seen as imposing more of a negative obligation, requiring restraint from actions that may jeopardise the enjoyment of that right.<sup>24</sup> Šlaus and Jacobs share the conviction that practical solutions to the range of challenges confronting humanity can be found by exploring alternative paradigms.<sup>25</sup> Accordingly, Nagan argues that the right to development meets the criteria to be considered as such a paradigm.<sup>26</sup> These positions suggest looking at the right to development more concretely as a mechanism for dealing with development challenges,<sup>27</sup> which provides the point of departure for this thesis.

## **4. Approach and Structure**

### **4.1. Theory Base**

Owing to the incessant abusive and exploitative behaviour of foreign stakeholders in Africa under the banner of development cooperation, I situate this thesis within the theories of pragmatism and capabilities to show that Africa has indeed practically demonstrated the

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<sup>22</sup> Hausermann (n 2 above) 5 & 8.

<sup>23</sup> De Feyter (n 2 above) 17.

<sup>24</sup> Oduwole O 'International law and the right to development: A pragmatic approach for Africa' (2014) *International Institute of Social Studies* 3.

<sup>25</sup> Šlaus I & Jacobs G 'In search of a new paradigm for global development' (2013) 1:6 *Cadmus Journal* 1-3.

<sup>26</sup> Nagan (n 5 above) 24-27.

<sup>27</sup> Oduwole (n 24 above) 3.



capability to uphold the right to development. Capability, according to Martha Nussbaum, is ‘pragmatic and result-oriented’ and ‘provides a fine basis for a theory of justice and entitlement’.<sup>28</sup> I anchor the analysis on these theories to dissipate the misconceptions with regard to the realisation of the right to development through development cooperation, which I contend is not practically possible and to explore the functional dimensions of the right to development as a suitable alternative model suited to drive the development processes in Africa.

Radin’s conception of pragmatism as a legal theory, describes a practical and result oriented approach that evaluates theories or beliefs in terms of the success of their application in particular circumstances.<sup>29</sup> According to Singer, pragmatism requires focusing attention on the actual workings of the law within a specific context, which is more important to consider than insisting on formal theories and conceptual correctness.<sup>30</sup> I employ these understandings of pragmatism to make the argument that for good reasons, development cooperation is not envisaged under African law as a means to achieve the right to development. Given the historical injustices and the realities of continuous external domination in Africa,<sup>31</sup> the context does not necessitate recourse to development cooperation, which, although it is envisaged by international law as shown in chapter three, remains fluid in its application and is unrealistic as a means to practically change the existing socio-economic and cultural circumstances in Africa.

In accordance, I draw inspiration from the theoretical understanding of the capabilities approach propounded by Amartya Sen and Martha Nussbaum as a theory base for dealing with issues relating to development and human rights.<sup>32</sup> The idea of capabilities is explained to mean ‘the opportunity to achieve valuable combinations of human functioning’.<sup>33</sup> It focuses on the recognition of the human potential, emphasised by the need to expand opportunities and choices and to develop productive capabilities. The theoretical underpinnings of the capabilities model

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<sup>28</sup> Nussbaum M *Creating Capabilities: The Human Development Approach* (2011) 17-18.

<sup>29</sup> Radin MJ ‘The pragmatist and the feminist’ (1990) 63 *South Calif L Rev* 1700; Singer (n 30 below) 1822.

<sup>30</sup> Singer JW ‘Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism’ (1990) 63 *South Calif L Rev* 1821.

<sup>31</sup> African Union Commission ‘Agenda 2063: The Africa we want’ (2015) *African Union* para 59.

<sup>32</sup> Sen A *Development as Freedom* (1999) 87-95; Nussbaum (n 28 above) 33-34.

<sup>33</sup> Sen A ‘Elements of a theory of human rights’ (2004) 34:4 *Philosophy & Public Affairs* 320.



provides the basis for my analysis of the right to development in Africa as a means to advance the capacity of the African peoples to freely set their own development priorities.

Basing on these theories, I examine the concept of the right to development in Africa in terms of the success of its practical application. The points I advance in this regard are anchored on the fact that Africa has both the resource potential for implementation as illustrated in chapter four and also the legal capacity to ensure judicial enforcement when necessary. As an alternative to development cooperation, I describe in chapter five, the actual functioning of the right to development as a development paradigm capable of redressing the prevailing development injustices in Africa. While the attainment of this goal is still very much visionary as reflected in the 2063 African agenda for development, my argumentation is that it is achievable with a proper conceptualisation of the right to development.

## **4.2. Scope and Delineation**

It might seem risky to generalise about the continent of Africa as a homogenous entity. It is worth acknowledging that Africa is made up of 55 autonomous states whose sovereignty has however, increasingly dissipated, giving way to a more integrated continent, politically, socio-economically and culturally.<sup>34</sup> The broad focus of this thesis on Africa is thus informed by the progressive shift in the African narrative towards greater integration with emphasis on human rights protection and sustainable development as envisaged by the Constitutive Act of the African Union (AU), the 2063 agenda for development<sup>35</sup> and the African Charter that makes provision for the right to development.<sup>36</sup> It is important to also highlight the African origins of the right to development, which, as illustrated in chapter two was conceptualised to address issues pertaining to the entire continent and not to specific African countries.

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<sup>34</sup> Ngang (n 6 above) 1.

<sup>35</sup> Constitutive Act of the African Union adopted in Lomé on 11 July 2000 art 3(a), (h)&(j); AU Commission 'Agenda 2063 (n 31 above) para 20.

<sup>36</sup> African Charter (n 1 above) art 22.

A country-by-country analysis would have been appropriate to determine the extent of implementation of the right to development at domestic level. Unfortunately, such an extensive analysis cannot realistically be achieved within the structural limitations of this thesis. Reference is made to a few countries not with the aim to narrow down understanding of the right to development to those particular countries. The specific examples are intended to explore the challenges with individual state efforts at implementing the right to development. The facts and lessons drawn from these examples are made understandable within the framework of the African Charter that obligates states parties to collectively ensure the realisation of the right to development guaranteed to all the peoples across the continent.<sup>37</sup>

Given the context, and because the thesis involves more of a conceptual analysis, I find it expedient to explore the subject from a continental scope to determine how in conjunction with Africa's 2063 agenda for development, the right to development could be achieved. Agenda 2063 adopted by the AU Commission is a consolidated roadmap that aims at harmonising efforts towards sustainable development in Africa.<sup>38</sup> As promising as it appears, the agenda leaves unanswered questions relating to how the collective entitlement to development enshrined in the Charter could be used to achieve the outlined development aspirations, which I endeavour to explore in this thesis. By so doing, I provide justification for looking at the right to development as a context-specific model for development relevant to Africa.

### **4.3. Outline of Chapters**

The thesis is structured in six chapters, including this introductory chapter, four substantive chapters and a concluding chapter. The introductory chapter provides an overview of the problem and the related research questions, the motivation and approach in conducting the research and thus, lays the groundwork on which the rest of the analysis is developed. In response to the question whether there is a right to development, I present a historical account in chapter two that situates the African origins of the right to development and the fact that it has evolved in a dual dimension as a human rights concept and also as a development paradigm;

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<sup>37</sup> African Charter (n 1 above) art 22(2).

<sup>38</sup> AU Constitutive Act (n 35 above) paras 5-8.

intended to achieve justice and equity in development and to promote the collective right to socio-economic and cultural development in Africa.

In chapter three, I establish that development cooperation holds the promise to enable developing countries, particularly Africa to advance in a comprehensive manner. However, an examination of the characteristic features indicates that development cooperation is primarily paternalistic in nature and designed to promote the geopolitical interests of donor countries and not necessarily to advance the right to development in Africa. Based on the understanding of the right to development as a human rights concept, I proceed in chapter four to look at the right to development dispensation and the entitlement to self-determination that it engenders in setting development priorities that are relevant to Africa. In relation to this, I outline the safeguard measures for consolidating the right to development dispensation, which I argue does not currently guarantee sufficient protection to the peoples of Africa.

I situate the enquiry in chapter five on the fact that Africa has been constrained to embrace development cooperation, which allows the opportunity for abuse and exploitation by foreign stakeholders, due to the absence of an established development model for the continent. Drawing from its dimensions as a development paradigm, I illustrate how the right to development could be conceptualised as a home-growth development model for Africa and a suitable alternative to development cooperation. In the sixth and concluding chapter, besides providing a summary of the main findings, I further explore the right to development governance as a transformative model with the potential to drive the kind of radical transformation that is envisaged for Africa. In accordance, I recommend a number of priority measures that need to be taken at the continental level by the AU/NEPAD and at domestic level by state governments.

## CHAPTER TWO

### **Determining the Right to Development in Africa from a Historical Perspective**

*We, therefore, have no doubt that at the heart of Africa's development objectives must lie the ultimate and overriding goal of human-centred development that ensures the overall well-being of the people through sustained improvement in their living standards and the full and effective participation of the people in charting their development policies, programmes and processes and contributing to their realization'*

African Charter for Popular Participation in Development and Transformation, 1990.

#### **1. Introduction**

In this chapter, in making the determination whether there is indeed a right to development in Africa, I provide a historical account of its African origins with a detailed description of how and the purpose for which it came to be conceptualised as a claimable legal entitlement. I explain how slavery and colonialism contributed to the dispossession and impoverishment of the African peoples, which eventually provoked claims for the right to development. With this extensive narrative, I illustrate how the right to development has evolved not only as a human right as it is generally understood, but indeed also as a development paradigm, which unfortunately has not been explored to make a radical turnaround of the legacy of historical injustices. On this basis, given the resource potential that the continent of Africa is endowed with and the capabilities inherent in its peoples,<sup>1</sup> I hope to show that with the right to development as a model for development, Africa would be able to advance much faster than by clinging to paternalistic models such as development cooperation.

With the historical narrative that I provide in this chapter, my purpose is, first and foremost, to establish the basis for interrogating in the next chapter, the proposition to have recourse to development cooperation as a mechanism for the realisation of the right to development.

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<sup>1</sup> Suhfree CS *Africa: Where Did We Go Wrong?* (2016) 104-108.

Secondly, I aim to rely on this background information to justify in chapters five and six, the need for a paradigm shift in development thinking from development cooperation towards greater focus on the right to development as a model for development suited to Africa.

Human rights are inherent entitlements that people possess by virtue of their humanity. For a right to be inherent does not create any legal problem. The problem arises when entitlements that are inherent to individuals or peoples come under attack or are threatened. This often then results in demands for the recognition and protection of those rights. When human rights become recognised and protected by law, they provide right holders the legitimacy to seek justice and protection under the law. To say that there is a right to development means that the African peoples are inherently entitled to that right, which in and of itself does not create any legal problem. The fact that the peoples of Africa began to make assertions for the recognition of their right to development is indicative that this entitlement was threatened or had been contravened. Laying claim to development as a human right thus posed a legal problem in the sense that it provoked contestation as to whether there is such thing as a right to development.<sup>2</sup>

Owing to the controversy, the legitimacy of the idea of development as a human right requires justification of its nature as an inherent entitlement worthy of legal recognition and protection. One way of making such a determination is by looking back into history; to explore the factors and circumstances that gave birth to claims on the right to development. Scholarship on the right to development has largely associated its origins with provisions of the International Bill of Human Rights, which has been interpreted to imply that apart from the human rights explicitly enshrined in the various instruments, there is an additional entitlement called the right to development.<sup>3</sup> Assuming that the idea of development as a human right originated from Africa

<sup>2</sup> Whyte J (2007) 'Book review: Development as a human right edited by Bard A Andreassen and Stephen P Marks Harvard University Press London England 2006' 1:1 *Elect J Sust Dev't* 1-3; Rosas A 'The right to development' in Eide A, Krausus C & Rosas A (eds) *Economic, Social and Cultural Rights* (2001) 251; Shivji IG *The Concept of Human Rights in Africa* (1989) 82; Bello E 'Article 22 of the African Charter on Human and Peoples' Rights' in Bello E & Ajibola B (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992) 462.

<sup>3</sup> See Charter of the United Nations 1945 art 55, Universal Declaration of Human Rights (UDHR) 1948 arts 22 & 25-28; International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by GA Res

with its complex development history, its intricate dimensions cannot be understood simply by looking at it as deriving from international human rights law. While this interpretation may not be wrong, it is misleading in that it conceals the African origins of the right to development, distorts its conceptual clarity and thus complicates the mechanism for its realisation.

Relating to the origins, the historical narrative that I provide in this chapter is intended to provide a comprehensive understanding of the right to development in order to deflate some apparent misconceptions and, therefore, pave the way for a proper enquiry into the requirement of development cooperation for its realisation. The chapter is structured as follows: In section 2, I explore the origins of the right to development, bringing into focus Africa's history of development injustices (2.1), leading to the rejection of colonialism and imperial domination (2.2). I proceed to investigate in section 3, how the concept of the right to development has evolved, with a retrospective view on how it manifested in latent form (3.1) and also how it eventually gained formal recognition both in Africa and internationally (3.2). In section 4, I provide conceptual clarity on the right to development in Africa by exploring its theoretical nature as a human rights concept (4.1), and its pragmatic nature as a development paradigm (4.2). I then wrap up the discussion in section 5 with some concluding remarks.

## **2. Origins of the Right to Development**

In this section, I explore the genesis of the right to development in order to show that although it has been part of development and human rights scholarship for over half a century, it has not yet fully impacted positively on development practice in Africa where its origins can more accurately be traced.<sup>4</sup> This may be explained by the fact that in spite of its African roots, the right

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2200A (XXI) 1966 art 11(1). See also Ware A 'Human rights and the right to development: Insights into the Myanmar government's response to rights allegations' (2010) *18th Biennial Conference of the Asian Studies Association of Australia* 3; Johnson GM 'The contributions of Eleanor and Franklin Roosevelt to the development of international protection for human rights (1987) 9:1 *HRQ* 36; Alston P 'Making space for new human rights: The case of the right to development' (1988) 1 *Hum Rts Yearbk* 5-6; Office of the High Commissioner for Human Rights 'Development: Right to development' available at: <http://www.ohchr.org/EN/Issues/Development/Pages/Backgroundtrtd.aspx> (accessed: 30 June 2014)

<sup>4</sup> Dąbrowska AO 'Legal status of the right to development' (2010) *Haskoli Island University* 2-3.

to development has largely been abandoned in favour of development cooperation as I explain in chapter three. Without this historical account, the potential value of the right to development in redressing underdevelopment in Africa might be overlooked. Much of the literature on the right to development does not give a true narrative of its actual origins, which therefore complicates its conceptual nature and modalities for implementation. Attempts to trace the origins of the right to development have rather described stages in the evolution of the concept instead of looking at the factors that caused the emergence of such a right. It is true that Africa's underdevelopment is a product of the interplay between external factors and a host of domestic factors.<sup>5</sup> However, a better understanding of the right to development necessitates knowledge of the historical events that gave birth to such a right, which has to do more with the external factors from which most of the domestic factors arose.

A starting point for this analysis is the claim that Africa's underdevelopment can be directly attributed to exploitation by industrialised countries.<sup>6</sup> An exploration of the historical events that motivated claims for the right to development is not only necessary for an understanding of how the right came to be. Such background knowledge is also crucial in determining what the right to development is intended to achieve and to what extent development cooperation could contribute to the realisation of that purpose. The earliest origin of the right to development has been attributed to a statement made by human rights protagonist Eleanor Roosevelt in 1947, in the run-up to the adoption of the Universal Declaration of Human Rights. She is quoted as having said that; 'we will have to bear in mind that we are writing a bill of rights for the world and one of the most important rights is the opportunity for development'.<sup>7</sup> It might not be wrong to interpret this statement as inferring a right to development. It is however, difficult through such an interpretation to establish a connection to the events that gave birth to such a right.

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<sup>5</sup> Soko M & Lehmann JP 'The state of development in Africa: Concepts, challenges and opportunities' (2011) 14 *J Int'l Rel & Dev* 97.

<sup>6</sup> See generally Rodney W *How Europe Underdeveloped Africa* (1973); Kirchmeier F, Luke M & Kalla B *Towards the Implementation of the Right to Development: Field-testing and Fine-tuning the UN Criteria on the Right to Development in the Kenyan-German Partnership* (2008) 7.

<sup>7</sup> Sengupta A 'Realising the right to development' (2000) 31 *Development & Change* 554-555; Johnson (n 3 above) 36; Alston (n 3 above) 5-6.

The fact that the right to development as Eleanor Roosevelt might have intended it, did not find its way into the Universal Declaration suggests that it had other, more remote origins, which did not correlate with the immediate causes that triggered the codification of the range of human rights that got enshrined in the Declaration.<sup>8</sup> As Cornwall and Musembi have rightly suggested, many of the principles that are articulated as part of the concept of the right to development have been part of struggles for self-determination and social justice, which predate the discourse on human rights.<sup>9</sup> This claim motivates the reason to look back beyond 1947; to explore why and how consciousness about historical injustices gradually built up into what eventually became known as the right to development. Empirical studies suggest that Africa's entangled history with industrialised countries explains part of its current underdevelopment<sup>10</sup> and by implication the origins of the right to development.

## **2.1. Africa's History of Development Injustices**

In recounting Africa's history of development injustices in this section my aim is to provide justification for arguing against development cooperation as a mechanism for the realisation of the right to development, which I contend is instead the appropriate development model for Africa to pursue. This narrative is not intended to showcase Africa's development gains, but to describe events whose legacy continues to impede aspirations for development on the continent. It is a narrative that is characterised by dispossession, exploitation and extraction of the continent's human and material resources, accompanied by gross violations of human rights. A study on the right to development in Africa necessitates this historical perspective for the reason that what happened in the past shapes the present and determines the future.

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<sup>8</sup> The atrocities of the Second World War constituted the immediate causes that motivated the codification of the UDHR, following the signing of the Atlantic Charter in 1941 by Great Britain and the United States as a blueprint for post-war peace and the basis of the mutual recognition of the rights of all nations. See Facing History 'Universal Declaration of Human Rights Timeline' available at: <https://www.facinghistory.org/for-educators/educator-resources/universal-declaration-human-rights-timeline> (accessed: 15 March 2017).

<sup>9</sup> Cornwall A & Nyamu-Musembi C 'Putting the "rights-based approach" to development into perspective' (2004) 25:8 *Third World Quarterly* 1420.

<sup>10</sup> Nunn N 'The long-term effects of Africa's slave trades' (2006) *J Econ Lit* 2.



While unfair development practices continue to prevail in Africa, two unforgettable historical processes, namely slavery and colonialism, account for a large part of the continent's current state of underdevelopment. Prior to the invasion of the African continent, the self-governing polities are reported to have been making steady and significant progress.<sup>11</sup> Although it cannot be stated with exactitude which developmental direction the peoples of Africa would have taken and the level to which the continent would have advanced, it also cannot be denied that the continent would not have remained stagnant were it not for slavery and colonisation. Following Walter Rodney's argument that the 'magnitude of man's achievement is best understood by reflecting on the early history of human society',<sup>12</sup> it cannot be denied that slavery and colonialism to a large extent stalled progress on the African continent. I proceed from this understanding of African history to illustrate how the injustices stemming from slavery and colonialism contributed to depriving the African populations of the opportunity to advance their capabilities for development and thus progressively built up into resentment and rejection.

### **2.1.1. Slave trade and the impact on development in Africa**

For a period of over five centuries between the years 1400 and 1900 the African continent was raided for slaves. This decimated the once functional polities.<sup>13</sup> The four slave routes that operated simultaneously during the course of this period were the trans-Saharan, Red Sea, Indian Ocean and trans-Atlantic routes.<sup>14</sup> Through this dehumanising practice the continent suffered the extraction of millions of its competent men and women, leading to severe deterioration in the African human potential.<sup>15</sup> Not counting those who died in the process, the number of African men and women who were taken as slaves to the Americas alone to supply workforce in the European-established plantations is documented at between 12 and 13 million.<sup>16</sup> The total number that was forcefully extracted from the continent, including those who were tortured to

<sup>11</sup> Settles DJ 'The impact of colonialism on African economic development' (1996) *Honours Thesis University of Tennessee* 1; Rodney (n 6 above) 3-4.

<sup>12</sup> Rodney (n 6 above) 3.

<sup>13</sup> Nunn N 'The historical origins of Africa's underdevelopment' (2007) *VOX CEPR's Policy Portal* available at: <http://www.voxeu.org/article/slave-trade-and-african-underdevelopment> (accessed: 13 February 2015).

<sup>14</sup> Nunn 2006 (n 10 above) 4.

<sup>15</sup> Nunn 2006 (n 10 above) 4.

<sup>16</sup> Nunn 2006 (n 10 above) 4; Whatley & Gillezeau (n 19 below) 2.

death, is estimated at between 20 and 50 million.<sup>17</sup> During this period international trade was beginning to boom, which motivated the high demand for slaves from Africa to expand the production of sugar, cocoa, cotton, tobacco and coffee to supply the international market.<sup>18</sup>

The boom in international trade bolstered the sale of human beings through the practice that has commonly been termed ‘slave trade’, which I argue was ethically wrong in the sense that the value of what was taken was not commensurate to what was exchanged in return. The major concern lies in the manner with which the African peoples were dehumanised and deprived of the opportunity to develop their own communities, the legacy of which haunts Africa to this day. Millions of Africans were bundled away for a surprisingly disparate exchange of firearms, gunpowder, brandy, cloth, tobacco, glassware, and iron, among others.<sup>19</sup> While the slaves from Africa worked in the European plantations in the Americas to boost production for international trade and consequently the development of western capitalist societies, it is hard to understand how ammunitions and consumable items which were exchanged for Africa’s human potential could contribute to the development of African societies.

Without the African workforce the plantations would not have had the requisite human input for extensive commercial production. It also means that supplies from the plantations would not have been able to meet the demands of international trade and therefore also implies that international trade would have suffered tremendously. The Europeans promoted the invasion of African communities and fuelled the raid for slaves because of the cost benefits they derived from the practice – a primary source of cheap labour.<sup>20</sup> Terreblanche provides an elaborate explanation of how, through extensive slave raiding, the Portuguese, Dutch, English and French

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<sup>17</sup> Nkrumah K *Africa Must Unite* (1963) 5.

<sup>18</sup> M’bokolo E ‘The impact of the slave trade on Africa’ *Le Monde Diplomatique* available at: <http://mondediplo.com/1998/04/02africa> (accessed: 12 February 2015).

<sup>19</sup> Whatley W & Gillezeau R ‘The impact of the slave trade on African economies’ (2009) *Department of Economics University of Michigan* 6; M’bokolo (n 18 above).

<sup>20</sup> Williams C “‘Am I not a man and a brother?’ ‘Am I not a woman and a sister?’: The trans-Atlantic crusade against the slave trade and slavery’ (2010) 56:1/2 *Caribbean Quarterly* 108; Dodson H ‘How slavery helped build a world economy’ (2003) *National Geographic News* available at: [http://news.nationalgeographic.com/news/2003/01/0131\\_030203\\_jubilee2.html](http://news.nationalgeographic.com/news/2003/01/0131_030203_jubilee2.html) (accessed: 16 August 2016).

successively reduced the peoples of South Africa into dehumanising forms of cheap labour while systematically plundering the country's resources to build the capitalist empires of the West.<sup>21</sup> The African person represented to the European a factor of production or 'economic property', in other words, which motivated slaveholding for purposes of economic exploitation.<sup>22</sup>

The success of international trade and the consequent development of the western capitalist societies of Europe and America were achieved at the expense of development that would have taken effect in Africa had the slave raid not happened. The European demand for slaves severely retarded socio-economic progress,<sup>23</sup> while the process by which slavery took place, through domestic warfare and kidnapping also adversely impacted on long-term development prospects in Africa.<sup>24</sup> To prove the impact of slavery, Nathan Nunn has established empirical evidence of a direct causal link between the raid for slaves and Africa's current development challenges; indicating that the African countries from which the largest number of slaves were extracted have remained the least developed to this day.<sup>25</sup> The massive extraction of the human potential led to fragile and politically fragmented states, fractionalised communities and weak judicial institutions incapable of enforcing laws to regulate the society.<sup>26</sup>

The legacy of poverty and deprivation as well as structural inequalities and systemic injustices contributed to weakening the African continent economically.<sup>27</sup> Proceeding from the era of slavery, the European imperialists took advantage of the weakened Africa to advance the 'civilisation theory' on the pretext that the continent was backward and needed the intervention

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<sup>21</sup> Terreblanche S *A History of Inequality in South Africa 1652-2002* (2002) 8-14 & 153; Amin S *Imperialism and Unequal Development* (1977) 49-55.

<sup>22</sup> Eltis D 'Europeans and the rise and fall of African slavery in the Americas: An interpretation' (1993) 98:5 *The American Historical Review* 1399.

<sup>23</sup> Nunn N 'Slavery, institutional development and long-term growth in Africa 1400-2000' (2005) *J Econ Lit* 4; Inikori JE 'Africa and the trans-Atlantic slave trade' in Falola T (ed) *Africa Volume 1: African History Before 1885* (2000).

<sup>24</sup> Nunn 2006 (n 10 above) 3.

<sup>25</sup> Nunn 2006 (n 10 above) 2.

<sup>26</sup> Nunn 2006 (n 10 above) 2.

<sup>27</sup> Terreblanche (n 21 above) 382-400.

of western societies to bring civilisation to it.<sup>28</sup> The refusal to equate the African civilisation that existed at the time to the European perception of civilisation as Suhfree explains<sup>29</sup> provided an unjustified basis for the colonisation of the African continent in 1885.

### 2.1.2. Iniquities of colonialism

Official colonial rule in most of Africa lasted from 1884 to the 1960s, a total of approximately seventy five years.<sup>30</sup> Apart from some notable development gains recorded during the colonial period, evidence abounds that African populations experienced a severe deterioration in living standards principally through land expropriation.<sup>31</sup> Taking South Africa for example, Heldring and Robinson explain that not only were the majority of African populations dispossessed of about 93% of agricultural lands, they were also subjected to coercive labour at exploitative wage rates, which cumulatively amounted to an estimated 59% decline in living standards.<sup>32</sup> Before the advent of colonialism, it is reported that communities in Tanzania, Malawi, Zambia and Zimbabwe practised an organised governance system of civic participation and accountability, which, experienced remarkable deterioration during the colonial period.<sup>33</sup>

The colonial enterprise was not designed to create development in Africa. It thrived on a policy of sustained 'immiserization' of the African populations through extraction, dispossession, looting of the continent's wealth and resources, and also through the massive expropriation of native lands as well as infringement of indigenous property rights.<sup>34</sup> In the absence of legality the

<sup>28</sup> Truman HS 'Inaugural address' (1949) available at: [www.bartleby.com/124/pres53.html](http://www.bartleby.com/124/pres53.html) (accessed: 14 October 2015) paras 44-45; Nkrumah (n 17 above) 8; M'bokolo (n 18 above).

<sup>29</sup> Suhfree (n 1 above) 76-78.

<sup>30</sup> Nunn 2006 (n 10 above) 2.

<sup>31</sup> Heldring L & Robinson JA 'Colonialism and economic development in Africa' (2012) *National Bureau of Economic Research - Working Paper 18566* 10-12; Bowden S & Mosley P 'Politics, public expenditure and the evolution of poverty in Africa 1920-2009' (2010) available at: <http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-12510.pdf> (accessed: 10 February 2015); De Zwart P 'South African living standards in global perspective 1835-1910' (2011) *Economic History of Developing Regions* 26.

<sup>32</sup> Heldring & Robinson (n 31 above) 12.

<sup>33</sup> Heldring & Robinson (n 31 above) 14-15.

<sup>34</sup> Heldring & Robinson (n 31 above) 10-17.

application of ‘subjugation laws’ in the governance of the colonies was not intended to promote development but rather to compel the African populations to comply with colonial rule.<sup>35</sup> For instance, though slavery had officially been outlawed, it persisted in the colonies in the form of forced labour where the local populations were constrained to work for starvation wages in order to pay arbitrary taxes imposed by the colonial administration.<sup>36</sup> The imperial machinery employed the strategy of ‘divide and rule’ in many polities to create ethnic cleavages that have ended up in entrenched inequalities, political instability, conflict and animosity among African peoples which did not exist prior to colonisation.<sup>37</sup> Colonialism did not only fail in advancing Africa, it also flouted the process through which development could have been achieved.

It might be true that to a certain extent colonialism brought considerable benefits to Africa in terms of increased income per capita, school enrolment, adult literacy, human capital and life expectancy among others.<sup>38</sup> However, it is difficult to be convinced that these benefits measured up as development; otherwise the peoples of Africa would not have found reason to orchestrate the collapse of the colonial system. On the contrary, colonialism rendered the African situation worse than it was before the continent was partitioned in 1885 and exploited for over 75 years. This negates any ‘optimistic interpretation of the impact of colonialism on development in Africa’.<sup>39</sup> The European colonisers ‘set goals for the continent based on foreign interests’ to the extent that Africans had no control over their own affairs and the fate of the continent.<sup>40</sup> Even

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<sup>35</sup> A good example is the apartheid laws that were made official from 1948 and for a period of almost 50 years used to govern most of Southern Africa; according to which the white and the black races were forced to live separately and use separate public facilities. Contact between the races was limited and only permissible under conditions of exploitation where those of the black race were required to carry ‘passbooks’ to be able to access white areas menial job opportunities.

<sup>36</sup> M’bokolo (n 18 above).

<sup>37</sup> Heldring & Robinson (n 31 above) 20-21. They cite the examples of Rwanda, Ghana, Uganda and Burkina Faso where cleavages created during colonial rule have deteriorated in later years into animosity and murderous conflicts.

<sup>38</sup> Prados de la Escosura L ‘Human development in Africa: A long-run perspective’ (2011) *University Carlos III - Working Papers in Economic History WP 11-09*.

<sup>39</sup> Heldring & Robinson (n 31 above) 23.

<sup>40</sup> Oloka-Onyango J ‘Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium’ (1999) *15 Am U Int’l L Rev* 171.

‘under the relatively less virulent forms of colonial control, such as that of the British’, the proportion of resources spent on ‘law and order’ obviously to subjugate the African peoples, ‘far exceeded that spent on education, health, and social welfare combined’.<sup>41</sup> Socio-economic and cultural rights remained a privilege within the discretion of the colonial authorities to grant to the African peoples and to withdraw at will.<sup>42</sup> Undeniably, the colonial administration did invest in some infrastructural projects such as railroads, forts, export systems and a money economy, but these were used principally to promote the colonial interest of extraction, looting, plundering and profit making rather than to empower the local populations.<sup>43</sup>

The levels of colonial injustices thus ignited resentment which triggered resistance movements in different parts of Africa.<sup>44</sup> The wave of liberation struggles swept across the continent from the late 1950s up to 1990 when apartheid – the last bastion of colonial rule – collapsed, without much to show in terms of development. It might be relevant to ask why the colonisers failed to invest in the development of the colonies when the primary motivation for colonisation was supposedly to ‘civilise’ the continent. It is noted for instance that over four decades of British colonial rule in Tanzania left no record of any remarkable development gains but the country is reported to have instead experienced serious deterioration when the British took over from the Germans after the First World War.<sup>45</sup> When Julius Nyerere took over administration of the country from the British after 43 years of colonial rule, he remarked that 85% of the adult population was illiterate while the British had trained only 2 engineers and 12 doctors.<sup>46</sup> By the

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<sup>41</sup> Oloka-Onyango (n 40 above) 172.

<sup>42</sup> Oloka-Onyango (n 40 above) 172.

<sup>43</sup> Hrituleac A ‘The effects of colonialism on African economic development: A comparative analysis between Ethiopia, Senegal and Uganda’ (2011) *Masters Dissertation Aarhus University* 14-15.

<sup>44</sup> South African History Online ‘The fight against colonialism and imperialism in Africa’ available at: <http://www.sahistory.org.za/article/fight-against-colonialism-and-imperialism-africa-grade-11> (accessed: 3 March 2015).

<sup>45</sup> Heldring & Robinson (n 31 above) 15.

<sup>46</sup> Tornielli A ‘Former Tanzanian politician Julius Nyerere could be made a saint’ *Vatican Insider* available at: <http://vaticaninsider.lastampa.it/en/inquiries-and-interviews/detail/articolo/tanzania-santo-saint-santos-20322/> (accessed: 11 February 2015).

time he resigned in 1985, 91% of the population had become literate and practically all children attended school, while thousands of engineers, doctors and teachers had been trained.<sup>47</sup>

In Ghana, Nkrumah lamented that all the British left was ‘much ignorance and few skills’, while over 80% of the local population remained illiterate on account of the fact that the existing schools were designed to promote imperial ideologies which did not respond to local realities.<sup>48</sup> According to Heldring and Robinson, the British colonial expedition accomplished virtually nothing in terms of education and human development.<sup>49</sup> Despite the priority accorded to education as a fundamental human right, and by implication the responsibility of the European nations that assumed administration of the colonies,<sup>50</sup> education for the colonised peoples was barefacedly neglected.<sup>51</sup> French colonial policies in Morocco for instance, made it such that ‘[i]t was practically impossible for a Moroccan child to get a decent education’.<sup>52</sup> It is therefore not unusual that the colonial administration saw the need to chase the colonisers out of Africa.

## **2.2. Rejection of Colonialism and Imperial Domination**

### **2.2.1. The quest for independence**

The history of struggles for independence points to similar fundamental causes, which include exploitation, dispossession, subjugation and the denial or violation of inherent rights as well as an overriding goal to achieve justice. Compared to the region of Asia, where, after independence, colonisation were completely cast off, allowing the decolonised peoples to advance steadily

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<sup>47</sup> Tornielli (n 46 above).

<sup>48</sup> Nkrumah (n 17 above) xiii.

<sup>49</sup> Heldring & Robinson (n 31 above) 15; Nkrumah (n 17 above) xv.

<sup>50</sup> France for example, practiced a colonial policy of assimilation aimed at creating a favoured class of African elites by introducing them to French culture and civilisation and raising them to the status of Frenchmen with the aim to avoid the rise of African nationalism and by so doing, guarantee hegemony over the French colonies. Like France, Portugal also pursued a colonial policy of assimilation by which its African colonies of Mozambique and Angola were regarded as integral parts of Portugal, administered by the *Ministerio do Ultramar* in Lisbon. Accordingly, Portugal granted its colonised peoples the right to become ‘white’ by a process of law if they met with European standards. See Nkrumah (n 17 above) 10-12.

<sup>51</sup> Nkrumah (n 17 above) 11.

<sup>52</sup> Nkrumah (n 17 above) 10.



towards accelerated development, Africa has remained stuck to colonial structures and systems that have caused the continent to remain backward.<sup>53</sup> Over half a century after independence, the story of colonial domination of parts of or the entire continent is still being told. Africa's past, present and future remains shrouded in unanswered questions, some of which I try to explore in this chapter. Given the reasons why European powers subjugated Africa under colonial rule (supposedly to bring civilisation to the continent), what motivated the drive for decolonisation? What did Africa envisage to achieve by seeking to become independent? How was independence going to redress the wrongs of colonialism? Did the liberation of Africa envisage a strategy that would shape the future of the continent after independence? The prevailing situation on the continent suggests that these questions might not have been taken into account; or maybe not seriously when the decolonisation project was initiated.

The above questions are explored in light of the capabilities theory, which explains the variations of human functioning in terms of 'doings' and 'beings'.<sup>54</sup> The 'doing' variant translates into the freedom to choose between alternatives, which the peoples of Africa manifested by opting for decolonisation. The 'being' variant found expression in expectations for improved well-being as a legitimate aspiration of the African peoples.<sup>55</sup> According to Nussbaum, the focus on capabilities as a theory of justice cannot look only to collective well-being but importantly to the opportunities that become available to every single person to exercise their human functioning.<sup>56</sup> Such an opportunity evolved as a latent manifestation of the right to development embodied in the quest for independence. As it followed, the primary reason for seeking freedom from colonial subjugation arose from the fact that the African peoples were dispossessed of the potential to

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<sup>53</sup> Vickers B 'Africa and international trade: Challenges and opportunities' (d.n.a) *Thabo Mbeki Leadership Foundation – International Trade and Economic Development Division* 9. Vickers illustrates for example that: 'The share of Africa's total trade in the world since 1980s has remained largely stagnant at around 2-3 percent. This compares poorly with the performance of the Asian region, where the shares of world trade have doubled over the same period, reaching 27.8% in 2006'.

<sup>54</sup> Sen A *Development as Freedom* (1999) 87-95.

<sup>55</sup> See Charter of the Organisation of African Unity (OAU Charter) 1963 preamble.

<sup>56</sup> Nussbaum M *Creating Capabilities: The Human Development Approach* (2011) 18.



manage their own affairs.<sup>57</sup> In seeking independence, the peoples of Africa aimed at something close to declaring a right to development as the following statement of Nkrumah suggests:

If the outside world refuses us its sympathy and understanding, we have at least the right to ask it to leave us alone to work out our destiny in ways that seem most apposite to our circumstances and means, human as well as material. In any event, we are determined to overcome the disruptive forces set against us and to forge in Africa...the African's ability to manage his own affairs.<sup>58</sup>

### **2.2.1.1 In pursuit of a legitimate cause**

The course of events prior to the struggle for decolonisation, characterised by gross injustices provided a legitimate moral justification to seek to become free from colonial rule. The quest for independence that subsequently engulfed the entire continent in the late 1950s originated from the consciousness that in spite of its purported civilisation mission, colonialism was actually not going to bring meaningful development but increased dispossession and deprivation of the African peoples of the opportunity to explore and utilise their potentials. The enthusiasm to reject colonial rule found legitimacy in the fact that 'the colonization of Africa had come with little regard for local education, health, or infrastructure', among others.<sup>59</sup> Land grabbing by the large European settler populations in Kenya, South Africa and Algeria dispossessed the African populations and thus limited their productive capacity as they were only looked upon to provide cheap labour under slavery-like conditions.<sup>60</sup>

It amounted to a moral wrong that the European powers continued to enslave the African peoples through colonialism, especially as slavery had been abolished. The codification of international law in the period after the Second World War rendered colonialism unlawful and thus gave legitimacy to the decolonisation of Africa. For instance, the UN Charter adopted in 1945 made

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<sup>57</sup> Nkrumah (n 17 above) 10.

<sup>58</sup> Nkrumah (n 17 above) xv.

<sup>59</sup> Yergin D & Stanislaw J 'Excerpt from *The Commanding Heights*' available at: [http://www-tc.pbs.org/wgbh/commandingheights/shared/pdf/prof\\_kwamenkrumah.pdf](http://www-tc.pbs.org/wgbh/commandingheights/shared/pdf/prof_kwamenkrumah.pdf) (accessed: 14 February 2015) 2.

<sup>60</sup> 'Uhuru: The African struggle for independence' available at: <https://www2.stetson.edu/secure/history/hy10430/uhuru.html> (accessed: 4 March 2015) 2-3.

provision for the principle of self-determination,<sup>61</sup> which was later recognised as a human right in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.<sup>62</sup> The subsequent codification of human rights in the Universal Declaration in 1948 also exposed the illegality of colonial practices, which contravened the human rights guarantees to which the peoples of Africa were equally entitled.<sup>63</sup>

Enthusiasm for independence mounted as many Africans, through education and exposure to Western democracies came into contact with the realities of the detriments of colonialism to the development of the African continent.<sup>64</sup> The international law instruments that came into force provided assurance that justice could be achieved through the assertion of rights, the basis on which the idea started to form that development for Africa could be claimed as a matter of right. Although not expressly stated, it has been argued that the idea of the right to development is embedded in the concept of self-determination which drove the quest for independence. I shall return to this later in more detail.<sup>65</sup> However, following the unfolding of events after independence, particularly relating to concerns about livelihood and the well-being of the African peoples,<sup>66</sup> the question arises as to whether the timing was right and also whether Africa was prepared to embrace independence.

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<sup>61</sup> UN Charter (n 3 above) arts 2 & 3.

<sup>62</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations Res 2625 (XXV) adopted by the GA on a Report from the Sixth Committee (A/8082) on 24 October 1970.

<sup>63</sup> UN Universal Declaration of Human Rights adopted by General Assembly resolution 217 A(III) of 10 December 1948 art 2.

<sup>64</sup> Many of the liberation leaders like Kwame Nkrumah of Ghana, Jomo Kenyatta of Kenya, Julius Nyerere of Tanzania, etc were educated in missionary schools. Nkrumah, the architect of independence in Ghana and in Africa received his early education in a Catholic missionary school and later went to study at Lincoln University in the United States where he experienced a stark difference between British colonial rule and the alternative system of governance practiced in America. He then moved to London where he mobilised other fellow Africans into a series of Pan African Congresses for the liberation of Africa from colonial rule.

<sup>65</sup> See sect 3.1.1 below.

<sup>66</sup> Gassama IJ 'Africa and the politics of destruction: A critical re-examination of neocolonialism and its consequences' (2008) 10:2 *Oregon Rev Int'l L* 328.

### 2.2.1.2 Operational model deficit

A fundamental problem that the quest for independence suffered from inception was the complete lack of a functional development model on which the independent states would operate. The rise of charismatic African liberation leaders<sup>67</sup> embodied the fact that the African peoples could do without colonial rule and that the timing was appropriate for decolonisation. However, leadership alone does not provide sufficient ground on which to found a state. The fragmented and destabilised situation in which the slave trade and colonialism left Africa necessitated a human rights-based development model to guide the independence project. However, because of the lack of such an operational model the quest for independence failed in strategy. Coming from a background characterised by illegality, development injustices and massive human rights abuses, it would have been rational at the time of seeking independence to proclaim in accurate terms the justification for rejecting imperialism and domination. Such a proclamation would have laid the foundation on which to anchor the quest for independence and probably constituted the operational model to forestall imperialistic practices and also bind the political conscience of the governments that were eventually to administer the independence states from engaging in further development injustices and governance malpractices. The right to development could in my view have provided such a model, as I proceed to illustrate in this chapter and in subsequent chapters.

The African liberation leaders rather believed in achieving political freedom as was echoed by Kwame Nkrumah's rallying ideology to 'seek...first the political kingdom and every other thing shall be added....'.<sup>68</sup> The liberation leaders unfortunately underestimated the extent to which slavery and colonialism had ruined African societies and so engaged in the decolonisation project quite nonchalantly.<sup>69</sup> Nkrumah believed, albeit wrongly that: 'If we get self-government, [...] we'll transform the Gold Coast [Ghana] into a paradise in ten years'.<sup>70</sup> He based this 'belief

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<sup>67</sup> Gassama (n 66 above) 334 & 350; Famous among the liberation leaders were people like Kwame Nkrumah of the Gold Coast (Ghana), Patrice Lumumba of the Belgian Congo (Democratic Republic of Congo), Leopold Sedar Senghor of Senegal, Julius Nyerere of Tanganyika (Tanzania), Jomo Kenyatta of Kenya, Kenneth Kaunda of Northern Rhodesia (Zambia).

<sup>68</sup> Yergin & Stanislaw (n 59 above); Gassama (n 66 above) 352.

<sup>69</sup> Oloka-Onyango (n 40 above) 171.

<sup>70</sup> Yergin & Stanislaw (n 59 above).

in the capacity of ordinary people to decide their own future through politics.<sup>71</sup> Nkrumah like many of his contemporaries, failed to realise that many of the ‘ordinary people’ that they counted on to determine the future of Africa, had been dispossessed of the requisite capacity to engage in the game of politics.<sup>72</sup> Africa needed a pragmatic development model for human and social reconstruction rather than just political liberation based on civil liberties and fundamental freedoms. By this, I mean that there was need for a development model for rebuilding the destabilised African societies.

However, because the African leaders craved political independence, the colonial masters exploited the weaknesses and thus shrewdly crafted and handed over to the decolonised states succession plans in the form of independence constitutions. Those constitutions caused African leaders to imagine that the attainment of political independence with provisions for fundamental human rights was bound to bring about development.<sup>73</sup> Unfortunately, the independence constitutions were proficiently designed to breed chaos and instability rather than sustain independence and development on the continent. For instance, it is hard to understand the rationale behind the written constitutions that the British left in their former colonies, which, together with the home government had until then never been governed through a documented constitution. The constitution they fashioned for Zambia for example, created a presidential system with the name of Kenneth Kaunda enshrined in it as President. Meanwhile, Britain is governed by a parliamentary system.<sup>74</sup> It is doubtful how Zambia, like other independent African states was expected to succeed with the new system of governance, which in most cases was different from the systems they had become accustomed to under colonial rule.

Such skilful manipulation in my view was intended to ensure the failure of the independence project so as to justify the fact that the African peoples are incapable of managing their own

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<sup>71</sup> Gassama (n 66 above) 345.

<sup>72</sup> Keller EJ ‘Decolonisation, independence and the failure of politics’ in Martin P & O’Meara PO (eds) *Africa* (1995) 156-171.

<sup>73</sup> Aguda TA *Human Rights and the Right to Development in Africa* (1989) 13; Suhfree (n 1 above) vii.

<sup>74</sup> Go J ‘Modelling state and sovereignty: Postcolonial constitutions in Asia and Africa’ in Lee CJ (ed) *Making a World after Empire: The Bandung Movement and its Political Afterlives* (2010) 111-112.

affairs. In this way the opportunity was created for the colonial machinery to continue to exercise control over the colonies long after independence through the process that became known as ‘neo-colonialism’.<sup>75</sup> This is not to say that colonialism and neo-colonialism were the only factors that caused the failure of the decolonised states. The inability to govern effectively drove Africa’s ‘irresponsible leadership’ into corruption, embezzlement and mismanagement of public resources, which make up the political conditions that remain the greatest impediment to development on the continent.<sup>76</sup> However, Claude Ake as well as Alemazung concur to the fact that the foundation for failure was laid in Africa during colonialism and has been sustained through colonial legacies with the accomplice of African ruling elites.<sup>77</sup>

As the African leaders became increasingly conscious that liberation meant much more than nominal political independence, they haphazardly fumbled with a couple of conflicting ideologies.<sup>78</sup> The likes of Kenyatta and Mobutu advocated for western-style capitalism while Nyerere, Nkrumah and Sekou Toure lobbied for African socialism.<sup>79</sup> Unfortunately, both ideologies lacked the potential to protect the fragile independent African states from neo-colonial exploitation. The granting of independence thus allocated to the African states ‘all the classic attributes of statehood’ and ‘judicial sovereignty’ implied by the termination of colonialism.<sup>80</sup> However, the emerging states virtually failed to attain nationhood because without an appropriate founding model, the independent states exercised self-government, but remained porous and incapable of the economic potential to uplift the African peoples out of poverty.<sup>81</sup>

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<sup>75</sup> See generally Nkrumah (n 17 above).

<sup>76</sup> Ake C *Democracy and Development in Africa* (1996) 1; Alemazung JA ‘Post-colonial colonialism: An analysis of international factors and actors marring African socio-economic and political development’ (2010) 3:10 *The J Pan Afri Stud* 62.

<sup>77</sup> Ake (n 76 above) 2-6; Alemazung (n 76 above) 64-70; see also Pogge T ‘Real world justice’ (2005) 9:1/2 *The Journal of Ethics* 38; Fanon F (tr: Markmann CL) *Black Skin, White Masks* (1986) 98.

<sup>78</sup> Yergin & Stanislaw (n 59 above).

<sup>79</sup> ‘Uhuru: The African struggle for independence’ (n 60 above) 4.

<sup>80</sup> Le Vine VT *The Cameroons: From Mandate to Independence* (1964) 217.

<sup>81</sup> Le Vine (n 80 above) 217; Ake (n 76 above) 8-14.

The internal conflicts and political instability that ensued in almost all of the new African states in the years after independence proved that the acquisition of political freedom without an appropriate framework for development was fatally wrong. Through increased consciousness of that fact, African states quickly resorted to the codification of laws into various treaty and statutory instruments to protect the African patrimony, a project which in my opinion should have taken place prior to independence. However, as the saying goes that it is better late than never, the codification of African law, beginning with the OAU Charter as François Borella points out, has increasingly taken a developmental orientation.<sup>82</sup> Such a move represents a step in the right direction in laying down the minimum standards for the legal protection of Africa's development aspirations *vis-à-vis* the exploitative behaviour of foreign stakeholders. In this light, I advance the argument that if the struggle and subsequent acquisition of independence was anchored on the right to development, the probability of sustained development for Africa would have been much greater.

### **2.2.2. Post-independence difficulties**

From the forgoing analysis, my purpose here is to establish the fact that the difficulties that Africa encountered after independence came about largely because of the lack of an operational model to drive development on the continent. The anti-colonial struggles for liberation carried great promise that things would be different and better, politically, economically, and otherwise.<sup>83</sup> When Sen describes development as freedom, pragmatically he is saying that by exercising the capability to perform the human functioning of doing and being, the fact of that freedom should translate into development, which requires the removal of various types of 'unfreedoms' that limit peoples' choices and leave them with little prospect of taking reasoned action.<sup>84</sup> Accordingly, with the freedom achieved through independence, the scenario was created for the peoples of Africa to proceed to transforming the continent both in terms of

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<sup>82</sup> Borella F 'Le système juridique de l'Organisation de l'Unité Africaine' (1971) 17 *Annuaire Français De Droit International* 246.

<sup>83</sup> Gassama (n 66 above) 351-352.

<sup>84</sup> See generally Sen (n 54 above).

material acquisition and in terms of expanding capabilities and choices. However, events took a different dimension from the aspirations of the African peoples.<sup>85</sup>

Instead of engaging in the advancement of the human potential as the basis for consolidating independence, the immediate post-independence challenge that Africa faced as Gassama has noted, was that of struggling to define its political future amidst the complexity of domestic challenges and encroaching globalisation.<sup>86</sup> Africa needed, and of course still needs a post-independence strategy beyond that offered by the ‘generation of woefully unprepared leaders’ who, instead of positioning Africa on the path of development, resorted to futile efforts in combating neo-colonialism, which simply took advantage of their lack of foresight.<sup>87</sup> Thus, independence brought not the destruction of colonial practices but rather just transferred colonial administration into the hands of the political elites who, backed by the powers bestowed on them by the independence constitutions, administered the fragile states with unfettered control.<sup>88</sup>

The OAU was established in 1963 as a post-colonial institutional mechanism to harness the gains of independence and to ensure increased well-being for the African peoples.<sup>89</sup> By this time most of Africa had gained independence, which presented the opportunity to right the wrongs of the past by proclaiming the right to development as the basis for the formation of the OAU. The wordings of the preamble to the OAU Charter and article 2 which sets out the purpose of the organisation contain elements that could have been regrouped into a binding provision on the right to development.<sup>90</sup> However, the African leaders lacked the foresight to do so. Such a

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<sup>85</sup> Gassama (n 66 above) 334.

<sup>86</sup> Gassama (n 66 above) 334.

<sup>87</sup> Gassama (n 66 above) 353.

<sup>88</sup> Heldring & Robinson (n 31 above) 19; Poku N & Mdee A *Politics in Africa* (2011) 18, 22; Ndulo M ‘The democratisation process and structural adjustment in Africa’ (2003) *India J Global L Stud* 333; Ake (n 76 above) 4.

<sup>89</sup> OAU Charter (n 55 above) art 2.

<sup>90</sup> The preamble to the OAU Charter states that: ‘We, the Heads of African States and Governments... *Convinced* that it is the inalienable right of all people to control their own destiny; *Conscious* of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the Africa peoples;

formulation would have established the framework to drive the continent's development agenda much more effectively than has so far been achieved. By this, I am stating the claim that the right to development would have laid the foundation for post-colonial development in Africa. I go further on the basis of this argument to dispute in chapter three the assertion that the right to development in Africa is achievable through development cooperation. I provide justification to the claim in chapter five, where I make the case for conceptualising the right to development as a development model for Africa.<sup>91</sup> In the absence of such a framework model for development, Africa has been forced to rely on imported models that bear no relevance to the socio-economic and cultural development exigencies.<sup>92</sup> This has left the continent even more vulnerable to continuous external domination and exploitation, which I explain in subsequent chapters.<sup>93</sup> In what follows I look at how the right to development has evolved in Africa.

### **3. Evolution of the Right to Development**

#### **3.1. Latent Manifestations**

The purpose of this section is to illustrate that the idea of a right to development lingered in the African imagination but did not quickly find articulation or become reality in an instant. The idea evolved gradually and took different expressions, implicit and explicit. It also took on an international dimension, articulated first through the right to self-determination, which paved the way for independence and subsequently through the campaign for a New International Economic Order (NIEO), which aimed to redress global imbalances, as I proceed to illustrate.

##### **3.1.1. Right to self-determination**

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*Conscious* of our responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in all spheres of human endeavour...’ Have agreed to...

Art 2(1)(b) – ‘To co-ordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa...’

<sup>91</sup> See sects 2.2.2 & 3.1 (3.1.1 & 3.1.2) of chapter five.

<sup>92</sup> Ngang CC ‘Towards a right to development governance in Africa’ (2018) 17:1 *Journal of Human Rights* 113.

<sup>93</sup> See sects 3.3.1 & 3.3.2 of chapter three; sects 2.2.2.1 & 2.2.2.2 of chapter five.



The right to development, as many authors have noted, is inextricably bonded to or at least implied in the right to self-determination, which guarantees the right to seek political freedom and to freely pursue economic, social and cultural development.<sup>94</sup> When the United Nations Charter was adopted in 1945, it took into consideration the plight of colonised peoples and therefore stated as one of its founding principles, to promote the ideals of sovereign equality, universal respect for human rights and the *self-determination of peoples* in view of creating ‘conditions of stability and well-being.’<sup>95</sup> By acknowledging the equal right of colonised peoples to self-determination, the Charter signalled the fact that colonial practices were unacceptable under international law. The right to self-determination guarantees that no people have the right to dominate or exploit another as stipulated in the Declaration on the Granting of Independence:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.<sup>96</sup>

The right to self-determination thus gained currency within colonised territories and provided the legal and political platform for decolonisation, which saw the liberation of most of Africa.<sup>97</sup> Entrenched within the framework of international law, the right to self-determination did not straightforwardly translate into the right to development, but contained elements of it and thus facilitated decolonisation as many of the African colonies launched their campaign for independence on the platform of self-determination. The idea of a right to development was clearly inherent in the concept of self-determination, which guaranteed the right to seek political

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<sup>94</sup> Anghie A ‘Whose utopia?: Human rights, development and the third world’ (2013) 22:1 *Qui Parle: Critical Humanities and Social Sciences* 66; Udombana NJ ‘The third world and the right to development: Agenda for the next millennium’ (2000) 22:3 *HRQ* 769-770; Kamga S ‘Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa’s Development’ (2011) *LLD Thesis University of Pretoria* 131-132; Oloka-Onyango (n 40 above) 166.

<sup>95</sup> UN Charter (n 3 above) arts 1(2) & 55.

<sup>96</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by Gen Ass Res 1514 (XV) 14 December 1960 preamble.

<sup>97</sup> Özden M & Golay C ‘The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a human rights perspective’ (2010) *CETIM* 1.

freedom and to pursue socio-economic and cultural development.<sup>98</sup> The right to self-determination thus provided the first steps in the articulation of the right to development.

Apart from the UN Charter, entrenchment of the right to self-determination in other international human rights instruments guarantees that it amounts to a human rights offence to deprive a people of the opportunity for development.<sup>99</sup> International law recognises as an integral part of the right to self-determination: a people's right to sovereign ownership over their natural wealth and resources as a guarantee to social progress and development.<sup>100</sup> The idea of a right to development that emerged after independence was in effect, as Anthony Anghie correctly observes an extension of the project of decolonisation that was achieved on the platform of self-determination.<sup>101</sup> Self-determination thus resulted in political independence, while the right to development is envisaged to facilitate socio-economic and cultural independence.<sup>102</sup> It should be noted that the right to development is said to be implied in the right to self-determination in the sense that both are envisaged not as individual rights but as collective rights.<sup>103</sup>

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<sup>98</sup> Anghie (n 94 above) 66; See also DRtD (n 116 below) art 1(2); common art 1 of the ICESCR (n 2 above) and International Covenant on Civil and Political Rights (ICCPR) adopted by Gen Ass Res 2200A (XXI) 1966; Vienna Declaration and Program of Action adopted at the World Conference on Human Rights June 1993 para I(2); Declaration on Principles of International Law Concerning Friendly Relations (n 62 above).

<sup>99</sup> The Vienna Declaration stipulates in para I(2) that the 'denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right'. The preamble to the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation conveys the idea that the subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the UN Charter. The Declaration on the Granting of Independence to Colonial Countries Peoples also establishes in para 1 that 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation'.

<sup>100</sup> Declaration on Social Progress and Development adopted by Gen Ass Res 2542 (XXIV) 11 December 1969; Oloka-Onyango (n 40 above) 173.

<sup>101</sup> Anghie (n 94 above) 66.

<sup>102</sup> ICCPR (n 98 above) art 1(1).

<sup>103</sup> Oloka-Onyango (n 40 above) 166; African Charter on Human and Peoples' Rights adopted in Nairobi on 27 June 1981 art 22(1); UN Human Rights (n 134 below) 12.

### 3.1.2. Campaign for a New International Economic Order (NIEO)

The origin of the right to development is also traceable to the NIEO concept propagated in the 1970s as a quest for a just global system that reflects the aspirations of developing countries.<sup>104</sup> It follows that the NIEO campaign was intended to address questions relating to the advancement of developing countries.<sup>105</sup> Beside the global imbalances generated by the combination of colonial and post-colonial forces, the NIEO campaign demonstrated that the economic growth ambitions of developed countries jeopardised prospects for advancement in developing countries.<sup>106</sup> The campaign highlighted concerns about unfair agricultural policies and free trade rules imposed by the World Trade Organisation (WTO), which systematically disfavoured developing countries and therefore only served as a tool through which developed countries institutionalised their economic dominance.<sup>107</sup> As Udombana has noted, the newly decolonised states were dragged into and constrained to abide by the rules of free trade.<sup>108</sup> These measures proved extremely disadvantageous to many developing countries, especially those in Africa that heavily depend on agriculture for economic growth. With these frustrations, developing countries have continuously called for changes in the global arrangements.<sup>109</sup>

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<sup>104</sup> Kwakwa E 'Emerging international development law and traditional international law: Congruent or cleavage?' (1987) 17 *Georgia J Int'l & Comp L* 431.

<sup>105</sup> Nagan WP 'The right to development: Importance of human and social capital as human rights issues' (2013) 1:6 *Cadmus Journal* 29.

<sup>106</sup> See generally Ngang CC 'Differentiated Responsibilities under International Law and the Right to Development Paradigm for Developing Countries' (2017) 11:2 *HR & ILD* 265-288.

<sup>107</sup> Birovljev J & Četković B 'The impact of the WTO Agreement on Agriculture on food security in developing countries' (2013) *135 EAAE Seminar – Challenges for the Global Agricultural Trade Regime after Doha* 57; Schoenstein A & Alemany C 'Development cooperation beyond the aid effectiveness paradigm: A women's rights perspective' (2011) *Association for Women's Rights in Development – Discussion Paper* 1.

<sup>108</sup> Udombana (n 94 above) 760.

<sup>109</sup> Clapp J 'Developing countries and the WTO Agriculture Negotiations' (2006) *The Centre for International Governance Innovation – Working Paper No 6* 1-2.

To the extent that developing countries envisage achieving structural changes within the global system and a 'more just global order',<sup>110</sup> the NIEO agenda may rightly be said to have embodied the idea that developing countries are entitled to choose their own development path. Upendra Baxi has noted that although the NIEO campaign was not anchored on the language of rights, it unavoidably emphasised the idea of entitlement to work and employment, education, meaningful participation and freedom from exploitation.<sup>111</sup> The right to development, which conveys the idea of equality of opportunity for development as Baxi also rightly points out, evolved in principle from the same notion of basic needs and associated notions of conversion of those needs into rights.<sup>112</sup> In running the campaign for an equitable global system, developing countries hoped to achieve redistributive justice as a matter of right to that which they were deprived of as a result of the imbalances created by the global arrangement.<sup>113</sup>

The campaign to further the cause for global equity and justice culminated in the authoring of the Declaration for a New International Economic Order in 1974, which aimed at upholding the economic position of the new sovereign participants within the global society.<sup>114</sup> Although the aspirations for a new international economic order failed to materialise, it paved the way for the first public pronouncement of the right to development at a conference involving the group of developing countries that championed the cause for the global order.<sup>115</sup> It turned out, as Margot Salomon has observed, that the Declaration on the Right to Development was adopted as a follow-up to the quest by the community of developing countries for a just global system to redress the imbalances created by the prevailing economic arrangement.<sup>116</sup> The Declaration on

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<sup>110</sup> Baxi U 'The new international economic order, basic needs and rights: Notes towards development of the right to development' (1983) *Indian J Int'l L* 225-227.

<sup>111</sup> Baxi (n 110 above) 231.

<sup>112</sup> Baxi (n 110 above) 231.

<sup>113</sup> Udombana (n 94 above) 763.

<sup>114</sup> Nagan (n 105 above) 29.

<sup>115</sup> Ouguergouz F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 298.

<sup>116</sup> Salomon ME *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2008) 50.

the Right to Development in effect pays tribute to the resolution on the new international economic order as an important antecedent to the concept of the right to development.<sup>117</sup>

### **3.2. Formal Recognition**

Following the events described in the previous sections, which illustrate clear manifestations of development injustices inflicted on Africa through different forms of imperial practices including slavery, colonialism and neo-colonialism, the formal recognition of the right to development happened in two stages: First, through proclamations emanating from the African continent and subsequently through the legal recognition and protection of the right to development in official instruments both at the African and at the international levels.

#### **3.2.1. Proclamations on the right to development**

Tribute has largely and maybe rightly been paid to Senegalese Jurist Kéba M'baye for originally conceptualising development as a human right. However, earlier proclamations of the right to development are recorded to have been made prior to M'baye's pronouncement. It is noted for instance that while addressing the Economic Conference of the Group of 77 developing countries in Algiers, Algeria in October 1967, Senegalese Minister of Foreign Affairs, Doudou Thiam categorically declared that '[t]he old colonial past, of which the present is merely an extension, should be denounced' and to 'proclaim, loud and clear, *the right to development* for the nations of the Third World' (emphasis added).<sup>118</sup> Thiam did not only state the fact that developing countries were entitled to the right to development, but made clear that the right emanated from the development injustices that characterised the colonial past, which he said must be denounced. Thus, he was stating the fact that African countries among other developing countries have the right to be released from the injustices of subjugation. By stating emphatically the need to proclaim the right to development, Thiam sounded loud and clear that developing countries do not need to be plugged into the systems of the industrialised world to be able to function.

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<sup>117</sup> Declaration on the Right to Development adopted by the Gen Ass Res 41/128 on 4 December 1986 art 3(3).

<sup>118</sup> Ouguergouz (n 115 above) 298; Okafor OC 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights *Realizing the Right to Development* (2013) 374.

Two years later in the same city of Algiers in Algeria another early pronouncement on the right to development is recorded to have been made in 1969 by the humanitarian and anti-imperialist Archbishop Emeritus, Cardinal Léon-Étienne Duval.<sup>119</sup> Cardinal Duval decried the development injustices perpetuated by industrialised countries and thus advocated that ‘the right to development should be proclaimed for the Third World’.<sup>120</sup> Kéba M’baye is credited to have brought the concept of right to development to the limelight in academic discourse in 1972 when he stated in legal terms that the right to development is indeed a human right guaranteed to be enjoyed by everybody.<sup>121</sup> M’baye’s claim on development as a human right laid the foundation for conceptualising development as an inherent legal entitlement for the existence of mankind, to which all other fundamental rights and freedoms are connected.<sup>122</sup> When M’baye stated the claim for a right to development, he was concerned about the exploitation of African countries, which in legal terms constituted a human rights offence necessitating redress by the law.<sup>123</sup> After his proclamation the right to development gained widespread attention in academia and in development politics.<sup>124</sup> What did Thiam, Duval, and M’baye envisage when they advocated for the right to development for Africa or more broadly for developing countries?

The robust advocacy for the right to development, at the time they were made might have sounded like the expression of an unattainable aspiration but in effect the proponents were postulating a model or an operational paradigm, which carried the potential to determine Africa’s future and development prospects *vis-à-vis* the aggressive imperialistic attitude of developed countries and their instruments for subjugation. Emerging from the continent of Africa shortly after independence, the proclamations on the right to development did not just coincide with the happenings of the time but were informed by the same injustices that motivated decolonisation

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<sup>119</sup> Ouguergouz (n 115 above) 298.

<sup>120</sup> Ouguergouz (n 115 above) 298.

<sup>121</sup> M’baye K ‘Le droit au développement comme un droit de l’homme: Leçon inaugural de la troisième session d’enseignement de l’Institut International des Droits de l’Homme’ (1972) 5 *Revue des Droits de l’Homme* 505-534; Ouguergouz (n 115 above) 298-299.

<sup>122</sup> Bulajic M ‘Principle of international development law: The right to development as an inalienable human right’ in de Waart P *et al* (eds) *International Law and Development* (1988) 359.

<sup>123</sup> Shivji IG *The Concept of Human Rights in Africa* (1989) 30.

<sup>124</sup> Ouguergouz (n 115 above) 299.

and continued to threaten post-independent African societies. It is apparent as articulated by the protagonists that in the absence of an operational model such as embodied by the concept of the right to development, Africa lacked the ability to sustain decolonisation and independence. The pronouncements on the right to development echoed the voice of the African peoples claiming as a matter of entitlement the freedom to determine a development agenda that is suited to Africa and the liberty to enjoy the benefits deriving therefrom.<sup>125</sup>

At the dawn of independence in Africa, the proponents of the right to development were not only preoccupied with preserving the newly gained freedom, but in essence were postulating a development paradigm to drive Africa into a new era, which unfortunately was not and until recently has not been taken seriously. It is necessary to make a comparative reference to South Africa as the last kid on the block to gain independence in 1990. South Africa probably learnt from the experience of other African countries and therefore structured its independence within the legal framework of transformative constitutionalism.<sup>126</sup> There is no denying the fact that South Africa's independence has been more sustainable than the wave of independence achieved by the majority of African countries in the late 1950s and throughout the 1960s, which, of course, lacked a solid operational model to stand on.<sup>127</sup> The acquisition of independence by the American colonies under British colonial rule provides an informative example. When the thirteen American colonies achieved independence in 1776 they stated and documented in the Declaration of Independence a list of grievances and injustices that necessitated and justified their rejection of British colonial rule, which became entrenched as part of the fundamental statute law that defines American democracy.<sup>128</sup>

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<sup>125</sup> See generally Ngang 2017a (n 92 above) 1-17.

<sup>126</sup> See generally Rapatsa M 'Transformative constitutionalism in South Africa: 20 years of democracy' (2014) 5:27 *Mediterranean Journal of Social Sciences* 887-895.

<sup>127</sup> Not long after independence most of the African states plunged into instability; including economic stagnation, political strife, lethal civil and ethnic conflicts, single party dictatorship, military *coup d'états* and widespread tyranny up till the 1990s when the wind of political change began to blow across the continent. Meanwhile, South Africa, although it may not represent the best example as it has its own share of weaknesses, has been able to sustain its independence relatively steadily for over twenty five years.

<sup>128</sup> National Centre for Constitutional Studies 'The Declaration of Independence part of American law' available at: <http://www.nccs.net/1998-06-the-declaration-of-independence-part-of-american-law.php> (accessed: 20



I assume that the injustices that the American colonies suffered under British rule were not unlike what the African colonies endured under European imperialism,<sup>129</sup> with the exception that the proponents of independence in the American colonies were themselves settler colonists, who were in the process of subjugating the native American peoples. This notwithstanding, a similar obligation necessitated the decolonised African states to have formulated their rejection of colonialism in a declaration on the right to development to pilot the course of independence. However, the independence leaders opted to seek first the ‘political kingdom’ with the anticipation that every other thing about development would eventually be added.<sup>130</sup> A unified proclamation on the right to development, which highlights the ideas of equity and justice would have made much more sense as a development model for Africa than the nominal political independence that each of the African states achieved in isolation. The granting of political independence deflected attention away from socio-economic and cultural concerns and in effect, concealed many of the colonial injustices for which the perpetrators ought to have been held accountable. As an analogy to this point, Mamdani shows how South Africa’s transition from apartheid to constitutional democracy was marred by political compromises through which perpetrators of the ills of apartheid were shielded from legal responsibility for their actions and in particular those causing the socio-economic underdevelopment of black South Africans.<sup>131</sup>

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February 2015); The Heritage Foundation ‘The Declaration of Independence July 4 1776’ available at: <http://www.heritage.org/initiatives/first-principles/primary-sources/the-declaration-of-independence> (accessed: 14 February 2015).

<sup>129</sup> American Government ‘The colonial experience’ available at: <http://www.ushistory.org/gov/2a.asp> (accessed: 16 August 2016). It states that ‘British rule suppressed political, economic, and religious freedoms’, coupled with arbitrary taxation which were not unlike the conditions under which African colonies were oppressed by the European colonialists.

<sup>130</sup> See Yergin & Stanislaw (n 59 above) 2: Ghana’s independence leader, Kwame Nkrumah whose country became the first to gain independence in 1957 inspired his peers across Africa with his philosophy of self-government and autonomy as preconditions for development.

<sup>131</sup> Mamdani M ‘Amnesty or impunity?: A preliminary critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)’ (2002) 32:3/4 *Diacritics* 57.



A unified declaration of independence on the basis of the right to development would in my opinion have established an indomitable force to withstand any form of imperial domination. However, the right to development – an African brainchild – was hijacked by international actors, who in trying to extrapolate on its meaning have actually not accomplished much, but dragged the concept into controversy and, therefore, confused its original meaning and purpose. Although the right to development has eventually become a subject of international concern, its unique dimensions as an African concept have, to some extent, been retained.

### **3.2.2. Legal recognition and protection**

By legal recognition and protection, I refer to official guarantees and documented evidence on the right to development both in hard law and in soft law instruments. Owing to the fact that the question of development invariably connects Africa to the rest of the world, and that most of the development injustices that Africa suffers often stem from the actions of developed countries and other international actors, it is important to look at the recognition of the right to development at the African as well as at the international levels. This is to ensure a balanced determination of the extent to which foreign stakeholders are morally or legally bound by the right to development in Africa as discussed in chapters four and five.

Contrary to the conviction that the right to development was first officially documented by the UN Commission on Human Rights in 1977,<sup>132</sup> the right to development was indeed first given official statutory recognition in the 1972 Constitution of Cameroon,<sup>133</sup> following the public proclamations by Doudou Thiam, Cardinal Duval and Kéba M'baye. The UN Commission on Human Rights only subsequently endorsed the right to development in 1977 and went further to commission an investigation on its international dimensions as a human right.<sup>134</sup> Based on the findings of this investigation, the General Assembly in 1979 adopted Resolution 34/46, recognising that the right to development is indeed a human right that guarantees equality of

<sup>132</sup> UN Commission on Human Rights Res 4 (XXXIII) 21 February 1977; Mahalu CR 'Human rights and development: An African perspective' (2009) 1:1 *Leiden J Int'l L* 19.

<sup>133</sup> Constitution of the Republic of Cameroon 1972. Article 65 guarantees that the preamble forms an integral part of the Constitution, which means, although contained in the preamble, the right to development has the nature of a legally enforceable right.

<sup>134</sup> UN Human Rights *Realizing the Right to Development* (2013) 3.

opportunity for development as an entitlement guaranteed to states and to individuals.<sup>135</sup> This marked the beginning of the shift in the original formulation of the right to development as essentially a collective entitlement.

The implication for recognising the right to development, particularly at international level was that the perpetuation of development injustices was acknowledged to be unacceptable. By this assurance African governments hoped, although erroneously that it was a ticket to access some form of remedial justice against the perpetrators of the historical injustices of slavery and colonialism.<sup>136</sup> The race for the recognition of the right to development gathered momentum in the 1980s. Groundwork towards its codification at the international level took off in March 1981 when the Commission on Human Rights assigned a Working Group of Governmental Experts to investigate and draft an international instrument on the right to development, which, however, only became available eight years later.<sup>137</sup>

Meanwhile, in Africa, the stage was set for the writing of the Charter on Human and Peoples' Rights. While commissioning the group of African legal experts to draft the charter, the then Senegalese President Sedar Senghor is quoted to have stated that '[w]e want to lay emphasis on the right to development and other rights which need the solidarity of our states to be fully met'.<sup>138</sup> In 1981, the same year that the UN Working Group was established and getting ready to start work to produce a universal document on the right to development, Africa went ahead to adopt the African Charter on Human and Peoples' Rights in which it provided legal recognition

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<sup>135</sup> UN General Assembly Resolution A/RES/34/46 of 23 November 1979 para 8; see also Rich RY 'The right to development as an emerging human right' (1983) 23 *Virg J Int'l L* 322; Tadeo MA 'Reflections on the right to development: Challenges and prospects' (2010) 10 *AHRLJ* 329.

<sup>136</sup> Tadeo (n 135 above) 340.

<sup>137</sup> UN Human Rights (n 134 above) 3.

<sup>138</sup> See *Kevin Mgwanga Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 173; see also Baricako G 'Introductory preface: The African Charter and African Commission on Human and Peoples' Rights' in Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006* (2008) 6; Address delivered by Mr Leopold Sedar Senghor, President of Senegal, OAU DOC CAB/LEG/67/5; Ouguergouz (n 115 above) 41.

and protection of the right to development as a justiciable entitlement to the peoples of Africa.<sup>139</sup> As Chinedu Okafor has observed, the African Charter became the first hard law instrument to enshrine the right to development, not only within the context of Africa's evolving human rights law but also within the context of international human rights law.<sup>140</sup> Africa thus made a significant contribution not only in terms of pioneering the legal recognition of the right to development but also in integrating human rights and development within a legal framework. The Charter came into force in October 1986, two months before the UN General Assembly adopted the Declaration on the Right to Development in December 1986.

Unlike the African Charter, the UN Declaration contains noticeable differences in the formulation of the right to development.<sup>141</sup> One of such differences is the conflicting arrangement with regard to development cooperation as a mechanism for the realisation of the right to development. Development cooperation ought to provide the framework for redressing the structural imbalances created by international actors, which in turn impacts adversely on the aspirations of developing countries.<sup>142</sup> However, while the African Charter enshrines the right to development as an absolute legal entitlement, the moral character of the Declaration on the Right to Development leaves questions with regard to the need to have recourse to development cooperation as a mechanism for its realisation. This is challenging, because for developed

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<sup>139</sup> The African Charter was adopted on 27 June 1981 three months after the Working Group was commissioned to start work on the right to development. The Charter entered into force on 21 October 1986, two months before the UN Declaration on the Right to Development was adopted on 4 December 1986.

<sup>140</sup> Okafor OC "Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 52.

<sup>141</sup> The differences in the conceptualisation of the right to development in the African Charter and the DRtD include the following: 1) The Africa Charter makes clear that the right to development is a collective right guaranteed only to peoples, while the DRtD stipulates that it is both an individual and a collective right. 2) The African Charter envisages socio-economic and cultural development as a claimable entitlement, while the DRtD sees the right to development as an inalienable human right which only allows individuals and peoples to participate in, contribute to and benefit from economic, social, cultural and political development.

<sup>142</sup> Salomon 2008 (n 116 above) 50.

countries, cooperation provides the opportunity to dominate weaker developing countries.<sup>143</sup> It explains the reluctance of developed countries to commit to a legal obligation on the right to development, preferring a non-compelling approach, for example, through global partnerships in dealing with issues of human rights and development.<sup>144</sup>

A compromise was thus reached when world leaders attending the Millennium Summit in 2000 'committed to making the right to development a reality for everyone'.<sup>145</sup> This, however, remains a moral commitment without any genuine obligation to ensure its realisation. By this arrangement they consented to the setting of time-bound goals for combating development challenges through a global partnership for development.<sup>146</sup> Although the Millennium Declaration set out to eradicate extreme poverty and to achieve human development and the realisation of human rights, the resultant Millennium Development Goals (MDGs) failed to incorporate human rights. The MDGs lacked the force of law and, therefore, imposed no legally binding obligations. Consequently, Pogge has expressed reservation with regard to the framing of such global actions to eradicate global poverty owing to the lack of sufficient clarity on the roles and responsibilities that states are supposed to play.<sup>147</sup> Following after the Millennium Summit, the Durban Declaration of 2001 reaffirmed the solemn promise by all states to promote the right to development among other human rights.<sup>148</sup>

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<sup>143</sup> See Alemazung (n 76 above) 70-73. Alemazung explains how after independence the colonial masters sought means of protecting their interests and retaining economic control in Africa and thus introduced the (ill-intentioned) mechanism of development aid, which she says is based on the hidden intention to secure control over the resources, the economy and politics in the ex-colonies.

<sup>144</sup> Kirchmeier F 'The right to development – where do we stand?: State of the debate on the right to development' (2006) *Friedrich Ebert Stiftung – Occasional Paper No 23* 13-17.

<sup>145</sup> UN Millennium Declaration Resolution *A/55/L.2* adopted by the Gen Ass 2000 para III(11).

<sup>146</sup> Villaroman NG 'Rescuing a troubled concept: An alternative view of the right to development' (2011) 29:1 *NQHR* 15.

<sup>147</sup> Pogge T 'The Sustainable Development Goals: Brilliant propaganda?' (2015) *Annals of the University of Bucharest – Political Science Series ISSN 1582-2486* 1.

<sup>148</sup> Durban Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, South Africa 31 August - 8 September 2001 paras 19 & 78.

While the right to development continued in its strides as soft law at international level, Africa stepped decisively ahead of the international community to further develop its normative dimensions in other treaty instruments. In 2003, the African Union adopted the Protocol on the Rights of Women in Africa, which recognises the rights of women to sustainable development.<sup>149</sup> This is a ground-breaking achievement for Africa where women have generally been suppressed through conservative practices. In spite of pessimism, the African Commission on Human and Peoples' Rights forged ahead to demonstrate that the right to development is indeed justiciable. In 2004 the Commission dealt with the first inter-state communication in the *DRC* case in which it found the respondent states in violation of article 22 on the right to development, among other provisions of the African Charter.<sup>150</sup> The right to development thus gained not only legal recognition but also judicial enforcement as a justiciable entitlement.

As can be observed, the African human rights system, more than any other in the world has championed the cause on the right to development, both in terms of developing its normativity and in terms of jurisprudential advancement. Another major milestone was recorded in 2006 with the adoption of the African Youth Charter, which like the other regional treaty instruments clearly guaranteed legal protection on the right to development for the youth of Africa.<sup>151</sup> In 2009 the African Commission further dealt with the *Darfur* case<sup>152</sup> and the groundbreaking *Endorois* case.<sup>153</sup> The litigation remains a landmark in the African Commission's jurisprudence because of the precedent it set in clarifying the intricate dimensions of the right to development as a collective entitlement.<sup>154</sup> Following the increasing importance attached to the right to development within the African human rights system, coupled with the legal commitments undertaken under ancillary treaties and other international instruments, a number of African countries have proceeded to domesticate the right to development as an entrenched right in their

<sup>149</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in Maputo Mozambique on 11 July 2003 art 19.

<sup>150</sup> *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 95.

<sup>151</sup> African Youth Charter adopted in Banjul the Gambia on 2 July 2006 art 10.

<sup>152</sup> *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 224.

<sup>153</sup> *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHRLR 75 (ACHPR 2009).

<sup>154</sup> Kamga (n 94 above) 382.

national constitutions.<sup>155</sup> These, together with the African treaty instruments and the cases that I have highlighted in this section, are discussed in greater detail in chapter three.

The fact that the right to development is guaranteed legal protection in Africa creates expectations for justice and fairness as well as liberty of action in self-determining an African development agenda. This is unlike in the instance where the power of policy-making on issues relating to development in Africa remains in the hands of foreign stakeholders.<sup>156</sup> The legal guarantees on the right to development in the African treaty instruments also make a normative proposition that any threat or contravention of the right would amount to an offence against the law and therefore, susceptible to adjudication.<sup>157</sup> It is important to note that the right to development in Africa is formulated with the realities of the socio-economic and cultural challenges in mind and the need to address those realities. The African Charter makes clear that it is primarily the duty of state parties to do so.<sup>158</sup> This has largely not been achieved, owing to the absence of an enabling international environment, which constitutes a critical constraint to country efforts to ensure the enjoyment of the right to development.<sup>159</sup> Thus, its status in law in Africa raises concerns regarding its realisation.

Concerning the requirement to have recourse to development cooperation for the realisation of the right to development, the Charter fails to take cognisance of the adverse influence exerted by major development stakeholders and therefore does not make provision for holding these actors

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<sup>155</sup> The countries include Cameroon, Malawi, the DRC, Ethiopia as well as Benin and Nigeria, which provide explicit guarantees and also South Africa, Sao Tome and Principe and Burkina Faso, which provide implicit guarantees. More explanation on this is provided in sects 2.2.1 & 2.2.2 of chapter five.

<sup>156</sup> Sengupta A 'The human right to development' (2004) 32:2 *Oxf Dev't Stud* 194. Fiscal and economic policies for Africa are in most cases decided by the IMF and World Bank, in most cases without the involvement or participation of the countries concerned where the policies are to be implemented. A typical example is the structural adjustment policies that were imposed on African countries for implementation.

<sup>157</sup> African Charter (n 103 above) art 22; Protocol on the Rights of Women (n 149 above) art 19; African Youth Charter (n 151 above) art 10.

<sup>158</sup> African Charter (n 103 above) art 1.

<sup>159</sup> Marks S 'The human right to development: Between rhetoric and reality' (2004) 17 *Harvard Hum Rts J* 139; Kirchmeier (n 144 above) 12.

legally accountable for their sometimes questionable actions in Africa.<sup>160</sup> The question that may be asked is whether the legal status of the right to development in Africa imposes any binding obligation on foreign stakeholders to comply with the relevant treaties on matters relating to the right to development? It is important to point out that according to international law standards, regional treaties only impose legally binding obligations on states parties, which therefore means that foreign stakeholders are insulated from legal action when they contravene the right to development in Africa, except for the extent to which African states can act toward foreign non-state actors operating in their jurisdiction through application of the domestic law, developed in accordance with the duty to protect the right to development. However, according to Mohamed Mattar, regional human rights treaties have a unique potential to combine universal norms and principles with sensitivity and responsiveness to regional particularities.<sup>161</sup> I agree with Mattar to the extent that, as illustrated in chapters four and five below, the right to development needs to be developed even further to be able to respond adequately to the development challenges in Africa and to ensure greater protection against abuse and exploitation by foreign stakeholders. In the meantime, I proceed to establish what the right to development in Africa represents.

## **4. Conceptual Clarity on the Right to Development in Africa**

### **4.1. Nature of the Right to Development as a Human Rights Concept**

Development has generally been equated to economic growth.<sup>162</sup> Drawing from that perception in relation to the right to development, the question that arises is whether there is a human right to economic growth. Of course, there is no such thing as a human right to economic growth but there is in effect an established right to development, which is recognised and protected by law. In this section, I look at the right to development as formulated in the African context, with the aim of dispelling some misconceptions with regard to its conceptual nature.

<sup>160</sup> Okafor 2008 (n 140 above) 61-62.

<sup>161</sup> Mattar M 'Article 43 of the Arab Charter on Human Rights: Reconciling national, regional and international Standards' (2013) 26 *Harvard Hum Rts J* 91.

<sup>162</sup> Melo A 'Is there a right to development?' (2008) 1:2 *Rizoma Freireano – Instituto Paulo Freire de España* 2; Sengupta 2004 (n 156 above) 181.



#### 4.1.1. Defining characteristics

The right to development does not respond to any universally acceptable definition.<sup>163</sup> Its formulation in Africa as a collective right creates an even more complex definitional problem, particularly in relation to the orthodox understanding of human rights as basically individualistic in nature. Thus, to ascribe a universal definition to the right to development is theoretically not possible and pragmatically not necessary, because, as I contend, its realisation is context specific. In this regard, it is of essence to look at the defining characteristics of the right to development rather than attribute to it a straightforward definition. Literally, the right to development represents an integrated process for equalising opportunities for the advancement of all peoples to participate in and to enjoy the benefits obtaining from socio-economic and cultural development.<sup>164</sup> It is a subjective concept: as much as it is recognised universally as an inalienable human right, its practical dimensions remain relative to particular circumstances.

It is not unsurprising that the formulation of the right to development in Africa differs from the way it is understood under the UN and other regional human rights systems. Informed by the historical account of how the idea of development evolved into an entrenched human right, I try to construct not a definition but a description of the right to development as it envisages responding to African realities. The African Charter provides that:

- 1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- 2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.<sup>165</sup>

My interpretation of this provision on the right to development in the African Charter is as follows: Originating from the legacy of injustices bequeathed by slavery and colonialism, the right to development can be understood to mean recognition of the collective potential of all the peoples of Africa to participate freely in the development process with due regard to the liberty

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<sup>163</sup> Dąbrowska (n 4 above) 6.

<sup>164</sup> Armiwulan H 'Development and human rights' (2008) *China Hum Rts* 32.

<sup>165</sup> African Charter (n 103 above) art 22.



to determine a policy agenda that allows for equity and justice to prevail.<sup>166</sup> It ascribes entitlement to the African peoples to *exercise* the right, which means to take concrete action to ensure equitable redistribution of the benefits of development for the purpose of sustained well-being. The right to development in Africa also suggests that if it is to be achieved through development cooperation, my view is that the peoples of Africa should determine the terms of cooperation and not vice versa, where development cooperation has generally been donor-driven.

Taking development in the broadest context as ultimately aiming to achieve well-being,<sup>167</sup> it is important to make clear that the right to development does not mean the right to economic growth as may be conceived in neo-liberal terms.<sup>168</sup> The Office of the High Commissioner for Human Rights has noted that '[t]he formulation of development as a right is based on the idea that it is not merely an equivalent to economic growth'.<sup>169</sup> While the right to development generally does not mean the right to economic growth, it also does not exclude economic growth.<sup>170</sup> Economic growth constitutes an important component in the holistic concept of the right to development,<sup>171</sup> incorporating economic, social and cultural elements.<sup>172</sup> It therefore

<sup>166</sup> This view is opposed to the views of other scholars such as De Feyter K 'Towards a framework convention on the right to development' (2013) *Friedrich Ebert Stiftung* 17; Salomon ME 'Legal cosmopolitanism and the normative contribution of the right to development' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 17; Sengupta A 'Development cooperation and the right to development' (2003) *Copyright © 2003 Arjun Sengupta* 20; Sengupta A 'On the theory and practice of the right to development' (2002) 24:4 *HRQ* 880 whose propositions is for the right to development to be achieved through development cooperation, which basically takes away the right of participation and ownership of the development process from the African peoples.

<sup>167</sup> UN Information Service Bangkok Press Release No G/05/2000 12 February 2000; Dąbrowska (n 4 above) 3.

<sup>168</sup> Sengupta 2002 (n 166 above) 853.

<sup>169</sup> UN Office of the High Commission for Human Rights 'The right to development and least developed countries' UN Human Rights, available at: <http://www.ohchr.org/EN/Issues/Development/Pages/LDCIVconferenceandRighttoDevelopment.aspx> (accessed: 4 November 2016).

<sup>170</sup> Kamga S & Heleba S 'Can economic growth translate into access to rights?: Challenges faced by institutions in South Africa in ensuring that growth leads to better living standards' (2012) 9:17 *SUR – Int'l J Hum Rts* 82-104; Sengupta 2004 (n 156 above) 184-185.

<sup>171</sup> Sengupta A *et al* 'The right to development and human rights in development: A background paper' (2004) *The Norwegian Centre for Human Rights – Research Notes 07/2004* 6-8.

suggests that effective realisation would progressively redress the plethora of development challenges without breeding new ones.<sup>173</sup> Accordingly, the right to development in Africa guarantees substantive entitlements in terms of the achievement of well-being and legal entitlements in the sense that it can be claimed through legal processes as I proceed to explain.

#### 4.1.2. Substantive entitlements

Substantive entitlement entails the material or abstract things that peoples can anticipate to achieve as a result of asserting the right to development. These entitlements guarantee the opportunity for the advancement of human capabilities in the sense that they set the standards of achievement for people to live with dignity.<sup>174</sup> In Africa, the substantive entitlements are embodied in socio-economic and cultural rights, without excluding civil and political rights.<sup>175</sup> The legal instruments that enshrine the right to development suggest that if all peoples are allowed to exercise the right to development freely, they would invariably be entitled to enjoy well-being at the economic, social and cultural levels.<sup>176</sup> These instruments do not define what would amount to economic, social and cultural development, which leaves much interpretative responsibility with the judiciary.<sup>177</sup> However, a scrutiny of the provisions of the African Charter reveals that the rights to property ownership, job security and income guarantee would contribute to economic development.<sup>178</sup> The rights to health care and education would contribute to social

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<sup>172</sup> See African Charter (n 103 above) art 22(2).

<sup>173</sup> See Ewanfoh OP *Underdevelopment in Africa: My Hands are Clean* (2014) 140.

<sup>174</sup> Sengupta 2004 (n 156 above) 185.

<sup>175</sup> See African Charter (n 103 above) preamble.

<sup>176</sup> African Charter (n 103 above) art 22; Protocol on the Rights of Women (n 149 above) art 19; African Youth Charter (n 151 above) art 10.

<sup>177</sup> Much of the interpretation and clarification on the nature and content of the right to development enshrined in the African Charter has been provided by the African Commission in the following cases: *Kevin Gunme* (n 138 above) paras 172-179; *DRC* (n 151 above) para 95; *Endorois* (n 153 above) para 269-298; *Darfur* (n 152 above) para 224.

<sup>178</sup> African Charter (n 103 above) arts 14 & 15.

development.<sup>179</sup> Recognition of traditional values and belief systems, customary practices and an African lifestyle would lead to cultural development.<sup>180</sup>

In stating that the right to development is to be achieved with due regard to peoples' 'freedom and identity',<sup>181</sup> the Charter establishes that its content is subject to determination by the peoples concerned. Only a collective of people in accordance with their communal identity can state with exactitude what would constitute socio-economic and cultural development in their particular context. For instance, indigenous peoples are identified to manifest unique cultural, spiritual and lifestyle characteristics that distinguish them from other communities.<sup>182</sup> Their conception of development is thus unlikely to respond to the same criteria applicable to communities that live a more urbanised and modern lifestyle. In the same manner, what constitutes development for women<sup>183</sup> differs from what the youths envisage as development.<sup>184</sup>

Contrary to the view that the right to development does not create any 'substantive right',<sup>185</sup> the right to development in Africa does guarantee entitlement to improved livelihood and well-being realisable through economic, social and cultural self-determination. Former UN High Commissioner for Human Rights, Navi Pillay has reiterated that the right to development contains a specific entitlement 'to participate in, contribute to, and enjoy economic, social, cultural and political development'.<sup>186</sup> Unlike in the African Charter, where political development is deliberately omitted, the Declaration on the Right to Development includes political development.<sup>187</sup> The omission in the Charter is explained in the following manner:

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<sup>179</sup> African Charter (n 103 above) arts 16 & 17(1).

<sup>180</sup> African Charter (n 103 above) arts 17(2-3) & 18; see also Charter for African Cultural Renaissance adopted in Khartoum on 24 January 2006.

<sup>181</sup> African Charter (n 103 above) art 22(1).

<sup>182</sup> ILO Convention on Indigenous and Tribal Peoples 1986 (No 196) art 1; Martínez Cobo 1987 UN Doc E/CN.4/Sub.2/1986/7.

<sup>183</sup> See Protocol on the Rights of Women in Africa (n 149 above) art 19.

<sup>184</sup> See African Youth Charter (n 151 above) art 10.

<sup>185</sup> Dąbrowska (n 4 above) 5.

<sup>186</sup> UN Human Rights (n 134 above) 4.

<sup>187</sup> DRtD (n 117 above) art 1(1).

‘[T]he satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights’.<sup>188</sup> The implication is that, for purposes of the Charter, when socio-economic and cultural development is achieved, political development naturally follows.

To seek to achieve the right to development otherwise, by prioritising political development over economic, social and cultural development only creates the opportunity for failure. In calling on states to cooperate for development, the UN Charter points to the same fact that issues that need attention are those of an economic, social, cultural or humanitarian nature.<sup>189</sup> It seems obvious that political issues are not considered international problems, because they have to do with state sovereignty and are therefore complex to deal with through development cooperation.<sup>190</sup> While political development may be relevant for the achievement of the right to development, it is not inherent to human livelihood. Thus, the absence of political development may not necessarily devalue the right to development. The point here is simply to explain why the right to development as conceptualised in the African Charter only envisages socio-economic and cultural development and not political development.<sup>191</sup> However, the preamble to the Charter makes clear that the realisation of socio-economic and cultural rights is prerequisite to the fulfilment of civil and political rights and therefore cannot be dissociated from it.

#### **4.1.3. Legal entitlements**

African regional human rights law provides extensive recognition of the right to development<sup>192</sup> but there is as yet no comprehensive clarification as to its precise nature. By looking at the legal

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<sup>188</sup> African Charter (n 103 above) preamble.

<sup>189</sup> UN Charter (n 3 above) art 1(3).

<sup>190</sup> Based on the principle of sovereign equality of states, which allows for friendly relations among states based on respect for the principle of equal rights and the right to self-determination, the UN Charter formulates the need for international cooperation to deal purposefully with ‘problems of and economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights’. The Charter does not make mention of issue of a political nature.

<sup>191</sup> See African Charter (n 103 above) art 22(1).

<sup>192</sup> African Charter (n 103 above) art 22; Protocol on the Rights of Women (n 149 above) art 19; African Youth Charter (n 151 above) art 10; African Charter on Democracy, Elections and Governance adopted in Addis Ababa 30 January 2007 preamble; Report of the Meeting of Experts of the First Ministerial Conference on

nature of the right development in Africa, I aim to explore the core dimensions of the idea of development as an entrenched entitlement under African law, which François Borella has rightly contextualised as development law.<sup>193</sup> Informed by the injustices that motivated the conceptualisation of development as a human right,<sup>194</sup> the African Charter forbids the further subjugation of the African peoples to enslavement or domination.<sup>195</sup> It also guarantees protection of the African space from inappropriate invasion that may jeopardise, cause a regression to or contravene the right to development.<sup>196</sup> Though controversial at the level of the international community, the right to development in Africa is worth paying close attention to because of the normative impetus that it pulls together, which guarantees that it can legitimately be invoked before a court of law in accordance with the criteria necessary for making such a claim.<sup>197</sup>

Reading from article 22 of the African Charter, it can be deduced that the right to development creates the condition not just for the realisation of socio-economic and cultural development but also for the exercise of legality, legitimacy, equity and justice in the development process. It imposes the obligations to respect, to protect, to fulfil and to prevent, which by extension translates into the positive duty to ensure sustained access to the material benefits corresponding to the fulfilment of each right and the negative duty necessitating restrained action to avoid a regression in the enjoyment of existing rights.<sup>198</sup> Drawing from universal human rights standards,

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Human Rights in Africa Kigali 5-6 May 2003 EXP/CONF/HRA/RPT(II) para 42; Grand Bay Declaration and Plan of Action adopted by the First OAU Ministerial Conference on Human Rights held in Grand Bay April 1999 para 2; Kigali Declaration adopted by the AU Ministerial Conference on Human Rights in Africa held in Kigali May 2003 para 3; Solemn Declaration on Gender Equality in Africa adopted by the AU Assembly of Heads of State and Government in Addis Ababa July 2004 para 6; Pretoria Declaration on Economic, Social and Cultural Rights in Africa adopted by the African Commission at its 36th Session December 2004 preamble & para 1; New Partnership for Africa's Development (NEPAD) Declaration adopted as a Programme of the AU at the Lusaka Summit (2001) para 79. These instruments are discussed in sects 2.1.2 & 2.1.1 of chapter four.

<sup>193</sup> Borella (n 82 above) 246.

<sup>194</sup> See sects 2.1.1 & 2.1.2 above.

<sup>195</sup> See DRtD (n 116 above) art 5.

<sup>196</sup> African Charter (n 103 above) preamble para 8.

<sup>197</sup> Sengupta 2004 (n 156 above) 186.

<sup>198</sup> See Sengupta 2004 (n 156 above) 184.

I describe these obligations as follows: The obligation to respect, which entails recognition of the fact that all African peoples are entitled to the inalienable right to development. The obligation to protect entails taking action in the form legislation and enforcement measures against perceived threats. The obligation to fulfil requires making available the material things that are necessary to ensure well-being, which includes ensuring access to remedies when a violation is alleged. Lastly, the obligation to prevent necessitates the ability to pre-empt and to take appropriate measures to avert a potential violation of the right to development. These obligations can be summed up into two principal duties: On the one hand, the positive duty to fulfil requires concrete action in order to achieve the substantive entitlements relating to economic, social and cultural development, which ultimately must result in the full enjoyment of well-being and improvement of the human condition.<sup>199</sup> This duty imposes a direct legally binding obligation on the state parties to the instruments that enshrine the right to development. On the other hand, the right to development establishes the negative duty to respect the rights of the African peoples to make their own development choices, which must not be infringed upon or contravened.<sup>200</sup>

When development is acknowledged to constitute an entrenched human right, it empowers right-holders with the legitimacy to demand accountability by requiring of duty-bearers to honour their treaty obligations.<sup>201</sup> Thus as a human right, the right to development accords to the peoples of Africa a justifiable basis for claiming that their governments have certain development obligations to fulfil.<sup>202</sup> These obligations include protecting the right to development from violation, especially by foreign stakeholders.<sup>203</sup> The legal nature of the right to development in Africa is not only guaranteed by its normative force. The means by which it is envisaged to be

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<sup>199</sup> Sengupta 2004 (n 156 above) 187-188.

<sup>200</sup> Oduwole O 'International law and the right to development: A pragmatic approach for Africa' (2014) *International Institute of Social Studies* 3.

<sup>201</sup> Sengupta 2004 (n 156 above) 181.

<sup>202</sup> Sengupta 2004 (n 156 above) 187.

<sup>203</sup> See generally United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations 'protect, respect and remedy' Framework adopted by the UN Human Rights Council UN Doc A/HRC/17/L17/31 (June 2011).

achieved – through cooperation – is also guaranteed by law.<sup>204</sup> Under the development cooperation framework, it is hard to envisage a directly binding obligation requiring foreign stakeholders to fulfil the right to development in Africa despite the legally binding obligation originating from international law necessitating cooperating partners to respect such a right.<sup>205</sup>

#### **4.1.4. Normative standards**

The normative standards should be understood to mean the highest attainable benchmarks that the right to development in Africa aims to achieve. Fundamentally, the right to development was conceived to establish some form of transformational justice against the negative impact of global incompatibilities that has increasingly affected development in Africa.<sup>206</sup> The right to development proposes an alternative model that looks at development from a rights-based point of view with the objective to ameliorate the human condition.<sup>207</sup> Envisaging development in Africa from a rights-based perspective carries the promise that human well-being can be attained through the concurrent realisation of economic growth and human rights. To this end, it is important to look at and include standards for up-holding human rights and standards for promoting development, which lay the groundwork for the right to development in Africa.

##### **4.1.4.1 Standards for up-holding human rights**

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<sup>204</sup> The treaty instruments that impose the duty to cooperate include, the UN Charter (n 3 above) arts 1(3), 55 & 56); ICESCR (n 3 above) art 1(2); African Charter (n 104 above) art 22(2); DRtD (n 117 above) art 3(3) & 4(2); Vienna Declaration (n 98 above) para I(10).

<sup>205</sup> See UN Charter (n 3 above) art 1(3), 55 & 56; ICESCR (n 3 above) art 1(2).

<sup>206</sup> Garavito CR, Kweitel J & Waisbich LT 'Development and human rights: Some ideas on how to restart the debate' (2012) 2:17 *SUR – Int'l J Hum Rts* 6.

<sup>207</sup> Williams MK 'Bringing human rights to bear on strategies to achieve the Millennium Development Goals (2005) *Keynote address Irish Department of Foreign Affairs 7th Annual NGO Forum on Human Rights* 2. Mehr Khan notes that: 'When we use the phrase – "human rights and development" – we sometimes seem to imply that the two are quite different. Indeed in the way that human rights and development have been addressed in the past, there are differences. But fundamentally the ultimate goal is the same: to contribute to enhancing the dignity of people's lives. Development aims at improvement in the lives and the well-being of all people. It does this through the delivery of services and the expansion of government capacities. This is also the process of realizing many human rights'.



The Vienna Declaration underscores the fact that human rights and fundamental freedoms are the birthright of all human beings.<sup>208</sup> Besides being a right in itself, the right to development provides the means through which other human rights may be achieved. Looking at Africa's human rights record (which remains a major concern), if progress is to be made toward the realisation of the African Union Agenda 2063 for development,<sup>209</sup> the following standards on human rights in Africa must be adhered to.

#### 4.1.4.1.1 *Inalienability of the right to development*

The right to development has been recognised universally and reaffirmed in many international forums as an inalienable human right.<sup>210</sup> It means that the right to development is an undeniable entitlement that cannot be taken away, cannot be bartered or bargained for less than its inherent value and more so it cannot be set aside for any reason including the lack of development.<sup>211</sup> Sengupta explains this to mean that the right to development is absolute and cannot be negotiated.<sup>212</sup> According to Luo Haocai, the right to development is of primary importance to the millions of peoples in developing countries that are yet to align with the global development process, which as he argues can only be attained through claiming that right.<sup>213</sup> The importance and inalienability of the right to development in Africa justifies its recognition and protection as a legal entitlement to the African peoples. By virtue of this legal fact, a compelling obligation is imposed if not positively to ensure fulfilment, at least negatively to ensure that the right to development is not violated.<sup>214</sup>

<sup>208</sup> Vienna Declaration (n 98 above) para I(1); Sengupta 2000 (n 7 above) 558.

<sup>209</sup> Amnesty International 'African Union: President Mugabe should urgently address human rights concerns' (2015) available at: <https://www.amnesty.org/en/articles/news/2015/01/african-union-president-mugabe-should-urgently-address-human-rights-concerns/> (accessed: 17 March 2015).

<sup>210</sup> See sect 2.1 of chapter four.

<sup>211</sup> Kamga (n 94 above) 121.

<sup>212</sup> Sengupta 2000 (n 7 above) 563.

<sup>213</sup> Haocai L 'Remarks at the opening ceremony of the Beijing forum on human rights' (2008) *China Hum Rts* 1.

<sup>214</sup> See Oduwole (n 200 above) 3; Sengupta 2004 (n 156 above) 183. In making this assertion, I take cognisance of the problematic in accurately distinguishing between positive and negative duties in the realisation of socio-economic rights as highlight in Brand D 'Introduction to socio-economic rights in the South African Constitution' in Heyns C & Brand D (eds) *Socio-Economic Rights in South Africa* (2005) 26-29; Skogly I



#### 4.1.4.1.2 Collectivism and people-centeredness

Acknowledging the right to development as a human right gives the impression, according to the orthodox understanding of human rights that it is vested in the individual.<sup>215</sup> The Declaration on the Right to Development makes a compromise by stipulating that the right to development is both an individual and a group right.<sup>216</sup> Fundamental to a realistic understanding of the right to development in Africa is the fact that peoples are recognised as the subjects and beneficiaries of the right to development.<sup>217</sup> Following the values of solidarity and community living that are traditional within most African societies,<sup>218</sup> the African Charter enshrines the right to development as essentially a collective right.<sup>219</sup> Scholarship reveals that the concept of human rights in Africa is basically communitarian in the sense that it provides protection based on ascribed status and belonging to the community with the aim to achieve collective well-being.<sup>220</sup> Accordingly, the individualistic or dual nature of the right to development has been argued to be irrelevant for advancing the concept of the right to development and thus, must be rejected.<sup>221</sup>

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'Extra-national obligations towards economic and social rights' (2002) *International Council on Human Rights Policy – Background Paper 4*.

<sup>215</sup> Sohn L 'The new international law: Protection of the rights of individuals rather than states' (1982) 32 *AM U L REV* 1, 48; Kiwanuka R 'The meaning of 'people' in the African Charter on Human and Peoples' Rights' (1988) 82 *Am J Int'l L* 85; Benedek W et al *The Role of Regional Human Rights Mechanisms* (2010) 4.

<sup>216</sup> DRtD (n 117 above) art 1(1).

<sup>217</sup> Sengupta *et al* (n 171 above) 15; DRtD (n 117 above) art 1(1).

<sup>218</sup> See the preambles to the OAU Charter (n 55 above) and the Constitutive Act of the African Union adopted in Lomé on 11 July 2000.

<sup>219</sup> African Charter (n 103 above) art 22(1).

<sup>220</sup> Chirwa DM 'In search of philosophical justifications and suitable models for the horizontal application of human rights' (2008) 11 *AJHR* 303; Cobbah JAM 'African values and the human rights debate: An African perspective' (1987) 9 *HRQ* 321; Mojekwu CC 'International human rights: The African perspective' in Nelson JL & Green VM (eds) *International human rights: Contemporary issues* (1980) 86.

<sup>221</sup> Bedjaoui M 'The right to development' in Bedjaoui M (ed) *International Law: Achievements and Prospects* (1991) 1180; Bunn ID 'The right to development: Implications for international economic law' (2000) 15 *Am U Int'l L Rev* 1435; Villaroman (n 147 above) 17.

The concept of the right to development in Africa places an uncompromised emphasis on the fact that people constitute the drivers of the development process. As Tamara Kunanayakam puts it, the right to development demands that peoples should be seen as subjects rather than as objects of development.<sup>222</sup> It establishes the legal principle that an individual cannot possibly succeed with a personal claim on the right to development, but, of course, can equally exercise and enjoy the right to development as part of a collective.<sup>223</sup> In the African context the right to development can only be claimed by peoples and not by individuals, because, as established by law – in accordance with article 22(1) of the African Charter – it is an entitlement guaranteed only to peoples. The collectivism that is ascribed to the right to development constitutes an empowering tool that provides agency to the millions of disadvantaged peoples in Africa who otherwise would not have the capacity to advance a claim on an individual basis. In contrast to the individualistic conception of human rights, the right to development as a collective entitlement does not alienate the individual, but instead makes provision for inclusiveness based on the recognition of the capabilities of all peoples to contribute to the development process and to enjoy the benefits deriving therefrom.<sup>224</sup>

As Haocai has argued, there are no collective human rights to speak of if individual human rights are not protected – likewise, collective human rights are the prerequisite and guarantee for the full realisation of individual human rights.<sup>225</sup> Development is a subjective process that cannot be imposed from outside, but must be determined and driven by popular participation in accordance with peoples’ aspirations to improvement of livelihood and well-being.<sup>226</sup> Therefore, to put people at the centre of the development process means to invest in the advancement of their capabilities and choices for the betterment of their lives.<sup>227</sup> This is a lofty aspiration, which under

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<sup>222</sup> Kunanayakam T ‘Report of the Working Group on the Right to Development on its fourteenth session’ (2013) *Human Rights Council A/HRC/24/37* 4-5.

<sup>223</sup> African Charter (n 103 above) art 22(1).

<sup>224</sup> Mahalu (n 132 above) 16-18.

<sup>225</sup> Haocai (n 213 above) 4.

<sup>226</sup> Kunanayakam (n 222 above) 5.

<sup>227</sup> Gawanas B ‘The African Union: Concepts and implementation mechanisms relating to human rights’ in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 145.

the present circumstances remains far-fetched to the poor in Africa who continue to ‘struggle in grinding poverty’.<sup>228</sup> It necessitates the right to development paradigm to prioritise not only human rights standards but also standards for promoting development.

#### **4.1.4.2 Standards for promoting development**

In spite of the role that economic growth may play in the realisation of the right to development, McKay and Vizard have pointed out that focus on economic growth alone raises concerns about the impact that accelerated growth may have on the realisation of human rights.<sup>229</sup> This also does not negate the extent to which respect for human rights may leverage economic growth.<sup>230</sup> The concept of the right to development suggests a radical shift from the economic growth dominated theory of ‘developmentalism’,<sup>231</sup> to conceptualising development in legal terms as a human right, which entitles the African peoples to make informed development choices.<sup>232</sup> The right to development thus presupposes that a rights-based approach to development is crucial for Africa.

##### *4.1.4.2.1 Rights-based approach to development*

Within the debate on development and human rights, Stephen Marks identifies seven different approaches for applying human rights thinking to development practice.<sup>233</sup> Of the seven approaches, I favour the rights-based approach, which in combination with the right to development, defines the process by which development can be achieved with equity and justice, ultimately for the attainment of human well-being and improved living standards.<sup>234</sup> As Sengupta rightly illustrates, the rights-based approach requires that every development activity must be

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<sup>228</sup> Gaeta A & Vasilara M ‘Development and human rights: The role of the World Bank’ (1998) *The International Bank for Reconstruction and Development/The World Bank* 5.

<sup>229</sup> McKay A & Vizard P ‘Rights and economic growth: Inevitable conflict or “common ground”?’ (2005) *Overseas Development Institute* 4.

<sup>230</sup> McKay & Vizard (n 229 above) 2.

<sup>231</sup> Kamga (n 94 above) 121.

<sup>232</sup> Gaeta & Vasilara (n 228 above) vii.

<sup>233</sup> Marks SP ‘The human rights framework for development: Seven approaches’ (2003) *François-Xavier Bagnoud Centre for Health and Human Rights, Harvard University – Working Paper No. 18* 1-29.

<sup>234</sup> Sengupta 2002 (n 166 above) 846.

carried out in a manner that is consistent with human rights standards.<sup>235</sup> Unlike with economic growth approaches, the rights-based approach envisages an alternative development model that aims at the realisation of all human rights and fundamental freedoms.<sup>236</sup>

Despite the critique by some scholars on the relevance of the rights-based approach in thinking human rights and development,<sup>237</sup> Selime Jahan explains that the rights-based framework (like in Africa where the right to development is recognised as law) provides the opportunity to assert a claim on the grounds that the right to development has been violated and the duty bearers can be held to legal accountability.<sup>238</sup> The rights-based formulation looks at development holistically in terms of the process and the goal, which must reinforce each other.<sup>239</sup> It implies that if the right to development is to be achieved through development cooperation as envisaged, the development cooperation process must prioritise human rights.<sup>240</sup> The rights-based approach also guarantees fairness in ensuring that development gains are evenly redistributed to ensure improved well-being as highlighted by article 22 of the African Charter.<sup>241</sup>

#### 4.1.4.2.2 Model for poverty eradication

Poverty, which in itself has been described as a violation of human rights, constitutes one of the major obstacles to development in Africa.<sup>242</sup> Contrary to resorting to dependence on

<sup>235</sup> Sengupta 2004 (n 156 above) 180.

<sup>236</sup> Sengupta 2002 (n 166 above) 847.

<sup>237</sup> See for example Renard R 'Theories of development and the emergence of rights based approaches' 2013) *Lecture notes on the Right to Development – Centre for Human Rights University of Pretoria* 1-17; Donnelly J 'The right to development: How not to link human rights and development' in Welch CE & Meltzer RI (eds) *Human rights and development in Africa* (1984) 261; Whyte (n 2 above) 1-3.

<sup>238</sup> Jahan S 'Human rights-based approach to poverty reduction: Analytical linkages, practical work and UNDP' (2004) *UNOHCHR High-Level Seminar on Global Partnership for Development on Right to Development 9-10 February 2004* 2.

<sup>239</sup> Sengupta 2002 (n 166 above) 846.

<sup>240</sup> UN Gen Ass 'Human rights-based approach: Statement of common understanding' adopted at the Inter-Agency Workshop on a human rights-based approach 3 - 5 May 2003 1-3.

<sup>241</sup> Sengupta 2002 (n 166 above) 846.

<sup>242</sup> Doz Costa F 'Poverty and human rights from rhetoric to legal obligations: A critical account of conceptual frameworks' (2008) 5:9 *SUR – Int'l J Hum Rts* 86-88; see also Prada MF *Empowering Poor through Human*

development assistance through cooperation as a means of eradicating poverty as has become the norm in the global development goals narrative, the African conception of the right to development provides a model through which the challenges of poverty can most effectively be redressed. Poverty is defined as ‘a human condition characterised by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living’.<sup>243</sup> In practical terms, poverty is injustice resulting from the policy choices that create and sustain inequalities and power imbalances.<sup>244</sup> In this instance, people are not poor because they are incapable but because they are rendered poor by political design. This relates to Sen’s description of poverty as a deprivation of the freedom to advance human potential.<sup>245</sup> Following these definitions, poverty in Africa can rightly be said to derive from the development injustices that the peoples have experienced for several decades.

In this way, it is possible to argue that the right to development as an expression of self-determination provides the framework for eradicating poverty, which entails on the most part the ‘the integral liberation’ and empowerment of the African peoples to make their own development choices.<sup>246</sup> It necessitates, as I argue, a radical shift from cooperation frameworks that unnecessarily yoke African countries with developed countries in a relationship of dependency on development assistance. The capability to achieve this has manifested previously in the instance where the colonised peoples of Africa asserted with vigour the right to self-determination, which led to decolonisation and the acquisition of independence. Udombana has noted that the right to development flows from the right to self-determination and has the same nature,<sup>247</sup> meaning that it constitutes a tool in the hands of the peoples of Africa to change the socio-economic and cultural situation on the continent.

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*Rights Litigation* (2011) 7; Campbell T ‘Poverty as a violation of human rights: Inhumanity or injustice?’ (2003) *CAPPE – Working Paper 2003/9* 1-19; Pogge T (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2008) 2-11.

<sup>243</sup> ESCR Committee ‘Poverty and the International Covenant on economic, Social and Cultural Rights’ Statement adopted on 4 May 2001 para 8.

<sup>244</sup> Brand D *et al* ‘Poverty as injustice’ (2013) 16 *Law, Democracy & Development* 273-275.

<sup>245</sup> Sen (n 54 above) 87-95.

<sup>246</sup> Brand *et al* (n 244 above) 277.

<sup>247</sup> Udombana (n 108 above) 769-770

Gauri and Gloppen have pointed out that in the past couple of years development has increasingly been framed in the language of human rights, thus setting apart poverty eradication not only as a moral but also as a legal imperative.<sup>248</sup> The human rights development framework allows a plurality of models for achievement but as Perry has asserted, the right to development constitutes a novelty in the sense that it combines the complex relationship between development, poverty eradication and the realisation of human rights.<sup>249</sup> It implies as Sengupta further argues that by asserting the right to development, substantive development can be achieved with equity and justice.<sup>250</sup>

#### 4.2. Nature of the Right to Development as a Development Paradigm

In spite of scepticism about the relevance of the right to development as a stand-alone human right,<sup>251</sup> its theoretical dimensions as discussed in the previous section illustrates that it is not just a human right in the ordinary sense but in effect a ‘new paradigm in development thinking that places human rights firmly within national and international development’ frameworks.<sup>252</sup> UN Human Rights recognises that the right to development is ‘a development paradigm for our globalized future’.<sup>253</sup> As Winston Nagan puts it, ‘the right to development represents a concept that with proper clarification could enhance the kind of thinking that anticipates a new global economic paradigm’.<sup>254</sup> It is a pragmatic concept that entails functionalism; involving the engineering of human capabilities, equitable social construction and non-doctrinaire application

<sup>248</sup> Gauri V & Gloppen S ‘Human rights based approaches to development: Concepts, evidence and policy’ (2012) *World Bank Development Research Group 2*.

<sup>249</sup> Perry R ‘Preserving discursive spaces to promote human rights: Poverty reduction strategy, human rights and development discourse’ (2011) *J Sust Dev’t L & Policy* 78.

<sup>250</sup> Sengupta 2002 (n 166 above) 850.

<sup>251</sup> De Feyter K ‘Right to development: A treaty and its discontents’ (2016) © 2016 Prof Dr K de Feyter *Law & Development Research Group University of Antwerp* 1-27; Vandenbogaerde A ‘The right to development in international human rights law: A call for its dissolution’ (2013) 31:2 *NQHR* 197-209.

<sup>252</sup> Ibhawoh B ‘The right to development: The politics and polemics of power and resistance’ (2011) 33 *HRQ* 103; see also Udombana (n 94 above) 762.

<sup>253</sup> UN Human Rights (n 134 above) 495.

<sup>254</sup> Nagan (n 105 above) 30.

of the legal obligations that it imposes for its realisation.<sup>255</sup> Accordingly, Chinedu Okafor estimates that the right to development ought to be made “right”, not just by strengthening its normative capacity, but also its capacity to contribute to “good” development praxis’.<sup>256</sup>

#### **4.2.1. Specific components for realisation**

##### **4.2.1.1 Sovereign ownership of the African patrimony**

It takes ownership of natural wealth and resources for socio-economic and cultural development to be achieved. The African Charter establishes the fact that the right to economic, social and cultural development can only be achieved with due regard to the ‘freedom and identity’ of the African peoples.<sup>257</sup> This is a particularly unique formulation that is not common with other instruments that make provision for the right to development. The guarantee of ‘freedom and identity’ confers recognition of human potential in the peoples of Africa to refuse to be seen as ‘backward savages’, as they have been labelled to justify the colonisation theory.<sup>258</sup> Freedom represents a broad range of liberties, which include liberty of mind and thought, liberty of decision-making, liberty of action and liberty of ownership of the African patrimony. Freedom further denotes the liberty to develop human capabilities, of which the African peoples have been deprived for long. Owing to the fact that development injustices in Africa were perpetuated in the form of deprivation of rights and the dispossession of wealth and resources, the right to development originating from this background guarantees the freedom to make development choices and the liberty of action to translate such choices into concrete entitlements.<sup>259</sup>

To acknowledge that the right to development must be achieved with due regard to the freedom and identity of the African peoples articulates the right to self-determination, which the African

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<sup>255</sup> See Amir S Israel’s *Development Cooperation with Africa, Asia and Latin America* (1974) 1.

<sup>256</sup> Okafor (n 118 above) 373.

<sup>257</sup> African Charter (n 103 above) art 22(1).

<sup>258</sup> Watson I *Aboriginal Peoples, Colonialism and International Law: Raw Law* (2015) 5.

<sup>259</sup> Sing’Oei K ‘Engaging the leviathan: National development, corporate globalisation and the Endorois quest to recover their herding grounds’ in Henrard K (ed) *The Interrelation between the Right to Identity of Minorities and their Socio-Economic Participation* (2013) 395; Endorois (n 153 above) para 283.



Charter recognises as an ‘unquestionable and inalienable right’.<sup>260</sup> The capability to exercise the series of liberties as the Charter makes provision for, must be accompanied by the freedom to portray a collective identity as peoples, which forms the eligibility criterion for claiming the right to development. This is embedded in the African construction of collectivism, which situates individual functioning only within the framework of the broader community.<sup>261</sup> It is further emphasised by the fact that the African patrimony is conceived as a ‘common heritage’ from which its peoples are entitled to derive benefits by exercising the right to development.<sup>262</sup> Freedom and identity allow for sovereignty in decision-making with regard to economic, social and cultural development.<sup>263</sup> It qualifies the right to development in terms of peoples’ collective entitlement to self-determine development priorities without subjection to economic coercion or exploitative relationships.<sup>264</sup> Freedom and identity constitute an empowering component of the right to development not only because they guarantee the advancement of capabilities but also because they emphasise the collective nature of that entitlement to the peoples of Africa.<sup>265</sup>

#### 4.2.1.2 Inclusive participation

Unlike in neo-liberal understanding where development is characterised by individualism and the accumulation of wealth,<sup>266</sup> the right to development allows for the inclusive participation of all peoples in the development process.<sup>267</sup> Accordingly, any development initiative that is crafted and super-imposed on the African peoples without their free consent and active participation

<sup>260</sup> African Charter (n 103 above) art 20.

<sup>261</sup> Carson LR ‘“I am because we are”: Collectivism as a foundational characteristic of African American college student identity and academic achievement’ (2009) 12 *Soc Phys Educ* 327.

<sup>262</sup> African Charter (n 103 above) art 22(1) states that: ‘*All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind*’ (emphasis added).

<sup>263</sup> DRtD (n 117 above) art 1(2).

<sup>264</sup> Van der Have N ‘The right to development and state responsibility: Towards idealism without a sense of realism?’ (2011) *LLM Thesis University of Amsterdam* 4.

<sup>265</sup> See *Endorois* (n 153 above) para 157.

<sup>266</sup> Femi OW ‘Adam Smith’s view in *wealth of nations* and how it has led to the growth and consolidation of capitalism’ *Academia.edu* available at: [https://www.academia.edu/4057757/adam\\_smith\\_and\\_capitalism](https://www.academia.edu/4057757/adam_smith_and_capitalism) (accessed: 21 March 2015) 2-3.

<sup>267</sup> African Charter (n 103 above) art 22(1); DRtD (n 117 above) art 1(2).



violates the right to development.<sup>268</sup> Inclusive participation entails a deep-rooted involvement that has an important effect in advancing people's capabilities in the course of creating development.<sup>269</sup> This is relevant in the developmental context in Africa where, in accordance with the right to development, all peoples are assured of active participation in the development process as a matter of right and to share equitably in the benefits deriving from that process.<sup>270</sup>

The theoretical basis for inclusive participation is contained in the African Charter and ancillary instruments such as the Protocol on the Rights of Women in Africa, which provide that the right to development is principally a collective entitlement that allows individuals inclusive participation in exercising the right to well-being.<sup>271</sup> I am of the opinion that although benefits can be enjoyed individually, the right to development makes more sense as a collective entitlement in the sense that greater social justice is attained by extending benefits to a wider number of individuals. As the pioneer instrument to give the right to development hard law status, the African Charter punctured the cliché by which human rights have been regarded solely as individualistic in nature. Following Perry's estimation that participatory processes are crucial to promoting genuinely sustainable forms of development,<sup>272</sup> states are required to encourage popular participation as an important factor for the realisation of the right to development.<sup>273</sup> As a minimum standard, peoples' prior informed consent must be obtained.<sup>274</sup> This is established in the *Endorois* case where the African Commission held that because participation aligns with the right to development, the process must be carried out in good faith to ensure that disadvantaged communities are actively involved.<sup>275</sup>

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<sup>268</sup> See *Endorois* (n 153 above) para 291.

<sup>269</sup> *Endorois* (n 153 above) para 279.

<sup>270</sup> *Endorois* (n 153 above) para 291.

<sup>271</sup> African Charter (n 103 above) art 22(1).

<sup>272</sup> Perry (n 249 above) 76.

<sup>273</sup> DRtD (n 117 above) art 8(2).

<sup>274</sup> *Endorois* (n 153 above) paras 290-291; Kamga S 'The right to development in the African human rights system: The *Endorois* case' (2011) *De Jure* 390.

<sup>275</sup> *Endorois* (n 155 above) paras 281 & 289; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* Comm 155/96(2001) AHRLR 60 (ACHPR 2001) para 54.

### 4.2.1.3 Equality of opportunity

The right to development in Africa provides the opportunity for the enjoyment of well-being by all peoples, which according to Stephen Marks suggests ‘equality of welfare’.<sup>276</sup> The capitalist driven practices of slavery and colonialism deprived the African populations of the opportunity for development.<sup>277</sup> The right to development on the contrary grants rights of access to the opportunities that in principle, guarantees to all the peoples of Africa entitlement to basic needs and as Baxi puts it, the associated notions of conversion of such needs into rights.<sup>278</sup> Equality of opportunity guarantees the right to choose between alternatives, which right embodies the freedom to determine what options to trade off and what development path to pursue.<sup>279</sup> Sengupta explains this by illustrating that the state, for instance, cannot arbitrarily decide where people must live just because it provides housing, but preferably, people must be granted the freedom to choose where to live.<sup>280</sup> If development is understood to mean a commitment to achieve improved human well-being and social equity, which in order words is referred to as ‘sustainable development’, equality of opportunity for development thus entitles present generations to meet their needs without compromising the rights guaranteed to future generations to also meet their own needs.<sup>281</sup>

As part of the duty to ensure the realisation of the right to development, states are required to ensure, *inter alia*, ‘equality of opportunity for all in their access to basic resources, education, health care, food, housing, employment and the equitable distribution of income’.<sup>282</sup> Equality of opportunity envisaged by the right to development also means that all peoples are guaranteed

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<sup>276</sup> Marks SP ‘Obligations to implement the right to development: Political, legal and philosophical rationales’ in Andreassen BA & Marks SP (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 59.

<sup>277</sup> See sects 2.1.1 & 2.1.2 above.

<sup>278</sup> Baxi (n 110 above) 231.

<sup>279</sup> Sengupta 2000 (n 7 above) 8.

<sup>280</sup> Sengupta 2000 (n 7 above) 8; *Endorois* (n 153 above) para 278.

<sup>281</sup> Brundtland GH ‘Report of the World Commission on Environment and Development: Our common future’ (1987) *Brundtland Commission* 27.

<sup>282</sup> DRtD (n 117 above) art 8(1).

equal enjoyment of the benefits of development.<sup>283</sup> The assurance is also contained in the Covenant on Economic, Social and Cultural Rights, which is based on the conviction that ‘the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights’.<sup>284</sup> For Marks, equality of opportunity requires developed countries to act in ways that increase the potential for the realisation of the right to development in developing countries.<sup>285</sup>

#### **4.2.1.4 The role of the state**

From the foregoing analysis, the role of the state is directly invoked to ensure the realisation of the right to development. The African Charter imposes primary responsibility on states parties to ensure the exercise and enjoyment of the right to development either through individual or collective action.<sup>286</sup> It obligates states parties to create the conditions and the enabling environment for the African peoples to engage in the development process and to reap the benefits of doing so. The obligation to take action necessitates the state to take fulfilment, protective and preventive measures in the form of legislation, development policies, and human rights guarantees (especially including the range of economic, social and cultural rights) and to put in place implementation and enforcement mechanisms to ensure that the right to development translates into improved well-being for the peoples.<sup>287</sup> The role of the state is thus one of agency in coordinating different constituencies of peoples to make development choices from a variety of options to ensure the realisation of the right to development. It implies that the state has the duty to create a scenario in which national development policies are designed to allow equal opportunity for the range of collectives that the state is composed of, to make their own socio-economic and cultural choices.<sup>288</sup>

<sup>283</sup> DRtD (n 117 above) arts 1(1) & 6(2); Vienna Declaration (n 98 above) para I(10).

<sup>284</sup> ICESCR (n 2 above) preamble.

<sup>285</sup> Marks 2006 (n 276 above) 60.

<sup>286</sup> African Charter (n 103 above) art 22(2).

<sup>287</sup> See DRtD (n 117 above) arts 3(1) & 2(3).

<sup>288</sup> The women of Africa are guaranteed the right to sustainable development alongside the range of other human rights under the Protocol on the Rights of Women (art 19), while indigenous peoples are guaranteed special protection under the UN Declaration on the Rights of Indigenous Peoples, which makes provision for

The right to development does not only involve action at national level but also at international level through cooperation. Thus, in addition to their domestic obligations, African states are further required to cooperate in order to ensure that the right to development is achieved. However, this does not provide an escape route for African countries to relinquish their sovereign obligation on the right to development and become relegated to the subordinate position of recipients of good-will donations from developed countries. Development prospects in Africa have for long been frustrated through the imperialistic interests of industrialised countries, which continue to exert a dominant influence in shaping international development policies through the globalisation agenda. As Okafor has pointed out, the African Charter does not make provision for how states parties may deal with the exploitative behaviour of foreign stakeholders, which poses a challenge to the possibility of holding these actors accountable.<sup>289</sup>

The responsibility for creating development in Africa lies first and foremost with African states.<sup>290</sup> Exposed to international cooperation, the extent to which African states may exercise full control over the right to development becomes questionable in the context where development cooperation allows developed countries only the moral responsibility *to assist* without necessarily any legal obligation to be accountable for wrongful action.<sup>291</sup> Thus, I contend that the right to development can only be achieved through cooperation when partner states assume mutual obligations for accountability. As Sengupta has emphasised, state responsibility to ensure the realisation of the right to development is not diminished by the absence of international cooperation.<sup>292</sup> The primary role of African states within the framework of development cooperation can, therefore, not be circumscribed. Without international cooperation

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indigenous peoples' right 'to determine and develop priorities and strategies for exercising their right to development' (art 23).

<sup>289</sup> Okafor 2008 (n 140 above) 61-62.

<sup>290</sup> Dąbrowska (n 4 above) 9.

<sup>291</sup> DRtD (n 117 above) art 4(2).

<sup>292</sup> Sengupta 2002 (n 166 above) 877.

African states retain the obligation of action, the essence of which is not to become passive recipients of foreign aid but to make conditions favourable for development to take place.<sup>293</sup>

#### **4.2.2. Right to development goals**

The question relating to what the right to development aims to achieve is relevant not only in justifying its existence but also in shaping critical thinking about its realisation through the mechanism of development cooperation. The unique formulation of the right to development in Africa both as a human right and as a development paradigm suggests a quest to address in a holistic manner issues of justice and equity within a legal framework, which I describe as a ‘right to development dispensation’ on the basis of the range of moral and legal commitments undertaken in this regard.<sup>294</sup> This integrated process, which is required to be rights-based and people-centred, must ensure that the achievement of the full range of human rights adds up to the enjoyment of well-being and amelioration of the human condition.<sup>295</sup> To this end, I argue that the right to development aims at achieving two principal goals, namely, justice in development and substantive development in the form of improved livelihood, which I proceed to explain.

##### **4.2.2.1 Justice in development**

Under-development in Africa is portrayed by extreme levels of poverty amidst an immeasurable wealth of natural resources.<sup>296</sup> From a ‘functionalist’ understanding of poverty,<sup>297</sup> the solution is envisaged to entail cooperation between states in order to accelerate ‘comprehensive development’ in poor countries.<sup>298</sup> The functionalist perception ignores the fact that poverty in Africa originates from historical disadvantage, which from a ‘dialectical’ point of view is perceived as injustice rather than as a developmental problem.<sup>299</sup> In this instance, a redress of the situation requires ‘not development’ as Brand *et al* argue, ‘but rather liberation from the [...]

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<sup>293</sup> Skogly SI ‘Global responsibility for human rights’ (2009) 29:4 *Oxf J Leg Stud* 838.

<sup>294</sup> See sect 2.1 of chapter four & 2.1 of chapter five.

<sup>295</sup> Sengupta 2002 (n 166 above) 846.

<sup>296</sup> Suhfree (n 1 above) 102-106.

<sup>297</sup> Brand *et al* (n 244 above) 275.

<sup>298</sup> DRtD (n 117 above) art 4(2).

<sup>299</sup> Brand *et al* (n 244 above) 275.

structures' that subjugate the poor.<sup>300</sup> Accordingly, they envisage not just an approach in dealing with poverty that focuses solely on legal strategy but importantly, an approach that takes into account a politicised account of justice.<sup>301</sup> The understanding of poverty in Africa as injustice demands a political commitment to ensure equitable opportunities as a legal entitlement to advance the capabilities of the peoples of Africa. As part of that political commitment, the leaders of Africa have recognised that development on the continent is threatened by external interferences,<sup>302</sup> consequently requiring a legal framework to regulate the situation.

However, the *corpus* of international law, which aims partly at the duty to cooperate for development,<sup>303</sup> has become the dominant paradigm that has been employed in global development frameworks such as the MDGs and the Sustainable Development Goals (SDGs) among others. The norms that form the core content of international development are identified to include the principle of cooperation for global welfare, the principle of deferential treatment for developing countries, and the principle of entitlement of developing countries to development assistance.<sup>304</sup> The inference is that international development law envisages only positive moral obligations, which is problematic. If international development law aims at eliminating inequalities in international economic relations to the benefit of developing countries,<sup>305</sup> I argue that without emphasis on the aspect of justice, it certainly does not guarantee fairness, particularly to Africa where development injustices are perpetuated with impunity. Accordingly, Kwakwa has rightly cautioned that international law must be viewed with scepticism because its application engenders a *status quo* that does not sufficiently protect developing countries.<sup>306</sup>

The connection between justice and development has been made clear by the UN General Assembly when it emphasised that global development should be established 'on the basis of

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<sup>300</sup> Brand *et al* (n 244 above) 276.

<sup>301</sup> Brand *et al* (n 244 above) 277.

<sup>302</sup> African Union Commission 'Agenda 2063: The Africa we Want' (2015) *African Union* para 59.

<sup>303</sup> Kwakwa (n 104 above) 435.

<sup>304</sup> Kwakwa (n 104 above) 436.

<sup>305</sup> Kwakwa (n 104 above) 453.

<sup>306</sup> Kwakwa (n 104 above) 453.

justice, equality and mutual benefit'.<sup>307</sup> The right to development in Africa does not only impose a positive obligation for collective action for its realisation,<sup>308</sup> but also imposes a negative obligation for its protection.<sup>309</sup> The principles of cooperation and justice must be mutually reinforcing through appropriate legislative and other measures to ensure adequate protection of the right to development, in which case, when a violation is alleged, access to a remedy must be guaranteed. The negative obligation to respect the right to development and consequently to protect it from violation is not only a question of principle but one of legal practice as illustrated by a number of instances of right to development litigation in Africa.<sup>310</sup>

Ultimately, the right to development requires that development must be determined by considerations for equity and justice,<sup>311</sup> without which efforts towards the achievement of substantive development may remain in vain. To the extent that slavery and colonialism could be considered as crimes against humanity, the ethics of equity and justice necessitate redress of some kind.<sup>312</sup> To proponents of development cooperation, the provision of development assistance is envisaged to constitute some form of redistributive or restorative justice.<sup>313</sup> I take a sceptical view of this, with the argument that the context demands more of 'liberation' and 'preventive' justice, which I elucidate on in chapter four.<sup>314</sup>

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<sup>307</sup> Preparation for an International Development Strategy for the Third United Nations Development Decade, GA Res 33/193 UN GAOR Supp (No 45) at 121 UN Doc A/33/45 (1979); Kwakwa (n 104 above) 449-450.

<sup>308</sup> African Charter (n 103 above) art 22(2).

<sup>309</sup> The principle of justice in development is embedded in the formulation of the right to development within the framework of international law as a human rights concept. Article 3(2) of the DRtD stipulates that the 'realization of the right to development requires full respect for the principles of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations'.

<sup>310</sup> *Endorois* (n 153 above); *Darfur* (n 152 above); *DRC* (n 150 above), *SERAC* (n 275 above); *Kevin Gunme* (n 138 above).

<sup>311</sup> Sengupta A 'Conceptualizing the right to development for the Twenty-First Century' in UN Human Rights *Realizing the Right to Development* (2013) 69; Oduwole (n 200 above) 19.

<sup>312</sup> See Mamdani (n 131 above) 56-57.

<sup>313</sup> Tomasevski K *Development Aid and Human Rights: A Study for the Danish Centre for Human Rights* (1989) 48.

<sup>314</sup> See generally sect 3 of chapter four.

#### 4.2.2.2 Substantive development

The philosophy behind the right to development is that development of any kind would not be meaningful if it does not result in human well-being. To this end, the right to development as it is entrenched in African human rights treaties and domestic legislation makes provision for entitlement to socio-economic and cultural development.<sup>315</sup> It suggests a claim for access to opportunities that guarantee substantive development, which by indication is constrained by the global systems that are designed to limit the potential of the African peoples. By substantive development I refer to the tangible and non-tangible entitlements which derive from exercising the right to development. The tangible entitlements include material things such as, for example, educational facilities for the dissemination of knowledge and skills, health facilities for dispensing health care, and land for productive use to ensure the provision of survival needs such as food, water and shelter. Material entitlements usually do not automatically translate into improved livelihood, which is the reason why the African Charter obligates the peoples of Africa to exercise the right to development, obviously by taking action to ensure that the guarantees of socio-economic and cultural development are converted into entitlements of well-being and improvement in standards of living.<sup>316</sup>

The achievement of substantive development requires positive action, usually through domestic political processes and according to the requirement of the African Charter, through collective action. After over five decades since most of Africa became independent, and in spite of the volume of assistance that the rest of the international community has sent to Africa, it seems substantive development has yet not been achieved as the majority of African countries have remained under the classification of the least developed in the world.<sup>317</sup> For this reason, I argue that owing to global imbalances, the achievement of substantive development and by inference the realisation of the right to development in Africa depends largely on the extent to which the

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<sup>315</sup> The African Charter does not make provision for peoples' right to political development. The Youth Charter however, does stipulate that the youths of Africa, besides their entitlement to socio-economic and cultural development are also entitled to the right to political development.

<sup>316</sup> See Sengupta 2004 (n 165 above) 184.

<sup>317</sup> Nielsen L 'Classifications of countries based on their level of development: How it is done and how it could be done' (2011) *IMF Working Paper WP/11/31* 20-23.



development process is defined by justice and equity. The Declaration on the Right to Development takes cognisance of this fact by stating that the ‘existence of serious obstacles to development’ persists as a result of the denial of human rights.<sup>318</sup> In accordance, UN Secretary General Ban Ki-Moon emphasised the need to incorporate the element of justice as a prerequisite for delivering on the post-2015 sustainable development agenda.<sup>319</sup> The right to development requires the peoples of Africa to strive not only for substantive development, but importantly for justice in development in order to ensure equitable access to opportunities for development.<sup>320</sup>

## 5. Concluding Remarks

By way of conclusion, it is important to recall that Africa has not only had a complicated development history – the development challenges that it continues to experience have for several decades elevated the continent into the spotlight of international development discourse and the politics of development assistance, which in relation to the formulation of the right to development in Africa is questionable. Owing to the complexity with regard to the proper understanding of the right to development, I endeavoured to bring clarity to the subject by exploring the historical events that gave birth to the right to development, which as I illustrated, originated from Africa. On this basis I proceeded to explain what the right to development in Africa actually aims to achieve.

Importantly, I demonstrate that, rooted in a distressful history characterised by material dispossession of wealth and resources, deprivation of human rights and denial of the productive capacity for development, the right to development aims to achieve two fundamental goals,

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<sup>318</sup> DRtD (n 117 above) preamble para 10.

<sup>319</sup> UN General Assembly ‘The road to dignity by 2030: Ending poverty, transforming all lives and protecting the planet’ Synthesis report of the Secretary General on the Post-2015 Sustainable Development Agenda 4 December 2014 para 77-79.

<sup>320</sup> DRtD (n 117 above) art 5: ‘States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination’.

namely, justice in development and substantive development.<sup>321</sup> Although the extent to which Africa would have achieved these goals if not for the historical injustices as pointed out in this chapter cannot be stated with precision,<sup>322</sup> asserting the right to development suggests that the continent would not have remained underdeveloped but for the legacy of injustices created by several decades of subjugation. Because of the development injustices perpetuated through the globalisation agenda, I noted that the aspiration for substantive development is largely contingent on a legal framework to ensure that development is achieved with justice and equity.

However, questions relating to the realisation of the right to development in Africa remain complex for a number of reasons, which directly translate into operational difficulties. Without sufficient clarity on the purpose of the right to development, it is inconceivable that modalities for its implementation would become clear and straightforward. The insufficiencies that necessitated the adoption of the African Charter in 1981 and subsequently the Constitutive Act of the African Union in 2001 to replace the OAU Charter, which largely favoured development cooperation, underscored the need for a shift from dependency-based development thinking to envisaging development more in terms of self-determination and self-sufficiency as highlighted in Agenda 2063.<sup>323</sup> However, despite Sengupta's designation of the right to development as a rights-based process that entails equity and justice,<sup>324</sup> Mekuria Fikre posits that the process will not be complete without situating the role of development cooperation.<sup>325</sup> To substantiate my preceding argument in favour of pursuing the right to development as a remedy mechanism to the Africa's development challenges, resulting from the absence of an established development model for the continent, I move on to explore the mechanism of development cooperation in the next chapter to determine to what extent it can ensure the realisation of the right to development.

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<sup>321</sup> See sect 4.2.2 above.

<sup>322</sup> See sect 2.1.1 & 2.1.2 above.

<sup>323</sup> African Union Commission (n 302 above) para 19.

<sup>324</sup> Sengupta 2002 (n 166 above) 846.

<sup>325</sup> Fikre BM 'The politics underpinning the non-realisation of the right to development' (2011) 5:2 *Mizan L Rev* 256.

## CHAPTER THREE

### **The Right to Development in Africa and the Geopolitics of Development Cooperation**

*We, heads of State and Government ... are committed to making the right to development a reality for everyone and to freeing the entire human race from want. We resolve therefore to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty.*

Millennium Declaration A/RES/55/2, 2000 para III(11) & (12).

#### **1. Introduction**

One of the main arguments that I make in this chapter is that owing to the paternalistic nature of development cooperation, which runs counter to the concept of the right to development in Africa, the discourse on human rights and development in Africa ought to focus more on advancing the right to development as an alternative to development cooperation. I refer to development cooperation as paternalistic in the sense that it is constructed on the preconception that developing countries ought to be helped to develop, even at the expense of their entitlement to self-determination and the freedom to make their own development choices. This argument builds on the analysis in the previous chapter where I demonstrate how the right to development originated in Africa as an expression of socio-economic and cultural self-determination rather than a solicitation for development assistance. In this way, I show that the right to development is in effect a development paradigm and therefore, a potential remedy to Africa's development challenges. This is reflected in the two-fold purpose that the right to development in Africa sets out to achieve: First, to create the context for justice in development to prevail and secondly, to ensure that well-being and an improved standard of living for the peoples of Africa is achieved.

Building on that argument, I proceed in this chapter to dispute the fact that the right to development is achievable through development cooperation as envisaged under international law as well as human rights and development scholarship. On the basis of this argument I

reiterate the need, if Africa is to advance beyond prevailing circumstances, to move away from paradigms that promote dependency on development cooperation towards greater focus on the right to development as a development model for the continent.

The enquiry draws on the fact that international law demands recourse to development cooperation as a means to resolving, among others, problems of an economic, social and cultural nature and for promoting and encouraging respect for human rights and fundamental freedoms.<sup>1</sup> In this regard, many scholars estimate that development cooperation provides a platform on which to negotiate how the right to development is to be achieved.<sup>2</sup> To determine whether the right to development is achievable through development cooperation necessitates a proper analysis of how development cooperation could as a means and as a process enable the attainment of the outcomes that the right to development anticipates. The question that might not have been considered is the adverse impact resulting from the actions of foreign stakeholders within the development cooperation framework on the realisation of the right to development in Africa. With regards to the discussion in this chapter, I outline in chapter 4, the range of legal instruments that define the right to development dispensation, which in effect obligates states parties to individually or collectively prioritise the right to development in Africa.

Africa may and has often been blamed for its own ‘backwardness’ but the fact that the right to development emerged from the African continent indicates that the peoples have been able to identify where the problem is situated. The angle from which that problem is conceived determines the extent to which strategies may be formulated to try and fix it. According to

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<sup>1</sup> Charter of the United Nations adopted in San Francisco on 26 June 1945 art 1(3).

<sup>2</sup> De Feyter K ‘Towards a framework convention on the right to development’ (2013) *Friedrich Ebert Stiftung* 17; Salomon ME ‘Legal cosmopolitanism and the normative contribution of the right to development’ in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 17; Sengupta A ‘Development cooperation and the right to development’ (2003) *Copyright © 2003 Arjun Sengupta* 20; Sengupta A ‘On the theory and practice of the right to development’ (2002) 24:4 *HRQ* 880; Hausermann J ‘A human rights approach to development: Some practical implications for WaterAid’s work’ (1999) *Rights & Humanity* 5; Bedjaoui M ‘The right to development’ in Bedjaoui M (ed) *International Law: Achievements and Prospects* (1991) 1178; Siitonen L ‘Political theories of development cooperation: A study of theories of international cooperation’ (1990) *UN University WIDER – Working Paper* 86 15-16.

Charles Gore, the concept of development is multidimensional, which therefore implicates the way it can be understood.<sup>3</sup> There are good commentaries that present an optimistic and sometimes romanticised account of development in Africa in terms of impressive economic growth rates, emerging economies and opportunities for investment.<sup>4</sup> However, in this thesis, I choose to problematise the notion of development in Africa. The reason is to be able to advance my argument against development cooperation as an envisaged mechanism for the realisation of the right to development in Africa principally because Africa's development challenges are either generated or amplified by the lop-sided global arrangement.

Theoretically, it is estimated that the global imbalances that tilt unfavourably towards Africa could be redressed through advancing the right to development. The intricacy follows from the way collaboration with Africa is envisaged. For instance, whereas South-south partners such as China, India and Brazil see cooperation with Africa more in terms of mutual collaboration for collective advancement, developed countries, particularly those within the Organisation for Economic Cooperation and Development (OECD), see Africa rather as facing a problem of economic growth and thus place emphasis on the provision of development assistance as a solution to the problem.<sup>5</sup> In accordance with this perception, the Declaration on the Right to Development is formulated to ensure that sustained action is made available, which practically translates into the provision of development assistance to enable developing countries to advance in a comprehensive manner.<sup>6</sup> With the anticipation to achieve some form of redistributive justice,

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<sup>3</sup> Gore C 'The new development cooperation landscape: Actors, approaches, architecture' (2013) 25 *J Int'l Dev't* 772.

<sup>4</sup> See The Economist 'Development in Africa: Growth and other good things' (2013) available at: <http://www.economist.com/blogs/baobab/2013/05/development-africa> (accessed: 10 June 2015); UNCTAD *Economic Growth in Africa Report 2014: Catalysing Investment for Transformative Growth in Africa* (2014) United Nations Publication; African Development Bank *Africa Development Report 2014: Regional Integration for Inclusive Growth* (2014) African Development Bank.

<sup>5</sup> Gore (n 3 above) 772.

<sup>6</sup> Declaration on the Right to Development adopted by the Gen Ass Res 41/128 on 4 December 1986 art 4(2).

Kirchmeier notes that the promise of development assistance has caused an aid-dependency syndrome and therefore challenges the African conception of the right to development.<sup>7</sup>

If development assistance, which is promised and made available through cooperation, constitutes the reason for asserting the right to development in Africa, it would have featured in the instruments that enshrine such a right. I also assume that if development cooperation has the potential to ensure the realisation of the right to development, it would by every indication contribute to redressing development injustices and improving human well-being through, for example, the eradication of poverty and the advancement of human rights in Africa. While development cooperation as envisaged for the realisation of the right to development seems unproblematic, I take for granted that it may not always turn out as promising as envisaged. Many developed countries, which according to the development cooperation understanding are expected to make provision for development assistance are apprehensive of any legal obligations stemming from the right to development, which is propagated principally by developing countries.<sup>8</sup> In exploring these issues, I subject the theoretical and practical dimensions of development cooperation to critical examination.

The chapter is structured as follows: In section 2, I examine the cooperation framework for development as a mechanism for the realisation of the right to development in Africa. In this regard, I explore the origins (2.1) and the basic features of development cooperation (2.2) as well the nature of two seemingly opposing cooperation patterns (2.3) to the effect that development cooperation is design not necessarily with the aim to achieve the right to development. In section 3, I try to relate development cooperation with the right to development by looking at the connection that may exist (3.1), the actual geopolitics that informs development cooperation (3.2) and the circumstances that constrain the realisation of the right to development through cooperation owing to the persistent sabotage of Africa's development prospects by foreign stakeholders (3.3). I go further in section 4 to examine the right to development in Africa in

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<sup>7</sup> See Kirchmeier F 'The right to development—where do we stand?: State of the debate on the right to development' (2006) *Friedrich Ebert Stiftung – Occasional Paper No 23* 14.

<sup>8</sup> See for example Kirchmeier (n 7 above) 13-14.

terms of the recommended modalities for its realisation in (4.1) and the context for implementation in (4.2). I then conclude in section 5 with a summary of the principal arguments.

## **2. Cooperation Framework for Development**

In this section, I examine the mechanism of development cooperation with the purpose to determine its potential as an envisaged mechanism for the realisation of the right to development and to establish whether there is in effect a causal connection between development cooperation and the right to development. Owing to the fact that the right to development in Africa is established by law to remedy development injustices and consequently lead to improved well-being, background knowledge on development cooperation as well as its status in law might help to illustrate to what extent it could contribute to achieving the intended purpose.

### **2.1. Origins of Development Cooperation**

#### **2.1.1. Brief historical account**

Knowledge on the background to development cooperation is intended to illustrate the fact that the post-colonial relationship that has been forged between Africa and foreign stakeholders and in most instances former colonial masters, leaves room to question what development cooperation actually aims to achieve. Drawing from the discussion in the previous chapter on how imperialist practices helped to destabilise Africa, it is worth noting that the post-Second World War global arrangement established a framework for collaboration that was primarily designed to advance the colonial agenda. The history of development cooperation dates back to around 1944 with the creation of institutional frameworks for cooperation,<sup>9</sup> probably in anticipation of decolonisation.<sup>10</sup> The UN Charter subsequently established the legal basis that set the development cooperation framework into motion. Development cooperation as envisaged by

<sup>9</sup> Führer H 'The story of official development assistance: A history of the Development Assistance Committee and the Development Cooperation Directorate in dates, names and figures' (1996) *OECD* 4-5.

<sup>10</sup> Jordan S (tr) 'Cooperation: New players in Africa' (2010) 1 *Int'l Dev't Pol* 95-113. By the time the institutional frameworks for cooperation were established, colonised territories had not yet gained independence and so exercised no autonomy to get involved in international development politics.

the UN Charter to deal with global problems might have been well intended but because of Cold War politics, the 1960s experienced a radical redesigning of the meaning of cooperation to respond to western capitalist ideologies of domination and profit maximisation.<sup>11</sup> As a result, the decolonised countries of the third world that regrouped as the Non-Aligned Movement became the target for development aid from the United States (US)-led capitalist bloc.<sup>12</sup> As Bartenev and Glazunova rightly indicate, the intentions of the US was not based on any genuine interest for cooperation on the basis of equitable partnership but as a Cold War strategy to win more allies as a means to overpower the communist bloc led by the Soviet Union.<sup>13</sup> The same is true for the Soviet Union.

The development aid bait used by the capitalist bloc became widespread following the establishment of aid agencies such as the US Agency for International Development (USAID), the American Peace Corps, and the Alliance for Progress, which brought US presence in almost every developing country around the world.<sup>14</sup> The designation of the 1960s as the UN Development Decade saw the creation of an unprecedented number of cooperation agencies,<sup>15</sup> financial institutions, multinational corporations and a host of others to represent and to promote the colonial, diplomatic and economic interests of the countries that established them. Accordingly, because these foreign stakeholders are mandated or regulated by their respective states, they take on accompanying legal obligations under international law, as do the countries

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<sup>11</sup> See [http://www.isc.niigata-u.ac.jp/~miyatah/oda/oda\\_top.htm](http://www.isc.niigata-u.ac.jp/~miyatah/oda/oda_top.htm) 'In 1960 the OECD set up the Development Assistance Group (DAG) as a forum for consultations among aid donors on assistance to less-developed countries. In the following year, it was reconstituted as the Development Assistance Committee (DAC)'. On the other hand, in 1961, the UN General Assembly designated the 1960s as the UN Development Decade 'in which Member States and their peoples will intensify their efforts to mobilize and to sustain support for the measures, required on the part of both developed and developing countries to accelerate progress towards self-sustaining growth of the economy of the individual nations and their social advancement so as to attain in each under-developed country a substantial increase in the rate of growth'.

<sup>12</sup> Bartenev I & Glazunova E *International Development Cooperation: Set of Lectures* (2013) 22.

<sup>13</sup> Bartenev & Glazunova (n 12 above) 22.

<sup>14</sup> Berg R & Gordon DF (eds) *Cooperation for International Development: The United States and the Third World in the 1990s* (1989) 1.

<sup>15</sup> 'Development cooperation' available at: [http://www.isc.niigata-u.ac.jp/~miyatah/oda/oda\\_top.htm](http://www.isc.niigata-u.ac.jp/~miyatah/oda/oda_top.htm) (accessed: 28 May 2015).



that they represent.<sup>16</sup> However, by 1969 the concept of development cooperation had undergone a corrupt modification to mean the allocation of ‘official development assistance’ to developing countries under the auspices of the OECD, with the Development Assistance Committee (DAC) as the coordinating mechanism.<sup>17</sup> By so doing the OECD-DAC cooperation architects skilfully removed the legal obligations attributed by international law, leaving the cooperation framework to operate on the basis of charity. It is within this framework that the bonds between former colonial masters as donors and the former African colonies as recipients of development assistance became established.<sup>18</sup> This calls into question the proper meaning of development cooperation, especially when juxtaposed with the right to development in Africa.

### **2.1.2. Definitional problem**

The discussion in this section is intended to establish the fact that the concept of development cooperation poses a definitional problem, which has misleadingly been normalised as standard practice according to which the right to development is envisaged to be achieved. If the right to development is to be achieved through development cooperation, both concepts need to be seen from the same perspective. However, drawing in particular from the background discussion above, development cooperation can be said to be capitalist driven while the right to development is more socialist in orientation. Most leading international development agencies programme their cooperation arrangements in line with the OECD-DAC model, which prioritises development assistance as a modality for cooperation.<sup>19</sup> This is problematic in the sense that development cooperation is supposed to aim at creating a global enabling environment for

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<sup>16</sup> See Augenstein D ‘State responsibilities to regulate and adjudicate corporate activities under the European Convention on Human Rights’ (2011) *Submission to the Special Representative of the UN Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* 5-6.

<sup>17</sup> Rich R ‘The right to development: A right of peoples?’ in Crawford J (ed) *The Rights of Peoples* (1988) 49-50.

<sup>18</sup> Dann P *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (2013) 135.

<sup>19</sup> See for example Rijksolvereid ‘Interministerial policy review: Towards a new definition of development cooperation considerations on ODA’ (2013) 10. Within the context of the ODA definition, the Netherlands’ development cooperation policy considers that the aim of development cooperation is to promote economic development and prosperity, focusing particularly on poverty reduction.

balanced development to take place. However, the focus has been more on development assistance, which represents just an aspect of the broader concept of development cooperation.<sup>20</sup> More light is shed on this in the discussion on the operational modalities for cooperation below.<sup>21</sup>

Development cooperation derives from the broad concept of international cooperation, which embodies many dimensions.<sup>22</sup> In the context of this thesis, development cooperation should be understood to refer to the specific aspects of international cooperation that deals with economic, social and cultural development.<sup>23</sup> It is worth highlighting that the concept of development cooperation as originally envisaged by the UN Charter, existed long before the emergence of the right to development. The reason why the two concepts have become yoked together suggests, at least in principle the common purpose to promote human rights and to deal with problems of an economic, social and cultural nature. However, this bonding has been severed as a result of the fact that development cooperation has lost its original meaning. Although development cooperation is supposed to be driven by the principle of sovereign equality of states, it has instead largely become subjected to the discretion of donor countries.<sup>24</sup>

Consequently, in the course of developed countries providing assistance according to the contemporary understanding of development cooperation, most African countries have been

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<sup>20</sup> See Tinbergen J 'Alternative forms of international co-operation: Comparing their efficiency' (1978) 30:2 *Int'l Soc Sc J* 224-225. Tinbergen identifies aspects that make up sound international cooperation to include; participation in decision making and/or policy formulation, mutual exchange of information, review and appraisal of programmes for execution, non compulsory mediation, compulsory arbitration, application of sanctions and a legal framework for cooperation that must be charter-based.

<sup>21</sup> See sect 2.2.2 (2.2.2.1 & 2.2.2.2) below.

<sup>22</sup> Esteves P & Assunção M 'South-South cooperation and the international development battlefield: Between the OECD and the UN' (2014) 35:10 *Third World Quarterly* 1776; IOM 'International cooperation' available at: [http://www.rcmvs.org/documentos/IOM\\_EMM/v1/V1S07\\_CM.pdf](http://www.rcmvs.org/documentos/IOM_EMM/v1/V1S07_CM.pdf) (accessed: 26 May 2015) 9-17. The areas of development cooperation include among others technical, economic, security, climate, migration and military cooperation.

<sup>23</sup> UN Charter (n 1 above) art 1(3); DRtD (n 6 above) art 2.

<sup>24</sup> Janus H, Klingebiel S & Mahn T 'How to shape development cooperation?: The global partnership and the development cooperation forum' (2014) *German Development Institute – Briefing Paper* 3 1; Gore (n 3 above) 770.

rendered dependent – in contradiction to the international law principle that recognises the sovereign equality of states;<sup>25</sup> in contradiction to the African Charter provision that prohibits external domination;<sup>26</sup> and therefore also in contradiction to the right to development. If the right to development aims at achieving justice and equity in development for the ultimate realisation of human well-being and an improved standard of living,<sup>27</sup> as a causal principle development cooperation should invariably lead to the same outcome. Theoretically, it means that in the absence of the causal factor, the consequential factor is bound to suffer setbacks, giving the impression that development cooperation is inevitable for the realisation of the right to development. On the contrary, it may not be so, especially when the right to development and development cooperation are juxtaposed in terms of their conceptual formulation.

Literally, development cooperation could be defined as the act of states working together to achieve a common development purpose. In this context, the element of ‘working together’ would be understood to respond to the principle of sovereign equality of states, while the component of ‘common development purpose’ may be said to represent the range of economic, social and cultural problems that need to be addressed. This entails a scenario for collective action where cooperating partners are capable of adjusting their actions and behaviours to the actual or anticipated preferences of other states.<sup>28</sup> On the basis of this definition it is necessary to explore the motives behind development.

## **2.2. Basic Features of Development Cooperation**

### **2.2.1. Motives behind development cooperation**

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<sup>25</sup> UN Charter (n 1 above) art 2(1). States may not have the same economic power but in terms of treaty recognition every state is guaranteed the right to sovereign equality, which must be respected.

<sup>26</sup> African Charter on Human and Peoples’ Right adopted in Nairobi on 27 June 27 1981 art 19.

<sup>27</sup> UN Charter (n 1 above) art 55; DRtD (n 6 above) art 2; International Covenant on Economic, Social and Cultural Rights adopted by Gen Ass Res 2200A (XXI) of 16 December 1966 art 11.

<sup>28</sup> Paulo S ‘International cooperation and development: A conceptual overview’ (2014) *German Development Institute* 3; Axelrod R & Keohane RO ‘Achieving cooperation under anarchy: Strategies and institutions’ (1985) 38:1 *World Politics* 226.

In analysing the motives behind development cooperation my aim is to illustrate that development cooperation is not designed to achieve the right to development. The purpose for which countries engage in development cooperation is characterised by a diversity of interests and objectives,<sup>29</sup> which have constantly changed over time.<sup>30</sup> Degnbol-Martinussen and Engberg-Pedersen identify four primary motives for giving and receiving development assistance involving moral and humanitarian considerations, political and national security concerns, economic and trade motivations as well as environmental considerations.<sup>31</sup> Of these motives, which are categorised in accordance with the parameters established by some key development cooperation actors, the one that relates closest to the issues embodied in the right to development in Africa is cooperation that is based on moral and humanitarian considerations. However, as Maria Anderssen notes, ‘Western powers have always been very clear that foreign aid to former colonies is not compensation for the violations and damages that colonialism imposed’.<sup>32</sup>

Apparently, development cooperation is portrayed as intended to support developing countries through economic, financial and technical assistance and by adapting this assistance to the requirements of recipient countries.<sup>33</sup> However, as will be illustrated later, purely moral and humanitarian motives are uncommon in prevailing development cooperation patterns mainly because they are often overridden by the ‘enlightened self-interest’ of donor countries.<sup>34</sup> This is generally informed by the dominant priority to promote their ‘economic and commercial interests, including continuous access to natural resources, raw materials, and markets in the former colonies’.<sup>35</sup> According to Berthélemy, the motive for giving aid is primarily commercial, in terms of which target countries for cooperation are often selected from the perspective of the

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<sup>29</sup> Hynes W & Scott S ‘The evolution of Official Development Assistance: Achievements, criticisms and a way forward’ (2013) *OECD* 2.

<sup>30</sup> Anderssen M ‘Motives behind the allocation of aid: A case study regarding Swedish motives for aid allocation’ (2009) *Master Essay in Political Science Goteborg Universitet* 8.

<sup>31</sup> Degnbol-Martinussen J & Engberg-Pedersen P *Aid: Understanding International Development Cooperation* (2005) 7-24; Anderssen (n 30 above) 9.

<sup>32</sup> Anderssen (n 30 above) 9.

<sup>33</sup> Hynes & Scott (n 29 above) 3.

<sup>34</sup> Degnbol-Martinussen & Engberg-Pedersen (n 31 above) 10.

<sup>35</sup> Degnbol-Martinussen & Engberg-Pedersen (n 31 above) 9.

potential for trade.<sup>36</sup> This mercantile motive often has a short-term strategy of first identifying and seizing market opportunities in the cooperating country and in the longer term to gain and expand trade and investment opportunities.<sup>37</sup> Unfortunately, the underlying commercial and trade interests behind development cooperation are never actually in Africa's favour. The motives that inform states' actions in their international transactions determine the operational modalities for cooperation. I will look at two of the operational modalities to determine the underlining reasons for development cooperation.

### **2.2.2. Operational modalities**

In this section, I examine two operational modalities namely, development assistance and development partnership employed by the different cooperation patterns with the aim to determine to what extent they could ensure the realisation of the right to development in Africa. There are two reasons for making this distinction. The first stems from concerns relating to the effectiveness of development assistance in dealing with the challenges that impact adversely on developing countries.<sup>38</sup> Although development assistance is commonly understood as intended to accelerate progress in developing countries as stated in article 4(2) of the Declaration on the right to development, the reality is that it instead creates a situation where developing countries remain dependent on those that provide the assistance. The second builds on the fact that the idea of partnership has loosely been used synonymously with the concept of development cooperation.<sup>39</sup> Article 55 of the UN Charter for instance, underscores the idea of partnership, which must be based on the principles of sovereign equality and self-determination of states. In contrast, development cooperation is often established on the premise of dominance of the giving state over the receiving state and therefore, cannot be said to qualify as partnership. In this section, I provide an overview of these two modalities with the aim to illustrate to what extent they could contribute to the realisation of the right to development in Africa.

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<sup>36</sup> Berthélemy J-C 'Aid allocation: Comparing donors' behaviours' (2006) 13 *Swed Eco Pol Rev* 75-109.

<sup>37</sup> Anderssen (n 30 above) 9.

<sup>38</sup> Bailey F & Dolan AM 'The meaning of partnership in development: Lessons for development education' (2011) 13 *Policy & Practice: A Development Education Review* 30-31.

<sup>39</sup> Bailey & Golan (n 38 above) 30.

### 2.2.2.1 Development partnership

Not to confuse it with other forms of partnership, the discussion in this section is specifically related to development cooperation of a genuinely mutual nature between two or more actors for the purpose of creating the opportunity for socio-economic and cultural development to take place. For the reason that the law prohibits domination by one state over another, the term partnership, because it sounds more appealing has been used quite frequently as ‘a subtle form of external power imposition’.<sup>40</sup> This is illustrated in the way developed countries conceptualise partnership to entail ensuring ‘aid effectiveness, the reduction of corruption, and the provision of assistance rather than mutual benefits and reciprocity’.<sup>41</sup>

There is a fundamental legal justification why it is important to focus on development partnership as an operational modality to ensure that the right to development may be achieved in the process. When development cooperation is established on the basis of partnership, it allows legal norms to become applicable, requiring cooperating partners to honour their commitments. The rationale for engaging in development partnership from a development point of view is to leverage the achievement of substantive development and from a legal point of view, to ensure justice and equity in the development process.<sup>42</sup> Genuine partnership for development is thus associated with and defined by the following characteristic principles: sustainable commitment, a common goal and shared responsibilities, reciprocal obligations, equality and mutual respect, transparency and accountability, joint decision making, and most importantly symmetry in power relations.<sup>43</sup> In the light of these defining principles, major

<sup>40</sup> Fowler A ‘Beyond partnership: Getting real about NGO relationships in the aid system’ (2000) 13 *IDS Bulletin* 3; Bailey & Golan (n 38 above) 36.

<sup>41</sup> Bailey & Golan (n 38 above) 32.

<sup>42</sup> Sengupta A ‘The human right to development’ (2004) 32:2 *Oxf Dev’t Stud* 183-184; Sengupta 2002 (n 2 above) 848-852.

<sup>43</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Brussels ‘A global partnership for poverty eradication and sustainable development after 2015’ 5.2.2015 COM (2015) 3-4; Bailey & Golan (n 38 above) 33-34.

international development fora in the course of the past decade have consistently emphasised a need for country ownership of development programmes.<sup>44</sup>

However, instead, Africa's development agenda has often entirely been determined by foreign stakeholders who generally determine the terms of partnership, usually without Africa's active involvement and participation in the decision-making processes.<sup>45</sup> At a conceptual level, development partnership seen from the perspective of rights-based approaches to development should be understood to translate from the international law principles of sovereign equality of states, the right to self-determination and the right not to be dominated by another state. The suggestion is that the formulation of partnerships for development must be based on legality to ensure greater reasonableness, transparency and accountability, especially in respect of human rights. As it stands that the right to development in Africa is guaranteed by law, it is important also to determine what the law says with regard to development cooperation.

Deriving from the principle of friendly relations, the motivation to engage in global partnerships for development has largely been determined by a moral commitment as laid down in soft law instruments.<sup>46</sup> Although these instruments are in the strict sense not absolutely binding, they provide moral guidelines that can be 'used as mechanisms for authoritative interpretation or amplification of the terms of a treaty'.<sup>47</sup> As Kanga points out, most soft law instruments have come to be accepted as constituting international customary practice, which is an acceptable

<sup>44</sup> The 2002 Monterrey International Conference on Financing for Development; the 2003 Rome High Level Forum on Harmonization; the 2004 Marrakech Roundtable on Managing for Development Results; the 2005 Paris High Level Forum on Aid Effectiveness; and the 2008 Accra High Level Forum on Aid Effectiveness.

<sup>45</sup> Bailey & Golan (n 38 above) 35.

<sup>46</sup> The soft law instruments that make provision for development cooperation for the realisation of the right to development include the DRtD (n 6 above) (art 3, arts 4 & 6(1), the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights June 1993 (para I(10)); UN Millennium Declaration (para III(11)); the Millennium Development Goals (goal 8) & the Sustainable Development Goals (goal 17).

<sup>47</sup> See Mahalu CR 'Human rights and development: An African perspective' (2009) 1:1 *Leiden J Int'l L* 19; Boyle AE & Chinkin C *The Making of International Law* (2007) 216; Salomon ME *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007) 89; Kirchmeier (n 7 above) 11.



source of international law.<sup>48</sup> Besides that, the UN Charter among other international instruments stands out as the primary instrument that provides the legal framework for development cooperation as a means of solving international problems relating to human well-being.<sup>49</sup> Given the magnitude of development challenges that Africa is confronted with, the legal guarantee that development cooperation conveys inspires the need for effective right to development practice.<sup>50</sup> However, while the legal requirement for development cooperation as it applies in principle may be considered for the realisation of the right to development, some scholars have argued that it does not impose any absolute obligation.<sup>51</sup> Accordingly, most developed countries deny that they owe any legal obligation to cooperate for the purpose of achieving the right to development.<sup>52</sup> Thus, contrary to the obligation to cooperate for the purpose of equalising opportunities for development, development cooperation has rather established a situation where donor countries take liberty to patronise recipient countries through the mechanism of development assistance.

#### **2.2.2.2 Development assistance**

In the discourse on international development, the encompassing concept of international development cooperation has unfortunately been abridged and narrowed down to the provision of development assistance. This has come about as a result of the practice where the provision of aid by developed countries and the dependence by developing countries on such aid for developmental purposes has dissipated the original meaning of development cooperation.<sup>53</sup> To my mind, development assistance should be regarded as only a sub category of the broad concept

<sup>48</sup> Kamga S 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' (2011) *LLD Thesis University of Pretoria* 145.

<sup>49</sup> Fikre BM 'The politics underpinning the non-realisation of the right to development' (2011) 5:2 *Mizan L Rev* 260; UN Charter (n 1 above) arts 1(3), 55 & 56; see also ICESCR (n 27 above) art 2(1).

<sup>50</sup> See Marks SP 'The human rights framework for development: Seven approaches' in Sengupta A, Negi A & Basu M (eds) *Reflections on the Right to Development* (2005) 23-60.

<sup>51</sup> Salama I 'The right to development: Towards a new approach?' (2005) *Perceptions* 58; Donnelly J 'In search of the unicorn: The jurisprudence and politics on the right to development' (1985) 15:3 *Calif West Int'l L J* 509; Meir BM & Fox AM 'Development as health: Employing the collective right to development to achieve the goals of the individual right to health' (2008) 30 *HRQ* 328.

<sup>52</sup> Nwauche ES & Nwobike JC 'Implementing the right to development' (2005) 2:2 *SUR – Int'l J Hum Rts* 4.

<sup>53</sup> Schoenstein A & Alemany C 'Development cooperation beyond the aid effectiveness paradigm: A women's rights perspective' (2011) *Association for Women's Rights in Development – Discussion Paper* 1-2.



of development cooperation. Development assistance, which in OECD-DAC terminology is known as Official Development Assistance (ODA) consists of concessional flows of development financing by bilateral and multilateral donors to developing countries with the aim to promote their economic development and welfare.<sup>54</sup> It may be assumed that the motivation to advance the right to development in Africa is underlined by the desire to achieve a particular interest. If that interest is a claim to development assistance, sound logic would support the fact that such an interest would feature in the instruments that proclaim the right to development. However, a perusal of the African treaty instruments and domestic legislation that enshrine the right to development reveals nothing about a claim to development assistance as a pre-requisite for the realisation of the right to development in Africa.<sup>55</sup>

The African Charter is explicit about the fact that it is the duty of African states either individually or collectively to ensure the realisation of the right to development.<sup>56</sup> It is important to note that collectivism in this instance does not carry the same connotation as development cooperation in the manner that it is conceived in this thesis. Accordingly, I contend that development assistance is thus neither the envisaged development goal that Africa aims to achieve nor is it a strategic option for advancing the right to development in Africa. For Donald Rukare, development assistance constitutes a legally binding right established through international customary law.<sup>57</sup> Without disputing the existence of such a right, my basic argument is that it is unproductive to pursue development cooperation (except where it plays a complementary role) because in terms of effectiveness, development assistance generally lacks the potential to facilitate the realisation of the right to development in Africa.

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<sup>54</sup> Führer (n 9 above) 24; OECD-DAC 'Is it ODA?' (2008) *OECD-DAC – Factsheet November 1*; Draft International Development (Official Development Assistance Target) Bill presented to Parliament by the Secretary of State for International Development by Command of Her Majesty January 2010 1.

<sup>55</sup> See the African Charter (n 26 above) art 22; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 art 19; African Youth Charter 2006 art 10; Constitution of Malawi art 30; Constitution of the DRC art 58; Constitution of Ethiopia art 43 and Constitution of the Republic of Uganda 2006, National Objectives and Directive Principles of State Policy objective six.

<sup>56</sup> African Charter (n 26 above) art 22(2).

<sup>57</sup> Rukare D 'The role of development assistance in the promotion and protection of human rights in Uganda' (2011) *LLD Thesis University of Pretoria* 94.

Sengupta has also advanced the argument that development assistance remains the most important instrument of development cooperation and therefore advocates in favour of increasing the volume of foreign aid to developing countries.<sup>58</sup> A couple of other scholars advance similar arguments that the legal force of the right to development is established on the duty of states to cooperate with one another.<sup>59</sup> I argue to the contrary for a number of reasons: First, the provision of foreign aid or development assistance is a political decision that is motivated by the discretion of the donor rather than by the obligation to fulfil development obligations in another country. The criteria by which development assistance is allocated are determined primarily and often unilaterally by donor entities rather than by the exigency of the countries that might genuinely need such assistance for development purposes. Fundamentally, donors determine the criteria for allocating development assistance and formulate the policies while recipient countries are often only expected to comply with programmes implementation.<sup>60</sup>

Second, considering that development from a rights-based point of view means improvement in human well-being through the realisation of all human rights, an important question is whether the volume of foreign aid that has been channelled to Africa has achieved improvement in the well-being of the African peoples? Quite to the contrary, in spite of the phenomenal flow of development assistance to Africa over the decades, human rights violations have become endemic, exacerbated by extreme levels of poverty.<sup>61</sup> Third, development, which Amartya Sen describes as freedom, ought to amount to the removal of various types of ‘unfreedom’ that limit rational action and, therefore, should be seen as a process of expanding the actual freedoms and

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<sup>58</sup> Sengupta 2002 (n 2 above) 880.

<sup>59</sup> Villaroman NG ‘Rescuing a troubled concept: An alternative view of the right to development’ (2011) 29:1 *NQHR* 41; Iqbal K ‘The declaration on the right to development and implementation’ (2007) 1:1 *Political Perspectives* 4; Rich R ‘The right to development as an emerging human right’ (1983) 23 *Virg J Int’l L* 291.

<sup>60</sup> Branzick A ‘Humanitarian aid and development assistance’ (2004) *Beyond Intractability* available at: <http://www.beyondintractability.org/essay/humanitarian-aid> (accessed: 18 November 2016). One of the most common features in the development cooperation arrangement is the fixing of conditionalities by donor countries, which recipient countries are obligated to comply with.

<sup>61</sup> Statistical, Economic and Social Research Training Centre for Islamic Countries (SESRTCIC) ‘Poverty in Sub-Saharan Africa: The situation in the OIC member countries’ (2007) *Preliminary Report* 1-14.

capabilities to sustain well-being and standards of living that people have reason to value.<sup>62</sup> Following Sen's definition, the question to ask is whether development assistance creates the kind of freedom that amounts to development? In essence, development assistance, which is often tied to conditionalities, rather creates a relationship of dominance on the part of donor countries while recipient countries are reduced to the level of subservience and dependency.<sup>63</sup> In this relationship recipient countries enjoy neither the freedom to make development choices, the liberty to formulate their own development policies nor the opportunity to advance the productive capabilities of their peoples.<sup>64</sup> In other words, apart from its ineffectiveness as a modality for development, development assistance is in fact opposed to the concept of the right to development in Africa as it is conceived of in this thesis.

Lastly, contrary to Rukare's view that there is a legally binding right to development assistance under international law, which implies a duty to make such assistance available to developing countries,<sup>65</sup> I argue that the right to development in Africa does not create any binding obligation for reliance on development assistance and therefore, African countries are not bound to remain subject to the patronage of developed countries to develop. My argument is based on the logic that if development assistance is accepted as an operational modality for development, when such assistance becomes unavailable, development will consequently not be achieved and, therefore, the right to development would have been compromised. Relating this analysis to Radin and Singer's conception of pragmatism as a legal theory that envisages practical outcomes

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<sup>62</sup> Sen *A Development as Freedom* (1999) xii, 1 & 8.

<sup>63</sup> BBC News 'Kenya's Uhuru Kenyatta urges Africa to give up aid' (2015, 12 June) available at: <http://www.bbc.com/news/world-africa-33108716> (accessed: 14 June 2015). Though foreign aid is said to amount for about 5-6% of Kenya's national income, President Uhuru Kenyatta, while addressing the 25<sup>th</sup> Summit of the African Union is quoted to have stated that: 'The future of our continent cannot be left to the good graces of outside interests. Dependency on giving that only seems to be charitable must end. Foreign aid, which so often carries terms and conditions that preclude progress is not an acceptable basis for prosperity and freedom. It is time to give it up'.

<sup>64</sup> See Uhuru Kenyatta's statement cited in (n 63 above).

<sup>65</sup> See Rukare (n 57 above) 94, 321-324.

through the actual workings of the law,<sup>66</sup> I further argue that if the right to development is to be achieved through development cooperation, cooperation arrangements must comply with the law that protects the right to development. Accordingly, the commitment undertaken by industrialised countries to provide 0.7% of their national GDP as assistance to developing countries,<sup>67</sup> for example, ought to become a legal obligation that must be fulfilled to produce expected outcomes of well-being. Unfortunately, that commitment has never fully been met. The 0.7% GDP quota is more fully discussed in chapter five below.<sup>68</sup>

The realisation of the right to development cannot reasonably be based on charitable provision of development assistance, which Richard Dowden observes, does not have the potential to rescue Africa from its development challenges.<sup>69</sup> It requires equitable balance in the global system, which entails that development cooperation must be designed to comply with the obligations imposed by the right to development enshrined in the African Charter and ancillary instruments. Even where it is established that development assistance is of relevance in order to accelerate development in Africa,<sup>70</sup> I contend that because of the patronising nature of development cooperation through which assistance is provided, which I explain below, it can ultimately only result in dependency rather than guarantee the right to development.

### 2.2.3. Paternalism

I consistently refer to donor-driven forms of cooperation as fundamentally paternalistic in nature in the sense that although regulated by international law requiring states to undertake concerted

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<sup>66</sup> Radin MJ 'The pragmatist and the feminist' (1990) 63 *South Calif L Rev* 1700; Singer JW 'Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism' (1990) 63 *South Calif L Rev* 1821-1822.

<sup>67</sup> Monterrey Consensus on Financing for Development adopted at the International Conference on Financing for Development, Monterrey Mexico *United Nations* 2002 para 42; UN Resolution 2626 (1970) *The International Development Strategy for the Second United Nations Development Decade*.

<sup>68</sup> See sect 2.2.1.1.2 of chapter five.

<sup>69</sup> Dowden R *Africa: Altered States, Ordinary Miracles* (2009) 508.

<sup>70</sup> See UN Charter (n 1 above) art 55 & 56; DRtD (n 6 above) art 4(2); ICESCR (n 27 above) art 1(2); Rukare (n 57 above) 94.

action in dealing with development challenges,<sup>71</sup> development cooperation often does not espouse the principle of sovereign equality, especially looking at the competition for hegemony within rival development cooperation patterns.<sup>72</sup> The Office of the High Commissioner for Human Rights describes development cooperation as the space regulated by law within which the right to development can fully be realised.<sup>73</sup> Contrary to the general perception that development cooperation is intended to improve living conditions in poorer countries, Janus *et al* portray development cooperation as ‘part of an international system characterised by fragmentation and limitations in global problem solving’.<sup>74</sup> If international law were to apply in actual terms in guaranteeing genuine equality between developed and developing countries, development cooperation could be counted on as a means to achieve the right to development. However, because of established global inequalities, development cooperation has rather become a mechanism through which developing countries are constrained to remain perpetual subordinates to donor developed countries for subsistence.<sup>75</sup>

<sup>71</sup> See for example UN Charter (n 1 above) art 1(3), 55 & 56; DRtD (n 6 above) art 3(3) & 4(2); ICESCR (n 27 above) art 1(2); Vienna Declaration (n 46 above) para I(10); Fikre (n 49 above) 256-257.

<sup>72</sup> For a general discourse on development cooperation see Esteves & Assunção (n 22 above) 1775-1790; Mawdsley E ‘Human rights and south-south development cooperation: Reflections on the “rising powers” as international development actors’ (2014) 36:3 *HRQ* 630-652; De Renzio P & Seifert J ‘South-south cooperation and the future of development assistance: Mapping actors and options’ (2014) 35:10 *Third World Quarterly* 1860-1875; Milani CRS & Muñoz EE ‘Does the South challenge the geopolitics of international development cooperation?’ (2013) 4:1 *Geopolítica(s)* 35-41; Quadir F ‘Rising donors and the new narrative of ‘south-south’ cooperation: What prospects for changing the landscape of development assistance programmes?’ (2013) 34:2 *Third World Quarterly* 321-338; Gore (n 3 above) 769-786.

<sup>73</sup> UN Human Rights ‘Development is a human right for all’ available at: <http://www.ohchr.org/EN/Issues/Development/Pages/Backgroundtrtd.aspx> (accessed: 8 April 2015).

<sup>74</sup> Janus H, Klingebiel S & Paulo S ‘Beyond aid: A conceptual perspective on the transformation of development cooperation’ (2014) *Centre on Democracy, Development and the Rule of Law - CDDRL Working Paper* 1-2.

<sup>75</sup> Todaro MP & Smith SC *Economic Development* (2006) 115-118; Ngang CC ‘Differentiated responsibilities under international law and the right to development paradigm for developing countries’ (2017) 11:2 *HR & ILLD* 272; Rukare (n 57 above) 84; Kirchmeier (n 7 above) 14.

San Bilal describes the approach to development cooperation of actors from the Northern industrialised countries, as framed in the ideology of ‘we will help you’,<sup>76</sup> which in my view is not unrelated to the civilisation ideology that informed colonialism in the 17<sup>th</sup> century as illustrated in chapter two.<sup>77</sup> Over the decades after independence, development cooperation has been characterised by paternalism, marked by an asymmetrical relationship that robs Africa of the potential and capacity to chart its own development trajectory.<sup>78</sup> Featuring in the dependency ratio between developed countries and the developing countries under their influence as Girvan points out, is the manifestly incongruous power imbalance that is sustained among others through economic dominance,<sup>79</sup> which is underscored by ‘donor-dictated conditionalities’.<sup>80</sup> In analysing the economic potential and growth rate of emerging economies, especially those in Asia, in comparison with advanced economies, Bilal argues that ‘[d]eveloping countries do not need to be taught how to grow’.<sup>81</sup> Unfortunately, despite pioneering the right to development, Richard Ilorah sees Africa’s endemic dependency on foreign aid as a poignant manifestation of inability to survive without aid, which has rather plunged a great number of countries into extreme levels of poverty.<sup>82</sup>

The vicious cycle of paternalism creates a false hope that development in Africa is achievable through foreign assistance, which in effect only ensnares Africa in a debt trap, undermines its autonomy in development policy making and the ability to gainfully exploit its immense natural

<sup>76</sup> Bilal S ‘The Rise of South-South relations: Development partnerships reconsidered’ (2012) *Conference paper - European Centre for Development Policy Management* 1.

<sup>77</sup> See sect 2.1.2 of chapter two.

<sup>78</sup> Brett EA ‘Explaining aid (in)effectiveness The political economy of aid relationships’ (2016) *Department of International Development, London School of Economics – Working Paper Series No 16-176* 1-5; Betteraid ‘Development effectiveness in development cooperation: A rights-based perspective’ (2010) *Betteraid* 1.

<sup>79</sup> Girvan N ‘Power imbalances and development knowledge’ (2007) *North-South Institute* 5-15; Betteraid (n 78 above) 2.

<sup>80</sup> Ilorah R ‘Africa’s endemic dependency on foreign aid: A dilemma for the continent’ (2011) *ICITI - ISSN: 16941225* 4-6, 22-25.

<sup>81</sup> Bilal (n 76 above) 1-10.

<sup>82</sup> Ilorah (n 80 above) 1-3.

resource endowments and in turn exacerbates the continent's vulnerability to exploitation.<sup>83</sup> Because development cooperation provides foreign stakeholders the platform to patronise developing countries, Africa's irrational dependence on foreign assistance has meant that it cannot legitimately assert the right to development due to the fact that the donor that 'pays the piper, determines the tune' in accordance with the aid conditionality principle. I illustrate this claim by moving on to look at some development cooperation prototypes.

### 2.3. Cooperation Patterns

By looking at existing patterns of development cooperation in this section, my purpose is to point out that none of them is designed to achieve the right to development in Africa. There are four identified cooperation patterns within the development cooperation framework, namely; the North-South, South-South, triangular and global partnerships, which as Milani and Muñoz observe have emerged as a result of the struggle for hegemony and legitimacy among competing donor actors.<sup>84</sup> For the purpose of my analysis, I examine the apparently contrasting North-South and South-South patterns to further prove the point that development cooperation only provides the opportunity for dominant actors to patronise Africa rather than advance the right to development.

#### 2.3.1. North-South cooperation

Traditionally, North-South development cooperation has been understood to refer to the lopsided donor/recipient relationship, where development assistance is made available by affluent developed countries of the North to the impoverished developing countries of the South.<sup>85</sup> North-South cooperation started in the form of a moral responsibility by former colonial masters to

<sup>83</sup> See Anna T *et al* 'Real aid 3: Ending aid dependency' (2011) *ActionAid* 17-20; UNDP *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (2011) 151-152; Ilorah (n 80 above) 14-25.

<sup>84</sup> Milani & Muñoz (n 72 above) 37-38.

<sup>85</sup> Rosseel P *et al* 'Approaches to north-south, south-south and north-south-south collaboration: A policy document' (d.n.a) available at: [https://lirias.kuleuven.be/bitstream/123456789/229636/1/policy\\_paper\\_vlir\\_uwc\\_nss.pdf](https://lirias.kuleuven.be/bitstream/123456789/229636/1/policy_paper_vlir_uwc_nss.pdf) (accessed: 25 April 2015) 11-12.



carry out ‘development activities...in their overseas territories’.<sup>86</sup> Although there is pretence that North-South cooperation is intended to help poor countries, the underlying agenda has always been imperialistic and exploitative.<sup>87</sup> Within the North-South cooperation structure, developing countries are conditioned to become dependent on the life-support of development assistance, which in most cases does not have any long-term objective.<sup>88</sup> Owing to the fact that North-South cooperation is established principally on the provision of development assistance, it gives donor countries the privilege to impose with conditionality their understanding of development on recipient African countries.<sup>89</sup> This often happens notwithstanding that the African perception about development may be diametrically different from that of the donor countries.<sup>90</sup>

As a pre-requisite to the allocation of development aid to Africa, for instance, terms and conditions are often imposed emphasising respect for civil and political rights through good governance and democratisation programmes.<sup>91</sup> Meanwhile, the actual development priorities in Africa as enshrined in the African Charter and ancillary instruments that provide for the right to development relate principally to livelihood security concerns embodied in economic, social and cultural rights, are often not given due consideration by donors.<sup>92</sup> The contents of the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs) support the fact that issues that are central to development are predominantly those of a social, economic and cultural nature.<sup>93</sup> The North-South aid conditionality strategy that principally promotes civil and

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<sup>86</sup> Führer (n 9 above) 4.

<sup>87</sup> Rosseel (n 85 above) 12-13.

<sup>88</sup> Rosseel (n 85 above) 13-14.

<sup>89</sup> Rosseel (n 85 above) 13.

<sup>90</sup> Rosseel (n 85 above) 13.

<sup>91</sup> Mawdsley (n 72 above) 634.

<sup>92</sup> Mawdsley (n 72 above) 635.

<sup>93</sup> Six of the MDGs including Goal 1: Eradicate extreme poverty and hunger, Goal 2: Achieve universal primary education, Goal 3: Promote gender equality and empower women, Goal 4: Reduce child mortality, Goal 5: Improve maternal health and Goal 6: Combat HIV/AIDS, malaria and other diseases are all related to socio-economic concerns. Goal 7: Ensure environmental sustainability, deals with environmental issues. And of course, Goal 8: Develop a global partnership for development emphasises the need for cooperation. None of the MDGs deals with civil or political issues, which suggests that they are not as relevant for achieving development as socio-economic issues. Of the 17 SDGs, 8 are directly related to socio-cultural issues, 5 to



political rights thus contradicts the African aspirations for development, which establishes that priority be given to the realisation of socio-economic and cultural rights as a guarantee for the enjoyment of civil and political rights.<sup>94</sup>

In the vain attempt to democratise and to institute good governance to satisfy donor defined standards, aid recipient countries often fail to focus on the livelihood security concerns, resulting in the cry about aid ineffectiveness. If development ‘aid is intended to reduce poverty, or at least improve the welfare and living conditions of the poor’ as Morrissey notes,<sup>95</sup> Olumide Taiwo thinks that such aid needs to be prioritised in accordance with the recipient countries’ prerogatives to be able to achieve people-centred development.<sup>96</sup> In this regard, it is not illogical as Esteves & Assunção have argued to label conditionalities attached to development assistance as a means to advance donor interests rather than foster development in the recipient countries.<sup>97</sup> Owing to this shortcoming, the South-South cooperation pattern emerged as an attempt to challenge the North-South *status quo* and promote solidarity among developing countries.

### **2.3.2. South-South cooperation**

South-South cooperation represents a regrouping of development actors that do not adhere to the OECD-DAC rules and therefore function through operational modalities that are diametrically opposed to the dominant North-South pattern.<sup>98</sup> Basically, South-South cooperation provides the framework within which developing countries make available their expertise and financial support to other developing countries on the basis of mutual benefits rather than just the

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environmental issues, 2 to economic growth, 1 dwells on peace and security and 1 on development partnership. Basically none of the SDGs deals with civil and political issues.

<sup>94</sup> African Charter (n 26 above) preamble; AU Commission ‘Agenda 2063: The Africa we want’ (2015) *African Union Aspiration* 1 paras 9-18; Gawanas B ‘The African Union: Concepts and implementation mechanisms relating to human rights’ in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 143

<sup>95</sup> Morrissey O ‘Aid effectiveness for growth and development’ (2002) *ODI Opinions* 2.

<sup>96</sup> Taiwo O ‘Improving aid effectiveness for Africa’s economic growth’ (2011) *Foresight Africa* 16-18.

<sup>97</sup> Esteves & Assunção (n 22 above) 1781.

<sup>98</sup> See Jordan (n 10 above).

provision of development assistance.<sup>99</sup> The South-South strategy thus challenges the OECD-DAC practice that distinguishes some countries as donors and others as recipients.<sup>100</sup> As Yun Sun argues, South-South cooperation is more often largely transactional and reciprocal in nature<sup>101</sup> than the lop-sided North-South divide. Esteves and Assunção as well as Zimmermann share the view that unlike in the North-South pattern, South-South cooperation emphasises the exchange of technical skills to further the collective self-reliance of developing countries in enhancing their productive capacity to deal with development challenges.<sup>102</sup> According to Quadir, the South-South pattern is advantageous to developing countries in the sense that it shifts significantly from policy conditionality-driven development assistance and rather emphasises partnership, entailing a horizontal relationship based on the principles of sovereign equality and mutual interests.<sup>103</sup>

In the light of the divergent approaches, OECD-DAC proponents frown at the unwillingness of South-South actors to impose conditionalities as undermining efforts by North-South donors ‘to reduce corruption, achieve poverty reduction, and promote human rights’.<sup>104</sup> These concerns may be genuine. However, the question is whether the imposition of conditionalities has in effect redressed the issues in question pertaining to development in Africa. South-South partners are united by ‘a shared experience of colonial exploitation, post-colonial inequality, and present vulnerability to uneven neoliberal globalization, and thus a shared identity with poorer nations’.<sup>105</sup> South-South cooperation could to a large extent deal with the issues that hold back developing countries and in effect facilitate the realisation of the right to development to the extent that equitable redistribution of the benefits of development is guaranteed.

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<sup>99</sup> Tortora P ‘Common ground between south-south and north-south cooperation principles’ (2011) *OECD Issues Brief* 1; Zimmermann F ‘New partnerships in development co-operation’ (2011) 2010:1 *OECD Journal: General Papers* 38; Esteves & Assunção (n 22 above) 1784.

<sup>100</sup> Zimmermann (n 99 above) 43.

<sup>101</sup> Sun Y ‘Africa in China’s foreign policy’ (2014) *John L Thornton China Centre & Africa Growth Initiative* 2.

<sup>102</sup> Esteves & Assunção (n 22 above) 1779; Zimmermann (n 99 above) 43.

<sup>103</sup> Quadir (n 72 above) 324; Zimmermann (n 99 above) 43.

<sup>104</sup> Mawdsley (n 72 above) 642.

<sup>105</sup> Mawdsley (n 72 above) 640.

However, looking at the economic clout of the championing actors of South-South cooperation such as the BRICS countries, which include Brazil, Russia, India, China and South Africa,<sup>106</sup> it is difficult to resist questioning their underlying motives for exploring the African development space. The one concern is whether as emerging economies these actors are not simply driven by the pursuit of economic expansion, with the aim to impose their economic weight on Africa. Another concern is whether the South-South actors have the potential to support other developing countries, considering that they equally face insurmountable development challenges.<sup>107</sup> These questions do not have straightforward answers. China, in spite of its domestic difficulties dating back to the Cultural Revolution is reported to have since 1955 provided huge amounts of foreign aid to Africa.<sup>108</sup> In the course of this period, it has also managed to uplift millions of Chinese people out of poverty.<sup>109</sup> South Africa on the other hand, in spite of its relatively flourishing economy is yet to satisfactorily deal with the extreme levels of poverty and social inequality at home, but is extending a sizable amount of assistance to other African countries.<sup>110</sup> With these illustrations, De Siqueira argues that although South-South cooperation is not utterly ‘sinful’, it might not be a ‘virtuous’ project for developing countries to venture into.<sup>111</sup>

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<sup>106</sup> Quadir (n 72 above) 321-322; De Renzio & Seifert (n 72 above) 1864. There are a couple of other developing countries involved in south-south cooperation but I focus on Brazil, China and South Africa because of their growing interests in Africa.

<sup>107</sup> De Siqueira DR ‘Brazilian cooperation is not a free lunch: An analysis of the interests contained in the international development cooperation strategy’ (2013) 4:1 *Geopolítica(s)* 150. Brazil, China, India and South Africa are known to be the most socio-economically unequal countries in the world in terms of disparity between the poor and the rich and extensive human rights abuses. A huge proportion of the populations in these countries live in grinding poverty while the largest chunk of the wealth is in the hands of a few highly privileged persons.

<sup>108</sup> Sun (n 101 above) 3-4

<sup>109</sup> Stahl AK ‘Trilateral development cooperation between the European Union, China and Africa: What prospects for South Africa?’ (2012) *University of Stellenbosch Centre for Chinese Studies – Discussion Paper No 4* 12.

<sup>110</sup> Grimm S ‘South Africa as a development partner in Africa’ (2011) *EDC2020 – Policy Brief 2*; Besharati NA ‘South African Development Partnership Agency (SADPA): Strategic aid or development packages for Africa?’ (2013) *SAIIA – Research Report 12* 17-22.

<sup>111</sup> De Siqueira (n 107 above) 146.

While South-South cooperation has on the one hand been recognised as ‘effective and desirable’, the modality of aid flow among South-South partners has on the other hand been described as unethical. As Mawdsley puts it, South-South partners ‘appear overwhelmingly motivated by *mere self-interest* rather than *enlightened self-interest*’ (emphasis added).<sup>112</sup> Translated literally, it means that the way developing countries project their self-interest in the course of practising development cooperation is ‘primitive’, unlike the ‘civilised’ manner by which developed countries do. Two inferences could be drawn from this. The first is that notwithstanding its form, development cooperation fundamentally aims to promote a certain self-interest that is unrelated to the advancement of human well-being by which the right to development is defined. The second inference is that developing countries do not have the agency to create development in an *enlightened* manner and, therefore, should not venture into the field of development cooperation where they do not have expertise and do not understand the rules of the game.<sup>113</sup>

It cannot be denied that such sentiments against the South-South cooperation architecture are nursed because the actors do not belong to the OECD-DAC club of imperialist donors and are recalcitrant to profess the OECD-DAC doctrine. It can also not be contested that South-South cooperation does not genuinely practice equal horizontal partnership as it portends to do.<sup>114</sup> It would appear as the current discourse on development cooperation suggests that South-South partnership for development lacks a unified strategy and proper coordination.<sup>115</sup> On this note, it is appropriate to argue that South-South cooperation is yet to prove its potential to achieve the right to development, but has in essence exposed the lapses and weaknesses of the North-South pattern. With this in mind, it is important to test the mechanism of development cooperation from the starting point that the right to development in Africa is not just a claimable entitlement or a quest for assistance but in itself a development paradigm. In other words, it necessitates an examination of the relationship between development cooperation and the right to development.

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<sup>112</sup> Mawdsley (n 72 above) 639.

<sup>113</sup> Milani & Muñoz (n 72 above) 37.

<sup>114</sup> De Siqueira (n 107 above) 139.

<sup>115</sup> Quadir (n 72 above) 324.

### 3. Development Cooperation and the Right to Development

#### 3.1. Determining the Connection

Felix Kirchmeier has pointed out – and I agree with him – that development cooperation ought to be driven by the right to development.<sup>116</sup> The discussion in this section reveals the contrary in the sense that there is in effect no causal relationship between development cooperation and the right to development. This, therefore, begs the question how the right to development is estimated to be achieved through development cooperation. Neither the North-South nor the South-South cooperation patterns examined above demonstrates a direct connection on the basis of which to justify the potential of development cooperation to achieve the right to development. As a pragmatic concept, the right to development can only be achieved when the right holders who are inherently entitled with the right to self-determination to make their own development choices are capable of exercising that right proactively and without constraint.

There might be a legitimate expectation from Africa on the basis of the promises of development assistance envisaged within the framework of development cooperation under international law as a guarantee for the fulfilment of the right to development. However, without a genuine commitment by developed countries to provide such assistance,<sup>117</sup> it is unrealistic to anticipate the right to development to be achieved through development cooperation, unless international law, which is more protective of developed countries, is significantly reformed to achieve global balance. Global balance entails eliminating the policies that perpetuate development injustices and the biased globalisation practices that systematically dispossess the peoples of Africa of the right to self-determination in making their own development choices. Until this is achieved, there is no justification why Africa should embrace development cooperation as a *modus operandi* for development rather than advance the right to development, which requires asserting a legitimate claim against the systems that hold back progress on the continent.<sup>118</sup>

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<sup>116</sup> Kirchmeier (n 7 above) 5.

<sup>117</sup> See Kirchmeier (n 7 above) 13.

<sup>118</sup> With this explanation, it should be noted that my opposition to the idea of development cooperation is based on the fact that even were development cooperation is legally binding, it is inappropriate as a modality for

Following the international law principle of *pacta sunt servanda*, which only requires the exercise of good faith, the requirement to assist developing countries through cooperation is in practice generally only optional and not based on any absolute obligation in terms of specific allocation of responsibilities for which donor countries could be held accountable.<sup>119</sup> With regard to the global partnerships for the achievement of universal benchmarks for development, for instance, Thomas Pogge has expressed doubts about the framing of these global actions to eradicate poverty due to lack of clarity about the roles and responsibilities that states are supposed to play.<sup>120</sup> Without clarity on the actual responsibilities of states, development cooperation remains too vague to be considered a mechanism through which the peoples of Africa could advance legitimate claims for the right to development. The role of development cooperation is thus not pivotal, but only serves an ancillary purpose as a support mechanism to efforts that aim at the realisation of the right to development. Moreover, development cooperation in the current forms in which it is structured runs contrary to the purpose of the right to development, which is sustained by the principles of self-determination,<sup>121</sup> independent development policy making<sup>122</sup> and domestic ownership of the development process.<sup>123</sup>

To the extent that the right to development is estimated to be achieved through development cooperation, even in the instance where it is guaranteed a status that engenders more than a moral and soft law commitment, given the history of foreign domination and the pre-eminence that gives to actual self-determination for Africa, I argue that development cooperation is

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implementing the right to development, principally because it undermines the capabilities of the African peoples and disregards the sovereign equality of African states to self-determination.

<sup>119</sup> Bunn ID 'The right to development: Implications for international economic law' (2000) 15 *Am U Int'l L Rev* 1453. Bunn highlights that the DRtD does not contain any 'explicit obligation to provide development assistance'. See also Gandhi (n 131 below) 333.

<sup>120</sup> Pogge T 'The Sustainable Development Goals: Brilliant propaganda?' (2015) *Annals of the University of Bucharest – Political Science Series ISSN 1582-2486* 1.

<sup>121</sup> DRtD (n 6 above) art 1(2).

<sup>122</sup> DRtD (n 6 above) art 2(3).

<sup>123</sup> See generally Final Draft African Consensus and Position on Development Effectiveness adopted by the African Union in Addis Ababa 30 September 2011.

unsuited as a development model because of its paternalistic and donor-recipient asymmetrical nature. Without development cooperation, it remains an intrinsic entitlement to the peoples of Africa and a duty for African states to strive for the achievement of the right to development. Otherwise, development cooperation may only become relevant and suitably applicable *sans* its problematic characteristics or only when it is divested of its innate impediments, if at all such divestment can be achieved within the context of the current global arrangement.

Although developed countries are required as a matter of legal obligation under international law to assist developing countries, most developed countries contend that they are not compelled by any obligation on the right to development to do so, which they argue, is a duty that developing countries are bound to fulfil.<sup>124</sup> As Kirchmeier has observed, the argument advanced by developed countries hinges on the fear that ‘the right to development might be perceived as a right to development assistance’,<sup>125</sup> thus basically posing a threat to the privileged position of dominance that developed countries may not want to relinquish. However, given the requirement envisaged by the Declaration of the Right to development to eliminate obstacles to development that may arise from the unconventional behaviour of developed countries, I argue that they are constrained by a negative duty to refrain from actions that may contravene the right to development in Africa.

Pragmatically, the responsibility lies with the peoples of Africa as proponents of the right to development to become more radical in asserting that right, especially with respect to taking adequate measures to ensure its realisation. Article 2(3) of the Declaration on the Right to Development guarantees to every state the duty and the right to formulate appropriate development policies. Within the African context, such policies ought to reflect the legally binding character of the right to development as an assurance of protection against contravention. Beside the increasing fatigue among donor countries on the rationale for the continuous provision of development assistance, Hamilton notes that there is in effect a significant decline in

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<sup>124</sup> Kirchmeier (n 7 above) 10.

<sup>125</sup> Kirchmeier (n 7 above) 10.

development aid to the extent that its sustainability is uncertain.<sup>126</sup> Without this practical shortcoming, development cooperation still does not become relevant because as I argue in this thesis, its inappropriateness as a development model for Africa is more fundamental (designed not in a manner to favour development in Africa) than practical. The underlying motives for which donor countries engage in cooperation are often more political and driven by economic growth ambitions than by the people-centred priorities that Africa aims to achieve, which, as established by relevant instruments are mostly socio-economic and cultural in nature.<sup>127</sup>

In my view, it makes no sense to promote development cooperation as a mechanism by which to achieve the right to development, knowing that the outcome to anticipate is relatively insignificant. According to Margot Salomon, states are legally accountable for creating global poverty and therefore have the collective obligation through the normative function of the right to development to deal with the resulting injustices and structural imbalances.<sup>128</sup> Her argument is that international law provides the framework for the global community to ‘assume responsibility for world poverty’ and to ‘eliminate the structural obstacles that impede the realization of basic human rights’<sup>129</sup> She believes that this global responsibility is achievable through international cooperation.<sup>130</sup> However, despite the legal obligations imposed by international law with regard to development cooperation as stipulated in articles 55 and 56 of the UN Charter, the reality as Sandy Gandhi rightly observes is that ‘many powerful donor states see development cooperation as “discretionary” rather than as a relevant legal obligation’.<sup>131</sup> Thus, without refuting the significant role that development cooperation plays in international development, in the context of this thesis, I state the claim that the deep-seated geopolitical motives behind development cooperation override the motivation to achieve the right to development.

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<sup>126</sup> Hamilton JM ‘Development cooperation: Creating a public commitment’ in Berg R & Gordon DF (eds) *Cooperation for International Development: The United States and the Third World in the 1990s* (1989) 211-213.

<sup>127</sup> African Charter (n 26 above) art 22(1); UN Charter (n 1 above) art 1(3).

<sup>128</sup> Salomon 2008 (n 2 above) 17.

<sup>129</sup> Salomon 2008 (n 2 above) 12.

<sup>130</sup> Salomon 2007 (n 47 above) 109 & 204.

<sup>131</sup> Gandhi S ‘Global responsibility for human rights: World poverty and the development of international law by Margot E Salomon’ (2011) 8:1 *Brit Yearbk Int'l L* 333.



## 3.2. Geopolitics of Development Cooperation

The analysis in this section is intended to illustrate with some concrete examples that the right to development in Africa is nowhere near to be achieved through development cooperation. My argument draws from the fact that donor developed countries base their choice of countries for cooperation not necessarily on the right to development prerogatives in Africa but on the potential of the countries concerned to contribute to the donor country's economy.<sup>132</sup> Thus, as I explain in the following sub-sections, for developed countries, development cooperation is intended either to promote their self-interest or to exert their dominant influence over Africa.

### 3.2.1. Self-interest

Development cooperation might have been established to respond to deep-seated development problems but in reality the reasons why foreign stakeholders initiate and engage in cooperation are predominantly to promote what Mekuria Fikre refers to as 'strategic interests' rather than to address the developmental needs in developing countries.<sup>133</sup> Donald Rukare is not far from the point in estimating that development cooperation has in some ways only contributed to maintaining the *status quo* of keeping poor countries in perpetual poverty.<sup>134</sup> This tendency continues to manifest in different forms within the development cooperation framework, whereby donor partners tend to promote their geo-strategic interests rather than aim to enable developing countries to advance beyond their current state of underdevelopment.<sup>135</sup>

The rapidly growing presence of China in Africa for example, has become a subject of great concern and controversy. China's operation in Africa is established within the framework of

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<sup>132</sup> Anderssen (n 30 above) 10.

<sup>133</sup> Faust J & Ziaja S 'German Aid Allocation and Partner Country Selection: Development-orientation, self-interests and path dependency' (2012) *German Development Institute – Discussion Paper 7/2012* 5-6; Alesina A & Dollar D 'Who gives foreign aid to whom and why?' (2000) 5 *Journal of Economic Growth* 33-63; Fikre (n 49 above) 262; Hamilton (n 126 above) 216; Mawdsley (n 72 above) 641.

<sup>134</sup> Rukare (n 57 above) 47.

<sup>135</sup> Esteves & Assunção (n 22 above) 1776.

south-south cooperation, which in theory is based on partnership and mutual benefits.<sup>136</sup> In reality, cooperation often does not reflect what it envisages. In spite of the supposed South-South partnership with Africa, the following excerpts show how China sees Africa in the relationship:

Politically, China seeks Africa's support for China's 'One China' policy and for its foreign policy agendas in multilateral forums such as the United Nations. Economically, Africa is seen primarily as a source of natural resources and market opportunities to fuel China's domestic growth....

China also sees an underlying ideological interest in Africa, as the success of the 'China model' in non-democratic African countries offers indirect support for China's own political ideology and offers evidence that Western democratic ideals are not universal....

Politically, the continent is of small importance to China's foreign policy agenda, with Africa playing a largely supportive role in China's overall international strategy. Rather than being seen as 'key' or a 'priority,' Africa is seen to be part of the 'foundation' on which China's broader strategic ambitions are built (footnote omitted)....

Given the general low priority of Africa in China's foreign policy agenda, African issues rarely reach the highest level of foreign policy decision making in the Chinese bureaucratic apparatus.<sup>137</sup>

With such one-sided interests, it is undeniable that aid from China to Africa is designed to promote the goals that China aims to achieve rather than Africa's own development goals. Another example worth noting is Brazil's engagement in Africa within the South-South cooperation framework. In analysing the concentration of Brazil's cooperation programmes in Africa (using the case of Mozambique) and South America, Duarte de Siqueira illustrates that the cooperation is largely driven by the 'geopolitical interests' in Brazil's defence policy to control the 'Arch of the South Atlantic, where the Blue Amazon and its oil-rich resources are geographically located'.<sup>138</sup> Just like China, Brazil as an emerging third-world super-power 'wants to gain ground in international decision processes'.<sup>139</sup> Many more geopolitical interests of this kind only contribute to the stratification of the international system into cleavages where the

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<sup>136</sup> Owen O & Melville C 'China and Africa: A new era of south-south cooperation' (2005) Open Democracy available at: [https://www.opendemocracy.net/globalization-G8/south\\_2658.jsp](https://www.opendemocracy.net/globalization-G8/south_2658.jsp) (accessed: 20 April 2015).

<sup>137</sup> Sun (n 101 above) 1-2.

<sup>138</sup> De Siqueira (n 107 above) 146-150; Milani & Muñoz (n 72 above) 39.

<sup>139</sup> De Siqueira (n 107 above) 140.

states that have the financial muscles shape the policies, make the rules for engagement, arbitrate the game of cooperation and determine the outcome of the development process.<sup>140</sup>

### 3.2.2. Desire to dominate

History holds evidence that the imperialistic practices and conflicts that have characterised the past are not unrelated to superpower competition and the quest for global supremacy.<sup>141</sup> Accompanying the need to promote national self-interest is the desire to exercise hegemony over other states. For a long time, this attitude has shaped the field of development cooperation, which Pierre Bourdieu has described as:

[A] space of structured positions [between] developing and developed countries, or donors and recipients. This dyadic structure, established in the early 1970s, would be kept stable for four decades, consolidating not only donor and recipient positions but also the rules of mobility governing the ways through which one developing country could graduate to become a developed country.<sup>142</sup>

Based on Bourdieu's description of how development cooperation is configured, it is now more than four decades and there is hardly empirical evidence of a developing country that has graduated to the status of a developed country as a result of assistance received through development cooperation. The best that has been achieved during this period has been a re-configuration of the developing world into *middle income* and *low income countries* and a further ranking of the low income countries into *fragile states*, *least developed countries* and *heavily indebted poor countries*.<sup>143</sup> As some form of psychological comfort, the International Monetary Fund (IMF) has in another classification renamed the global divide, which has traditionally been known as developed and developing countries into what is now known as *advanced countries* consisting of some 34 highly industrialised countries and the rest of the 154 countries, which are

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<sup>140</sup> Esteves & Assunção (n 22 above) 1776-1778.

<sup>141</sup> Esteves & Assunção (n 22 above) 1777.

<sup>142</sup> Bourdieu P *Practical Reason: On the Theory of Action* (1998) 32; Esteves & Assunção (n 22 above) 1777.

<sup>143</sup> Alonso JA, Glennie J & Sumner A 'Recipients and contributors: Middle income countries and the future of development cooperation' (2014) available at: <http://effectivecooperation.org/wordpress/wp-content/uploads/2014/04/Recipients-and-Contributors-MICs-and-the-future-of-development-cooperat...pdf> (accessed: 09 April 2015) 5.

labelled as *emerging markets* and *developing economies*.<sup>144</sup> These configurations are misleadingly designed to create a collective guilt of everlasting underdevelopment and in that way developing countries are locked in a position of continuous subservience.<sup>145</sup>

In contrast to the income per capita criterion that the IMF uses in making the above classifications, Vázquez and Sumner use a more progressive cluster categorization to describe developing countries based on evolving conceptions about development consisting of: ‘development as human development; development as economic autonomy; development as political freedom; and development as sustainability’.<sup>146</sup> This categorisation enables developing countries to practically focus on expanding capabilities, that is, the means, opportunities or substantive freedoms to advance human functioning in terms of practical outcomes of well-being unlike dependence on patriarchal forms of cooperation that do not guarantee freedoms.<sup>147</sup> The primary motivations why developed countries promote cooperation are not divorced from the imperialistic purposes for which slavery and colonisation were carried out.<sup>148</sup> It is not surprising that issues relating to development in Africa are decided by the OECD-DAC instead of being

<sup>144</sup> International Monetary Fund ‘Proposed new grouping in WEO country classifications: Low-income developing countries’ (2014) *IMF Policy Paper 2*.

<sup>145</sup> The World Bank and the IMF acknowledge the fact that development entails well-being and not economic growth. These institutions acknowledge that human development is just a means to achieving human development which is the end. To use economic growth criteria as a basis for their configuration of the world is what I consider fraudulent and misleading. According to another classification by New Economics Foundation (see: Happy Planet Index 2012 Report: available at: <http://neweconomics.org/2012/06/happy-planet-index-2012-report/> (accessed: 28 May 2015) based on ‘happy planet index’ criterion, which implies measurement in terms of happiness or well-being, most of the countries that the International Monetary Fund classifies as less development are those that rank top in terms of happiness (well-being).

<sup>146</sup> Vázquez ST & Sumner A ‘Beyond low and middle income countries: What if there were five clusters of developing countries?’ (2012) *Institute of Development Studies – Working Paper 404* 6 & 14.

<sup>147</sup> Vázquez & Sumner (n 146 above) 6; Sen (n 62 above) 18.

<sup>148</sup> Führer (n 9 above) 8-12. Helmut Führer’s historical account on the establishment of OECD-DAC and the Resolution on the Common Aid Effort presents a scenario reminiscent of the Berlin Conference where the decision was taken to partition and colonise Africa. The initiative, which is intended to provide development assistance to developing countries was taken in Europe and America, and involved only highly industrialised countries without consultation or representation of a single developing country in any of the deliberations, decision making or composition of the committees.

informed by the actual development priorities on the ground. Owing to the global imbalances that have been created as a result, Africa has remained deeply affected by structural changes that take place within the global framework.<sup>149</sup>

Mahalu identifies these changes to include the fact that most developing countries have been rendered unable to ‘exercise full sovereignty over their natural wealth and resources and do not control the prices of their raw materials, nor [do they] have any influence on the prices of imported capital goods’.<sup>150</sup> Ahluwalia, Carter and Chenery observe that in spite of the expansion of the world economy, the benefits ‘have only reached the world’s poor [the largest proportion of them in Africa] to a very limited degree’.<sup>151</sup> This is due not to any failure on the part of the poor but among other factors to the distributional patterns, which largely exclude the poor from the sphere of economic expansion and material improvements.<sup>152</sup> Besides these systemic impediments, the desire by donor partners to dominate within the development cooperation framework has exposed development prospects in Africa to direct attack by foreign stakeholders.

### **3.3. Sabotage of Africa’s Development Prospects**

#### **3.3.1. Economic Sabotage**

The dawn of the new millennium incited great expectations about Africa’s development future, especially revolving around whether Africa is capable of claiming the Twenty First Century.<sup>153</sup> Impressive economic performance across the continent points to the fact that Africa indeed has the potential to become the centre of development focus.<sup>154</sup> However, the possibility of a

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<sup>149</sup> Linda Lim YC ‘The impact of changes in the world economy on developing countries’ in Berg R & Gordon DF (eds) *Cooperation for International Development: The United States and the Third World in the 1990s* (1989) 21.

<sup>150</sup> Mahalu (n 47 above) 18.

<sup>151</sup> Ahluwalia MS, Carter NG & Chenery HB ‘Growth and poverty in developing countries’ (1979) 6 *J Dev’t Econ* 299.

<sup>152</sup> Ahluwalia, Carter & Chenery (n 151 above) 299.

<sup>153</sup> The World Bank *Can Africa Claim the 21<sup>st</sup> Century?* (2000) 7.

<sup>154</sup> UNCTAD ‘Economic development in Africa: Catalysing investment for transformative growth in Africa’ (2014) *United Nations Publication* 2.

sabotage theory cannot be ruled out in the failure to translate the recorded economic growth into right to development gains. Zu Wurong has noted that ‘the US is not ready for China’s rise, nor does it respect China’s basic right to development’.<sup>155</sup> The same is true for Africa, where the right to development has consistently been sabotage by foreign stakeholders.

The boom in export trade during the 1960s ushered in a period of industrial, social and economic transformation that envisaged ‘greater development, equality and social justice’ in Africa.<sup>156</sup> However, this optimism soon translated into plunging depression, stagnation, and a debt crisis as all of Africa’s development initiatives dramatically ground to a halt.<sup>157</sup> In the absence of an established development model for Africa, the IMF and the World Bank seized the opportunity to introduce the structural adjustment programmes, which was packaged as a recovery strategy but in essence was a vehicle for advancing free market capitalism into Africa.<sup>158</sup> Trusting the expertise of these institutions, African governments quickly embraced their advice to introduce austerity measures, which instead of rescuing the ailing economies rather lured them into a debt trap.<sup>159</sup> By 1990, as Boaduo has observed, many African countries had borrowed much more than they could ever pay off.<sup>160</sup> Left with a deteriorating socio-economic situation and a huge negative balance sheet, the IMF and the World Bank found reason to invade the African economies with even more stringent austerity measures.<sup>161</sup>

Some scholars see merit in the SAPs as well-intentioned macro-economic policies that were designed to stimulate economic growth, without which socio-economic development may not be

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<sup>155</sup> Wurong Z ‘Respect for right to development’ *China Daily* US [New York, NY] of 28 Feb 2014.

<sup>156</sup> Boaduo NAP ‘Africa’s political, industrial and economic development dilemma in the contemporary era of the African Union’ (2008) 2:4 *J Pan Afr Stud* 96.

<sup>157</sup> Boaduo (n 156 above) 96.

<sup>158</sup> Heidhues F & Obare G ‘Lessons from structural adjustment programmes and their effects in Africa’ (2011) 50(1) *Qlty J Int’l Agric* 58; Dicklitch S & Howard-Hassmann R ‘Public policy and economic rights in Ghana and Uganda in Hertel S & Minkler L (eds) *Economic Rights: Conceptual, Measurement and Policy Issue* (2007) 327.

<sup>159</sup> Bunn (n 119 above) 1455-1457; Boaduo (n 156 above) 97.

<sup>160</sup> Boaduo (n 156 above) 97.

<sup>161</sup> Boaduo (n 156 above) 97.

achieved.<sup>162</sup> At face value, the austerity measures seemed like sound structural adjustment strategies. However, Boaduo points out that the primary motive behind the SAPs was to constrain African governments to pay off accumulated debts or surrender their economies to foreign control.<sup>163</sup> The strategy worked and the indebted African governments were compelled to roll back the provision of basic services, to privatise state-owned enterprises (most of which were purchased by foreign conglomerates) and to reduce public expenditures through salary cuts, massive retrenchments and currency devaluation, (like the CFA Franc that suffered a 104% devaluation in 1994).<sup>164</sup> The SAPs threw Africa into economic shock, which in turn has been blamed on poor governance, corruption, political instability and inefficiency in management.

Without disputing Boaduo's attribution of the fiasco of the SAPs to the dishonest intentions of the IMF and the World Bank in destabilising African economies,<sup>165</sup> I think that these institutions on the most part barely exploited the vacuum created by the lack of a functional development model, to ensnare Africa with attractive loan facilities. For Akum, the loan facilities were tailored to look like fine opportunities for economic growth but in effect constituted real threats to socio-economic development.<sup>166</sup> Cameroon for example, like many other African countries has been ensnared in a debt trap, which as Akum points out, has rendered the country permanently dependent on foreign loans in substitution of fiscal revenues.<sup>167</sup> The structure of Cameroon's external debt stands at 50.7%, distributed as follows: World Bank–24.5%, IMF–15.6%, African Development Bank Group–13.1%, Paris Club–12.3%, multilateral donors–20.6% and other official bilateral donors–13.6%.<sup>168</sup> Such a debt profile illustrates that the economy of

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<sup>162</sup> Dicklitch & Howard-Hassmann (n 158 above) 325-327.

<sup>163</sup> Boaduo (n 156 above) 97.

<sup>164</sup> Awung WJ & Atanga M 'Economic crisis and multi-party politics in Cameroon' (2011) 5:1 *CJDHR*; Ngwa AK 'The baobab tree lives on: Paul Biya and the logic of political survival' (2009) *African Studies Department Johns Hopkins SAIS* 5; Boaduo (n 156 above) 97-99.

<sup>165</sup> Boaduo (n 156 above) 98.

<sup>166</sup> Akum GJ 'The impact of foreign debt on GDP growth: Cameroon' (2011) *Msc Thesis Ritsumeikan Asia Pacific University* 2.

<sup>167</sup> Akum (n 166 above) 8.

<sup>168</sup> IMF 'Cameroon: Staff report for the 2010 Article IV consultation and debt sustainability analysis' (2010) *IMF Country Report No 10/25 – IMF Washington DC* 36; Akum (n 166 above) 8.



Cameroon is virtually controlled by foreign stakeholders, thus robbing the country of socio-economic self-determination. Under these circumstances, it is unlikely that Cameroon would be able to create the enabling domestic environment for asserting the right to development without provoking a coercive reaction from its many creditors.

Where imperial powers have not been successful in subduing the development prospects of African countries through the debt trap, they have employed alternative sabotage strategies, including through coercive economic sanctions like in Zimbabwe where sanctions imposed by the European Union and the US have in combination with the government's controversial policies systematically eroded gains in socio-economic and cultural development.<sup>169</sup> Meanwhile, as Isabella Bunn notes, the use of unilateral coercive measures such as the imposition of economic sanctions constitutes an obstacle to the realisation of the right to development.<sup>170</sup> Apart from economic sabotage, the African development landscape has also been the target of military sabotage.

### **3.3.2. Military sabotage**

Post-independence Africa has experienced a sequence of *coup d'états* and armed conflicts that have destabilised the continent to the extent that the few countries that have not yet plunged into the chaos make up the exception rather than the rule. It is noted that 'there have been at least 200 coups across Africa since the 1960s'.<sup>171</sup> The proliferation of arms on the continent also triggers curiosity about their origins and the purpose for which they flood the African political landscape. It is not a question of doubt, as Boaduo has pointed out, that instability in Africa has on the most part been orchestrated by mercenaries backed by foreign intelligence agencies as a calculated plan to frustrate Africa's development aspirations.<sup>172</sup> For instance, as Koutonin indicates, of the total number of *coup d'états* that have taken place in Africa, over 61% have happened in

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<sup>169</sup> Mathaba.Net 'Impact of sanctions against Zimbabwe' available at: [www.mathaba.net/news/?x=610987](http://www.mathaba.net/news/?x=610987) (accessed: 15 November 2014); ZANU-PF 'Sanctions on Zimbabwe are real' available at: [http://www.zanupf.org.zw/index.php?option=com\\_content&view=article&id=148:sanctions-on-zimbabwe-are-real](http://www.zanupf.org.zw/index.php?option=com_content&view=article&id=148:sanctions-on-zimbabwe-are-real) (accessed: 5 September 2015).

<sup>170</sup> Bunn (n 119 above) 1459-1462.

<sup>171</sup> Aljazeera 'Inside story' Aljazeera News of 18 September 2015.

<sup>172</sup> Boaduo (n 156 above) 96 & 100.



francophone Africa, masterminded by France to topple the government of any of the countries that dared to oppose French domination and continuous colonial influence in the country.<sup>173</sup>

In recognition of the detrimental impact of armed conflicts on the realisation of the right to development, it is recommended to strengthen disarmament efforts and consequently reallocate resources gained through disarmament into comprehensive development initiatives.<sup>174</sup> This notwithstanding, military assaults have remained a permanent tool in the hands of foreign stakeholders in sabotaging development efforts like in the case of Libya, which begs justification. Qaddafi was undeniably an eccentric and repressive dictator, noted for his horrific human rights abuses, for supporting terrorism and mercenary *coups* and also for financing anti-western revolutionary campaigns around the world. However, as Suhfree notes, he eventually mended relations and built rapprochement with the west and his long time antagonists.<sup>175</sup>

It is reported that Qaddafi's initiative to create an independent communications system and an African Monetary Fund as an alternative source of investment finance, planned to be headquartered in Yaoundé with a USD42 billion capital, were calculatedly sabotaged through the NATO military assault on Libya in 2011.<sup>176</sup> It is uncertain to what extent the projects would have succeeded had Qaddafi not been killed, given that his theatrical exploits to achieve his grand ambitions for Africa, did not gain the full support of some of his African peers. However, Petras asserts that the NATO military sabotage sent a shock signal to the rest of Africa to desist from any aspirations to establish a competitor financial institution to the IMF and the World Bank.<sup>177</sup> While the motive behind the NATO intervention in Libya may not be accurate as Petra indicates,

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<sup>173</sup> Koutonin MR '14 African countries forced by France to pay colonial tax for the benefits of slavery and colonisation' (2014) *Silicon Africa* Available at: <http://www.siliconafrika.com/france-colonial-tax/> (accessed: 30 October 2016); Le Vine VT *Politics in Francophone Africa* (2004) 2-6.

<sup>174</sup> DRtD (n 6 above) art 7.

<sup>175</sup> Suhfree CS *Africa: Where Did We Go Wrong?* (2016) 243-249.

<sup>176</sup> Petras J 'NATO's war crimes in Libya: Sanctions against defiance' (2011) *Voltaire Network New York (USA)* 14 September 2011 available at: <http://www.voltairenet.org/article171385.html> (accessed: 3 September 2015); Pougala JP 'The lies behind the west's war on Libya' *Pambazuka News* 14 April 2014 Issue 525 available at: <http://www.pambazuka.net/en/category.php/features/72575> (accessed: 3 September 2015).

<sup>177</sup> Petras (n 176 above) 9-10.

it is incontestable that the use of military force does not advance the right to development by any means. It is also worth highlighting that the military expedition in Libya was perpetrated within the context of international law that guarantees the sovereign equality of states, but as Anthony Anghie explains, does not provide sufficient protection to developing countries, which once were (and perhaps still remain) the subjects of domination under the same law.<sup>178</sup>

In spite of the perception with regard to the responsibility to protect as a means to guard against human rights violations,<sup>179</sup> which provided the basis for the military intervention in Libya, such interferences have not always been carried out in good faith. In Sengupta's estimation, designing an appropriate programme of action might be a more strategic approach in actualising the right to development.<sup>180</sup> This is reflected in Ibrahim Salama's suggestion to adopt a progressive, case-by-case approach to different situations,<sup>181</sup> which by inference necessitates an enabling environment for the realisation of the right to development. In what follows, I look at how the right to development is conceived to be achieved in Africa.

## **4. The Right to Development in Africa**

### **4.1. Recommended Modalities for Realisation**

In this section, I look at the modalities envisaged by the African Charter among other associated instruments for the realisation of the right to development. These modalities are discussed in light of article 2(3) of the Declaration on the Right to Development, which recognises the right and the duty that states are endowed with to formulate national development policies. It is important to clarify that the right to development as it is formulated in the African Charter does not imply a

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<sup>178</sup> Anghie A *Imperialism, Sovereignty and the Making of International Law* (2005) 111.

<sup>179</sup> Nasu H 'The UN Security Council's responsibility and the responsibility to protect' (2011) 15 *Max Planck Yearbook of United Nations Law* 381-382; Rishmawi M 'The responsibility to protect and protection of civilians: The human rights story (d.n.a) *Office of the High Commissioner for Human Rights* 91; Evans G *et al* 'The responsibility to protect' (2001) *International Development Research Centre* 15-18.

<sup>180</sup> Sengupta 2002 (n 2 above) 860-861.

<sup>181</sup> Salama I (n 51 above) 53.

solicitation for development assistance as it is envisaged at international level, i.e., to be achieved through cooperation with developed countries.<sup>182</sup> Rather, the right to development in Africa is fundamentally an assertion of socio-economic and cultural self-determination, which as stipulated in article 22(2) of the Charter, entails concrete action by African countries in putting the right to development effectively into practice.<sup>183</sup> The Charter makes provision for two possible scenarios. In the first scenario, African countries are required to take individual responsibility while in the second scenario they are required to take collective action to ensure that the right to development is achieved.

#### **4.1.1. Individual state responsibility**

According to Paul Gready, state responsibility is defined in terms of obligations of ‘*delivery and oversight*’, meaning that with regard to the right to development, the state has direct responsibilities in making available certain material entitlements as well as an oversight role in ensuring accountability.<sup>184</sup> It is an established principle in international law that the realisation of the right to development remains the primary responsibility of the state. The Declaration on the Right to Development provides that ‘[s]tates have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development’.<sup>185</sup> The African Charter stipulates as a matter of binding law that ‘[s]tates shall have the duty, individually ... to ensure the exercise of the right to development’.<sup>186</sup> So, it is first of all a state’s obligation to take steps and appropriate measures to ensure well-being and improved livelihood for its peoples before any considerations of engaging with other states for the purpose of achieving the same goal. Because the right to development imposes a legal obligation in Africa,

<sup>182</sup> Sengupta 2003 (n 2 above) 20.

<sup>183</sup> Article 22(2) stipulates that ‘States shall have the duty, individually or collectively, to ensure the exercise of the right to development’.

<sup>184</sup> Gready P ‘Rights-based approaches to development: What is the value added?’ (2008) 18:6 *Development in Practice* 740; see also Van der Have N ‘The right to development and state responsibility: Towards idealism without a sense of realism?’ (2011) *LLM Thesis University of Amsterdam* 15-27; Sengupta A ‘Realising the right to development’ (2000) 31 *Development and Change* 564; Dąbrowska AO ‘Legal status of the right to development’ (2010) *Haskoli Island University* 7-8.

<sup>185</sup> DRtD (n 6 above) art 3(1).

<sup>186</sup> African Charter (n 26 above) art 22(2).

failure to ensure its realisation may raise questions of legal accountability. Accordingly, Koen de Feyter ascertains that an essential feature of the right to development is to create accountability of the duty bearer to the right holders, implying that when the state – being the duty bearer – defaults, it has the obligation to repair the damages that may result from its action or inaction.<sup>187</sup>

A state's responsibility on the right to development extends beyond accountability to the right holders and involves taking protective and preventive measures to insulate right holders against violation by third parties.<sup>188</sup> Consequently, holders of the right to development are empowered to assert claims against the state if the latter fails in its duty. Not only is the state obligated to fulfil the right to development for present generations of its population, it is also required to ensure that the benefits of development are justly and equitably distributed in a manner as to guarantee that future generations will also be able to meet their own development needs.<sup>189</sup> More so, the state may not invoke the lack of development as an excuse to justify the inability to fulfil this mandated duty.<sup>190</sup> Fifty three out of the fifty five African states, (the exception being South Sudan and Morocco) have signed and ratified the African Charter, which enshrines the right to development.<sup>191</sup> As states parties to the Charter, they are legally bound to ensure that the right to development is achieved in Africa. This includes the commitment that each African state undertakes by adhering to the Charter, to adopt legislative and other measures to give effect to all of the Charter provisions, including the right to development.<sup>192</sup>

African countries have a reputation for treaty ratification, but implementation has remained a daunting problem.<sup>193</sup> This raises concerns relating to compliance with the legal obligations on the

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<sup>187</sup> De Feyter (n 2 above) 12.

<sup>188</sup> De Feyter (n 2 above) 13.

<sup>189</sup> Brundtland GH 'Report of the World Commission on Environment and Development: Our common future' (1987) *Brundtland Commission* para 27.

<sup>190</sup> Vienna Declaration (n 46 above) para I(10).

<sup>191</sup> African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed: 13 April 2015).

<sup>192</sup> African Charter (n 26 above) art 1.

<sup>193</sup> Maluwa T 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne J Int'l L* 3-4.

right to development. The law on treaties together with the principles that govern international law require states to become committed to the treaties they establish and consequently ensure their application at domestic level.<sup>194</sup> Treaty ratification, as Maluwa has noted, provides at least the first step towards the achievement of the policy goals and objectives enshrined in the treaty.<sup>195</sup> Following the historical development injustices that Africa has suffered, the extensive ratification of the African Charter provides a compelling reason to protect the range of human rights, including the right to development contained therein.<sup>196</sup> Africa's treaty ratification scorecard also indicates the political will expressed by African governments, which needs to be translated into action to ensure that their interactions with the rest of the international community should no longer be conducted like business as usual.<sup>197</sup> It means that treaty ratification must be followed with domestication, in which case monist constitutional regimes allow upon ratification for direct application of a treaty provision as part of domestic law, while dualist systems require a formal procedure of incorporation through parliamentary processes.<sup>198</sup> With regard to the domestication of the right to development enshrined in the African Charter, few African countries have explicitly done so.<sup>199</sup>

The scope of this thesis does not permit an in-depth analysis of the level of achievement of the right to development in different African countries. Only a few have taken legislative measures towards the realisation of the right to development at domestic level. A full discussion of the African constitutions that enshrine the right to development is provided in chapter four.<sup>200</sup> If the

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<sup>194</sup> Marian B 'The dualist and monist theories: International law's comprehension of these theories' (2007) *Faculty of Economics, Law & Administrative Science University of Târgu-Mureş Romania* 1.

<sup>195</sup> Maluwa (n 193 above) 9.

<sup>196</sup> Maluwa (n 193 above) 10-11.

<sup>197</sup> Maluwa (n 193 above) 11.

<sup>198</sup> Marian (n 194 above) 2-3.

<sup>199</sup> See sect 2.1.3.1 of chapter four. Only 6 African countries have domesticated the right to development in the sense that the national constitutions explicitly enshrine the right to development as a constitutional entitlement. These countries include Cameroon, Malawi, the DRC, Ethiopia, Benin and Nigeria. A few other African countries like Uganda, Sao Tome & Principe, Burkina Faso, Zimbabwe and South Africa enshrine a range of socio-economic and cultural rights that could be interpreted to imply the right to development.

<sup>200</sup> See section 2.1.3 (2.1.3.1 & 2.1.3.2) of chapter four.

realisation of the right to development is to be determined by the extent of its incorporation into domestic law, the conclusion to draw is that progress towards implementation is relatively slow. With the understanding that the obligation to achieve the right to development could be quite arduous to comply with for states individually, especially for the majority of African countries that are burdened by huge development challenges, it is important to explore the option granted by the African Charter to do so collectively.

#### **4.1.2. Obligation to take collective action**

The realisation of the right to development in Africa additionally requires the shared responsibility of states parties to the African Charter to take collective action. Although collective action may to some extent be understood to have the same connotation as development cooperation, it actually has a narrower scope in relation to traditional forms of cooperation. Traditional forms of development cooperation, as Anna Stahl has rightly noted are characterised by one-way flows of charitable relief assistance from developed to developing countries.<sup>201</sup> Collective action as it is envisaged for the realisation of the right to development in Africa is based on a responsibility to act with mutual interest to achieve a common purpose.<sup>202</sup> In my estimation, the duty to act collectively not only requires African countries to support each other; they have a collective duty to adopt a common policy, which I argue does not exclude conceptualising the right to development as a development model.

This is important to consider, because it is evident as pointed out earlier, that the right to development in Africa cannot possibly be achieved through prevailing patterns of development cooperation. The likelihood that it can be accomplished by African countries acting independently, especially faced with the increasing competition among developed countries for global dominance is even more challenging. A number of initiatives hold evidence of the extent to which African countries are making efforts in collectively dealing with issues relating to

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<sup>201</sup> Stahl (n 109 above) 11.

<sup>202</sup> See Constitutive Act of the African Union adopted in Lomé Togo on 11 July 2000 art 3(d) provides for example, as one of the objectives of the African Union to ‘promote and defend African common positions on issues of interest to the continent and its peoples’ and art 3(j) ‘promote sustainable development at the economic, social and cultural levels as well as the integration of African economies’.

development and human rights.<sup>203</sup> One such initiative, referred to as ‘African common positions’, through which policy decisions are taken by the African Union (AU) on issues of major importance, provides the framework that could be explored to advance the right to development. African common positions embody some form of ‘collectivism’, which represents an institutional practice within the AU in keeping with one of the primary objectives of the Constitutive Act to ‘[a]ccelerate the political and socio-economic integration of the continent’ and to ‘[p]romote and defend African common positions on issues of interest to the continent and its peoples’.<sup>204</sup>

Important questions to consider are how crucial these common positions are in addressing issues of priority to development and whether they could be used as a means to accelerate African integration in view of the collective obligation to ensure that the right to development is achieved. Tiyanjana Maluwa asserts that through the common position principle, the AU provides a forum through which member states collectively adopt policies and positions on a broad range of issues.<sup>205</sup> The motivation behind one such common position on the Post-2015 Development Agenda is stated in the preamble:

[t]hat the post-2015 Development Agenda provides a unique opportunity for Africa to reach consensus on common challenges, priorities and aspirations, and to actively participate in the global debate on how to provide a fresh impetus to the MDGs and to examine and devise strategies to address key emerging development issues on the continent in the coming years.<sup>206</sup>

The document emphasises the need for the post-2015 Development Agenda to reaffirm among others ‘the right to development’ and to ensure a ‘policy space for nationally tailored policies and programmes on the continent’.<sup>207</sup> This is strategic not only because the adoption of the common position allows the opportunity to address development concerns collectively, but also

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<sup>203</sup> The cooperation initiatives that African countries are engaged in include regional economic blocs such as ECOWAS, SADC, COMESA, ECCAS, EAU and Joint Commissions for Cooperation.

<sup>204</sup> AU Constitutive Act (n 202 above) art 3(d).

<sup>205</sup> Maluwa (n 193 above) 2.

<sup>206</sup> African Union Common Africa Positions on Post-2015 Development Agenda, adopted at the 22nd Ordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia on 31 January 2014.

<sup>207</sup> AU Constitutive Act (n 202 above) preamble.



because it provides a unified platform for African countries to influence and shape development policy formulation at the international level. In acknowledging the pro-activeness of the common position initiative, Barry Carin suggests that Africa needs to explore the opportunity strategically to ensure that the post-2015 development agenda is congruent with African priorities.<sup>208</sup>

However, Africa has always been constrained to prioritise foreign interests over its own development prerogatives.<sup>209</sup> Almost all of Francophone Africa for example, despite attaining statehood at independence, has remained under French ‘modo-colonialism’, a system of ‘compulsory solidarity’ known as *Françafrique* established through a French-imposed colonial pact.<sup>210</sup> According to Bradley, attempts to quit by any of the countries trapped in the system have resulted in French backed *coup d’états*, assassinations and economic sabotage.<sup>211</sup> Al Jazeera describes the *Françafrique* connection as ‘a brutal and nefarious tale of corruption, massacres, dictators supported and progressive leaders murdered, weapon-smuggling, cloak-and-dagger secret services, and spectacular military operations’.<sup>212</sup> The system allows France unfettered controls over the economy of Francophone African countries, which are compelled to continue to prop up the French economy even while the peoples endure extreme poverty and chronic underdevelopment.<sup>213</sup> With the understanding that the right to development in Africa has for the

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<sup>208</sup> Carin B ‘The African Union and the post-2015 development agenda’ (2014) *Centre for International Innovation – Policy Brief No 45* 1.

<sup>209</sup> See Le Vine VT *Politics in Francophone Africa* (2004) 2-6; Moncrieff R ‘French Relations with Sub-Saharan Africa under President Sarkozy’ (2012) *South African Institute of International Affairs - Occasional Paper No 107* 6-7; Koutonin (n 173 above) illustrate how France manipulates its former colonial possessions made up of some 14 francophone African countries to prioritise French interests in those countries.

<sup>210</sup> Bradley P ‘The colonial pact: How France sucks the life out of Africa’ (2013) *Our World Commentary* available at: <https://penniwinkleb.wordpress.com/2013/01/25/the-colonial-pact-how-france-sucks-the-life-out-of-africa/> (accessed: 24 August 2016).

<sup>211</sup> Bradley (n 210 above).

<sup>212</sup> Al Jazeera ‘The French African connection’ (2014) *Al Jazeera* available at: <http://www.aljazeera.com/programmes/specialseries/2013/08/201387113131914906.html> (accessed: 24 August 2016).

<sup>213</sup> Lehmann C ‘French Africa policy damages African and European economies’ (2012) *NSNBC* available at: <http://nnsbc.me/2012/10/12/french-africa-policy-damages-african-and-european-economies/> (accessed: 24 August 2016); Bradley (n 210 above).



most part been compromised through domination, it is unlikely that under the prevailing circumstances, where a large part of the continent is still subject to French colonialism, Africa will be able to advance beyond the status of underdevelopment.

The obligation for collective action to ensure the realisation of the right to development enjoins African countries to direct more attention towards effective integration of the continent as stipulated by the AU Constitutive Act.<sup>214</sup> Such integration will give Africa a stronger voice and sense of purpose in asserting the right to development, especially when engaging in negotiations at the international level. The Abuja Treaty of 1991 has been a progressive move towards bringing the eight existing regional economic blocs into one centrally coordinated African Economic Community (AEC). Unfortunately, the initiative focuses principally on economic integration, omitting the most essential aspects of social and cultural development, which are central to engineering human well-being in Africa. In the next section, I examine the context within which the right to development is legitimised in Africa and the normative requirements according to which cooperation may be established.

#### **4.2. Context for Implementation**

In this section, I examine the context for implementing the right to development in Africa, which converges at the point of intersection between human rights law and development law to set the normative standards for improved well-being. According to Alston and Robinson, the process represents an embrace of the values of participation and transparency in formulating policies to ensure the well-being of the poor.<sup>215</sup> The question to consider is how the right to development could rather be explored to regulate the actions of foreign stakeholders within the framework of development cooperation in Africa.

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<sup>214</sup> AU Constitutive Act (n 202 above) art 3, which lays out the objectives of the African Union makes the following provisions relating to regional integration:

- a) Achieve greater unity and solidarity between the African countries and the peoples of Africa;
- c) Accelerate the political and socio-economic integration of the continent;
- d) Promote sustainable development at the economic, social and cultural levels as well as the integration of African economies.

<sup>215</sup> Alston P & Robinson M *Human Rights and Development: Towards Mutual Reinforcement* (2005) 15.

#### 4.2.1. Human Rights and development in Africa

The African human rights system has rightly also been described as development law,<sup>216</sup> in the sense that besides protecting human rights it also aims at regulating development practice across the continent. This is explained by the fact that almost all the treaty instruments that make up the African legal framework combine principles for upholding human rights and the rules according to which development practice is regulated.<sup>217</sup> This has emerged into the unique formulation known as the right to development that envisages the realisation of the composite of human and peoples' rights as the core indicator for gauging development.<sup>218</sup> In spite of arguments denying that there is such a thing as development law,<sup>219</sup> David Kennedy affirms that law constitutes a central aspect of development although it must not usurp the political function of development policy making.<sup>220</sup> With the historical experiences of development injustices, it became necessary in the African constructivist imagination to design a legal system that guarantees justice in development and respect for individual and collective rights. This has practically translated into a catalogue of binding and non-binding continental instruments and domestic legislation that make provision for the right to development in Africa.<sup>221</sup>

Framed in the language of human rights and development, the African legal system is conceptualised to address a broad range of development concerns of an individual and collective

<sup>216</sup> Borella F 'Le système juridique de l'Organisation de l'Unité Africaine' (1971) 17 *Annuaire Français de Droit International* 246.

<sup>217</sup> See for example AU Constitutive Act (n 202 above) arts 3(h), 3(j), 3(k), 4(n).

<sup>218</sup> Okafor OC 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights *Realizing the Right to Development* (2013) 375; De Feyter K 'The right to development in Africa' (2013) *Law & Development Research Group University of Antwerp* 3; Kirchmeier (n 7 above) 9; Gawanas (n 94 above) 143-149.

<sup>219</sup> Chemillier-Gendreau M 'Relations between the ideology of development and development law' in Snyder F & Slinn P (eds) *International Law of Development: Comparative Perspectives* (1987) 58.

<sup>220</sup> Kennedy D 'The rule of law as development' in Hatcher J & Perry-Kessaris A (eds) *Law and Development - Facing Complexities in the 21<sup>st</sup> Century: Essays in Honour of Peter Slinn* (2003) 26.

<sup>221</sup> African Charter (n 26 above) arts 1-26; AU Constitutive Act (n 202 above) art 3; African Youth Charter (n 55 above) art 10; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in Maputo Mozambique on 11 July 2003 art 19.

nature, including socio-economic and cultural concerns; peace and security concerns; and environmental concerns.<sup>222</sup> Theoretically, the African legal system guarantees the application of human rights law to development practice in order to protect the disadvantaged and to ensure the equitable sharing of development gains.<sup>223</sup> It envisages justice to prevail in the development sector, especially where such justice has been denied through acts of dispossession and subjugation. The African Charter stipulates as a principle that '[n]othing shall justify the domination of a people by another',<sup>224</sup> which provides as a guarantee the right and the freedom to make development choices. This principle is affirmed by international law and thus impacts on a broad range of actors including foreign stakeholders whose sometimes excessive influence and uncontrollable behaviour pose a threat to the enjoyment of guaranteed rights. Within this volatile setting, the right to development sets out to play a multifunctional role: as an objective to achieve justice in development,<sup>225</sup> as a means to promote the law on development in Africa,<sup>226</sup> as an instrument to regulate development cooperation practice,<sup>227</sup> and also as an outcome in enabling the exercise and enjoyment of well-being and improved livelihood.<sup>228</sup>

The preamble to the African Charter affirms the commitment of member states to 'intensify their cooperation and efforts to achieve a better life for the peoples of Africa'.<sup>229</sup> Accordingly, the African legal system sets standards that bind all African states parties to the relevant treaties. For foreign stakeholders that are not parties to the African human rights treaties and by implication are not bound by any obligations imposed by those treaties, it remains a concern how they could be compelled to comply with the norms set by the treaty instruments in force. As affirmed by the German Development Institute, development cooperation must be guided by principles, norms,

<sup>222</sup> See African Charter (n 26 above) chapter 1, part 1.

<sup>223</sup> Gadio K 'The role of law in development for the African continent from a development agency perspective' *Keynote Speech delivered at the Harvard African Law & Development Conference 17 April 2010* 2-4.

<sup>224</sup> African Charter (n 26 above) art 19; Coleman AK *Resolving Claims to Self-Determination: Is there a Role for the International Court of Justice?* (2013) 84-86.

<sup>225</sup> AU Constitutive Act (n 202 above) art 4(n).

<sup>226</sup> AU Constitutive Act (n 202 above) art 4(m).

<sup>227</sup> AU Constitutive Act (n 202 above) art 3(k) & 3(n).

<sup>228</sup> AU Constitutive Act (n 202 above) art 3(k).

<sup>229</sup> African Charter (n 26 above) preamble.

and mechanisms that are legitimate, effective and relevant.<sup>230</sup> However, because foreign stakeholders are often unmindful of the constraints on their actions, it is important to examine the normative requirements for cooperation in relation to the right to development in Africa.

#### **4.2.2. Normative requirements for cooperation**

##### **4.2.2.1 Country ownership of the development process**

An important factor to take into consideration is the fact that the peoples of Africa are entitled to exercise the right to development with due regard to their ‘freedom and identity’ as custodians of the African patrimony.<sup>231</sup> This goes along with the principle of self-determination that is inherent in the right to development and thus provides the guarantee of effective country ownership of the development process. The Paris Declaration on Aid Effectiveness recognises the idea of country ownership of development programmes, which grants to developing countries the freedom to ‘exercise effective leadership over their development policies and strategies and co-ordinate development actions’.<sup>232</sup> However, it is worth stating that because donor partners provide the funding, it allows them the opportunity to patronise the development processes in developing countries through terms and conditions, which recipient countries are simply constrained to comply with.<sup>233</sup> The trend in Africa has been such that development policies have almost entirely been formulated abroad or has been the subject of extensive external influence.<sup>234</sup>

Country ownership of the development process requires agency and self-determination, which is guaranteed by article 22 of the African Charter that grants entitlement to the peoples of Africa to exercise the right to development. Anthony Giddens’ structuration theory, which describes

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<sup>230</sup> Janus, Klingebiel & Mahn (n 24 above) 1.

<sup>231</sup> See African Charter (n 26 above) art 22(2).

<sup>232</sup> Paris Declaration on Aid Effectiveness and the Accra Agenda for Action (2005/2008) paras 12 & 14; Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, Cotonou on 23 June 2000 (amended in 2005 & 2010) art 2.

<sup>233</sup> Ilorah R ‘Africa’s endemic dependency on foreign aid: A dilemma for the continent’ (2011) *ICITI - ISSN: 16941225* 4-6, 22-25; Bilal S ‘The Rise of South-South relations: Development partnerships reconsidered’ (2012) *Conference paper - European Centre for Development Policy Management* 12-14.

<sup>234</sup> Sun (n 101 above) 1.

structure and human agency as related and mutually binding, posits that human beings are propelled by a sense of purpose that shapes and directs their actions.<sup>235</sup> The Statement of Common Understanding on the Human Rights-Based Approach to Development Cooperation adopted by UN agencies in 2003 holds that development cooperation should contribute to building the capacity of duty-bearers to meet their obligations as well as of rights-holders in claiming their rights.<sup>236</sup> Granted the context in exercising the right to development, the peoples of Africa have the potential to self-reliantly shape the development future of the continent. Practically, such self-determination has manifested in Libya after the 1969 Revolution, where the state adopted domestic policies that empowered the peoples to participate freely in the development process and to share in the benefits.

Justified by Giddens's theory, I argue that the highest standard of living that has ever been recorded in African history could only be made possible through the agency of the state as duty bearer and the peoples of Libya as holders of the right to development. Through the practice of 'natural socialism', the Libyan government created the opportunity for sweeping transformation by encouraging the productive capacity of the people of Libya to own and utilise the country's wealth and resources for socio-economic and cultural development.<sup>237</sup> However, the 2011 popular uprising in Libya illustrates, in accordance with right to development standards that the realisation of one set of human rights at the expense of other human rights, is flawed. More on Libya is discussed in chapter five.<sup>238</sup> Unfortunately, the right to development in Africa does not impose direct legal responsibility on external actors like in the case of the NATO intervention in Libya in 2011 that destabilised and brought the country's development gains to ruin and foreign domination. Such external action, which creates the opportunity for the imposition of foreign

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<sup>235</sup> Giddens A *The Constitution of Society: Outline of the Theory of Structuration* (1984) 258.

<sup>236</sup> OECD 'The human rights based approach to development cooperation: Towards a common understanding among the UN Agencies' available at: <http://www.oecd.org/derec/finland/43966077.pdf> (accessed: 22 April 2014).

<sup>237</sup> Deeb MK & Deeb MJ *Libya since the Revolution: Aspects of Social and Political Development* (1982) 115-120; Monti-Belkaoui J & Riahi-Belkaoui A *Qaddafi: The Man and His Policies* (1996) 2; El Fathaly & Palmer (n 83 below) 23.

<sup>238</sup> See sect 2.2.2.2 of chapter five.

policies that often do not respond to local realities, constitutes an obstacle to development, which in accordance with the Declaration on the Right to Development ought to be eliminated.<sup>239</sup>

#### 4.2.2.2 Obstacles to development

Lest the right to development suffers the oversimplification of becoming a mere abstraction, genuine cooperation for development must not only focus on aid but essentially on ensuring that the hindrances to development, especially those that promote injustice, are removed.<sup>240</sup> The first of such obstacles stemming from the development cooperation framework, which promotes development injustice is domination, in reaction to which the African Charter is emphatic in stating that '[n]othing shall justify the domination of a people by another'.<sup>241</sup> The need to eliminate foreign domination is justified by the 'unquestionable and inalienable right to self-determination', guaranteed by the African Charter.<sup>242</sup> On a softer note, the Declaration on the Right to Development appeals to the moral conscience of the international community; in order to encourage, promote and sustain comprehensive development in developing countries including Africa, to start by eliminating certain identified obstacles to development.<sup>243</sup> The Declaration enumerates these obstacles to include human rights violations resulting from discriminatory practices, domination and subjugation, insecurity and dispossession as well as the failure to observe guaranteed human rights.<sup>244</sup> Owing to the principles of interrelatedness and indivisibility, Helen Quane explains the failure to observe human rights to include the situation where civil and political rights are given priority over socio-economic rights.<sup>245</sup>

An important pre-condition for ensuring the exercise and enjoyment of the right to development is peace and security, which in spite of the guarantee on 'the right to national and international

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<sup>239</sup> DRtD (n 6 above) art 5.

<sup>240</sup> Olusegun O & Aigbyoye O 'Realising the right to development in Nigeria: An examination of legal barriers and challenges' (2015) 6:1 *J Sust Dev Law & Policy* 156-63; Bunn (n 119 above) 1452-1467.

<sup>241</sup> African Charter (n 26 above) art 19.

<sup>242</sup> African Charter (n 26 above) art 20.

<sup>243</sup> DRtD (n 6 above) art 3(3).

<sup>244</sup> DRtD (n 6 above) art 5 & 6(3).

<sup>245</sup> Quane H 'A further dimension to the interdependence and indivisibility of human rights?: Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Hum Rts J* 49.

peace and security',<sup>246</sup> remains an illusion in most parts of Africa. According to Isabelle Roger, the relation between the right to peace and the right to development is of particular importance in the sense that peace constitutes an elementary component of the right to development.<sup>247</sup> Conflicts hinder the realisation of the right to development by destabilising the socio-economic structures that guarantee a decent livelihood.<sup>248</sup> The challenge remains for Africa – if collective action is to become meaningful and instrumental for the right to development to be achieved – that the conflicts that spread across the continent are brought to an end. As a prerequisite for socio-economic development, the AU Constitutive Act obligates state parties to eliminate endemic conflicts that constitute a major impediment to development,<sup>249</sup> in accordance too with the purpose of the UN that aims:

[t]o maintain international peace and security, and to that end: *to take effective collective measures* for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. (emphasis added).<sup>250</sup>

According to Ewanfoh, the right to development can only be achieved through development cooperation if the existing obstacles that are generated through development cooperation are eliminated and the development cooperation framework is rationalised to ensure that it does not produce new obstacles.<sup>251</sup>

#### **4.2.2.3 Enabling environment**

Technically, the right to development in Africa is intended to address concerns relating to the unjust practices that hinder development and therefore stand in the way of the African peoples' right to exercise and enjoy well-being. These practices include the development paradigms

<sup>246</sup> African Charter (n 26 above) art 23(1).

<sup>247</sup> Roger I 'Le droit au développement comme droit de l'homme: Genèse et concept' (2003) *Mémoire Instituts D'Etudes Politiques de Lyon Université Lumière Lyon* 52-53.

<sup>248</sup> Olusegun & Aigbyoye (n 240 above) 161-162.

<sup>249</sup> AU Constitutive Act (n 202 above) preamble.

<sup>250</sup> UN Charter (n 1 above) art 1(1).

<sup>251</sup> See Ewanfoh OP *Underdevelopment in Africa: My Hands are Clean* (2014) 140.



imposed by industrialised countries, which often ignite conflicts and are obtained not only at the cost of the peoples' human rights but also at a cost of predatory exploitation and destruction of the natural environment.<sup>252</sup> In accordance with rights-based approaches, the right to development is determined by the fact that it is not the outcome that justifies the process, but the process is supposed to justify the outcome.<sup>253</sup> It implies that it is not just about what, but about how development is achieved. If the process of creating development is wrong, logically, according to rights-based standards the outcome cannot be expected to be right. Thus, the African Charter enjoins states parties to ensure that the development space allows the opportunity and an environment that is enabling enough for the right to development to be achieved.<sup>254</sup>

The need for an enabling environment is not only established by the African Charter but also by international law. It is sustained by a number of provisions of the Declaration on the Right to Development, which require creating favourable conditions for the fulfilment of the right to development.<sup>255</sup> In reaffirming the right to development as an inalienable human right, the Vienna Declaration also emphasises the necessity to create a favourable and equitable environment at the international level for the realisation of the right to development.<sup>256</sup> Thus, an enabling environment forms the foundation for action without which the right to development would remain a pipedream. This said, the follow up question to consider is what an enabling environment could be understood to mean. I describe an enabling environment in this context to represent an ideological and a practical space within which the right to development can be achieved without undue constraints. In my view, it is ideological in the sense that it denotes the

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<sup>252</sup> Zhenghua D 'Rights to development and selection in development mode' (2008) *China Hum Rts* 56.

<sup>253</sup> Rodney W *How Europe Underdeveloped Africa* (1973) 1; Sengupta 2004 (n 42 above) 183-184; Sengupta 2002 (n 2 above) 848-852.

<sup>254</sup> Okafor OC "Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 60; Mmari A 'The challenges surrounding the implementation of the right to development in the African Charter on Human and Peoples' Rights in light of the *Endorois* case' (2012) *LLM Dissertation University of Pretoria* 23; Kirchmeier (n 7 above) 11; African Charter (n 26 above) 22(2).

<sup>255</sup> DRtD (n 6 above) art 3(1); arts 7, 8(1) & 10.

<sup>256</sup> Fikre (n 49 above) 257; Vienna Declaration (n 46 above); UN GAOR World Conference on Human Rights 48th Session 22nd Plenary Meeting UN Doc A/CONF 157/23 1993 para 10.



set of principles that must guide development cooperation, and practical in the sense that action must be seen to be taken to ensure the exercise and enjoyment of the right to development.

According to the Declaration on the Right to Development, an enabling environment also entails making national and international conditions favourable for the right to development to be achieved.<sup>257</sup> In this regard, as Özden reiterates, states are charged with the obligation to take legislative and other appropriate measures to ensure that right holders are able to exercise their right to development.<sup>258</sup> The obligation to take other measures is quite broad.<sup>259</sup> In this context, it does not exclude regulating the activities of foreign stakeholders within the framework of development cooperation, which falls within the realm of the right granted to states to formulate policies to ensure improved well-being.<sup>260</sup> However, because the right to development is less of an international priority, the necessity to create an enabling environment remains the primary responsibility of developing countries, particularly in Africa where the right to development is legally binding. In accordance, Bertrand Ramcharan thinks that although international action is essential to ensure the effective realisation of the right to development, such action can only build on and complement action at the national and regional levels.<sup>261</sup> Thus, it is a matter of legal obligation for Africa to strive for the necessary enabling environment by compelling foreign stakeholders to comply with the law that guarantees the right to development. This is essentially an inevitable prerequisite for actualising the right to development in Africa. It entails the formulation and implementation of people-centred development policies,<sup>262</sup> and the elimination of the massive and flagrant violations of human rights.<sup>263</sup> It also requires political stability and

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<sup>257</sup> DRtD (n 6 above) art 3(1).

<sup>258</sup> Özden M 'The rights to development' *CETIM Human Rights Programme* 9; see African Charter (n 24 above) art 22(2); DRtD (n 6 above) arts 3(2) & 4(1).

<sup>259</sup> Ngang CC 'Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to "take other measures"' (2014) 14:2 *AHRLJ* 672-675.

<sup>260</sup> DRtD (n 6 above) arts 3(2) & 4(1).

<sup>261</sup> Ramcharan B *The Right to Development in Comparative Law: The Pressing Need for National Implementation* (2010) 6.

<sup>262</sup> DRtD (n 6 above) arts 4 & 8(1).

<sup>263</sup> DRtD (n 6 above) arts 5, 3(3) & 6(3).

the redeploying of resources into comprehensive human development efforts,<sup>264</sup> which Paulo notes will create the opportunity for advancement.<sup>265</sup>

It is undeniable that many African states are unable to muster the capacity to fulfil their right to development obligations, and thus will remain dependent on development assistance.<sup>266</sup> However, the circumstances offer the opportunity for such states to influence significantly how development cooperation is conducted in order that development assistance is outcomes-focused to address targeted development priorities that respond to peoples' direct needs. Development cooperation, which is envisaged as the process for realising the right to development, ought to determine the outcome in the form of guaranteeing the attainment of human well-being. In this light, Sengupta points out that an enabling environment requires the international community not only to make provision for development assistance but importantly to create equitable balance as a guarantee of fairness to developing countries within the global system.<sup>267</sup> Following Kirchmeier's intimation that development cooperation ought to be informed by the concept of the right to development,<sup>268</sup> I argue that it is even more strategic for Africa to part ways with the paternalistic development cooperation paradigm, which pragmatically speaking, exhibits quite minimal potential to enable Africa to advance in a comprehensive manner.

#### **4.2.2.4 Autonomy in development policy formulation**

The realisation of the right to development is contingent on an effective national development policy framework that is adequately protective and allows the opportunity for the exercise and enjoyment of well-being and improved livelihood. Accordingly, one of the norms for entering into development cooperation is the obligation to respect the sovereignty of every state in self-reliantly setting its own development priorities. This is enshrined in the African Charter, which provides that the peoples of Africa 'shall freely determine their political status and shall pursue their economic and social development *according to the policy they have freely chosen*'

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<sup>264</sup> DRtD (n 6 above) art 7.

<sup>265</sup> Paulo (n 28 above) 6.

<sup>266</sup> Paulo (n 28 above) 6.

<sup>267</sup> Sengupta 2000 (n 184 above) 571.

<sup>268</sup> Kirchmeier (n 7 above) 5.

(emphasis added).<sup>269</sup> It is also universally acknowledged that ‘[s]tates have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals’.<sup>270</sup>

Development policy-making is not just a duty imposed on African countries; it is a right that they are entitled to exercise within the framework of development cooperation.<sup>271</sup> The legitimacy in development cooperation with Africa can only be established by the fact that the policy for implementation is formulated by the African states concerned, which in order to be effective and relevant must respond to domestic development realities and priorities. Blame cannot be apportioned elsewhere if African countries fail to take this obligation seriously. The importance for giving attention to development policy making is, as David Kennedy has noted, to ensure equitable redistribution in order to enable balanced development.<sup>272</sup> Appropriate development policy making involves making choices among policy alternatives with the aim to achieve optimal development outcomes.<sup>273</sup> In order to be developmentally relevant, policy formulation must be attuned to the realities of the socio-economic and cultural development challenges that Africa is confronted with.

## 5. Concluding Remarks

The stalemate in development, which according to global categorisation ranks Africa the most underdeveloped part of the world,<sup>274</sup> cannot be attributed solely to Africa’s failure to advance in a comprehensive manner. The sometimes prejudiced and uncontrollable actions and influences of external actors within the framework of development cooperation have over the decades impacted adversely on the development landscape in Africa. While it is incumbent on African

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<sup>269</sup> African Charter (n 26 above) art 20(1).

<sup>270</sup> DRtD (n 6 above) art 2(3).

<sup>271</sup> DRtD (n 6 above) art 3(2). The Declaration states that ‘States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being....’

<sup>272</sup> Kennedy (n 220 above) 18.

<sup>273</sup> Kennedy (n 220 above) 19 & 26.

<sup>274</sup> See Bilal (n 76 above) 2-12.

countries to demonstrate genuine commitment to achieving the right to development in respect of the obligations they have undertaken under the African Charter and other instruments, the manner in which foreign stakeholders influence the African development agenda cannot be overlooked. If the right to development is to be achieved through development cooperation as it is envisaged, a shared responsibility is imposed on African states as well as on foreign stakeholders to refrain from actions that may endanger the realisation of that right.

Judged in relation to the fundamental features, I point out that development cooperation is counter-productive to the African conception of the right to development in the sense that it is designed principally to enable foreign stakeholders to keep Africa perpetually dependent on the benevolence of foreign donors and not necessarily to enable Africa to advance. Thus, I find a very loose connection between development cooperation as a mechanism for the realisation of the right to development in Africa, which I establish constitutes a development model in itself and a suitable alternative to development cooperation. Development cooperation, as I argue, is driven more by geopolitical motives characterised by the self-seeking interest of foreign stakeholders and the desire to dominate than the genuine need to advance the right to development in developing countries.<sup>275</sup>

The duty to take collective action obtaining from the African Charter enjoins states parties to be more proactive in asserting the right to development in view of advancing the continental integration agenda in respect of the obligation imposed by the AU Constitutive Act.<sup>276</sup> Established within this legal framework, which according to Younkings, is intended to preserve freedom and moral agency, the right to development sets the principle that the pursuit of well-being and improved standard of living must be governed by rules of just conduct in lieu of the arbitrariness often exercised by foreign stakeholders.<sup>277</sup> However, as long as laws remain theoretical they cannot change the circumstances that hinder the exercise of the right to

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<sup>275</sup> See sect 3.2.2 (3.2.2.1 & 3.2.2.2) above.

<sup>276</sup> See sect 4.1.2 above.

<sup>277</sup> See Younkings EW 'The purpose of law and constitutions' (2000) *Le Québécois Libre* No 66 available at: <http://www.quebecoislibre.org/000902-11.htm> (accessed: 28 December 2014). Younkings explains how the law is supposed to be used to regulate and ameliorate human actions within society.

development, which rather demands pragmatic action for its realisation. As illustrated in this chapter, development cooperation lacks the potential to redress the range of development challenges and therefore unsuited as a development model for Africa. Thus, I reiterate the argument that attention ought to divert towards exploring the right to development as a suitable alternative functional development model in dealing with Africa's development challenges. In the next chapter, I explore the range of instruments that provide the framework for the practical implementation of the right to development in Africa and how that may impact and probably influence thinking about development cooperation as a model for development.

## CHAPTER FOUR

### **A Right to Development Dispensation in Africa and the Entitlement to Self-Determination**

*We affirm that Africa's development is the responsibility of our governments and people. We are now more than before determined to lay a solid foundation for self-reliant human-centred and sustainable development on the basis of social justice and collective self-reliance so as to achieve accelerated structural transformation of our economies.*

26th Assembly of Heads of State and Government of the OAU, 1990.

#### **1. Introduction**

In this chapter, I describe the legal context within which development is envisaged to take place in Africa as a legitimate entitlement as envisaged by the range of legal instruments that guarantee self-determination to the peoples of Africa in setting their own development priorities. The analysis stems from the central argument highlighted in the previous two chapters necessitating a shift from development cooperation, which I contend only perpetuates subordination to the dominant influence of foreign stakeholders and therefore is unsuited as a development model for Africa. The question then becomes why the right to development cannot be conceived in its own terms as a development model as opposed to envisaging its realisation through development cooperation. As pointed out in chapter three, without concrete action, the principles of law that legitimise development as a human right cannot by themselves, redress the injustices that hinder progress in Africa. Some of these injustices obtain from the fact that despite decolonisation, the development future of most African countries has remained caught up in the systems of industrialised countries.

For instance, since the late 1950s, France has controlled the economic and fiscal policies and is holding the national reserves of fourteen former French colonies in the French Central Bank under conditions that prevent these countries from having access to the reserves for development

purposes.<sup>1</sup> Although the example of Francophone African presented here may be argued not to be generic to all of Africa, Mahalu points out that most other African countries have also been rendered unable to ‘exercise full sovereignty over their natural wealth and resources and do not control the prices of their raw materials’.<sup>2</sup> In spite of guarantees on the basis of the right to self-determination in formulating domestic policies and in exercising sovereign ownership over national wealth and resources as prerequisites for the realisation of the right to development,<sup>3</sup> such circumstances have meant that the right to development in Africa has remained largely unachievable. Meanwhile, as Marks observes, the right to development sets universal standards of performance and regulatory functions, which states are required to pursue as an ethical demand reflecting acceptable values and norms of international behaviour.<sup>4</sup>

The illustrations in the previous chapter on how foreign stakeholders have with impunity consistently sabotaged development efforts in Africa, emphasises the need, for Africa is to make significant progress to become more assertive in assuring that the right to development guaranteed to the peoples of Africa can produce anticipated outcomes of well-being and improved standards of living. In accordance with the theory of pragmatism, pursuing the right to development entails the concrete application of the treaty and statutory provisions that enshrine such a right.<sup>5</sup> It means that besides pursuing policy reforms to achieve development, when a violation is alleged, recourse to accountability processes is guaranteed to ensure that equity and justice become the guiding principles to development practice in Africa. This is anchored in the

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<sup>1</sup> Koutonin MR ‘14 African countries forced by France to pay colonial tax for the benefits of slavery and colonisation’ (2014) *Silicon Africa* available at: <http://www.siliconafrika.com/france-colonial-tax/> (accessed: 30 October 2016); Le Vine VT *Politics in Francophone Africa* (2004) 2-6.

<sup>2</sup> Mahalu CR ‘Human rights and development: An African perspective (2009) 1:1 *Leiden J Int'l L* 18.

<sup>3</sup> African Charter on Human and Peoples’ Rights adopted in Nairobi on 27 June 1981 arts 20(1), 21(1) & 22(1); International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 art 1(1) & 2(1); Declaration on the Right to Development Gen Ass Res 41/128 1986 arts 1(2) & 2(3).

<sup>4</sup> Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 8.

<sup>5</sup> See Singer JW ‘Property and coercion in federal Indian law: The conflict between critical and complacent pragmatism’ (1990) 63 *South Calif L Rev* 1821-1822; Radin MJ ‘The pragmatist and the feminist’ (1990) 63 *South Calif L Rev* 1700.

reading of the right to development in Africa as both a human rights concept and a development paradigm, structured within the law as pointed out in chapter two.

In exploring the extent to which the right to development is guaranteed as a legal entitlement to the peoples of Africa, this chapter is structured as follows: In section 2, I examine the framework for implementation with emphasis on the right to development dispensation, which is legitimatised by a range of legal instruments that guarantees to the peoples of Africa entitlement to development as a right (2.1), and the associated legal responsibilities deriving from the obligations imposed by the right to development in Africa (2.2). On this account, I proceed to discuss in section 3, the compelling obligation to safeguard the right to development dispensation in Africa in terms of the available enforcement mechanisms (3.1) and also in terms of access to remedy and means of redress (3.2). I then conclude with a summary remark in section 4.

## **2. Framework for Implementation**

Following Radin and Singer's theorisation of pragmatism as entailing a results-oriented application of the actual functioning of the law in particular circumstances and within specific contexts,<sup>6</sup> the discussion in this section is intended to identify the range of legal instruments from which the right to development in Africa derives normative force. Unlike within the development cooperation framework where outcomes are unpredictable, the right to development guarantees that through enforcement the rule of law may be applied, justice and equity may prevail and human well-being may consequently be achieved. In view of the commitment to pay particular attention to the right to development necessitating legislative and a broad range of other measures,<sup>7</sup> I proceed to explore to what extent Africa has advanced in articulating the right to development, which presupposes a context that I describe as a *right to development dispensation*.

### **2.1. A Right to Development Dispensation**

<sup>6</sup> See Radin (n 5 above) 1700; Singer (n 5 above) 1821-1822.

<sup>7</sup> African Charter (n 3 above) preamble, art 22 & art 1; UN Millennium Declaration Resolution *A/55/L.2* adopted by the Gen Ass on 8 September 2000 preamble.



For the purpose of clarity, the right to development dispensation should be understood as necessitating a combination of the political and the legal commitments discussed in the subsections that follow to be able to establish the relevance of the right to development in regulating the development processes in Africa.

### **2.1.1. Soft law provisions on the right to development in Africa**

In this section, I dwell on the moral and political commitments on the right to development undertaken by African states, which represent an expression of political will, absent which consolidated action may not be taken to ensure the realisation of the right to development in Africa. During the process of adopting the Declaration on the Right to Development in 1986, while the United States (US) voted against and eight European and Asian countries abstained, all African countries voted in favour of the Declaration.<sup>8</sup> The collective response demonstrated a shared conviction that the right to development is of relevance to Africa. At the 1992 Rio Summit, all participating African states voted for the adoption of the Declaration on the Environment and Development, thereby committing to the fulfilment of the right to development contained therein as part of international efforts to achieve sustainable development.<sup>9</sup>

By joining ranks with the rest of the world in adopting the Vienna Declaration, which reaffirmed the universality, inalienability and fundamentality of the right to development, all African states committed to ensure its implementation at domestic level so as to meet in an equitable manner the development needs of present and future generations.<sup>10</sup> The political commitment to ensure that the right to development is translated into reality was also unanimously undertaken under the Millennium Declaration by all participating African states, which committed to the domestic implementation of the set of eight time-bound goals intended to achieve socio-economic and

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<sup>8</sup> Kamga SA 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' (2011) *LLD Thesis University of Pretoria* 147.

<sup>9</sup> Rio Declaration on Environment and Development adopted at the UN Conference on Environment and Development Rio de Janeiro 3 – 14 June 1992 principle 3.

<sup>10</sup> Vienna Declaration and Programme of Action adopted by the UN World Conference on Human Rights UN Doc A/CONF.157/24 25 June 1993 paras I(10) & (11).

cultural development.<sup>11</sup> Joining forces with the rest of the world again in adopting the Durban Declaration in 2001, all participating African states further reaffirmed their solemn commitment to ensure universal respect for all human rights, including the right to development as a necessary step towards eliminating obstacles to development.<sup>12</sup> Relating to specific categories of persons, African states collectively committed under the 2007 Declaration on the Rights of Indigenous Peoples to protect the right to development for indigenous populations in Africa.<sup>13</sup>

As an indication of the commitment to ensure that the promises undertaken at international level become effective at domestic level, similar commitments have been reiterated at the continental level as an auto-reminder to African governments to take the right to development seriously. At the Ministerial Conference on Human Rights held in Mauritius and Kigali, the African Commission requested all member states to adopt adequate strategies to give effect to the right to development.<sup>14</sup> The Grand Bay Declaration calls the attention of the participating states to the fact that the right to development is universally acknowledged as an inalienable and fundamental human right and therefore must be taken seriously in Africa.<sup>15</sup> The Kigali Declaration further reaffirms that there is indeed a right to development in Africa, which in accordance with the international law requirement for development cooperation, necessitates the support of the international community to ensure its realisation.<sup>16</sup> The Solemn Declaration on Gender Equality also highlights the need to promote and protect the right to development for women and girls in Africa.<sup>17</sup> Owing to resistance in recognising socio-economic and cultural rights, resulting in the

<sup>11</sup> Millennium Declaration (n 7 above) paras 11 & 24.

<sup>12</sup> Durban Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban 31 August – 8 September 2001 para 78.

<sup>13</sup> UN Declaration on the Rights of Indigenous Peoples Res 61/295 adopted by the Gen Ass 13 September 2007 arts 21 & 23.

<sup>14</sup> Report of the Meeting of Experts of the First Ministerial Conference on Human Rights in Africa Kigali 5-6 May 2003 EXP/CONF/HRA/RPT(II) para 42.

<sup>15</sup> Grand Bay Declaration and Plan of Action adopted by the First OAU Ministerial Conference on Human Rights held in Grand Bay April 1999 para 2.

<sup>16</sup> Kigali Declaration adopted by the AU Ministerial Conference on Human Rights in Africa held in Kigali May 2003 para 3.

<sup>17</sup> Solemn Declaration on Gender Equality in Africa adopted by the AU Assembly of Heads of State and Government in Addis Ababa July 2004 para 6.

exclusion of the majority of African peoples, governments undertook another solemn commitment under the Pretoria Declaration to ensure the implementation of the full range of rights enshrined in the Charter, which includes the right to development.<sup>18</sup> As a follow up to these commitments, the preamble to the Charter on Democracy, Elections and Good Governance underscores the need to promote the right to development.<sup>19</sup> This is based on the acknowledgement that ‘development is impossible in the absence of true democracy, respect for human rights, peace and good governance’.<sup>20</sup>

These commitments together with the right to self-determination entitle the peoples of Africa to freely *exercise* the right to development in accordance with the obligation imposed on their respective states to make it possible to do so. By employing the term *exercise* the Charter envisages concrete action, which I argue is only possible when there is the political will demonstrated through concrete action to ensure that legislative and other measures actually translate into a collective commitment to sustain development as embodied in this excerpt:

We affirm that Africa’s development is the responsibility of our governments and people. We are now more than before determined to lay a solid foundation for self-reliant human-centred and sustainable development on the basis of social justice and collective self-reliance so as to achieve accelerated structural transformation of our economies.<sup>21</sup>

It is important to note that the realisation of the right to development as enshrined in the range of African treaty instruments remains a matter of policy reforms and therefore, as I argue in the introductory part of chapter two, does not raise any legal question. The law becomes implicated when the right to socio-economic and cultural development is threatened or when a violation is established to have been committed. Thus, because in this thesis I interrogate the legal

<sup>18</sup> Pretoria Declaration on Economic, Social and Cultural Rights in Africa adopted by the African Commission at its 36th Session December 2004 preamble & para 1.

<sup>19</sup> African Charter on Democracy, Elections and Governance adopted in Addis Ababa 30 January 2007 preamble.

<sup>20</sup> New Partnership for Africa’s Development (NEPAD) Declaration adopted as a Programme of the AU at the Lusaka Summit (2001) para 79.

<sup>21</sup> Speech of the patron of the Thabo Mbeki Foundation, Thabo Mbeki at the ‘Africa arise summit’: University of the Free State Bloemfontein 20 August 2011.

determinants to development cooperation for the realisation of the right to development, the discussion in this chapter is intended to combine the legal and policy dimensions. I have shown in the previous chapters that the right to development is actually formulated to redress endemic injustices in Africa and to ensure improvement in the well-being of the African peoples.<sup>22</sup>

Although the right to development is envisaged to be achieved through cooperation, it is clear from historical evidence that Africa's relationship with foreign stakeholders has more often than not endangered the right to development, necessitating recourse to the law to ensure equity and justice in the development process.<sup>23</sup> This is not to say, as Isabelle Roger rightly asserts that efforts to create development should become completely reliant on the law and legal processes.<sup>24</sup> Arjun Sengupta has cautioned that it is inappropriate to think that the right to development cannot be invoked if it is not legally enforceable.<sup>25</sup> Acceptably, the right to development can more effectively be accomplished through political processes than through judicial processes.<sup>26</sup> However, for the purposes of this thesis, it is important to emphasise the fact that the right to development dispensation is established by law, which necessitates a scrutiny of the African treaty instruments that enshrine the right to development.

### **2.1.2. Treaty provisions on the right to development in Africa**

One of the preambular convictions on which the African Charter is founded is that it is 'essential to pay particular attention to the right to development'.<sup>27</sup> The Charter came into force in October 1986 and has to date been ratified by fifty three African states, with the exception of South

<sup>22</sup> See sect 2.1 (2.1.1 & 2.1.2) of chapter two & sect 3.3 (3.3.1 & 3.3.2) of chapter three.

<sup>23</sup> Okafor OC 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights *Realizing the Right to Development* (2013) 374; Odinkalu AC 'Analysis of paralysis or paralysis by analysis? implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23:2 *HRQ* 347; An agenda for development: report of the Secretary-General (A/48/935) para 3.

<sup>24</sup> Roger I 'Le droit au développement comme droit de l'homme: Genèse et concept' (2003) *Mémoire Instituts D'Etudes Politiques de Lyon* 9.

<sup>25</sup> Sengupta A 'On the theory and practice of the right to development' (2002) 24:4 *HRQ* 859-860.

<sup>26</sup> Sengupta 2002 (n 25 above) 860.

<sup>27</sup> African Charter (n 3 above) preamble.

Sudan and Morocco.<sup>28</sup> As Chinedu Okafor rightly observes, the African Charter remains the pioneer treaty instrument to give the right to development the force of positive law with binding effect.<sup>29</sup> Accordingly, it sets obligatory standards that state parties are duty-bound to comply with.<sup>30</sup> This is explained by 1) the commitment to eradicate foreign domination that has impoverished and dispossessed the African peoples of the capabilities to shape their own development future,<sup>31</sup> 2) the need to further the struggles for political independence, human dignity and economic emancipation,<sup>32</sup> and 3), the necessity to redress the effects of structural adjustment, economic globalisation and the debt burden, which impact negatively on the human condition in Africa.<sup>33</sup>

While the African Charter remains the most authoritative normative instrument on the protection of the right to development in Africa, other ancillary instruments (discussed below) also enshrine the right to development, specifically to certain groups of persons,<sup>34</sup> as well as the AU Constitutive Act, which as a framework of laws and principles that govern Africa, paves the direction for human and peoples' rights protection within the continent.<sup>35</sup>

### 2.1.2.1 Article 22 of the African Charter

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<sup>28</sup> African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights' available at: <http://www.achpr.org/instruments/achpr/ratification/> (accessed: 24 April 2014).

<sup>29</sup> Okafor OC "Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 52.

<sup>30</sup> Kamga SA 'The right to development in the African human rights system: The *Endorois* case' (2011) *De Jure* 386.

<sup>31</sup> Eckel J 'Human rights and decolonization: New perspectives and open questions' (2010) *Essay-Reviews* 111.

<sup>32</sup> Constitutive Act of the African Union adopted in Lomé Togo on 11 July 2000 art 3.

<sup>33</sup> Hausermann J 'A human rights approach to development: Some practical implications for WaterAid's work' (1999) *Rights & Humanity* 20.

<sup>34</sup> African Youth Charter adopted in Banjul the Gambia on 2 July 2006 art 10; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted in Maputo Mozambique on 11 July 2003 art 19.

<sup>35</sup> See AU Constitutive Act (n 32 above).

The African Charter remains the pioneer treaty instrument that ‘sanctions the right to development as a human right’.<sup>36</sup> Among the continuum of human and peoples’ rights recognised and protected by the Charter is the article 22 provision on the right to development, which as Bianca Gawanas has reiterated deserves particular attention.<sup>37</sup> The right to development needs prioritising because as a composite of all human rights, it constitutes the mechanism by which justice may be established to protect the African peoples from continuous development injustices. The preamble to the Charter highlights that the right to development provides the opportunity for safeguarding not only socio-economic and cultural entitlements but also civil and political liberties. Accordingly, although the exact wording of article 22 focuses on socio-economic and cultural development because of their relevance in guaranteeing sustainable livelihood in Africa, it does not limit judicial interpretation by which civil and political development may also be read into the same provision.

Civil and political development has an important role to play in guaranteeing effective governance, the rule of law as well as equity and justice for the realisation of the right to development. A fuller understanding of the entitlements that article 22 guarantees and the obligations that it imposes needs to be situated within the broader context of the range of human and peoples’ rights contained in the Charter and associated human rights instruments. As such, civil and political development could be read into article 22, deduced from the assurance that the right to development must be exercised ‘with due regard to [the peoples’] freedom and dignity’. This could be understood to refer to the liberties that permit the African peoples to enjoy improved well-being with dignity. The preamble also assures that when socio-economic and cultural rights are fulfilled, the enjoyment of civil and political rights is accordingly guaranteed.

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<sup>36</sup> Resolution on the African Commission on Human and Peoples’ Rights 29th Ordinary Session of the Assembly of Heads of States and Governments of the Organisation of African Unity Cairo Egypt 28-30 June 1993; Murray R *Human Rights in Africa: From the OAU to the African Union* (2004) 241.

<sup>37</sup> Gawanas B ‘The African Union: Concepts and implementation mechanisms relating to human rights’ in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 136.

This may further be explained by the fact that the Charter elaborately protects the totality of human and peoples' rights without dissociating them into generations of rights.<sup>38</sup>

Owing to its composite nature, the right to development in Africa cannot be interpreted to focus exclusively on the achievement of economic, social and cultural development. Depending on the circumstances, failure to achieve socio-economic and cultural development may also mean deprivation of the liberty to enjoy civil and political rights, which would directly imply, in keeping with Amartya Sen's conception of development as freedom, a denial of the freedom to enjoy the right to development.<sup>39</sup> Development in this instance, according to Sen, is conceptualised as a process of expanding the real human freedoms that people enjoy, the actual determinants of which are the socio-economic and cultural arrangements in society, in combination with the exercise of civil and political rights.<sup>40</sup>

Interestingly, article 22 attributes to the right to development an uncommon component, which includes 'the equal enjoyment of the common heritage of mankind'. The 'common heritage' principle is an international law concept which establishes that certain resources are international commons of communal ownership for mutual benefit to present and future generations.<sup>41</sup> The Charter identifies peoples as the primary holders of the right to development and conveys the

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<sup>38</sup> Human rights are generally classified into three generations, namely; the first generation consisting of civil and political rights, the second generation consisting of socio-economic and cultural rights and the third generation consisting of solidarity or group rights.

<sup>39</sup> Sen A *Development As Freedom* (1999) 15-16; see also Quane H 'A further dimension to the interdependence and indivisibility of human rights?: Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Hum Rts J* 49.

<sup>40</sup> Sen (n 39 above) 13-18.

<sup>41</sup> Larschan B & Brennan BC 'The common heritage of mankind principle in international law' (1983) 21 *Columbia J Trans L* 305-312; Noyes J 'The common heritage of mankind: Past, present and future' (2012) 40:1-3 *Denver J Int'l L & Pol* 449-450; Shackelford SJ 'The tragedy of the common heritage of mankind' (2007) 27 *Stanford Env'tl L J* 102-104; Wolfrum R 'The principle of the common heritage of mankind' (1983) *Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht* 313; Taylor P 'The common heritage of mankind: A bold doctrine kept within strict boundaries' available at: <http://wealthofthecommons.org/essay/common-heritage-mankind-bold-doctrine-kept-within-strict-boundaries> (accessed: 24 April 2014).

fact that socio-economic and cultural development is a legal entitlement that should be exercised and enjoyed in freedom and dignity as a communal legacy.<sup>42</sup> The common heritage principle embodies the idea of sovereignty over natural wealth and resources as underscored by the Declaration on the Right to Development.<sup>43</sup> Associating the common heritage principle to the right to development implies that Africa's resources constitute a communal legacy that must be distributed equitably for the collective benefit of communities within Africa.<sup>44</sup>

From this viewpoint, article 22 would be interpreted to mean that the right to development imposes an obligation to manage and redistribute Africa's wealth and resources sustainably for the benefit of the continent's present and future generations. This explains why article 22(2) enjoins states parties to individually or collectively ensure that the right to development is achieved. Paradoxically, the African resource-base has over the decades suffered wanton and abusive exploitation to serve imperialist interests while the standard of living of the African peoples continues to deteriorate. This supports my argument in favour of diverting focus from development cooperation to conceptualising the right to development as a development model to ensure that Africa's resource potential is judiciously utilised to the benefit of the African peoples. It is worth noting that article 22 does not make provision for recourse to international cooperation for the realisation of the right to development, apparently as a precautionary measure against foreign domination, which the African Charter denounces.<sup>45</sup> Owing to the need to pay attention to the right to development in Africa, if justice in development is to prevail, legal action must proceed where a violation is alleged. This is guaranteed in principle by the fact that access to judicial remedies is envisaged under the measures of safeguard and procedural rules provided for by the Charter,<sup>46</sup> although this is yet to become actual practice in law.

### **2.1.2.2 Article 19 of the Protocol on the Rights of Women in Africa**

<sup>42</sup> See African Charter (n 3 above) art 22.

<sup>43</sup> DRtD (n 3 above) art 1(2).

<sup>44</sup> Roe D, Nelson F & Sandbrook C *Communities as Resource Management Institutions: Impact, Experiences and New Directions* (2009) 5-12.

<sup>45</sup> African Charter (n 3 above) arts 19. Article 19 stipulates that '[a]ll peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another'.

<sup>46</sup> African Charter (n 3 above) arts 30 & 46-61.



It is acknowledged that women make up the cornerstone for development in Africa.<sup>47</sup> Consequently, the Protocol on the Rights of Women gives specific recognition to women's right to sustainable development as a justiciable entitlement.<sup>48</sup> It states that:

Women shall have the right to fully enjoy their right to sustainable development, in respect of which states parties are required to take appropriate measures to introduce gender perspectives in national development planning, ensure the active participation of women in the development process and in the sharing of the benefits of development.<sup>49</sup>

The binding nature of the Protocol imposes legal obligations on state parties to ensure through all appropriate measures that the standards for sustainable development guaranteed to all the women of Africa are adequately captured in national development policies and programmes as a guarantee of their effective realisation. It entails gender-responsive action to ensure improvement in the well-being of African women, importantly because they bear the brunt of development injustices due to their subjugated roles in the largely patriarchal African societies.<sup>50</sup>

Owing to African women's marginalised status, the standards established for the realisation of their right to sustainable development entail their active contribution to and equitable sharing of the benefits deriving from the development process, leveraging their agency and leadership and an enabling gender-equitable framework for development.<sup>51</sup> Gender equality and women's empowerment are central to economic and human development in every country, not just in terms of integrating women into the development process but in ensuring that they influence the

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<sup>47</sup> OECD 'Women in Africa' available at: <http://www.oecd.org/dev/poverty/womeninafrica.htm> (accessed: 3 July 2015).

<sup>48</sup> Protocol on the Rights of Women (n 34 above) art 19.

<sup>49</sup> Protocol on the Rights of Women (n 34 above) art 19.

<sup>50</sup> Meena R 'Women and sustainable development' available at: <http://www.un-ngls.org/orf/documents/publications.en/voices.africa/number5/vfa5.07.htm> (accessed: 16 December 2016); Assefa AG 'The impact of the African Charter on Human and Peoples' Rights and the Protocol on the Rights of Women on the South African judiciary' (2011) *LLM Dissertation University of Western Cape* 16-17.

<sup>51</sup> UN Women 'The future women want: A vision of sustainable development for all' (2012) *UN Women* 37-38.

broader development agenda.<sup>52</sup> It is more so, because, inequalities and unjust discriminatory practices inhibit development not only for women, but for society as a whole.<sup>53</sup>

Although development cooperation, which constitutes the focal point of this thesis, may not have a direct bearing on women, inequalities that are generated and sustained through globalisation affect African women negatively and are thus anathema to their right to sustainable development. According to Harcourt, the inequalities that impede women's rights to sustainable development can only be redressed through concrete measures that promote gender equality and women's rights in all their dimensions as a prerequisite for achieving sustainable development outcomes for Africa.<sup>54</sup> It involves tackling global inequalities perpetuated through development cooperation as well as the discriminatory practices engrained in the patriarchal cultures in African societies that stand in contravention of the advancement of women.<sup>55</sup> As a treaty provision, the right to sustainable development empowers African women to demand accountability when the composite of rights to which they are legitimately entitled is threatened.

### **2.1.2.3 Article 10 of the African Youth Charter**

Constituting over 60% of the African population, the youth is recognised as the most important pillar of development<sup>56</sup> and thus are granted special protection under the African Youth Charter, which besides dealing generally with matters of youth empowerment also recognises their right

<sup>52</sup> UN Human Rights 'The right to development and gender' *Information Note* 1.

<sup>53</sup> OHCHR 'TST issues brief: Human rights including the right to development' *Joint Issue Brief* available at: [https://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20Rights%20Issues%20Brief\\_FINAL.pdf](https://sustainabledevelopment.un.org/content/documents/2391TST%20Human%20Rights%20Issues%20Brief_FINAL.pdf) (accessed: 20 October 2015).

<sup>54</sup> Harcourt W 'Gender equality and development effectiveness' (2011) *Open Forum for CSO Development Effective* 3; Arbour L 'Using human rights to reduce poverty' in Ingram JK & Freestone D (eds) *Human Rights and Development* (2006) 6; DRtD (n 3 above) art 8(1).

<sup>55</sup> Harcourt (n 54 above) 3; Istanbul Principles for CSO Development Effectiveness adopted by the first Global Assembly of the Open Forum (2010) principle 2.

<sup>56</sup> African Union 'African youth decade 2009-2018 plan of action: Accelerating youth empowerment for sustainable development' (2011) *African Union* vii-viii; Ceesay I 'Youth empowerment for sustainable development' available at: [http://www.fasngo.org/assets/files/18%20GIMAC/Communications/Youth\\_Empowerment\\_for\\_Sustainable.pdf](http://www.fasngo.org/assets/files/18%20GIMAC/Communications/Youth_Empowerment_for_Sustainable.pdf) (accessed: 13 October 2015) 4.

to development.<sup>57</sup> As a legally binding document, the Charter provides the policy framework for youth advancement across Africa.<sup>58</sup> The provision on the right to development underscores the fact that states parties must create the conditions necessary for the youth of Africa to exercise without constraint their right to development.<sup>59</sup> The African Union (AU) highlights that:

Member States under the Charter are obliged to develop and implement comprehensive, integrated and cross-sectoral Youth Policies and programs with the active involvement of young people. Such policy and program development process needs to be underpinned by the mainstreaming youth perspectives into broader development goals and priorities, and investing in a meaningful participation and contribution of young people towards Africa's progress and sustenance of current gains.<sup>60</sup>

To achieve this objective requires implementation of the Charter provisions at the domestic level. Given that Africa's development future lies in the hands of the youth, ratification and domestication of the Youth Charter is fundamental to ensuring that they are given the opportunity to exercise the right to development as well as the legitimacy to assert claims when the range of entitlements pertaining to that right is threatened or violated.<sup>61</sup> However, to date only thirty six member states have ratified the Youth Charter,<sup>62</sup> which means the right to development among other entitlements guaranteed to the youth can only be enforced by those states that have established their commitment to be bound by the Charter through ratification. In spite of this impediment, claims may be brought under the umbrella protection provided by the African Charter, which has widely been ratified and guarantees in article 22 the right to development to all the peoples of Africa without distinction.

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<sup>57</sup> African Youth Charter adopted in Banjul the Gambia on 2 July 2006 art 10, stipulates that:

- 1) Every young person shall have the right to social, economic, political and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind.
- 2) States parties shall encourage youth organisations to lead youth programmes and to ensure the exercise of the right to development.

<sup>58</sup> African Union 'African Youth Charter: A framework defining Africa's youth agenda!' available at: <http://africa-youth.org/charter> (accessed: 13 October 2015); African Union 2011 (n 56 above) 1.

<sup>59</sup> African Youth Charter (n 57 above) art 10(1) & (2). See also art 11 on youth participation.

<sup>60</sup> African Union 2011 (n 56 above) 1.

<sup>61</sup> African Union 2011 (n 56 above) 1; African Union (n 58 above).

<sup>62</sup> Heyns C & Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2013) 507-508.

#### **2.1.2.4 African Union Constitutive Act**

As Hansungule has noted, the adoption of the AU Constitutive Act marked ‘a major turning point in the quest for development, justice, human rights, the rule of law and good governance’ in Africa.<sup>63</sup> Although the Constitutive Act does not expressly enshrine the right to development, it constitutes the basis on which the AU formulates its institutional focus in mainstreaming human and peoples’ rights into development programming.<sup>64</sup> Having attained full ratification,<sup>65</sup> as a constitutive instrument that binds all African states by virtue of membership in the AU, the Act sets the standards for human rights protection and therefore has a normative impact in advancing the right to development in Africa.<sup>66</sup>

The preamble to the Constitutive Act affirms a common identity among African states as a unique framework for collective action in confronting the challenges posed by globalisation, which in conformity with article 22(2) of the African Charter, lays the foundation for collective action for the realisation of the right to development.<sup>67</sup> Additionally, with regard to achieving balanced development, essentially through the pursuit of social justice and the protection of human rights, the Act makes provision for enforcement and access to justice through the African Court,<sup>68</sup> which together with other enforcement mechanisms discussed later, is crucial for protecting the right to development dispensation in Africa.

#### **2.1.3. Constitutional Guarantees**

##### **2.1.3.1 Entrenched provisions**

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<sup>63</sup> Hansungule M ‘African courts and the African Commission on Human and Peoples’ Rights’ in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 234.

<sup>64</sup> Gawanas (n 37 above) 155.

<sup>65</sup> Heyns & Killander (n 62 above) 503-504.

<sup>66</sup> Nmehielle VO ‘Development of the African human rights system in the last decade’ (2004) 11:3 *Hum Rts Brief* 6.

<sup>67</sup> Constitutive Act (n 32 above) art 3(j) & (k).

<sup>68</sup> Constitutive Act (n 32 above) art 18; Hansungule (n 63 above) 234.

Following the recognition and protection of the right to development in the African Charter and ancillary instruments, a number of African countries have proceeded to enshrine the right in their domestic constitutions. Long before the adoption of the African Charter, the preamble to the 1972 Constitution of Cameroon already provided for the right to development. Article 65 stipulates that the preamble forms an integral part of the Constitution, implying that the right to development in Cameroon is established as legally enforceable.<sup>69</sup> A close reading of the formulation of the right to development in the Constitution of Cameroon indicates that it is not just a claimable entitlement but in effect a development paradigm that the government envisages to pursue to ensure the well-being of its peoples. It underscores the principles of sovereignty, self-determination and as Kamga reiterates, reliance on the country's natural resources as pre-requisites for improving the standard of living in the country.<sup>70</sup> Thus, the right to development in Cameroon can be applied not only as a positive right but also a guiding principle to inform interpretation of the law and development policy making as explained in the previous chapter.<sup>71</sup>

Apart from Cameroon, the Constitution of Malawi also provides for the right to development, formulated as an individual and a collective right, implying that it can be claimed by individuals as well as by groups of people within the country.<sup>72</sup> Unlike the African Charter, the Malawian Constitution includes specific categories of beneficiaries, namely women, children and persons with disabilities to whom consideration must be given in view of achieving the right to development.<sup>73</sup> To this end, Kamchedzera and Banda point out that the Malawian government is as a matter of constitutional obligation required to take policy and legislative measures to promote the welfare of the people as an indicator of the country's state of human development.<sup>74</sup> Conceived in terms of a development paradigm, the right to development provides the

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<sup>69</sup> Kamga (n 8 above) 204.

<sup>70</sup> Kamga (n 8 above) 204.

<sup>71</sup> See sects 2.1 and 2.1.3 of chapter four.

<sup>72</sup> Constitution of the Republic of Malawi 1994 art 30.

<sup>73</sup> See Heyns & Killander (n 62 above) 505 (Malawi ratified the African Charter on 17 November 1989); Constitution of Malawi (n 72 above) art 30.

<sup>74</sup> Kamchedzera G & Banda CU 'The right to development, the quality of rural life and the performance of legislative duties during Malawi's first five years of multiparty politics' (2002) *Research Dissemination Seminar Number Law/2001-2002/001* 1.

framework for policy reforms by which the government of Malawi could ensure improved standard of living for its people. In contravention of this, as Kamchedzera and Banda further observe, the people of Malawi have practically been deprived of this fundamental right, which has resulted in deterioration in living standards.<sup>75</sup> Accordingly, the peoples of Malawi are entitled to lay claim on the right to development against the state as a constitutional right although this is yet to become a subject of litigation.

The Constitution of the Democratic Republic of Congo (DRC), which has emerged as one of Africa's most progressive in recent times, also enshrines the right to development as a constitutional entitlement.<sup>76</sup> It provides that all Congolese people are entitled to benefit from the country's wealth, which the state is obligated to distribute equitably as a guarantee for the enjoyment of the right to development.<sup>77</sup> In spite of this constitutional guarantee and the affluence of mineral and other natural resource deposits, the DRC has not only remained poverty-stricken and underdeveloped, it represents a good example of a state that has no sovereign control over its natural resources, lest to talk of redistributing the resources equitably. The DRC is ranked one of the most impoverished/least developed countries in the world with its people languishing in want, misery and excruciating poverty meanwhile, for decades its extensive deposits of mineral and other natural resources have been the source of conflict perpetuated by foreign extractive multinationals.<sup>78</sup>

Elsewhere on the African continent, the Ethiopian Constitution also makes provision for the right to development with an even broader dimension with regard to collectives that are entitled to assert such a right, which include 'each Nation, Nationality and People in Ethiopia'.<sup>79</sup> The guarantee is that all the constituted communities in Ethiopia are empowered to assert the right to development as a constitutional entitlement, which I think constitutes a positive step in

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<sup>75</sup> Kamchedzera & Banda (n 74 above) 35-37.

<sup>76</sup> Constitution of the Democratic Republic of Congo (DRC) 1996 art 58.

<sup>77</sup> Constitution of the DRC (n 76 above) art 58.

<sup>78</sup> Carpenter L 'Conflict minerals in the Congo: Blood minerals and Africa's under-reported first world war (2012) *Suffolk University – Working Paper* 1-25.

<sup>79</sup> Constitution of the Federal Republic of Ethiopia 1994 art 43.

advancing the requirement for collective action to achieve the right to development at the domestic level. Besides the constitutional guarantees, it is yet to be seen how the right to development is enforced in the DRC and in Ethiopia.

Unlike the above cited countries where the constitutions explicitly enshrine the right to development as stand-alone provisions, a few other constitutions provide for the direct application of the provisions of the African Charter as part of domestic law. In Benin for example, the Constitution allows for direct application of the African Charter, which the state ratified in 1986 into domestic law.<sup>80</sup> It provides in article 7 that the rights and duties proclaimed and guaranteed by the Charter constitute an integral part of the Constitution and of Beninese law. The Federal Republic of Nigeria has also, through an Act of Parliament domesticated the African Charter to the effect that all the rights contained therein can be invoked in Nigerian courts as part of domestic law.<sup>81</sup> These measures provide the assurance that article 22 of the Charter has the same normative force and is legally binding as domestic law, meaning that the peoples of Benin and Nigeria can legitimately assert the right to development before domestic courts, which would then be required to apply article 22 of the African Charter in adjudicating such a claim.

### **2.1.3.2 Implicit guarantees**

Following narratives that attribute to provisions of international human rights treaties interpretations that imply the right to development,<sup>82</sup> a number of constitutions in Africa do not

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<sup>80</sup> Constitution of the Republic of Benin 1990 art 7.

<sup>81</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act No 2 of 1983 – Laws of the Federal Republic of Nigeria on the Enforcement of provisions of African Charter on Human and Peoples' Rights; In the *SERAC* case at para 41, the African Commission acknowledged the fact that Nigeria has incorporated the African Charter into domestic law, meaning that article 22 of the Charter is directly applicable in Nigeria as a justiciable right and therefore can be invoked by the peoples of Nigeria before the local courts and the courts have the jurisdiction to adjudicate upon and award remedies accordingly.

<sup>82</sup> See Ware A 'Human rights and the right to development: Insights into the Myanmar government's response to rights allegations' (2010) *18th Biennial Conference of the Asian Studies Association of Australia* 3; Kirchmeier F 'The right to development—where do we stand?: State of the debate on the right to development' (2006) *Friedrich Ebert Stiftung – Occasional Paper No 23* 6-8; Johnson GM 'The contributions of Eleanor and Franklin Roosevelt to the development of international protection for human



explicitly enshrine the right to development but contain provisions that could purposively be read as implying the right to development. Examples include the Constitution of Uganda, which provides for the right to development in a rather cursory manner; not explicitly enshrined on par with other human rights contained in the Constitution but as a directive principle of state policy to be determined and pursued at the discretion of the government.<sup>83</sup> Except where otherwise stated, preambles and directive principles as some scholars have observed, generally do not carry the same normative force as the rights-proclaiming provisions of a constitution.<sup>84</sup> They are often considered only as aspirational goals intended to guide government action in the formulation of policies and therefore, are in most instances not considered justiciable. However, Rukare has made clear that the Ugandan Constitution of 1995 as amended contains a new provision that basically translates the national objectives into justiciable obligations.<sup>85</sup> It means that although the right to development in the Ugandan Constitution is formulated as a directive principle, in effect it has the same force of law as the other human rights provisions and therefore can stand up for adjudication before a domestic court of law.

Other African countries enshrine a broad range of economic, social and cultural rights, the realisation of which, taking from the formulation in article 22(1) of the African Charter may be interpreted to amount to an implicit recognition of the right to development. To cite a few examples, the Constitution of Sao Tome and Principe provides for the rights to work, social security, housing, health care, education and culture.<sup>86</sup> The Constitution of Burkina Faso also

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rights (1987) 9:1 *HRQ* 36; Alston P 'Making space for new human rights: The case of the right to development' (1988) 1 *Hum Rts Yearbk* 5-6.

<sup>83</sup> Constitution of the Republic of Uganda 1995 as amended in 2005, national objectives and directive principles of state policy objective ix.

<sup>84</sup> Sanni A 'Fundamental Rights Enforcement Procedure Rules 2009 as a tool for the enforcement of the African Charter on Human and Peoples' Rights in Nigeria: The need for far-reaching reform' (2011) 11 *AHRLJ* 511; Chiviru T 'Socio-economic rights in Zimbabwe's new Constitution' (2014) 36:1 *Strategic Review for Southern Africa* 111; Cissé H *et al* (eds) *The World Bank Legal Review Volume 5: Fostering Development through Opportunity, Inclusion and Equity* (2014) 572.

<sup>85</sup> Rukare D 'The role of development assistance in the promotion and protection of human rights in Uganda' (2011) *LLD Thesis University of Pretoria* 122-123.

<sup>86</sup> Sao Tome & Principe's Constitution of 1975 with amendments through 1990 arts 41, 43, 48, 49, 54 & 55.



makes provision for the right of ownership over the country's natural wealth and resources, which must be utilised for ameliorating living standards, and for advancing the rights to education, social security, housing and culture, decent work, and health care.<sup>87</sup> The Constitution of Zimbabwe enshrines the rights to education, health care, food and water among other socio-economic rights, which are only recognised as national objectives of state policy.<sup>88</sup>

The Constitution of South Africa also enshrines a comprehensive bill of rights that provides among others livelihood sustainability socio-economic entitlements, which if achieved could lead to human development and improved well-being.<sup>89</sup> The socio-economic rights provisions could through a creative interpretation as Shadrack Gutto rightly argues, be understood to imply that the right to development is indeed implied in the South African constitutional order.<sup>90</sup> This is underscored by the fact that South Africa has ratified the African Charter and is bound by the right to development enshrined therein, which the domestic courts are enjoined to apply in order to promote the values of socio-economic development within the country.<sup>91</sup> Relating to the collective nature that is attributed to the right to development, although the socio-economic rights in the South African Constitution are mostly individualistic in nature, they have often been claimed through public interest litigation involving large numbers of individual right holders.<sup>92</sup>

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<sup>87</sup> Burkina Faso's Constitution of 1991 with amendments through 2012 arts 14, 18, 19 & 26.

<sup>88</sup> Constitution of Zimbabwe Amendment Act No 20 of 2013 sects 75, 76 & 77; Chiviru (n 84 above) 112-113.

<sup>89</sup> Constitution of the Republic of South Africa Act 108 of 1996 sects 26, 27, 29 & 31.

<sup>90</sup> Gutto S 'The right to development: An implied right in South Africa's constitutional order' in SAHRC *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 109-118; see also the First Periodic Report of South Africa to the African Commission 38<sup>th</sup> Ordinary Session 2005 para 325.

<sup>91</sup> See Heyns & Killander (n 62 above) 504 (South Africa ratified the African Charter on 9 July 1996); Constitution of South Africa (n 89 above) sect 39(1).

<sup>92</sup> See for example *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99(CC); *Minister of Health & Others v Treatment Action Campaign & Others* (1) 2002 10 BCLR 1033 (CC); *Schubart Park & Others v City of Tshwane & Another* CCT 23/12 [2012] ZACC 26; *Government of the Republic of South Africa v Grootboom & others* 2000 11 BCLR 1169 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); Skelton A 'Public interest litigation: The South African experience' (2010) *Presentation at Public Interest Litigation Conference in Belfast* 1-16.

Anna-Lena Wolf has described such an approach as ‘juridification of the right to development’, applied as a legal argument for the protection of minority and marginalised groups.<sup>93</sup> Illustrating with the practice of judicial activism in India, Wolf explains how the right to development has been interpreted as part of article 21 on the right to life in the Indian Constitution.<sup>94</sup> Accordingly, a creative interpretation of article 39(1)(b) requiring South African courts to consider international law when interpreting the bill of rights implies that article 22 of the African Charter could be invoked to justify application of the right to development in South Africa.

For the states that have ratified the African Charter and also enshrined socio-economic and cultural rights in their national constitutions, the implicit constitutional guarantees could be read together with article 22 of the Charter to impose a legally enforceable right to development at domestic level as mandated by the Charter.<sup>95</sup> This is particularly significant for Africa, to ensure that development is achieved with equity and justice as Sengupta has noted.<sup>96</sup> It is relevant to do so for reasons that the right to that process is legally recognised as an entitlement to self-determination, which as an essential component in culminating the process of decolonisation and in dissociating from the injustices of imperial domination, it is imperative for Africa to achieve.<sup>97</sup> However, if the commitments undertaken under the various instruments that establish the right to development dispensation as illustrated above are to translate into practice, it is likely to significantly shift the goal-posts within the cooperation framework for development in favour of actual self-determination for Africa as I proceed to explained in the next section.

## 2.2. Entitlement to Self-Determination

It is established that the right to development is indeed inbuilt in the right to self-determination, which guarantees the liberty to seek political freedom and to freely pursue socio-economic and

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<sup>93</sup> Wolf A-L ‘Juridification of the right to development in India’ available at: <http://voelkerrechtsblog.com/> (accessed: 18 September 2015).

<sup>94</sup> Wolf (n 93 above).

<sup>95</sup> African Charter (n 3 above) art 56(6).

<sup>96</sup> Sengupta A ‘Right to development as a human right’ (2001) 36:27 *Econ & Pol Wkly* 2534.

<sup>97</sup> Kiwanuka R ‘The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights’ (1988) 82 *Am J Int’l L* 95.

cultural development.<sup>98</sup> By implication, the right to development can be achieved by asserting the right to self-determination, which is guaranteed to the peoples of Africa as a non-negotiable entitlement that cannot be traded off. The African Charter provides that the peoples of Africa shall have the ‘unquestionable and inalienable right to self-determination’ and the liberty to assert to determine their political status and to pursue their socio-economic and cultural development in a manner that is apposite to the policies they have freely chosen.<sup>99</sup> As highlighted in chapter two, the right to self-determination provided the opportunity for the attainment of full sovereignty, but unfortunately, at the collapse of the colonial project, African states were granted only nominal political independence.<sup>100</sup>

Independence allowed the peoples of Africa a free hand over governance, whereas the succeeding neo-colonial dispensation created gaps through which the colonial entrepreneurs retained their exploitative grip on African economies and other aspects of socio-cultural life.<sup>101</sup> Following Amartya Sen’s theorisation of development as freedom,<sup>102</sup> it is worth noting that asserting the right to socio-economic and cultural self-determination is central to achieving full

<sup>98</sup> See sect 3.1.1 of chapter two; Charter of the United Nations adopted in San Francisco on 26 June 1945 art 1(2) & 55; DRtD (n 3 above) art 1(2); Vienna Declaration (n 9 above) para I(2); Kamga (n 8 above) 131-132; Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by Gen Ass Res 1514 (XV) 14 December 1960; common art 1 of the ICESCR (n 3 above) and the International Covenant on Civil and Political Rights (ICCPR) adopted by GA Res 2200A (XXI) 1966; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations Res 2625 (XXV) adopted by the GA on a Report from the Sixth Committee (A/8082) on 24 October 1970; Declaration on Social Progress and Development adopted by Gen Ass Res 2542 (XXIV) 11 December 1969; Anghie A ‘Whose utopia?: Human rights, development and the third world’ (2013) 22:1 *Qui Parle: Critical Humanities and Social Sciences* 66; Oloka-Onyango J ‘Heretical reflections on the right to self-determination: Prospects and problems for a democratic global future in the new millennium’ (1999) 15 *Am U Int’l L Rev* 166; Udombana NJ ‘The third world and the right to development: Agenda for the next millennium’ (2000) 22:3 *HRQ* 769-770.

<sup>99</sup> African Charter (n 3 above) art 20(1).

<sup>100</sup> See sect 3.1.1 of chapter two; Özden M & Golay C ‘The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a human rights perspective’ (2010) *CETIM* 1;

<sup>101</sup> Ngang CC ‘Differentiated responsibilities under international law and the right to development paradigm for developing countries’ (2017) 11:2 *HR & ILD* 274.

<sup>102</sup> Sen (n 39 above) 87-95.

autonomy, which the peoples of African were dispossessed of at independence. Development as freedom as implied by the capabilities theory means that with freedom, which according to Bedjaoui is justified by the independence of nations,<sup>103</sup> African countries ought to be able to create the conditions for their peoples to exercise the right to development by performing the human functioning that is necessary to achieve anticipated outcomes of well-being.<sup>104</sup> Besides that, because the right to development in Africa is established by law, its realisation requires as a preliminary measure, compliance with the standards set within the content of the right to development dispensation in Africa.

### **2.2.1. The rule of law**

Besides the moral imperative to make the right to development a reality, a binding obligation is attributed to African states to ensure that this is done in accordance with the law.<sup>105</sup> The rule of law guarantees that the peoples of Africa can hold the state to legal accountability and the state can in turn exercise its obligation to regulate the actions of non-state actors to ensure the constant improvement in standard of living, devoid of undue external influences that may prejudice the well-being of the African peoples. For the reason that slavery and colonialism exposed Africa to abuse and exploitation and that such imperialistic practices remain prevalent, compliance with the law in this context includes ensuring that development cooperation, which as I argue is by nature paternalistic and therefore problematic to the realisation of the right to development in Africa, is effectively regulated by law. It requires that development cooperation as it is envisaged in the UN Charter is pursued with due respect of the principles of sovereign equality and self-determination of states.<sup>106</sup>

According to Isabella Bunn, the rule of law constitutes a major guiding principle in the advancement of the right to development (although not necessarily achievable only through

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<sup>103</sup> Bedjaoui M ‘Some unorthodox reflections on the “right to development”’ in Snyder FG & Slinn P (eds.) *International Law of Development: Comparative Perspectives* (1987) 93-94.

<sup>104</sup> See Sen (n 39 above) 95.

<sup>105</sup> See African Charter on Democracy (n 19 above) art 4(1).

<sup>106</sup> See UN Charter (n 98 above) arts 55 & 56.

judicial processes) and as such, to act outside the law undermines this principle.<sup>107</sup> The rule of law entails compliance with the treaties, domestic legislation and other relevant instruments that enshrine the right to development and, therefore, impose obligations to adequately regulate the activities of foreign stakeholders operating within the right to development dispensation in Africa. By this I mean that the right to development creates a primary legal duty that directly implicates the states that have ratified the Charter and are thus, bound by it. When these states default in their obligations on the right to development, they are directly accountable for their actions or inactions. Additionally, Africa has over the decades been the subject of imperial domination, resulting in unjust practices that impede development on the continent. In this light, the need to deal with such injustices imposes a greater obligation on states parties to the African Charter and ancillary instruments to become even more radical in asserting the right to development as a policy tool by which to protect the peoples of Africa against the excesses that foreign stakeholders often commit with impunity.

This scenario provides the basis for formulating domestic legislations and national development policies that are informed by the right to development governance (discussed in chapter five) as a standard-setting paradigm by which to regulate cooperation agreements and the activities of foreign stakeholders. As David Kennedy notes; the '[r]enewed interest to bring law to bear in the struggle for development offers an opportunity to contest the distributive choices and market alternatives of development policy-making',<sup>108</sup> which is still largely determined by foreign stakeholders. The economic and political systems of developing countries, as Kennedy further asserts differ from those of developed societies 'in ways which encourage *attention to particular legal arrangements* rather than universal economic and political theories' (emphasis added).<sup>109</sup> In accordance, D'Hollander, Marx and Wouters observe that cooperation agreements and

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<sup>107</sup> Bunn ID 'The right to development: Implications for international economic law' (2000) 15 *Am U Int'l L Rev* 1460.

<sup>108</sup> Kennedy D 'The "rule of law" as development' in Hatchard J & Perry-Kessaris A (eds) *Law and Development: Facing Complexities in the 21<sup>st</sup> Century* (2003) 17.

<sup>109</sup> Kennedy (n 108 above) 18.

international development policy statements have increasingly mainstreamed human rights as a crucial factor in poverty reduction initiatives in developing countries.<sup>110</sup>

Unfortunately, this has not translated into practice, due on the most part to the imbalances and development injustices generated by the global system, which as Cristina Diez identifies, include the financial systems that developed countries operate and the trade agreements that they broker.<sup>111</sup> Attempts, for instance, through the campaign for a New International Economic Order (NIEO) championed by Africa in the 1970s, with the hope to achieve equitable balance within the global system met with substantial resistance by industrialised countries.<sup>112</sup> Considering the excessive, and sometimes abusive influence of foreign stakeholders in the course of their operations in Africa, it is relevant to look at the extent of legal responsibility that may be incurred for contravening the right to development.

### **2.2.2. Associated Legal Responsibilities**

This section relates to the question of legal responsibility for enforcing the right to development in Africa as a justiciable entitlement and on the basis that impunity ought to be redressed as a prerequisite for genuine sustainable development to take place in Africa.<sup>113</sup> The law envisages not only practical implementation of the right to development as a remedy to the development challenges that inhibit the enjoyment of a better standard of living,<sup>114</sup> the African Charter actually imposes a duty on states parties to ensure that development is achieved with fairness at the domestic level by ensuring equitable sharing of development gains.<sup>115</sup>

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<sup>110</sup> D'Hollander D, Marx A & Wouters J 'Integrating human rights in development policy: Mapping donor strategies and practices' (2013) *Leuven Centre for Global Governance Studies – Working Paper No 108* 14.

<sup>111</sup> Diez C 'Policy brief and proposals: Common but differentiated responsibilities' (2014) *International Movement ATD Fourth World* 3.

<sup>112</sup> Nagan W 'The right to development: Importance of human and social capital as human rights issues' (2013) 1:6 *Cadmus Journal* 29; Bunn (n 107 above) 1431.

<sup>113</sup> Manby B 'The African Union, NEPAD and human rights: The missing agenda' (2004) 26:4 *HRQ* 1005.

<sup>114</sup> DRtD (n 3 above) art 5.

<sup>115</sup> African Charter (n 3 above) art 22; DRtD (n 3 above) arts 4 & 8. These provisions stipulate that states have the duty to undertake all necessary measures, including the formulation of policies for the realisation of the

### 2.2.2.1 Domestic responsibilities

As established by international law, issues pertaining to human rights remain the primary responsibility of states.<sup>116</sup> The obligation of African states to ensure the realisation of the right to development is innately not problematic in the sense that the right to development dispensation obligates them to do so. The obligation invokes the positive duties to protect, to promote and to fulfil, which compels states parties to ensure that the peoples of Africa freely exercise their right to socio-economic and cultural development. The duty to protect obliges states parties to take legislative and other measures to safeguard against actions that may contravene the right to development, which entails regulating the activities of non-state actors and accordingly, provision is made for remedial action when a violation is established.<sup>117</sup> When a state defaults in this regard, it assumes a double legal responsibility for its own actions as well as for the actions of the non-state actors that it fails to regulate.<sup>118</sup> The duty to promote enjoins the state to ensure that conditions are made favourable for exercising the right to development.<sup>119</sup> The duty to fulfil creates positive expectations obligating states parties to take concrete action or to make substantial efforts towards the realisation of the right to development.<sup>120</sup> It entails measures to ensure that substantive development is achieved through the provision of goods and services to satisfy requirements for an improved standard of living.

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right to development. The obligation does not exclude taking measures to ensure respect for the right to development as well as assuming legal responsibility when the right to development is violated.

<sup>116</sup> Commission on Human rights, Sub-commission on the promotion and protection of human rights 55<sup>th</sup> Session Agenda Item 4 Distr General E/CN.4/Sub.2/2003/12/Rev 2 26<sup>th</sup> August 2003.

<sup>117</sup> Frankovits A 'Rules to live by: The human rights approach to development' (2002) 17 *PRAXIS-The Fletcher J Dev't Stud* 9; Chirwa DM 'Toward revitalizing economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*' (2002) 10:1 *Hum Rts Brief* 16; *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* Comm 155/96(2001) AHRLR 60 (ACHPR 2001) para 46; African Charter (n 3 above) art 1; Okafor 2008 (n 29 above) 60; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights adopted by the International Commission of Jurists on 28 September 2011 para 27.

<sup>118</sup> See *SERAC* (n 117 above) paras 70-72.

<sup>119</sup> Chirwa 2002 (n 117 above) 16; Frankovits (n 117 above) 9.

<sup>120</sup> Chirwa 2002 (n 117 above) 16; Frankovits (n 117 above) 9.



Following the standards of human rights law and the obligations imposed by the legal instruments discussed above, it is the incontestable duty of African states to ensure that these duties are accomplished at domestic level, not excluding the obligation to remedy violations perpetuated either by the state or by non-state actors.<sup>121</sup> The African Commission established in the *SERAC* case that the full enjoyment of some rights requires the state to take concerted action consisting of more than one of the above-mentioned duties.<sup>122</sup> The Maastricht Guidelines hold that a violation can occur through the direct action of the state or other entities that are insufficiently regulated by the state.<sup>123</sup> In accordance, the African Commission found the Nigerian government liable to remedy the human rights violations resulting from the activities of Shell Corporation, which the government failed to regulate.<sup>124</sup>

Thus by default, states are bound by the duty to protect human rights, including against violation by non-state actors, which means that when they fail in this obligation they are directly accountable. The state would be considered to contravene its obligations under the Charter by engaging in wrongful action or by failing to regulate interventions that turn out to be detrimental to entrenched rights.<sup>125</sup> By this, an even greater duty is imposed on African states to not only take legislative but also regulatory measures to ensure that the right to development is not violated by foreign stakeholders and non-state actors, which have continued to do so with impunity. In respect of the Constitutive Act of the African Union that enshrines as one of its principles to reject impunity on the continent,<sup>126</sup> there is no reason why liability cannot be imputed to foreign stakeholders that contravene the right to development in Africa.

As a general principle of human rights law, states have the duty to regulate the actions of non-state actors to ensure that they do not violate established rights within their domestic jurisdiction. This is embodied in the duty to protect, which in accordance with the African Charter enjoins

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<sup>121</sup> See *SERAC* (n 117 above) paras 57-72; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights adopted by the International Commission of Jurists 26 January 1997 para 12.

<sup>122</sup> *SERAC* (n 117 above) para 48; Chirwa 2002 (n 117 above) 16.

<sup>123</sup> Maastricht Guidelines (n 121 above) para 14.

<sup>124</sup> *SERAC* (n 117 above) paras 43-72; Kamga (n 28 above) 387.

<sup>125</sup> Chirwa 2002 (n 117 above) 16.

<sup>126</sup> AU Constitutive Act (n 32 above) art 5(o).



states parties to ‘adopt legislative and other measures’ to guard against possible contraventions.<sup>127</sup> As part of the duty to protect, adopting domestic legislation on the right to development requires states, as a matter of necessity, to impose obligations necessitating foreign stakeholders to abide by human rights standards. This proposition obtains from the fact that their activities in Africa are known to have a severe bearing on the enjoyment of human rights, implying that they do have liabilities to incur, as I move on to explain.

### 2.2.2.2 Liability of foreign stakeholders

With regard to the excessive influence of foreign stakeholders, which has in effect dwarfed the role of African states in effectively protecting the right to development,<sup>128</sup> I explore in this section the liability of foreign stakeholders when their actions contravene the right to development in Africa. The on-going debate with regard to the human rights obligations of non-state actors<sup>129</sup> is according to Svensson-McCarthy still very much in its formative stages and thus may only be considered as *lex ferenda* (the law as it is supposed to be).<sup>130</sup> Conversely, for d’Aspremont *et al*, the actual concern is no longer whether non-state actors have obligations, or should bear legal responsibility but rather how they should be held legally accountable for wrongful behaviour or when their actions produce harmful outcomes.<sup>131</sup>

The Universal Declaration of Human Rights envisages that ‘human rights should be protected by the rule of law’, requiring recognition and observance not only by states but also by ‘every organ

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<sup>127</sup> African Charter (n 3 above) art 1; Frankovits (n 117 above) 16; *SERAC* (n 117 above) para 46.

<sup>128</sup> Chirwa DM ‘In search of philosophical justifications and suitable models for the horizontal application of human rights’ (2008) 11 *AJHR* 294-295.

<sup>129</sup> See for example Ronen Y ‘Human rights obligations of territorial non-state actors’ (2013) 46 *Cornell Int’l L J* 21-50; Clapman A *The Human Rights Obligations of Non-State Actors* (2006) 25-58; Danailov S ‘The accountability of non-state actors for human rights violations: The special case of transnational corporations’ (1998) 1-74; Cassel D ‘Corporate initiatives: A second human rights revolution?’ (1996) 19 *Fordham Int’l L J* 1963; Clapman A ‘The privatisation of human rights’ (1995) *Eur Hum Rts L Rev* 20.

<sup>130</sup> Svensson-McCarthy A-L *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 19.

<sup>131</sup> D’Aspremont J *et al* ‘Sharing responsibility between non-state actors and states in international law: Introduction’ (2015) 62 *Neth Int’l L Rev* 50.

*of society*' (emphasis added).<sup>132</sup> This seems necessarily to imply that rule of law prohibits states as well as non-state actors from acting in violation of universally recognised human rights. An organ of society would be understood to include foreign stakeholders, which as 'global actors, exert considerable influence on the realisation of economic, social and cultural rights across the world', and should as underscored by the Maastricht Principle be required to abide by universal human rights standards.<sup>133</sup> A number of non-binding instruments have emerged in this regard, providing guidelines on regulating non-state actors and the extraterritorial activities of foreign stakeholders.<sup>134</sup> However, as long as there is yet no legally binding instrument under international law compelling non-state actors to abide by human rights standards, these actors remain insulated from accountability in the international sphere, which poses a challenge to the effective realisation of the right to development in Africa.

The Maastricht Principles establish that the responsibility of foreign stakeholders derives from 'obligations of a global character' that are set out in the UN Charter and human rights instruments to 'take action, separately, and jointly through international cooperation' for the realisation of human rights.<sup>135</sup> It includes among others the obligation to refrain from causing harm,<sup>136</sup> applicable in any situation over which foreign stakeholders exercise authority or effective control, 'whether or not such control is exercised in accordance with international law'.<sup>137</sup> Where a foreign stakeholder is not a subject of international law *per se*, its responsibility resulting from conduct that infringes on human rights becomes attributable to the state that has

<sup>132</sup> UN Universal Declaration of Human Rights adopted by General Assembly resolution 217 A(III) of 10 December 1948 preamble.

<sup>133</sup> Maastricht Principles (n 117 above) preamble.

<sup>134</sup> Nkonge CG 'The right to development under international law: Reflections from the European Union and Nigeria' (2014) *LLM Dissertation Central European University* 55-65. The instruments in question include; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents 2011; United States Alien Tort Act 1789; UN Guiding Principles on Business and Human Rights: Implementing the United Nations "protect, respect and remedy" Framework adopted by the UN Human Rights Council UN Doc A/HRC/17/L17/31 (2011); ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 2006; Maastricht Principles (n 114 above) paras 1-44.

<sup>135</sup> Maastricht Principles (n 117 above) para 8(b).

<sup>136</sup> Maastricht Principles (n 117 above) para 13.

<sup>137</sup> Maastricht Principles (n 117 above) para 9(a).

the obligation to regulate its activities.<sup>138</sup> However, in respect of the violations approach in adjudicating human rights,<sup>139</sup> and the discourse in favour of holding non-state actors legally accountable,<sup>140</sup> Skogly as well as D'Aspremont *et al* argue that when a violation is alleged involving a foreign stakeholder, legal action should be brought jointly against the state concerned and the foreign stakeholder that perpetrates the violation.<sup>141</sup>

It is worth noting that this would be possible only to the extent that domestic remedies relating to the right to development are available in a specific country. It makes the duty to protect through creating domestic laws that allow joint legal action against the state and foreign stakeholders much more imperative. In this instance, according to the established law of the state concerned, legal action would be permissible in domestic courts, jointly against the state and a foreign corporation, for example that contravenes the right to development within that jurisdiction. Unfortunately, the prevailing context under general international law is yet to allow legal action against non-parties to the treaties that impose obligations for the respect and protection of human rights. Beyond the jurisdiction of the state and domestic law, legal action can only be taken against the state and not against a foreign stakeholder that colludes with the state in contravening the right to development. If Africa is to advance beyond the external pressures exerted by foreign stakeholders, state governments are obligated to proactively assert the right to self-determination in taking appropriate legislative and other measures to protect the right to development.

### **3. Safeguard Measures**

In this section, I draw attention to the fact that Africa has not only extensively recognised and provided legal protection to the right to development in various instruments, it has indeed also put in place institutional mechanisms to enforce and give effect to the provisions on the right to

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<sup>138</sup> Maastricht Principles (n 117 above) paras 12, 24 & 25.

<sup>139</sup> Odinkalu (n 23 above) 239; Chirwa 2002 (n 117 above) 15; See also sect 3.3.4 of chapter four.

<sup>140</sup> Chirwa 2002 (n 117 above) 15; Skinner *et al* (n 177 below) 4-5.

<sup>141</sup> Skogly SI 'Global responsibility for human rights' (2009) 29:4 *Oxf J Leg Stud* 832-845; D'Aspremont *et al* (n 131 above) 49-67.

development as an assurance that victims of violations are able to seek redress.<sup>142</sup> These mechanisms, which at the continental level include the African Commission and the African Court<sup>143</sup> and at the national levels the range of domestic courts, are mandated to interpret the law and to dispense justice by offering the platform where claims relating to the right to development could be made and adjudicated upon and remedies crafted appropriately. Before moving on to examine the functioning of these mechanisms it is essential, particularly in relation to the behaviour of foreign stakeholders and non-state actors, to first look at the duty incumbent on Africa states to protect the right to development from inappropriate incursion.

### **3.1. The Duty to Protect**

Human rights law generally requires as a matter of obligation, besides the duties to respect and to fulfil, for the state to protect its people against potential threats or actual violation of universally recognised human rights. In effect, within the context of Africa, states parties to the African Charter commit, in respect of article 1 of the Charter, to ‘undertake to adopt legislative or other measures’ to convert the abstract rights contained therein into substantive entitlements. With evidence of the historical development injustices committed against the peoples of Africa as discussed in chapter two, which as I explain, engineered the birth of the right to development,<sup>144</sup> a reading of article 1 in consonance with article 22 of the Charter basically imposes an overarching duty on states parties to protect the peoples of Africa against continuous external/foreign domination and exploitation. It requires states parties, in addition to ratifying the Charter, to proceed, as a matter of legal obligation to domesticate the provision on the right to development by taking adequate legislative and/or other measures at the national level to ensure the requisite protection to their peoples.

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<sup>142</sup> Hansungule (n 63 above) 233.

<sup>143</sup> The African Commission is established by art 30 of the Charter as a measure of safeguard within the African Union to promote human and peoples’ rights and ensure their protection in Africa while the African Court is established by additional Protocol to the African Charter adopted on 10 June 1998.

<sup>144</sup> See sect 2.1 (2.1.1 & 2.1.2) of chapter two.

According to Mohammed Bedjaoui, the right to development imposes an *erga omnes* obligation as a *jus cogen* permitting no exception in so far as states obligations are concerned.<sup>145</sup> This is established by case law where, by finding the Kenyan government in violation in the *Endorois* and *Ogiek* cases, the African Commission and the African Court respectively underscore the duty of the state to protect, implying an absolute obligation to make conditions favourable to ensure the effective exercise of the right to development.<sup>146</sup> With regard to taking legislative measures at the domestic level, as required by article 1 of the Charter, a handful of countries have indeed, as highlighted earlier in this chapter, explicitly enshrined the right to development in their national constitutions. This is a significant positive step, which guarantees that the states concerned are duty bound by their treaty obligations at the continental level but crucially also by their constitutional obligations at the domestic level to ensure that the people feel protected to set their own development priorities and to drive the development processes.<sup>147</sup>

The duty imputed on states to protect involves, according to a 2010 report in this regard published by the South African Institute For Advanced Constitutional, Public, Human Rights And International Law (SAIFAC), ‘a consideration of the state’s obligations to ensure that third parties, including corporations, do not violate or assist in the violation of the rights in the charter’.<sup>148</sup> Providing protection to the peoples of Africa under the regime of the right to development, guarantees that violations of the range of socio-economic and cultural rights as well as civil and political rights can significantly be curbed. However, contrary to the acknowledgement by African states parties as stipulated in the preamble to the Charter, to give the right to development utmost priority, response in this regard has remain comparatively

<sup>145</sup> Bedjaoui M ‘Some unorthodox reflections on the right to development’ in Snyder F & Slinn P (eds) *International Law of Development: Comparative Perspectives* (1987) 69-86.

<sup>146</sup> See Ozoemena R & Hansungule M ‘Development as a right in Africa: Changing attitude for the realisation of women’s substantive citizenship’ (2014) 18 *Law, Democracy and Development* 230; *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009) AHRLR 75 (ACHPR 2009) paras 269-298; *African Commission on Human and Peoples’ Rights (Ogiek Community v Republic of Kenya)* (2017) Appl No 006/2012 paras 201-217.

<sup>147</sup> *Ogiek Community* (n 146 above) para 212-217.

<sup>148</sup> SAIFAC ‘The state duty to protect, corporate obligations and extra-territorial application in the African regional human rights system’ (2010) *SAIFAC* 15.

sluggish. Except for additional doctrinaire recognition of the right to development under further declarations and development agendas, which by their nature do not impose any absolute obligations, there is only little evidence, including in the form of established enforcement mechanisms as a practical measure in guaranteeing protection to the peoples of Africa.

## **3.2. Enforcement Mechanisms**

### **3.2.1. African Commission on Human and Peoples' Rights**

The African Commission, as a monitoring mechanism established by the African Charter is bestowed with a two-fold mandate: to promote and to protect human and peoples' rights in Africa.<sup>149</sup> It monitors state parties' compliance with the Charter in terms of ensuring state reporting and adjudicating complaints in accordance with laid down rules of procedure.<sup>150</sup> The mandate to promote represents a less compelling duty, necessitating the Commission to compile states reports on the measures undertaken to implement the Charter provisions; to carry out focused research and to ensure appropriate dissemination of the findings; to encourage the establishment of domestic institutional frameworks; and to provide adequate advice and recommendations to governments.<sup>151</sup> Additionally, the Commission is required to formulate legal standards to guide governments in adopting legislation and policies to ensure effective implementation of the Charter provisions at domestic level.<sup>152</sup>

Of more interest is the Commission's protective mandate, which deserves to be explored more to ensure effective protection of the right to development guaranteed to the peoples of Africa. The Commission's protective mandate is designed to follow applicable principles of law through a complaints procedure.<sup>153</sup> It means that the Commission functions on the basis of complaints brought to its attention by victims of violation or their legal representatives. As Chidi Odinkalu

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<sup>149</sup> Benedek W *et al The Role of Regional Human Rights Mechanisms* (2010) 70; African Charter (n 3 above) arts 30 & 45.

<sup>150</sup> Heyns C 'The African human rights system: In need of reforms?' (2001) 2 *AHRLJ* 155; African Charter (n 3 above) art 45.

<sup>151</sup> See African Charter (n 3 above) art 45(1)(a).

<sup>152</sup> See African Charter (n 3 above) art 45(1)(b) & (c).

<sup>153</sup> African Charter (n 3 above) arts 46-62.

has noted, the Commission's protective mandate follows the 'violations approach' through which real-life situations and specific allegations are dealt with.<sup>154</sup> The protective mandate requires first and foremost for the Commission to ensure that precautionary measures are in place to pre-empt violations. When a violation is alleged the Commission is required to provide appropriate redress by carrying out preliminary investigations and deciding on admissibility of complaints prior to adjudicating between the litigating parties.<sup>155</sup>

The jurisdiction of the African Commission in dealing with cases involving states parties under the right to development dispensation in Africa is not an issue for debate. The Commission has indeed through its nascent jurisprudence established competence in adjudicating on the right to development, illustrated by a number of cases, two of which are discussed below. Although a number of scholars have advanced convincing arguments relating to the fact that non-states parties have an obligation to respect human rights,<sup>156</sup> the question of jurisdiction where they could be held accountable, remains unsettled. Consequently, the peoples of Africa can only increasingly explore the litigation avenues through the African Commission, which may ultimately influence domestic legal reforms to ensure adequate protection of the right to development. For instance, it is reported that the landmark *Endorois* decision has had a huge positive impact in shaping constitutional reforms in Kenya, where greater protection was eventually granted to minority groups unlike was the situation before the case.<sup>157</sup>

### **3.2.2. African Court on Human and Peoples' Rights**

The African Court on Human and Peoples' Rights is created by an additional protocol to the African Charter 'with the authority to issue legally binding and enforceable decisions' to

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<sup>154</sup> Odinkalu (n 23 above) 239; Chirwa 2002 (n 117 above) 15; see also my analysis on the violations approach in sect 3.3.4 of chapter four.

<sup>155</sup> African Charter (n 3 above) arts 46-59.

<sup>156</sup> Chirwa 2008 (n 128 above) 303-311; Ronen (n 129 above) 21-50; Clapman (n 129 above) 25-58; Danailov (n 129 above) 1-74; Cassel (n 129 above) 1963; Clapman (n 129 above) 20; D'Aspremont *et al* (n 131 above) 49-67.

<sup>157</sup> Rutin Y 'A call to re-evaluate the status of minority and indigenous rights in Kenya: Decision on the Endorois communication before the African Commission on Human and Peoples' Rights' (2010) *Centre For Minority Rights Development 2*.



complement and reinforce the protective mandate of the African Commission.<sup>158</sup> According to Christof Heyns, '[t]he ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people'.<sup>159</sup> Comparing it by analogy to the European and inter-American human rights systems, Heyns points out that the African Court is charged with the vital role to effect transformation in Africa.<sup>160</sup> Unlike the relatively weak Commission, the African Court provides assurance for more effective protection of human and peoples' rights in general and the right to development in particular.<sup>161</sup>

The Court is in effect established with a wide mandate of jurisdiction to interpret, adjudicate and issue binding decisions on questions of human and peoples' rights.<sup>162</sup> In exercising these functions, the Court passed judgment in the *Ogiek Community* case in 2017 in which it found the Kenyan government in violation of provisions of the Charter, including article 22 on the right to development.<sup>163</sup> This seminal judgment not only upholds the African Commission's decision in the *Endorois* case in affirming the justiciability of the right to development, it also underscores states' overarching duty to protect as discussed above. In this regard, despite evidence of some enacted legislation by the Kenyan government to ensure the enjoyment of rights in greater freedom, the Court held that those measures do not sufficiently guarantee protection to the Ogiek community.<sup>164</sup> More so, without evidence of haven 'taken other measures' as stated in article 1 of the Charter, the Court further found the Kenyan government in violation of its treaty obligation to protect the Ogiek community.<sup>165</sup>

<sup>158</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 1998 art 2. The Protocol entered into force on 25 January 2004. The Protocol on the Statute of the African Court of Justice and Human Rights was further adopted at Sharm el-Sheikh Egypt on 1 July 2008; Benedek *et al* (n 149 above) 70.

<sup>159</sup> Heyns (n 150 above) 156.

<sup>160</sup> Heyns (n 150 above) 166.

<sup>161</sup> Udombana NJ 'A harmony or a cacophony? The music of integration in the African treaty and the New Partnership for Africa's Development' (2002) 13:1 *Indiana & Comp L Rev* 46.

<sup>162</sup> Protocol on the African Human Rights Court (n 158 above) arts 3, 7 & 28; see also Rules of Court 2010 rules, rules 26 & 61; Benedek *et al* (n 149 above) 70.

<sup>163</sup> *Ogiek Community* (n 146 above) para 202-217.

<sup>164</sup> *Ogiek Community* (n 146 above) para 216.

<sup>165</sup> *Ogiek Community* (n 146 above) para 217.



Traditionally, human rights law has been narrowly interpreted as imposing obligations only on states.<sup>166</sup> According to this *lex lata* interpretation, the International Justice Resource Centre underscores the fact that under regional human rights systems ‘only [s]tates may be held accountable for human rights violations’.<sup>167</sup> This current state of the law constitutes a major obstacle to redressing violations of the right to development effectively. I associate myself fully with Skogly’s view that entities like international organisations and multinational corporations, which have a powerful bearing on human livelihood, should equally be held accountable for human rights.<sup>168</sup> According to Yaël Ronen, there is ‘nothing in human rights theory that precludes the imposition of legal obligations on actors other than states’, which he argues are hardly the only entities that are likely to violate human rights.<sup>169</sup> In addition, the UDHR, which constitutes the foundational instrument of human rights law, envisages that human rights obligations may be imputed to non-state actors.<sup>170</sup> Nevertheless, under current international law there is no functional mechanism through which to enforce human rights norms such as the right to development to non-state actors, except indirectly through the exercise of the duty to protect internationally recognised rights in domestic legal systems, which according to Benedek, have a greater propensity for realisation at the domestic levels where enforcement mechanisms are more likely to have a legally binding force.<sup>171</sup>

Potentially, the African Court on Human and People’s Rights may eventually be replaced by the hybrid African Court of Justice and Human Rights, envisaged to become operational when the requisite number of ratifications is achieved.<sup>172</sup> When the Court ultimately becomes functional,

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<sup>166</sup> Gunduz C ‘Human rights and development: The World Bank’s need for a consistent approach’ (2004) *Development Studies Institute – Working Paper Series No 04-49 ISSN 1470-2320* 5.

<sup>167</sup> International Justice Resource Centre ‘Regional systems’ available at: <http://www.ijrcenter.org/regional/> (accessed: 8 September 2016).

<sup>168</sup> Skogly S *The Human Rights Obligations of the World Bank and the IMF* (2001) 50.

<sup>169</sup> Ronen (n 129 above) 21.

<sup>170</sup> UDHR (n 131 above) preamble.

<sup>171</sup> See Benedek *et al* (n 149 above) 6-7.

<sup>172</sup> Protocol on the African Court of Justice and Human Rights (n 154 above). The entry into force of the Protocol requires 15 ratifications (art 9). As of date only 5 states parties have complied with ratification.

besides dealing with ‘any question of international law’,<sup>173</sup> it is envisaged in accordance with the Malabo Protocol to have an even broader jurisdiction, including criminal jurisdiction in dealing with the corporate liability of multinational corporations operating in Africa.<sup>174</sup>

### **3.2.3. Domestic courts of first instance**

With regard to adjudicating cases relating to the right to development in Africa, by stating as one of the admissibility criteria that communications can only be received by the African Commission after complainants must have exhausted local remedies, the African Charter makes clear that domestic courts constitute jurisdictions of first instance.<sup>175</sup> Additionally, the first instance jurisdiction of domestic courts provides the basis for accessing higher jurisdictions such as the African Commission and the African Court. The Charter enshrines the principle that access to the African Commission can only be sanctioned on the basis of the exhaustion of local remedies, unless it is obvious that such remedies do not exist or are inaccessible or ineffective.<sup>176</sup> The procedural requirement to exhaust local remedies as a prerequisite for admissibility of complaints before the Commission affirms the fact that domestic courts have the first instance jurisdiction to adjudicate on the right to development.

It implies in principle that the domestic law of the state in which a violation is alleged is designated as the applicable law.<sup>177</sup> In this instance, although the state might not have incorporated the right to development into national law, domestic courts, especially in a monist system may not be precluded from invoking the African Charter on the basis of the state’s binding commitment to the Charter deriving from ratification. In the *SERAC* case it was held that the requirement to exhaust local remedies is intended first to give domestic courts an opportunity to decide upon cases before they are brought to an international forum and by so doing avoid

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<sup>173</sup> Protocol on the African Court of Justice and Human Rights (n 154 above) art 28(d) & (g).

<sup>174</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted in Malabo, Equatorial Guinea on 27 June 2014.

<sup>175</sup> African Charter (n 3 above) para 50 & 56(5).

<sup>176</sup> African Charter (n 3 above) para 50 & 56(5); Odinkalu (n 23 above) 227.

<sup>177</sup> Skinner G *et al* *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013) 8.

contradictory judgements at the national and international levels;<sup>178</sup> second, to allow domestic courts to bring to the attention of the government allegations of violation so that the state may have the opportunity to remedy such violations before being called to account by an international tribunal;<sup>179</sup> and third, to ensure that the Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists.<sup>180</sup> The Commission explained the requirement for the exhaustion of local remedies as implying an obligation to ensure that domestic remedies are not only available but that they are free of impediments, effective in offering prospects of success and also sufficient in redressing a complaint.<sup>181</sup>

This explains why, in respect of the preambular commitment to pay particular attention to the right to development, it is absolutely required of all state parties to the African Charter to do the domestication ritual not only on account of achieving the right to development at the domestic level but also to ensure that it becomes evenly enforceable across the continent. Failure to do this amounts to abdication of treaty obligations.<sup>182</sup> The rationale for domestication stems from the fact that the right to development provides a consolidated basis for formulating national policies, increases the negotiating capacity of African states *vis-à-vis* foreign stakeholders on important questions relating to development in Africa,<sup>183</sup> allows the peoples of Africa the freedom to exercise their right to development and promotes the liberty to enjoy well-being deriving from the equitable distribution of the benefits of development.<sup>184</sup>

With the liabilities attributable to foreign stakeholders as discussed above,<sup>185</sup> the concern is whether domestic courts have jurisdiction against foreign stakeholders when their actions contravene the right to development within the state? Following Chirwa's argument that African

<sup>178</sup> *SERAC* (n 117 above) para 37.

<sup>179</sup> *SERAC* (n 117 above) para 38.

<sup>180</sup> *SERAC* (n 117 above) para 39.

<sup>181</sup> *Odinkalu* (n 23 above) 237.

<sup>182</sup> *Ngang CC* 'Transgression of human rights in humanitarian emergencies: The case of Somali refugees in Kenya and Zimbabwean asylum-seekers in South Africa' (2015) *Journal of Humanitarian Assistance* 8-9.

<sup>183</sup> *Roger* (n 24 above) 8.

<sup>184</sup> *DRtD* (n 3 above) art 2(3).

<sup>185</sup> See sect 3.1.2.2 above.

conceptions of human rights impute obligations to non-state actors,<sup>186</sup> it is rational to posit that domestic courts provide the most appropriate jurisdictions for holding these actors accountable for wrongful action on account of the legally binding nature of the decisions of the courts.<sup>187</sup> The South African Constitution for instance, makes provision to the effect that human rights apply vertically as well as horizontal, meaning that domestic courts have jurisdiction not only over the state but equally over non-states actors.<sup>188</sup> This can be achieved either indirectly by invoking human rights through private law litigation or directly by invoking the violation of an entrenched constitutional right, especially based on the ‘nature of the right, the nature of the duty, the extent of the violation, the nature of the non-state actor, and the relationship between the non-state actor and the victim[s]’.<sup>189</sup> The latter approach could be more strategic for claiming the right to development at domestic level if such a provision has been enshrined in the national constitution as a claimable entitlement like in the case of Cameroon, Malawi, the DRC and Ethiopia among others as highlighted earlier. It further justifies the need for African countries to strengthen their domestic laws to ensure that they provide sufficient guarantees to hold non-state actors and foreign stakeholders accountable when their actions contravene right to development standards.

Although the first instance jurisdiction of domestic courts provides the basis for accessing higher jurisdictions as aforementioned, the challenge with regard to cases involving foreign stakeholders is that it might not be possible to go beyond the jurisdiction of domestic courts. This is because the law in its practical application does not provide jurisdiction to regional enforcement mechanisms over external actors that are not parties to regional treaties. It is to be noted also that in some instances, particularly concerning inter-state communications, the requirement to exhaust local remedies as pre-condition for admissibility may not apply. Such is the ruling on admissibility that the African Commission made in the *DRC* case,<sup>190</sup> which leads us to look at issues relating to access to justice and means of redress.

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<sup>186</sup> Chirwa 2008 (n 128 above) 303.

<sup>187</sup> See Benedek *et al* (n 149 above) 6-7.

<sup>188</sup> Constitution of South Africa (n 89 above) sects 8 & 39; Chirwa 2008 (n 128 above) 299.

<sup>189</sup> Chirwa 2008 (n 128 above) 308-310.

<sup>190</sup> *Democratic Republic of Congo v Burundi, Rwanda & Uganda* (2004) AHRLR 19 (ACHPR 2003) para 63.

### 3.3. Access to Justice and Means of Redress

#### 3.3.1. Procedural considerations

Considering that the right to development may not only be achieved through judicial processes, states are required to make non-judicial remedy mechanisms such as national human rights commissions or ombudspersons available and accessible to victims of violation who may not want to pursue the path of the law.<sup>191</sup> Where due process of the law becomes unavoidable in order to guarantee adequate protection, judicial remedy mechanisms must also be made available and accessible. The existence of domestic courts, particularly in the countries where the right to development has been domesticated, as well as the African Commission and the African Court provide assurance that redress could be sought when a threat or violation of the right to development is alleged to have been committed. Two important questions need to be considered: First, how is access to justice guaranteed to victims of violation? Second, who can bring a complaint alleging a violation of the right to development?

Generally, access to domestic enforcement mechanisms is determined by the domestic law of the state concerned. For instance, the South African Constitution provides generous procedural measures that allow for individual actions as well representative and public interest actions on behalf of persons to whom access to justice is limited by circumstances beyond their own making.<sup>192</sup> Although as Okogbule argues that redistributive justice is not feasible without access to remedy,<sup>193</sup> the inability to access the courts and to navigate the legal processes owing for example, to the lack of independence of the judiciary in most domestic jurisdictions in Africa explains why litigating the right to development at domestic level might be particularly challenging and therefore also limits access to higher enforcement mechanisms.<sup>194</sup>

<sup>191</sup> Maastricht Principles (n 117 above) para 40.

<sup>192</sup> Ngang CC 'Socio-economic rights litigation: A potential strategy in the struggle for social justice in South Africa' (2013) *LLM Dissertation University of Pretoria* 45; South African Constitution (n 89 above) sects 34 & 38.

<sup>193</sup> Okogbule NS 'Access to justice and human rights protection in Nigeria: Problems and prospects' (2005) 3 *SUR – Int'l J Hum Rts* 94, 95-97.

<sup>194</sup> See for example, the *Bakweri Land Claims Committee v Cameroon* (2004) *AHRLR* 43 (*ACHPR* 2004) paras 28-37 in which the complainants averred political influence over the judiciary and the legal processes in

With regards to access to the African Commission for remedy, the Charter makes provision for inter-state and other communications that must comply with laid down admissibility criteria.<sup>195</sup> Quite explicitly, inter-state communication refers to a complaint that one state party to the African Charter may bring against another like in the *DRC* case against Burundi, Uganda and Rwanda.<sup>196</sup> The inference as highlighted in article 2(3) of the Declaration of the Right to Development is that a state is entitled to claim the right to development. With the understanding that the right to development in Africa is guaranteed to collectives and not to individuals, ‘other communications’ would be interpreted to include complaints that may be brought by groups of persons. The Commission’s jurisprudence on the right to development illustrates that access to remedy on the grounds of an alleged violation of the right to development is possible through representative action or public interest litigation in the form of legal representation and *amicus curiae* interventions by individuals and civil society organisations on behalf of the people concerned.<sup>197</sup> Owing to logistical difficulties, litigating the right to development on behalf of a collective can ensure redress to a large number of victims<sup>198</sup> who might otherwise not have the opportunity to seek justice individually because of the costly and lengthy processes involved.<sup>199</sup>

Unlike the African Commission, access to the African Court is allowed to states parties and accredited non-governmental organisations as well as to individuals whose states have duly recognised the competence of the court.<sup>200</sup> Under the prevailing circumstances, with the high-

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Cameroon as a hindrance to effective domestic remedy. Although the complainants showed prove of seeking redress through political processes, the African Commission refused to entertain their complaint for failing to satisfy the requirement to exhaust local domestic remedies. It begs the question what constitutes domestic remedy? Whether domestic remedy only constitutes legal action? What if the complainants had found redress through the political processes they engaged, would that not have resolved the problem?

<sup>195</sup> African Charter (n 3 above) arts 47 & 55.

<sup>196</sup> See generally *DRC* (n 190 above).

<sup>197</sup> See Ngang 2013 (n 192 above) 49.

<sup>198</sup> Skinner *et al* (n 177 above) 11.

<sup>199</sup> Skinner *et al* (n 177 above) 9; The *Endorois* litigation was instituted by the Centre for Minority Rights Development (CEMIRDE) and Minority Rights Group International on behalf of the Endorois community, while the *Kevin Gunme* case was brought by 14 individuals on behalf of the peoples of Southern Cameroon.

<sup>200</sup> Protocol on the African Human Rights Court (n 158 above) art 5.

handedness under which the African peoples are governed, the burden that victims bear to prove their case in most instances makes it extremely difficult to litigate the right to development against the state.<sup>201</sup> The Protocol on the African Human Rights Court makes provision to the effect that when a violation of the right to development is alleged, the state is granted right of access to the Court to seek remedy.<sup>202</sup>

### **3.3.2. Litigation**

In analysing the following two cases involving external actors, I aim to illustrate to what extent the right to development is achievable through litigation and the nature of remedies that could be anticipated in the event that a violation is established.

#### **3.3.2.1 Social and Economic Rights Action Centre & Another v Nigeria**

Commonly known as the *SERAC* case, this is one of the African Commission's landmark cases, which highlights the important role that African states are obligated to play in protecting the human and peoples' rights enshrined in the African Charter.<sup>203</sup> The litigation originated from the uncontrolled action of Shell Corporation, whose abusive exploitation of petroleum in the Niger Delta in complicity with the Nigerian government, resulted in massive oil spills that caused severe damage to the environment and therefore adversely affected the livelihood of the Ogoni people. The complaint brought by the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights on behalf of the local population alleged violations perpetrated by the Nigerian government of a range of socio-economic and environmental rights protected by the African Charter.<sup>204</sup> It is important to highlight that Nigeria has ratified and domesticated the African Charter and is thus obligated to comply with the human and peoples' rights provisions contained therein.<sup>205</sup> This creates a legal obligation, which Svensson-McCarthy describes as a 'third-party effect' by which states may incur responsible for failing to take reasonable action to

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<sup>201</sup> Skinner *et al* (n 177 above) 8.

<sup>202</sup> Protocol on the African Human Rights Court (n 158 above) art 5(d).

<sup>203</sup> *SERAC* (n 117 above) para 57; Kamga SAD & Fombad CM 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) *Journal of African Law* 14.

<sup>204</sup> *SERAC* (n 117 above) para 43.

<sup>205</sup> *SERAC* (n 117 above) para 41.



prevent non-state actors from carrying out acts that violate human rights, or for failing to ‘provide adequate protection against such violations under domestic law’.<sup>206</sup> In contravention of these standards, the government colluded with Shell Corporation in ‘the destruction of the Ogoniland’ through the abusive exploitation of the people’s oil wealth and therefore failed in its duty to exercise due diligence in preventing the violation of established human rights.<sup>207</sup>

The African Commission has rightly been criticised for inconsistency in its adjudication approach.<sup>208</sup> For instance, while the Commission established in the *DRC* case that the violation of the Congolese peoples’ right to dispose of their wealth and natural resources occasioned the violation of the right to development,<sup>209</sup> it failed to apply the same standard in the *SERAC* case. The Commission found that by failing to adequately protect the Ogoni people, thus allowing a non-state entity to act ‘freely and with impunity’, the Nigerian government acted in violation of its obligations under the African Charter.<sup>210</sup> Although the complaint was not instituted as a right to development litigation *per se*, Kamga and Fombad argue that all the rights alleged to have been violated constitute the building blocks of the right to development, necessitating the Commission to have summarised them into a violation of the right to development.<sup>211</sup> Through a creative interpretation of the law, the Commission established a violation of the right to shelter even though such a provision is not enshrined in the African Charter.<sup>212</sup> It further acknowledged that by violating the right to food, the Nigerian government in complicity with Shell Corporation violated the right to development.<sup>213</sup> Based on these interpretations, it would have been

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<sup>206</sup> Svensson-McCarthy (n 130 above) 17; *SERAC* (n 117 above) para 57.

<sup>207</sup> *SERAC* (n 117 above) para 58; Chirwa 2008 (n 128 above) 305-306.

<sup>208</sup> Olowu D *An Integrative Rights-Based Approach to Human Development in Africa* (2009) 154; Kamga (n 28 above) 391; Yeshanew SA ‘Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples’ Rights: Progress and perspectives’ (2011) 11 *AJHR* 339-340.

<sup>209</sup> *DRC* (n 190 above) para 95.

<sup>210</sup> *SERAC* (n 117 above) paras 57 & 70.

<sup>211</sup> Kamga & Fombad (n 203 above) 18.

<sup>212</sup> *SERAC* (n 117 above) para 60; Kamga & Fombad (n 203 above) 18.

<sup>213</sup> *SERAC* (n 117 above) para 64.



appropriate to pronounce on a violation of the right to development but as Kamga remarks, the Commission avoided doing so.<sup>214</sup>

Considering the relevance of the right to development as a vital instrument by which to establish justice in development within Africa, the Commission might not have been wrong in taking an activist position by explicitly compelling the Nigerian government to cause Shell Corporation to repair the damages it had caused. This is explained by the fact that many multinational corporations like Shell have become so powerful that most states have increasingly lost the capacity to regulate their actions.<sup>215</sup> Accordingly, '[w]here a non-state actor has the capacity to redress the violation itself, it does not make sense to hold the state alone responsible'.<sup>216</sup> As Ronen also argues, 'to insist solely on the governmental obligations obscures the true nature of the violation; reinforces the corporation's impunity and thus also generates a dangerous sense of impunity for non-state actors that contravene guaranteed rights'.<sup>217</sup> However, because of the limitations of the law that insulates non-state actors, such a determination cannot be made under the present dispensation.

### **3.3.2.2 Democratic Republic of Congo v Burundi, Rwanda & Uganda**

This case, which is often referred to as the *DRC* case is the first inter-state communication in which the DRC alleged grave and massive violations of provisions of the African Charter committed in the eastern provinces of the country by the armed forces of Burundi, Rwanda and Uganda.<sup>218</sup> On the merits of the case, the African Commission found the respondent states in violation of a number of rights including the right to development.<sup>219</sup> The Commission applied

<sup>214</sup> Kamga (n 28 above) 389; *SERAC* (n 117 above) para 64. In adjudicating the *SERAC* case the African Commission pointed out that there was in effect a violation of the right to development which the complainants should have evoked but failed to do so.

<sup>215</sup> Chirwa DM 'The doctrine of state responsibility as a potential means of making private actors accountable for human rights' (2004) 5 *Melbourne J Int'l L* 26-28 & 33-35; Chirwa 2008 (n 128 above) 306.

<sup>216</sup> Chirwa 2008 (n 128 above) 307.

<sup>217</sup> Ronen (n 129 above) 54.

<sup>218</sup> *DRC* (n 190 above) para 2 & 69.

<sup>219</sup> *DRC* (n 190 above) para 95; Kwame ALP 'The justiciability of the right to development in Ghana: Mirage or possibility?' (2016) *Strathmore Law Review* 87-88; Scaets S 'Africa's new human rights court: Whistling in

an expanded interpretation of what would constitute a violation of the right to socio-economic and cultural development. Relating to cultural development, the Commission established a violation of the Congolese peoples' right to cultural development resulting from the indiscriminate dumping and indecent burial of victims of the massacred Congolese people, which it considered 'an affront on the noble virtues of the African historical tradition and values'.<sup>220</sup> This is a novel interpretation to the effect that an attack on peoples' values and virtues would constitute a violation of the right to development guaranteed by the African Charter.

The Commission further found the illegal exploitation and pillaging by Burundi, Rwanda and Uganda as a contravention of the Congolese peoples' right to ownership of their wealth and natural resources as enshrined in article 21 of the Charter.<sup>221</sup> The right to ownership over wealth and natural resources is not expressly stated as a component of article 22 of the Charter but as explicitly stipulated by the Constitution of the DRC and as Kamga and Fombad also rightly indicate, it is associated with the realisation of the right to development.<sup>222</sup> As a justification for linking associated rights to the right to development, the African Commission held that:

The deprivation of the right of the people of the Democratic Republic of Congo, ... to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of states to individually or collectively ensure the exercise of the right to development, guaranteed under article 22 of the African Charter.<sup>223</sup>

The Commission found Burundi, Rwanda and Uganda in violation of the right to development among others and drew their attention to the need to abide by their treaty obligations under the African Charter as well as under general international law.<sup>224</sup> In terms of remedy, the Commission recommended the respondent states to pay *adequate reparation* to the DRC on

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the wind?' (2009) *Chatham House – Briefing Paper* 8; Oduwole O 'International law and the right to development: A pragmatic approach for Africa' (2014) *International Institute of Social Studies* 15.

<sup>220</sup> DRC (n 190 above) para 87; Kamga & Fombad (n 203 above) 11.

<sup>221</sup> DRC (n 190 above) para 94-95; Kamga & Fombad (n 203 above) 11-12.

<sup>222</sup> Constitution of the DRC (n 76 above) art 58; Kamga & Fombad (n 203 above) 12.

<sup>223</sup> DRC (n 190 above) para 95.

<sup>224</sup> DRC (n 190 above) para 98; Kamga & Fombad (n 203 above) 11.

behalf of the dispossessed Congolese people.<sup>225</sup> While the Commission's ruling constitutes an important step in advancing the right to development, the abstract nature of the remedy it granted leaves much to be desired in terms of anticipating adequate protection on the right to development through litigation. It would have been more appropriate for the Commission to be a bit more precise as to the nature of reparation for the damages incurred by the victims.

Foreign stakeholders, especially extractive industry multinational corporations are known to be engaged in similar practices of looting and bloody exploitation of 'conflict minerals' in the DRC,<sup>226</sup> which as the African Commission acknowledged in the *DRC* litigation occasioned a violation of the right to development.<sup>227</sup> However, no known legal action has yet been taken against those corporations perhaps because they are not bound by the African Charter that proscribes wrongful behaviour that may violate the right to development guaranteed to the peoples of Africa. The Commission ruled against Burundi, Rwanda and Uganda because in effect as states parties to the Charter, they bear direct legal responsibility for their actions which contravened provisions of the Charter. In the *SERAC* litigation, although Shell Corporation's reckless exploitation and deprivation of the Ogoni peoples' right to dispose freely of their wealth and resources came out evidently, the government of Nigeria shouldered the legal responsibility that should have been shared with Shell Corporation. One would wonder whether such a legal bias in favour of foreign stakeholders does not condone impunity.

### 3.3.3. Nature of remedies

In the event that legal action becomes inevitable as a result of violation of an entrenched right, justice demands offenders of the law to be held accountable and that a remedy is granted to the victims.<sup>228</sup> In principle, the Covenant on Civil and Political Rights binds state parties with the

<sup>225</sup> *DRC* (n 190above) para 98.

<sup>226</sup> Petitjean O 'Perenco in the Democratic Republic of Congo: When oil makes the poor poorer' (2014) *Multinationals Observatory* available at: <http://multinationales.org/Perenco-in-the-Democratic-Republic> (accessed: 28 October 2015); Report of the Panel of Experts on the Illegal Exploitation of the Natural Resources and other Forms of Wealth of the Democratic Republic of Congo 12 April 2001 UN Doc S/2001/357 6-7.

<sup>227</sup> *Kevin Mgwanga Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 95.

<sup>228</sup> Van Boven T 'Human rights and rights of peoples' (1995) 6 *European J Int'l L* 462.

obligation to ensure that effective remedy is available and accessible to victims of a violation.<sup>229</sup> In this regard, the Principles and Guidelines on the Right to Fair Trial provide that the right to effective remedy entails among others; ‘1) access to justice; 2) reparation for the harm suffered’.<sup>230</sup> When the right to development is violated victims are entitled to effective remedies as supported by international law.<sup>231</sup> The Maastricht Principles additionally stipulate that for:

[r]emedies, to be effective, [they] must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non repetition. To avoid irreparable harm, interim measures must be available and States must respect the indication of interim measures by a competent judicial or quasi-judicial body.<sup>232</sup>

The African Charter envisaged three types of remedies that are likely to redress violations of the right to development which include the reparation of damages, interdict and provisional measures. In the event of spoliation the Charter provides for the right to ‘lawful recovery’ or restitution and the right to ‘adequate compensation’.<sup>233</sup> The Charter sets the rule that remedy for damages suffered as a result of a violation is not a privilege but a claimable right. In principle, lawful recovery or restitution applies in the case where a people have been dispossessed of some recoverable tangible thing, the value of which is indispensable for the achievement of substantive development. Lawful recovery also means that the dispossessed peoples are legitimately entitled to get back what they have been deprived of and the offender is compelled to restore same. In the case where the damage incurred is more intangible, justice demands the payment of adequate compensation to the effect that the remedy must be proportionate to the damage suffered.

When a violation of the right to development, involving the actual perpetration of an act or a threat happens, an interdict may be more effective in ensuring respect for the negative obligation to refrain from actions that have the potential to cause harm. Otherwise, a threat or actual

<sup>229</sup> ICCPR (n 98 above) art 2(3)(a).

<sup>230</sup> Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa 2003 para C(b)(1)&(2).

<sup>231</sup> Van Boven (n 228 above) 475; Skinner *et al* (n 177 above) 1.

<sup>232</sup> Maastricht Principles (n 117 above) para 38.

<sup>233</sup> African Charter (n 3 above) art 21(2).

violation of the right to development may also be remedied through the granting of a provisional measure, requiring a discontinuation of a harmful action from degenerating into further harm. As stipulated by the Rules of Procedure, the African Commission may in matters of emergency involving ‘serious or massive human rights violations’, or a situation that ‘presents the danger of irreparable harm or requires urgent action to avoid irreparable damage’, order for provisional measures.<sup>234</sup> The enforcement of provisional measures may not directly result in the realisation of the right in question but is intended to prevent harm from taking place or from causing a regression in the exercise and enjoyment of existing rights and well-being.

In terms of redress, drawing from the cases discussed above, Odinkalu observes, the African Commission’s remedial measures have not been sufficiently explicit.<sup>235</sup> The law is supposed to deal with clarity and exactitude and not leave room for doubt and uncertainty. For instance, although the African Commission rightly ordered for the payment of adequate compensation in the *SERAC* and *DRC* cases,<sup>236</sup> it is unclear what adequate compensation actually amounts to, which leaves respondents with the discretion to determine what they would consider to be adequate compensation. With regards to granting an interdict, in the *DRC* case the African Commission ordered the governments of Burundi, Rwanda and Uganda to stop their military operations and to withdraw their troops from the DRC, which order, it is noted was immediately complied with.<sup>237</sup> Similarly, in the *SERAC* litigation, the decision of the African Commission also contained an interdict requiring the Nigerian government to stop all attacks on the Ogoni people.<sup>238</sup> However, despite acknowledging the deplorable degradation of the environment within the Ogoni community as a result of Shell’s abusive exploitation, which ‘devastatingly affect[ed] the well-being of the Ogonis’,<sup>239</sup> by not providing a remedy to stop Shell’s harmful activities, the Commission failed to do justice to the Ogoni people.

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<sup>234</sup> Rules of Procedure of the African Commission on Human and Peoples’ Rights 2010 rules 79 & 80.

<sup>235</sup> Odinkalu (n 23 above) 242.

<sup>236</sup> *SERAC* (n 117 above) para 71; *DRC* (n 190 above) para 98.

<sup>237</sup> *DRC* (n 190 above) para 98.

<sup>238</sup> *SERAC* (n 117 above) para 71.

<sup>239</sup> *SERAC* (n 117 above) para 58.

The Principles and Guidelines on the Right to Fair Trial further make clear that the ‘granting of amnesty to absolve perpetrators of human rights violation from accountability violates the right of victims to an effective remedy’.<sup>240</sup> For instance, if a violation is established to have been committed by a foreign stakeholder like in the *SERAC* case in which the African Commission acknowledged the violations committed by Shell Corporation,<sup>241</sup> and the legal responsibility is shifted to the Nigerian government for not regulating the activities of the former, the likelihood that the state would remedy the damages is minimal. Meanwhile, if the actual perpetrator of the violation is brought directly to account, the chances are high that remedy would be effective. Thus, while the UN Guiding Principles ascertains that victims of rights violation resulting from the actions of non-state actors are entitled to effective judicial remedy,<sup>242</sup> how this may be achieved practically remains problematic owing to the shortcomings that I move on to examine.

### **3.4. Critique of the Regime of Protection**

#### **3.4.1. Extraterritoriality and the pre-emptive use of international law**

The legal basis of extraterritoriality for the realisation of the right to development or better still for the realisation of socio-economic and cultural rights has been explored extensively.<sup>243</sup> Henry Shue for instance, makes clear that ‘where the state with the primary duty to protect rights fails – for lack of will or capacity – to fulfil its duty, some other agent at least sometimes must step in and provide the missing protection’.<sup>244</sup> This has mainly been conceived from a perspective of

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<sup>240</sup> Principles and Guidelines on the Right to a Fair Trial (n 230 above) para C(d).

<sup>241</sup> See *SERAC* (n 117 above) para 57-72.

<sup>242</sup> UN Guiding Principles on Business and Human Rights (n 134 above) paras 25-28.

<sup>243</sup> De Schuter O *et al* ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ (2012) 34 *HRQ* 1084–1169; Ooms G & Hammonds R ‘Global constitutionalism, responsibility to protect, and extra-territorial obligations to realise the right to health: time to overcome the double standard (once again)’ (2014) 13:68 *Int’l Journal for Equity in Health* 2-4; Maastricht Principles (n 117 above) paras 1-44; Skogly SI ‘Extra-national obligations towards economic and social rights’ (2002) *International Council on Human Rights Policy* 1-24.

<sup>244</sup> Shue H *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1996) 176–177.

need, entailing the provision of development assistance to satisfy those needs.<sup>245</sup> However, as Thomas Pogge contends, effective remedy is not to be found in charity-based assistance but rather in an obligation to redress the harm inflicted on the poor, particularly those in Africa through the established unjust global system.<sup>246</sup> This notwithstanding, the perpetrators of these injustices have remained reticent about a legal obligation to repair the damages that their actions have caused in developing countries.<sup>247</sup>

Despite the observation that regional human rights enforcement mechanisms provide the cornerstones for the effective protection of universally recognised human rights,<sup>248</sup> it is noted that foreign stakeholders are generally not accountable to regional enforcement mechanisms.<sup>249</sup> The European and the Inter-American Conventions on Human Rights explicitly limit the enforcement of guaranteed rights within the jurisdiction of the ratifying states.<sup>250</sup> Contrary to Skogly's claim that the 'African Charter [...] does not contain any specific jurisdictional or territorial limitation,<sup>251</sup> article 47 of the African Charter allows any state party that has good reason to believe that another state party has violated the provisions of the Charter to make a

<sup>245</sup> Sengupta 2002 (n 25 above) 880; De Feyter K 'Towards a framework convention on the right to development' (2013) *Friedrich Ebert Stiftung* 17; Salomon ME 'Legal cosmopolitanism and the normative contribution of the right to development' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 17; Sengupta A 'Development cooperation and the right to development' (2003) *Copyright©2003 Arjun Sengupta* 20; Siitonen L 'Political theories of development cooperation: A study of theories of international cooperation' (1990) *UN University WIDER* 15-16; Arts K & Tamo A 'The right to development in international law: New momentum thirty years down the line?' (2016) 63:3 *Neth Int'l L Rev* 239-242; Hausermann (n 33 above) 5.

<sup>246</sup> Pogge TW 'Severe poverty as human rights violation' (2003) *UNESCO Poverty Project* 35.

<sup>247</sup> Kirchmeier (n 82 above) 11; Oduwole (n 219 above) 8.

<sup>248</sup> Benedek *et al* (n 149 above) 5.

<sup>249</sup> See Gunduz (n 166 below) 5; International Justice Resource Centre (n 167 below).

<sup>250</sup> Compare common articles 1 of the European Convention on Human Rights, the American Convention on Human rights and the African Charter on the obligations of the states parties to these treaties with regard to the realisation of the human rights provisions of the treaties.

<sup>251</sup> Skogly SI 'Extraterritoriality: Universal human rights without universal obligations?' (d.n.a) *Lancaster University UK* 18-19; Compare common articles 1 of the European Convention on Human Rights, the American Convention on Human rights and the African Charter on the obligations of the states parties to these treaties with regard to the realisation of the human rights provisions of the treaties.



complaint. It is clear that a complaint can only be made against a state party and not against a non-state party to the Charter. The Maastricht Principles indeed confirm the fact that violations committed by non-state actors are directly attributed to the state, which has the responsibility to regulate the activities of the non-state actors.<sup>252</sup>

Until the law has actually changed in favour of holding non-state actors and foreign stakeholders directly accountable for human rights offences, they remain insulated and may continue to contravene the right to development with impunity. In line with the argument advanced by D'Aspremont *et al* with regard to how non-state actors could be held accountable for wrongful actions,<sup>253</sup> I am of the opinion that international law is supposed to have a primary role to play in giving effect to the extraterritorial obligations of foreign stakeholders. However, it is important to note that human rights treaties have separate monitoring mechanism with specific enforcement procedures.<sup>254</sup> Unfortunately, there is yet no international treaty and therefore no universal monitoring mechanism on the right to development. International law has developed over time principally as a framework of principles to regulate relations between states and to protect human rights but has only recently begun to look into the behaviour of non-state actors in this regard.<sup>255</sup> With regard to the advancement of human rights, the aim has been to improve human well-being, which as Sengupta posits constitutes 'the objective of development'.<sup>256</sup>

Although non-state actors are known to be largely involved in global development processes and their actions have had huge negative impacts on the basic human rights of local peoples around the world, international law only compels states, as Steiner and Alston point out, to: a) respect the human rights of the peoples of other states, b) create institutional mechanisms for realisation, c) protect human rights and prevent violations, d) provide goods and services to ensure the

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<sup>252</sup> Maastricht Principles (n 117 above) para 12.

<sup>253</sup> D'Aspremont *et al* (n 133 above) 50.

<sup>254</sup> Benedek *et al* (n 148 above) 6-7; Svensson-McCarthy (n 130 above) 28-29.

<sup>255</sup> Manby B 'Shell in Nigeria: Corporate social responsibility and the Ogoni crisis' (2000) *Carnegie Council on Ethics and International Affairs – Case Study No 20 2*; Skogly 2002 (n 243 above) 1-8.

<sup>256</sup> Sengupta 2002 (n 25 above) 843.



fulfilment of human rights, and most importantly, e) promote human rights.<sup>257</sup> The application of international law mostly depends on the toothless *pacta sunt servanda* principle to act in good faith, which as Steven Reinhold argues, only serves the purpose of ‘limiting state sovereignty that is inherent in international law’.<sup>258</sup> Developed countries have often taken advantage of the lacuna in the *stricto sensu* application of international law to engineer chaos and destruction in developing countries under the pretext of humanitarian interventions to protect human rights.<sup>259</sup>

In the face of divergent perspectives on international law as a law of general application according to D’Amato<sup>260</sup> as opposed to McDougal, Lasswell and Chen who are unconvinced that international law actually constitutes law,<sup>261</sup> Anghie points out that international law was conceived by and exists essentially for ‘civilised nations’.<sup>262</sup> In line with Anghie’s view, the argument that I advance in this section is informed by my perception of international law as an instrument of protection for western industrialised countries and not necessarily for developing countries, particularly those in Africa. In spite of the guarantees contained in the Declaration on the Right to Development, as a soft law instrument of international law, I contend that it is an ineffective instrument to rely on for the protection of the right to development in Africa because of its predominantly patronising nature in promoting development cooperation and the absence of any provision for legal accountability in the event of a wrongful action.

### **3.4.2. Inadequacy in regional and domestic law**

In the next chapter, I highlight the fact that the right to development imposes an obligation for policy making as a means to translate the abstract provisions on the right to development enshrined in different instruments into practical reality.<sup>263</sup> It implies a superseding duty to exercise the right to self-determination both at the continental and domestic levels as a means to

<sup>257</sup> Steiner HJ & Alston P *International Human Rights in Context: Law, Politics, Morals* (2000) 182–84. Sengupta 2002 (n 25 above) 856.

<sup>258</sup> Reinhold S ‘Good faith in international law’ (2013) *UCL Journal of Law and Jurisprudence* 41.

<sup>259</sup> D’Amato A ‘Is international law really law?’ (1985) 79 *North-western Law Review* 1298.

<sup>260</sup> D’Amato (n 259 above) 1293-1310

<sup>261</sup> McDougal M, Lasswell H & Chen L *Human Rights and World Public Order* (1980) 161-363.

<sup>262</sup> Anghie (n 98 above) 52.

<sup>263</sup> See sect 2.2.2 of chapter five.

achieve the right to development. In this regard and in spite of arguments to the contrary,<sup>264</sup> the preceding analysis demonstrates that the right to development is not just a legal theory, it is indeed justiciable and legally enforceable in the sense that legitimate claims have effectively been adjudicated upon by the competent jurisdictions.<sup>265</sup> In essence, the right to development in Africa sets standards for seeking protection, the weaponry for asserting claims and the tool for crafting judicial remedies in the event that a threat or actual violation is established to have been committed. However, despite evidence of the harmful practices that have compromised or held back development in Africa, and in spite of the guarantees contained in the treaty instruments and domestic constitutions that enshrine the right to development as illustrated earlier, the general framework of law in Africa does not make provision for holding foreign stakeholders and other non-state actors legally accountable for wrongful action.

In a nutshell, transgressions of the right to development in Africa may happen when states fail in their positive duties to fulfil or to prevent violations that may be committed by third parties. Contraventions may also occur when states and non-state actors fail in their negative duties to refrain from actions that may impact negatively on the right to development. In the instance where a violation resulting from the conduct of a foreign stakeholder ‘constitutes a crime under international law’, the Maastricht Principles stipulates that the matter may lawfully be referred to ‘an appropriate jurisdiction’ for adjudication.<sup>266</sup> It begs for explanation what is envisaged as ‘appropriate jurisdiction’, considering that foreign stakeholders are not parties to the African human rights treaties and therefore are neither bound by those treaties nor are they subject to the treaty enforcement mechanisms. Thus, in spite of the liability that non-state actors and foreign

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<sup>264</sup> Rosas A ‘The right to development’ in Eide A *et al* (eds) *Economic Social and Cultural Rights* (2001) 251; Bello E ‘Article 22 of the African Charter on Human and Peoples’ Rights’ in Bello E & Ajibola B (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992) 462; Shivji I *The Concept of Human Rights in Africa* (1989) 82; Ghai Y ‘Whose human right to development?’ (1989) *Commonwealth Secretariat Occasional papers* 124; Donnelly J ‘In search of the unicorn: The jurisprudence and politics on the right to development’ (1985) 15:3 *Cal W Int’l L J* 473.

<sup>265</sup> Yeshanew (n 208 above) 320; Browning R ‘The right to development in Africa: An emerging jurisprudence?’ (2011) *Kenya Law* 10; Dąbrowska AO ‘Legal status of the right to development’ (2010) *Haskoli Island University* 8.

<sup>266</sup> Maastricht Principles (n 117 above) para 25(e).

stakeholders may incur, the actual functioning of the law as it is (*lex lata*), attributes responsibility primarily to the state to remedy violations of the right to development.

Otherwise, as a legally enforceable entitlement the right to development in Africa engenders, as a host of scholars have noted, a combination of positive and negative duties that enjoin states parties to the African Charter and its ancillary instruments to respect, protect, promote and fulfil the right.<sup>267</sup> The African treaty instruments do not impose any binding obligations on foreign stakeholders, which explains why developed countries have argued against and out-right denied any legal commitment relating to implementing the right to development in developing countries,<sup>268</sup> but would rather only do so through development cooperation. Because the right to development is envisaged to result in the constant improvement in human well-being,<sup>269</sup> cooperation ought to envisage not only the provision of development assistance but also an obligation of non-violation to ensure that development gains are not eroded.<sup>270</sup> This is often not the case as the framework of development cooperation generally does not impose such restraints, which in effect is most relevant in order to ensure progress in Africa. Although the African Union Constitutive Act highlights the need to encourage international cooperation,<sup>271</sup> I contend that the actual problem that Africa is confronted with cannot be redressed through soliciting development assistance but by dealing concretely with issues relating to acts of foreign domination, aggression or unwarranted interference that are prevalent across the continent.

Thus, with regard to safeguarding the right to development dispensation from on-going imperialistic practices, it is important to highlight the negative obligation not to hinder the

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<sup>267</sup> Chirwa (n 117 above) 16; Maastricht Guidelines (n 121 above) para 6; Okafor 2008 (n 29 above) 61; Shue (n 244 above) 52.

<sup>268</sup> Oduwole (n 219 above) 8; Kirchmeier (n 82 above) 11.

<sup>269</sup> DRtD (n 3 above) art 2(3).

<sup>270</sup> Mmari A 'The challenges surrounding the implementation of the right to development in the African Charter on Human and Peoples' Rights in light of the *Endorois* case' (2012) *LLM Dissertation University of Pretoria* 24; Okafor 2008 (n 29 above) 61.

<sup>271</sup> AU Constitutive Act (n 32 above) art 3(e).

enjoyment of the collective right to development guaranteed to the peoples of Africa.<sup>272</sup> According to Thomas Pogge, the negative obligation entails a duty not to harm or to avert harm that present actions may generate in the future.<sup>273</sup> For Skogly, the negative obligation compels states to respect human rights not only of their own citizens but also of the peoples in other countries who might be affected by their activities.<sup>274</sup> Accordingly, foreseeable harm must be avoided, which demands restrained action or behaviour that may infringe on or jeopardise the liberty of action to freely exercise the right to development.<sup>275</sup> If the right to development in Africa is to be achieved, actions that are foreseeable to adversely affect the human person or to violate other fundamental human rights must be avoided or prevented.<sup>276</sup> Such avoidable actions include development injustices in the form of ‘colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, [...] threats of war and refusal to recognize the fundamental right of peoples to self-determination’.<sup>277</sup>

While the African Court on Human and Peoples’ Rights or the African Court of Justice and Human Rights when it eventually replaces the former is anticipated to become fully operational, the African Commission remains the most active enforcement mechanism on issues of human and peoples’ rights with an established jurisprudence on the right to development. The Commission’s complaints procedure provides assurance that a violation of the right to development can be redressed through litigation.<sup>278</sup> However, although the Charter imposes binding obligations and mandates the Commission as a measure of safeguard to interpret and apply the principles of the law through adjudication in specific cases, I contend that the mandate

<sup>272</sup> N’Sengha MN ‘The African Charter on Human and Peoples’ Rights: An African contribution to the project of global ethic’ available at: <http://globlethic.org/Center/mutombo1.htm> (accessed: 17 April 2014).

<sup>273</sup> Pogge T ‘Real world justice’ (2005) 9:1/2 *The Journal of Ethics* 34; Pogge T *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002) 67, 145 & 172.

<sup>274</sup> Skogly d.n.a (n 251 above) 4.

<sup>275</sup> Eide A ‘Realisation of social and economic rights and the minimum threshold approach’ (1989) 1:2 *Hum Rts L J* 10; Chirwa 2002 (n 117 above) 16; Frankovits (n 117 above) 9; *SERAC* (n 117 above) para 45; see also Skogly d.n.a. (n 251 above) 8-9.

<sup>276</sup> Sengupta A ‘The human right to development’ (2004) 32:2 *Oxf Dev’t Stud* 193.

<sup>277</sup> DRtD (n 3 above) art 5.

<sup>278</sup> Frankovits (n 117 above) 10.

of the Commission has been construed rather too narrowly to mean that its decisions do not have the force of law. As provided for by article 45(2) and (3) when the Commission engages in its protective function to interpret the law, it constitutes itself as a tribunal. Because the Charter is legally binding on states parties, the decisions of the Commission create precedent to give practical effect to the principles of law and therefore, are supposed to also have enforceable effect deriving from the legal obligations imposed by the Charter.

However, the Commission's decisions have been seen principally as mere recommendations without binding force and therefore may only be enforced at the discretion of the states concerned, which of course, a host of scholars have dismissed as unreasonable.<sup>279</sup> I argue that the Commission's decisions are not devoid of legal effect and unenforceable. In effect, the Principles and Guidelines on the Right to a Fair Trial provide that 'any remedy granted shall be enforced by competent authorities' and that 'any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy'.<sup>280</sup> Once the Commission has rendered its ruling, it is left for the relevant national authorities to proceed with ensuring that the law is complied with and that damages suffered by victims are effectively remedied. Compliance with the law deriving from article 22 of the African Charter entails an enabling domestic environment that does not condone impunity; one that allows for substantive development to be achieved and for justice in development to prevail.

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<sup>279</sup> Odinkalu CA 'The individual complaints procedure of the African Commission on Human and Peoples. Rights: A preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 398; Naldi G & Magliveras K 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional Court of Human and Peoples' Rights' (1998) 16 *NQHR* 432; Welch CE 'The African Charter and freedom of expression in Africa' (1998) 4 *Buff Hum Rts L Rev* 113-115; Murray M 'Decisions by the African Commission on Human and Peoples. Rights on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *Int'l & Comp L Q* 413; Kodjo E 'The African Charter on Human and Peoples' Rights' (1990) 11 *Hum Rts L J* 280; Benedek W 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *NQHR* 31; Robertson G *Crimes against Humanity: The Struggle for Global Justice* (2000) 62-64.

<sup>280</sup> Principles & Guidelines on the Right to a Fair Trial (n 230 above) para C(c)(3) & (4).

By deferring enforcement of its decisions, the Commission is in effect throwing back legal responsibility to states parties to exercise the right to sovereignty by complying in good faith with the legal commitments they have freely undertaken under the African Charter and other human rights instruments. In respect of the negative duty that the right to development imposes, African governments have a primary obligation to ensure that the right to development guaranteed to the peoples of Africa is not violated. It is important that when the right to development is contravened either by states parties or by non-states parties, including foreign stakeholders, justice is sought as a guarantee to safeguarding the right to development dispensation in Africa. Practically, this can only be achieved through effective legislative and regulatory policy measures that impose constraints on the often uncontrollable actions of foreign stakeholders. A serious shortcoming in this regard is that most African countries are yet to domesticate the right to development, which they have committed to under the African Charter. As a result the African continent has remained at the mercy of powerful external actors, as the African Union Commission has rightly observed.<sup>281</sup> Meanwhile, judging from the analysis in this chapter, significant progress is possible in Africa, which entails advancing the right to development not only as a claimable entitlement but also as a development paradigm.

#### **4. Concluding Remarks**

While it is true that developing countries need to align their national development policies with the realities of a global economy that is largely shaped and dominated by western capitalist paradigms,<sup>282</sup> the fact cannot be ignored that global realities will not always be endured when the scales of justice remain tilted in favour of the exploitative attitude of foreign stakeholders in their relations with Africa. Global realities include the fact that the peoples of Africa are not condemned to subordination. It entails foreign stakeholders to respect international human rights law, which guarantees that the peoples of Africa are legitimately entitled to make their own development choices as a matter of right. The exercise of this right has practically manifested through the recognition and protection of the right to development in a range of legal instruments

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<sup>281</sup> African Union Commission 'Agenda 2063: The Africa we want' (2015) *African Union* para 59.

<sup>282</sup> Monti-Belkaoui J & Riahi-Belkaoui A *Qaddafi: The Man and His Policies* (1996) 268.

that together define the right to development dispensation in compliance with the conviction established in the preamble to the African Charter to prioritise the right to development.

Of significance is the fact that the right to development dispensation guarantees to the peoples of Africa entitlement to actual self-determination and in relation attribute responsibilities to African states to ensure its protection and fulfilment as well as liabilities to foreign stakeholders when their actions contravene the right to development in Africa. Following Amartya Sen's theorisation of development as freedom,<sup>283</sup> it is worth noting that having gained political independence, it is important to envisage the right to development as a legitimate platform on which to advance the crusade for socio-economic and cultural emancipation in the same manner that the right to self-determination facilitated the achievement of independence. To aspire for the kind of freedom that Sen envisages as development as implied by the capabilities theory means that with freedom, which according to Bedjaoui is justified by the independence of nations,<sup>284</sup> Africa ought to be able to create the conditions for its peoples to exercise the right to development by performing the human functioning necessary to achieve anticipated outcomes of well-being.<sup>285</sup> Asserting the right to self-determination in Africa represents not only the right to achieve socio-economic and cultural development but essentially, as part of that process, to seek to be liberated from external domination and to claim as a matter of right, sovereign ownership over the resources that are indispensable to achieve the right to development.<sup>286</sup>

In spite of the extensive commitments to make the right to development a reality, actual implementation remains problematic due largely to the fact that most of Africa is still subject to foreign domination that jeopardises the enabling environment for exercising that right. Notwithstanding the available enforcement mechanisms at the continental and domestic levels and the means of redress through litigation, the regime of protection under the right to development dispensation remains noticeably insubstantial, especially with regard to holding foreign stakeholders accountable for wrongful actions that contravene the right to development

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<sup>283</sup> Sen (n 39 above) 87-95.

<sup>284</sup> Bedjaoui (n 145 above) 93-94.

<sup>285</sup> See Sen (n 39 above) 87-95.

<sup>286</sup> African Charter (n 3 above) art 20(2); DRtD (n 3 above) arts 1(2) & 5.

guaranteed to the peoples of Africa. Because of the imperative to achieve justice and equity in development, part of the discussion in this chapter has dwelled on aspects of legal enforcement. However, it is worth acknowledging that the right to development cannot be achieved solely through legal processes, but essentially also through policy reforms. This imposes an even bigger responsibility on Africa, as part of the commitment under the African Charter to create the conditions for greater autonomy and self-determination as opposed to the endemic dependence on foreign assistance as a model for development.<sup>287</sup> It entails considering a broader collaboration among African countries and therefore also an enquiry into how the right to development in its formulation as a development paradigm could be conceptualised as a policy framework model suitable for safeguarding the right to development dispensation in Africa. I make this determination in the next chapter.

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<sup>287</sup> Ilorah R 'Africa's endemic dependency on foreign aid: A dilemma for the continent' (2011) *ICITI - ISSN: 16941225* 13; Bilal S 'The Rise of South-South relations: Development partnerships reconsidered' (2012) *Conference paper - European Centre for Development Policy Management* 1-3.



## CHAPTER FIVE

### Towards a Right to Development Governance in Africa

*If states are serious about their pledge to do something significant about world poverty, it is necessary to go beyond the rhetoric presented in [treaties], declarations, resolutions and statements, and demonstrate the political will to operate in accordance with the legal obligations they have freely undertaken through international human rights law.*

Sigrun I Skogly, 2009: 845

#### 1. Introduction

In this chapter, I illustrate how the right to development could be conceptualised as a suitable alternative to development cooperation owing to its formulation as an expression of self-determination against foreign domination and imperialistic neo-colonial practices. This is informed by the fact as stated in the introductory section of chapter one that Africa's retarded development is caused not by the need for development assistance but in essence by the lack of a functional model to drive development processes on the continent. Of interest in this regard is the reality that the right to development, which is embodied in the right to self-determination, creates the opportunity for independent policy formulation that may significantly shape development processes and of course, the manner too in which development cooperation is practiced in Africa.<sup>1</sup> I defend my proposition for a rejection of development cooperation as a modality for the realisation of the right to development with reference to Achille Mbembe's perception about rejecting colonisation, which as he posits, entails getting rid of its pre-existing models and not use them as paradigms.<sup>2</sup>

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<sup>1</sup> See African Charter on Human and Peoples' Rights adopted in Nairobi on 27 June 1981 arts 22(2) & 20(1); Declaration on the Right to Development Gen Ass Res 41/128 1986 arts 1(2) & 2(3).

<sup>2</sup> Mbembe A 'Decolonizing knowledge and the question of the archive' (2015) available at: <http://wiser.wits.ac.za/system/files/Achille%20Mbembe%20%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf> (accessed: 26 April 2017) 8-14.

Drawing from Mark's explanation, state action and development programming ought to be informed and guided by the right to development paradigm, which I argue is an appropriate development model for Africa, and therefore, needs to be conceptualised as such, as illustrated later in this chapter.<sup>3</sup> As a pragmatic concept, the right to development holds the promise to remodel the imperialistic tendencies that continue to inform developed countries' actions, which the peoples of Africa have manifestly or inexplicitly contested. It is important to clarify that as a human right, the right to development binds states parties with the duty to ensure its realisation. Meanwhile, development cooperation is generally not informed by any obligation to achieve a human right to development but rather by foreign policy considerations characterised by the pursuit of self-interest.<sup>4</sup> Thus, in spite of the right to development dispensation that has been established in Africa as illustrated in the previous chapter, implementation as De Feyter rightly observes, is a problem.<sup>5</sup> In examining the challenges involved in implementing the right to development, I point out in this chapter where the constraints lie and in effect, I illustrate why it is important to prioritise the right to development over development cooperation.

The idea to have recourse to development cooperation as a mechanism for the realisation of the right to development stems from the assumption that developing countries need the assistance of developed countries to achieve comprehensive development.<sup>6</sup> The Declaration on the Right to Development stipulates in article 4(2) that sustained action is required, by making the 'appropriate means and facilities' available through international cooperation to accelerate 'comprehensive' development in developing countries. In relation, global actions in the form of the Millennium Development Goals (MDGs) and the Sustainable Development Goals (SDGs) among others have consistently emphasised the need for global partnerships as a means to complement the efforts of developing countries. This is counter-productive and of course,

<sup>3</sup> See sect 2.2.2 & sect 3 (3.1 & 3.2) below.

<sup>4</sup> See Mawdsley E 'Human rights and south-south development cooperation: Reflections on the "rising powers" as international development actors' (2014) 36:3 *HRQ* 641. Hamilton JM 'Development cooperation: Creating a public commitment' in Berg R & Gordon DF (eds) *Cooperation for International Development: The United States and the Third World in the 1990s* (1989) 216.

<sup>5</sup> De Feyter K 'The right to development in Africa' (2013) *Law and Development University of Antwerp* 7.

<sup>6</sup> Bilal S 'The Rise of South-South relations: Development partnerships reconsidered' (2012) *Conference Paper - European Centre for Development Policy Management* 1; DRtD (n 1 above) art 4(2).

constitutes a limiting factor to developing countries' capacity for advancement in a self-sustainable manner.<sup>7</sup>

On the contrary, reflecting the view of the UN Working Group on the Right to Development, Ibrahim Salama draws attention to the fact that the right to development does not guarantee a right to lay claim to the wealth and resources of other countries and thus, international commitments to support the efforts of developing countries can only be accomplished on a voluntary basis.<sup>8</sup> Accordingly, developed countries have argued against the idea of framing development as a human rights entitlement with binding extraterritorial obligations, as inherently flawed.<sup>9</sup> This notwithstanding, Bonny Ibhawoh observes that many of the actions of developed countries that undermine the full realisation of the right to development have remained immune to criticism.<sup>10</sup> This is problematic, because as has been established, the excessive influence exercised by foreign stakeholders in their extraterritorial activities threatens and in most cases has actually violated socio-economic and cultural rights in developing countries, which by implication necessitates legal responsibility.<sup>11</sup>

With regard to parties to the right to development dispensation in Africa, the procedures for seeking remedy before the African Commission and the African Court have accordingly been laid down for instant application when a violation is alleged.<sup>12</sup> The principal concern is whether

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<sup>7</sup> Ngang CC 'Differentiated responsibility under international law and the right to development paradigm for developing countries' (2017) 11:2 *HR & ILD* 280-281.

<sup>8</sup> Salama I 'The right to development: Towards a new approach?' (2005) *Perceptions* 58; see also Donnelly J 'In search of the unicorn: The jurisprudence and politics on the right to development' (1985) 15:3 *Calif West Int'l LJ* 509.

<sup>9</sup> Ibhawoh B 'The right to development: The politics and polemics of power and resistance' (2011) 33 *HRQ* 97; Kirchmeier F 'The right to development—where do we stand?: State of the debate on the right to development' (2006) *Friedrich Ebert Stiftung – Occasional Paper No 23* 13-14; Donnelly (n 8 above) 509.

<sup>10</sup> Ibhawoh (n 9 above) 100.

<sup>11</sup> Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights adopted by the International Commission of Jurists on 28 September 2011 preamble.

<sup>12</sup> see also Rules of Procedure of the African Commission on Human and Peoples' Rights 2010 rules 83-113; Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on

legal responsibility is equally imputed to foreign stakeholders when they contravene the right to development in Africa. Unfortunately, as a standard principle on the law of treaties, foreign stakeholders cannot be held accountable under treaty instruments that they are not party to and therefore are not bound to comply with. Thus, the legal obligations imposed by the right to development in Africa only apply to state parties to the African Charter and not to foreign stakeholders that are not party to the Charter. Following the recognition as contained in the preamble to the African Charter for the pursuit of justice as one of the primary objectives for the achievement of the legitimate aspirations of the African peoples,<sup>13</sup> the responsibility is imputed to Africa to ensure protection of the right to development enshrined therein for all its peoples. This responsibility includes, as the African Commission acknowledges in the *SERAC* case, regulating the activities of foreign stakeholders and non-state actors to ensure that their actions do not infringe on guaranteed rights.<sup>14</sup> This concern draws from the fact that paternalistic practices remain a major setback to development in Africa. Consequently, for the situation to change, the focus in right to development studies should be on creating real self-determination for Africa. How this could be achieved is the determination that I aim to make in this chapter.

The chapter is structured as follows: In section 2, I look at the envisaged right to development regulatory mechanisms in Africa, with focus on the frameworks for development policy making in (2.1) and the need for a shift in paradigm to substitute development cooperation models that subject Africa to foreign domination in (2.2). On this account, I proceed to portray in section 3 the right to development as an alternative development model for Africa, which I describe as the right to development governance, with emphasis on its conceptual formulation in (3.1) and the operational considerations, especially with regard to contraventions in (3.2). I then conclude the chapter with a summary of the main highlights in section 4.

## **2. Right to Development Regulatory Mechanisms**

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Human and Peoples' Rights adopted in Addis Ababa Ethiopia on 10 June 1998 arts 3-10; see also Rules of Court 2010 rules 26-73; African Charter (n 1 below) arts 46-61.

<sup>13</sup> African Charter (n 1 above) preamble para 2.

<sup>14</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* Comm 155/96(2001) AHRLR 60 (ACHPR 2001) para 57.

In this section, I look at the right to development regulatory mechanisms with the aim to determine the structural and policy dimensions within which the right to development is envisaged to constantly evolve as a development paradigm to engineer transformation in Africa. As indicated in the introductory section above, the right to development by nature imposes an obligation for development policy formulation to ensure its realisation, which requires a scrutiny of the relevant entities at the continental and country levels that are mandated to regulate the realisation of the right to development in Africa. This is illustrated through a cursory analysis of the African Union (AU) and New Partnership for Africa's Development (NEPAD) as well as a country analysis of Cameroon and Libya. These two countries are juxtaposed to show, in the case of Cameroon (considered as bad practice), how in spite of its commitments on the right to development enshrined in the national Constitution, implementation remains constrained because of a questionable cooperation arrangement with France. Meanwhile, taking Libya as a good practice example, even though it does not enshrine the right to development, I show how, due to an equally questionable foreign intervention, forty years of recorded development gains in that country was dismantled.

The choice of countries is motivated by two reasons: The first reason is that both countries have ratified the African Charter and therefore are bound to ensure domestic implementation of the right to development enshrined therein.<sup>15</sup> Cameroon has an even bigger commitment owing to the fact that it was the pioneer country to enshrine the right to development in the 1972 Constitution, which has since then remained a constitutional provision to the present date.<sup>16</sup> Second, because as a paradigm for development suited to Africa, the right to development is expected to inform and guide development processes across the continent and therefore also regulate relations between Africa and foreign stakeholders as Felix Kirchmeier rightly points out.<sup>17</sup> By focusing on these two countries, I do not claim to be doing any kind of an in-depth

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<sup>15</sup> Heyns C & Killander M (eds) *Compendium of Key Human Rights Documents of the African Union* (2013) 503-504.

<sup>16</sup> See sect 3.2.2 of chapter two.

<sup>17</sup> Kirchmeier (n 9 above) 5.

empirical analysis but simply to illustrate how development cooperation and the actions of foreign stakeholders have impacted negatively on the right to development in both countries.

## **2.1. Mandated Entities for Development Policy Making**

### **2.1.1. African Union/NEPAD**

With respect to the commitment under the African Charter that compels states parties to take collective action to ensure the realisation of the right to development as pointed out in the previous chapters,<sup>18</sup> one would imagine the AU to provide the institutional frame for such concerted action to take place. However, in spite of the treaty guarantees on the right to development in Africa, the AU Commission recognises that Africa remains exposed to ‘continued external influence’.<sup>19</sup> This is due to the paternalistic nature of development cooperation and the interventionist agenda of foreign stakeholders that has left most of Africa vulnerable and exposed to exploitation. For the most part, Africa’s exposure to external influences could be attributed to the absence of an operational model for development, which I explain later. It is my view that the development context would have experienced significant transformation if, as stipulated in the preamble to the African Charter, the right to development were taken seriously, probably as an interpretative guide to policy making and development programming. This provides reason to examine the institutional role of the AU/NEPAD as custodian of the treaty instruments that enshrine the right to development in Africa.

The AU succeeded the Organisation of African Unity (OAU) as a standard setting supra-national entity, meaning that it has the duty to set policy standards on the right to development applicable to all its member states.<sup>20</sup> However, as Murray rightly observes, the AU’s standard setting function ‘has not been backed up in practice with a clear enforcement mechanism’.<sup>21</sup> The creation of NEPAD in 2001 and its subsequent ratification in 2002 as a policy framework ‘to address Africa’s development problems within a new paradigm’ inspired hope of a starting point

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<sup>18</sup> African Charter (n 1 above) art 22(2); see also sect 4.1.1.1.2 of chapter two & sect 4.1.2 of chapter three.

<sup>19</sup> African Union Commission ‘Agenda 2063: The Africa we want’ (2015) *African Union* para 59.

<sup>20</sup> See Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000 preamble & art 3.

<sup>21</sup> Murray R *Human Rights in Africa: From the OAU to the African Union* (2004) 264.

for reshaping Africa's development future.<sup>22</sup> It was eventually also endorsed by African leaders through which they reaffirmed their common vision and a shared conviction to rebuild and put their countries back on track from the ruins of the structural adjustment programmes.<sup>23</sup> The NEPAD programme envisages as its primary objective to 'eradicate poverty in Africa and place African countries, both individually and collectively, on a path of sustainable growth and development'.<sup>24</sup>

NEPAD recognises that 'development is a process of empowerment and self-reliance' in respect of which the peoples of Africa are cautioned not to become 'wards of benevolent guardians' but the 'architects of their own sustained upliftment'.<sup>25</sup> Along these lines, Kamga estimates that NEPAD ought to do more for the realisation of the right to development by implementing a rights-based approach to development.<sup>26</sup> On the contrary, its operational strategies, which emphasise reliance on foreign support 'marks a radical shift in position' from the aspiration for socio-economic and cultural self-determination, which Appiagyei-Atua contends, Africa has in principle stood for since independence.<sup>27</sup> Along the lines of development cooperation, it is noted that the international community endorses NEPAD as the framework mechanism for supporting Africa's development efforts.<sup>28</sup> In this regard, Sengupta estimates that the NEPAD programme

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<sup>22</sup> Murray (n 19 above) 266; NEPAD 'Historical context: Origins and influences' available at: <http://www.nepad.org/history> (accessed: 4 December 2015).

<sup>23</sup> Littmann J 'A human rights approach to the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM)' (2004) *International Federation for Human Rights* 3.

<sup>24</sup> New Partnership for Africa's Development (NEPAD) Declaration adopted as a Programme of the AU at the Lusaka Summit (2001) paras 1, 62 & 67.

<sup>25</sup> NEPAD Declaration (n 24 above) para 27.

<sup>26</sup> Kamga SA 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' (2011) *LLD Thesis University of Pretoria* 281.

<sup>27</sup> Appiagyei-Atua K 'Bumps on the road: A critique of how Africa got to NEPAD' (2006) 6 *AHRLJ* 525.

<sup>28</sup> Memorandum of Understanding on the African Peer Review Mechanism 2003 para 9; UN Gen Ass Declaration on the New Partnership for Africa's Development Res A/RES/57/2 of 18 September 2002; UN Gen Ass 'Final review and appraisal of the United Nations New Agenda for the Development of Africa in the 1990s and support for the New Partnership for Africa's Development' Res A/RES/57/7 of 4 November 2002; Urhobo Historical Society 'An address by Prime Minister of Great Britain before the Nigerian Parliament, 7



represents a ‘comprehensive partnership’ framework for implementing the right to development.<sup>29</sup> I find this contradictory in the sense that development cooperation as discussed in chapter three is conceptually opposed to the African perception of the right to development, which embodies the right to self-determination.

As an institutional organ of the African Union designated to function as Africa’s development agency<sup>30</sup> responsibility is by implication shifted to NEPAD to ensure compliance with the treaty obligations relating to development that state governments have committed to achieve under various instruments. Following the discussion above relating to the right to development dispensation in Africa, I argue that a lot may be expected of NEPAD in terms of ensuring compliance with right to development standards and in advancing the idea of development as a human right probably through the country-driven peer review processes. By extension, NEPAD has the duty to ensure that interventions by foreign stakeholders do not jeopardise enjoyment of the right to development in Africa. Unfortunately, the NEPAD founding instrument does not mention the right to development. This may be explained by the fact that because its operational modality is tilted more towards development cooperation, the idea of a right to development might not be attractive to potential foreign stakeholders, for the same reason as explained in the preceding paragraph that both approaches to development are conceptually opposed.

Notwithstanding that human rights and socio-economic development are repeatedly mentioned in the NEPAD Declaration and its supplementary instruments,<sup>31</sup> NEPAD’s approach to development is generally not human rights-based; not to talk of the conspicuous silence about the right to development in the NEPAD founding instrument. Meanwhile, as Serges Kamga rightly observes, the document is littered with neoliberal ideologies.<sup>32</sup> Consequently, NEPAD has come

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February 2002’ available at: <http://www.waado.org/NigerDelta/FedGovt/ForeignAffairs/TonyBlair.html> (accessed: 3 December 2015); Kamga (n 26 above) 108-109.

<sup>29</sup> Sengupta A ‘Development cooperation and the right to development’ (2003) *Copyright©2003 Arjun Sengupta* 19-20.

<sup>30</sup> The integration of NEPAD as an organ of the African Union was concluded at the 10th AU Assembly in Addis Ababa in January/February 2008.

<sup>31</sup> See Littmann (n 23 above) 20-30.

<sup>32</sup> Kamga (n 26 above) 97.



under criticism for perpetuating such ideologies as well as structural adjustment policies, which do not reflect African realities.<sup>33</sup> Despite the criticism, Rachel Murray is of the opinion that NEPAD plays an instrumental role in promoting human rights in Africa.<sup>34</sup> However, Julia Littmann thinks that ‘NEPAD seems to put a stronger emphasis on civil and political rights, linking them to the issue of democracy and political governance’.<sup>35</sup> Meanwhile, the African Charter highlights the core component of the right to development to be the satisfaction of socio-economic and cultural rights as a guarantee for the enjoyment of civil and political rights.<sup>36</sup>

Although NEPAD’s operational approach is designed in favour of ‘international partnership’,<sup>37</sup> accountability is required from African governments through the peer review mechanism<sup>38</sup> without an equivalent measure of accountability on the part of foreign stakeholders. The NEPAD Declaration envisages the establishment of ‘an independent mechanism for assessing donor and recipient country performance’.<sup>39</sup> Such a mechanism could serve the purpose of regulating the actions of foreign stakeholders, but unfortunately, no such accountability mechanism is known to have been established to be able to determine how it operates in reality. As illustrated in chapter three, development cooperation is not indispensable for development in Africa.<sup>40</sup> If NEPAD is to accomplish its mandate as Africa’s development agency in respect of the African Charter that enshrines and obligates states parties to pay particular attention to the right to development,<sup>41</sup> I argue in favour of refocusing the *modus operandi* for development from donor-oriented cooperation to considering the right to development as a tool for policy making to set the standards of behaviour that should become acceptable under the right to development

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<sup>33</sup> Kamga (n 26 above) 95-96 & 108; Bond P *Fanon’s Warning: A Civil Society Reader on the New Partnership for Africa’s Development* (2005) 33; Diamond L ‘Promoting real reform in Africa’ in Gyimah-Boadi E (ed) *Democratic Reform in Africa: The Quality of Progress* (2004) 277.

<sup>34</sup> Murray (n 21 above) 236.

<sup>35</sup> Littmann (n 23 above) 87.

<sup>36</sup> African Charter (n 1 above) preamble & art 22(1).

<sup>37</sup> Littmann (n 23 above) 88.

<sup>38</sup> See generally the Memorandum of Understanding on the African Peer Review Mechanism.

<sup>39</sup> NEPAD Declaration (n 26 above) para 149; Littmann (n 23 above) 88.

<sup>40</sup> See the whole of sects 4.1 & 4.2 of chapter three.

<sup>41</sup> African Charter (n 1 above) preamble & art 22.

dispensation in Africa. Indeed, Africa needs to establish its own systems, which does not exclude conceptualising a development model informed by the right to development as a means to deal with the realities that the peoples of Africa are confronted with on a daily basis.

Because the right to development in Africa also provides the option for its realisation through individual state action as explained in chapters two and three,<sup>42</sup> it is important also, through a country analysis, to examine the institutional role that national governments are supposed to play in the realisation of the right to development in Africa.

### **2.1.2. National governments – Country analysis**

Given that almost all African countries have ratified the African Charter and are legally bound to ensure domestic implementation of the right to development enshrined therein, a country-by-country assessment might be necessary to determine to what extent this has been achieved. However, because such an extensive analysis is not feasible within the scope of this thesis, two countries are examined namely; Cameroon and Libya. The purpose is to explain the nature of the constraints involved in implementing the right to development in Africa. In so doing, I justify the need to seriously rethink Africa's dependence on development cooperation and in relation to consider modelling development on the continent within the framework of the right to development governance.<sup>43</sup>

#### **2.1.2.1 Cameroon**

Prior to independence, Cameroon was administered under UN trusteeship by the French and the British.<sup>44</sup> Upon independence, the 1972 Constitution of Cameroon became the pioneer legal

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<sup>42</sup> See sect 4.2.4.4 of chapter two & sect 4.1.1 of chapter three.

<sup>43</sup> See sect 3 of chapter five.

<sup>44</sup> Nfi JL *The Reunification Debate in British Southern Cameroons: The Role of French Cameroon Immigrants* (2014) 339-349; Ndahinda FM 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) 16 *AHRLJ* 44-48. For an ample account of the Anglophone/Francophone problem see also Awasom NF 'Negotiating federalism: How ready were Cameroonian leaders before the February 1961 United Nations Plebiscites?' (2002) 36 *Canadian J Afri Stud* 425; Anyefru E 'Paradoxes of internationalisation of the Anglophone problem in Cameroon' (2010) 28 *J Contemp Afri Stud* 85.

instrument to afford statutory recognition to the right to development, framed in the form of a national resolve to utilise the country's natural resources for the well-being of the entire population as highlighted in chapter two.<sup>45</sup> As would be noticed, the right to development in Cameroon is formulated not just as a claimable entitlement but indeed as a post-independence model for development underscored by the principles of sovereignty, self-determination and as Kamga reiterates, self-reliance on the country's natural resources, which the government envisaged to utilise adequately in raising living standards for the peoples of Cameroon.<sup>46</sup> In view of achieving this objective, the government initiated a progressive policy of 'balanced development, and planned liberalism'.<sup>47</sup> However, following a range of 'cooperation accords' that Cameroon concluded with France prior to independence,<sup>48</sup> the policy reforms that the Cameroon government intended to embark on were unfortunately quickly replaced with institutionalised 'patrimonialism, personality cult[ism]... [and] bureaucratic and political corruption' with the associated 'negative consequence on the country's development'.<sup>49</sup>

Although Cameroon subsequently ratified the African Charter in 1989 among other regional instruments that enshrine the right to development and is thus legally bound to ensure its realisation, as Rousselot rightly observes, the country is on record for serious human rights abuses (the right to development inclusive) and deprivation of freedoms that undermine its development.<sup>50</sup> Based on constitutional recognition and following a political statement made by President Biya at the UN summit in 2001 that the government of Cameroon takes the right to

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<sup>45</sup> See sect 3.2.2 of chapter two.

<sup>46</sup> Kamga (n 26 above) 204.

<sup>47</sup> Awung WJ & Atanga M 'Economic crisis and multi-party politics in Cameroon' (2011) 5:1 *CJDHR* 102.

<sup>48</sup> Ogunmola D 'Redesigning cooperation: The eschatology of Franco-African relations' (2009) 19:3 *J Soc Sci* 233-242; Feuer G 'La révision des accords de coopération Franco-Africains et Franco-Malgaches' (1973) *Annuaire Français de Droit International* 720-739; Koutonin MR '14 African countries forced by France to pay colonial tax for the benefits of slavery and colonisation' (2014) *Silicon Africa* available at: <http://www.siliconafrika.com/france-colonial-tax/> (accessed: 30 October 2016); Le Vine VT *Politics in Francophone Africa* (2004) 2-6.

<sup>49</sup> Awung & Atanga (n 47 above) 102.

<sup>50</sup> Rousselot J 'The impact of French influence on democracy and human rights in Cameroon' (2010) 4:1 *CJDHR* 61-62.

development seriously,<sup>51</sup> the situation in the country does not give the impression that it actually does. The end of colonial rule saw most colonial powers taking a complete hands-off approach to their territorial possessions. For Francophone Africa, decolonisation rather marked a re-invention of imperial relations with France in what has come to be known as *Françafrique*.<sup>52</sup> Compliance with the cooperation accords, which Moncrieff says, defy standard interpretations of cooperation,<sup>53</sup> has meant that the constitutional guarantee of the right to development in Cameroon is stifled by the nature of Franco-Cameroon relations. This, as Rousselot highlights, allows France greater benefit at the expense of the well-being of the Cameroonian people.<sup>54</sup>

With regard to the obligations imposed on states to respect human rights extraterritorially,<sup>55</sup> although France purports to promote rights-based approaches to development,<sup>56</sup> its relations with Cameroon, established in accordance with the cooperation accords entered into in 1959, is not based on any considerations for development as a human right. As Rousselot has written, the colonial bond between France and Cameroon remains unbroken, because of ‘the economic benefits that Cameroon represents for France’.<sup>57</sup> Accordingly, since independence France has maintained unfettered control over Cameroon’s natural resources and in shaping its domestic policies to ensure they do not run contrary to French interests,<sup>58</sup> with little or no regard as to whether such interests are compatible with those of the peoples of Cameroon.<sup>59</sup> Although France

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<sup>51</sup> See Kamga (n 26 above) 204.

<sup>52</sup> Benneyworth IJ ‘The ongoing relationship between France and its former African colonies’ (2011) available at: <http://www.e-ir.info/2011/06/11/the-ongoing-relationship-between-france-and-its-former-african-colonies/> (accessed: 6 July 2015).

<sup>53</sup> Moncrieff R ‘French relations with Sub-Saharan Africa under President Sarkozy’ (2012) *South African Institute of International Affairs* 6-7.

<sup>54</sup> Rousselot (n 50 above) 60.

<sup>55</sup> Skogly SI ‘Extra-national obligations towards economic and social rights’ (2002) *International Council on Human Rights Policy* 7-34.

<sup>56</sup> See generally French Ministry of Foreign Affairs ‘Post-2015 Agenda on development: French position paper prepared with civil society’ (2013) *Directorate-General of Global Affairs, Development and Partnerships – Working Document* 1-21.

<sup>57</sup> Rousselot (n 50 above) 64.

<sup>58</sup> Rousselot (n 50 above) 64.

<sup>59</sup> Amuwo K ‘France and the economic integration project in Francophone Africa’ (1999) 4:1 *Afr J Pol Sc* 4.

has since independence remained the leading development cooperation partner to Cameroon,<sup>60</sup> it has used this as a means to foster its colonial continuation policies that have contravened the right to development in Cameroon alongside other human rights.<sup>61</sup>

Such colonial allegiance to France constitutes a major constraining factor to the realisation of the right to development in Cameroon in the sense that it limits Cameroon's potential to adopt appropriate domestic policies to advance that right to development. This is explained in part by popular uprisings that have erupted in Cameroon and how France has directly intervened to suppress legitimate demands for change.<sup>62</sup> For instance, a booming Cameroonian economy that kicked off after independence dramatically collapsed in 1985 as a result of an economic crisis that aggravated the poverty situation.<sup>63</sup> The government's failure to deal with the crisis frustrated aspirations for advancement, which led to popular demands for multiparty politics in the wave of democratisation that hit the country in the early 90s.<sup>64</sup> Orchestrated by a radical opposition movement, the political turmoil lasted several months, with massive civil disobedience characterised by a 'ghost city' campaign that witnessed the boycott of French goods and services, the grounding of business activities, and refusal to pay taxes and utility bills, which almost brought the nation to a stand-still.<sup>65</sup> In a desperate effort to stabilise the economy, the government resorted to donor assistance, which unfortunately failed.<sup>66</sup> The situation was exacerbated with the introduction of the World Bank and IMF engineered structural adjustment austerity measures that resulted in a devaluation of the CFA Franc,<sup>67</sup> discontinuation of development projects and deepening poverty as living conditions plummeted.<sup>68</sup>

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<sup>60</sup> OECD *OECD Development Cooperation Peer Reviews: France 2013* (2014) 118.

<sup>61</sup> Rousselot (n 50 above) 61-62.

<sup>62</sup> Rousselot (n 50 above) 66.

<sup>63</sup> MINEPAT 'Cameroon Vision 2035: Working paper' (2009) *Republic of Cameroon* ix; Awung & Atanga (n 47 above) 95.

<sup>64</sup> Awung & Atanga (n 47 above) 95.

<sup>65</sup> Awung & Atanga (n 47 above) 116.

<sup>66</sup> MINEPAT (n 63 above) ix.

<sup>67</sup> Ngwa AK 'The baobab tree lives on: Paul Biya and the logic of political survival' (2009) *African Studies Department Johns Hopkins SAIS* 4.

<sup>68</sup> MINEPAT (n 67 above) ix.

The nation-wide anti-government protests posed a real threat to French economic interests. In the heat of the political turmoil, President Francois Mitterrand issued a policy statement at the La Baule *France-Afrique* summit, pledging unflinching support for democratisation in Africa.<sup>69</sup> However, because of fears of losing control over Cameroon to the radical opposition, the French government rather increased its Official Development Assistance (ODA) to the government in power by FF335 million (approximately USD55.7 million) within the period of two years, coupled with the granting of debt relief in 1992.<sup>70</sup> Thus, the Biya regime backed by French support, used militarised operational commands in a prolonged state of emergency to thwart popular demands for change and thus held the country's development prospects at bay.<sup>71</sup> The turn of events, which ended up in the suppression of the anti-French opposition leaves the conclusion that the increase in French ODA to Cameroon was actually not intended to support the democratisation process but to retain the Biya regime in power in return for protecting French interests.<sup>72</sup> Another popular uprising in February 2008 triggered by increasing prices of foodstuff and other basic commodities and aimed to achieve improved living conditions, was also ruthlessly suppressed by the government, with the support of the resident French military in the country.<sup>73</sup> Contrary to article 7 of the Declaration on the Right to Development, which encourages the conversion of the funds spent on arms into development effort, France rather promotes the use of arms against aspirations for development in Cameroon.

The Constitution of Cameroon and the African Charter recognise the importance of a country's wealth and resources as requisite for improved livelihood.<sup>74</sup> There is no denying the fact that as a 'former' colonial master, France remains Cameroon's leading development cooperation partner, providing a net ODA of USD202 million in 2011 alone according to the Organisation for

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<sup>69</sup> Ngwa (n 67 above) 6; Rousselot (n 50 above) 68;

<sup>70</sup> Rousselot (n 50 above) 68.

<sup>71</sup> Rousselot (n 50 above) 68-69; Ngwa (n 67 above) 8-10.

<sup>72</sup> Rousselot (n 50 above) 69.

<sup>73</sup> Rousselot (n 50 above) 70.

<sup>74</sup> Constitution of the Republic of Cameroon 1998 preamble; African Charter (n 1 above) art 21.

Economic Cooperation and Development (OECD).<sup>75</sup> Paradoxically, the standard of living in Cameroon remains unacceptably low, ranking at 152<sup>nd</sup> out of 186 on the human development index.<sup>76</sup> As Sengupta has underscored, the right to development entails equality, which includes equality of opportunity, of access to resources, of participation in the development process and also in the equitable distribution of development gains.<sup>77</sup> In spite of these guarantees, the peoples of Cameroon have through the complicity of the Franco-Cameroon policy of subjugation been dispossessed of the right to development guaranteed by the Constitution of Cameroon and the African Charter. Because France is not necessarily bound by these instruments, the duty remains that of Cameroon as a sovereign state to prioritise the right to development as a development model, which I argue could dramatically change the *status quo* of Franco-Cameroon relations.

Cameroon's lack of commitment in protecting the right to development has provoked two cases from the country, namely the *Bakweri Lands Claim* and *Kevin Gunme* cases.<sup>78</sup> The *Bakweri Lands Claim* case, in which the complainants alleged the expropriation of their historic lands as constituting a violation of their right to development protected by the African Charter was the first right to development claim to be brought before the African Commission.<sup>79</sup> However, the complaint failed the admissibility test for failing to satisfy the requirement of exhausting local remedies and therefore, the Commission did not get a chance to pronounce on the merits.<sup>80</sup> In the *Kevin Gunme* case, the minority English-speaking peoples of Cameroon alleged marginalising

<sup>75</sup> OECD (n 60 above) 118; Mbangsi C 'Cameroon/France: Does Cameroon benefit from special relationship?' (2013) *Iroko Africa* available at: <http://irokoheritage.com/2013/08/22/cameroon-special-relationship-with-france-a-benefit/> (accessed: 5 September 2016).

<sup>76</sup> UNDP 'Human Development Report 2013: Cameroon' (2013) *UNDP* 2; UNDP 'Human Development Reports: Human Development Index trends, 1980-2013' available at: <http://hdr.undp.org/en/content/table-2-human-development-index-trends-1980-2013> (accessed: 30 August 2015).

<sup>77</sup> Sengupta A 'On the theory and practice of the right to development' (2002) 24:4 *HRQ* 849.

<sup>78</sup> *Bakweri Land Claims Committee v Cameroon*, Communication No. 260/2002 AHRLR (2004) 43; *Kevin Mgwanga Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) paras 205 & 206.

<sup>79</sup> Kamga SAD & Fombad CM 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) *J African Law* 10; Okafor OC 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in UN Human Rights *Realising the Right to Development* (2013) 376.

<sup>80</sup> Okafor 2013 (n 79 above) 376.



treatment by the predominantly French-speaking part of the country amounting to violation of a range of provisions of the African Charter, including the right to development.<sup>81</sup> Quite controversially, the African Commission noted the discriminatory practices perpetrated by the respondent state<sup>82</sup> but failed to establish a violation of the right to development resulting from such discriminatory practices. The Commission thus squandered the opportunity to uphold the right to development guaranteed to the peoples of Cameroon and therefore also, the opportunity to compel Cameroon as a state to take its constitutional and treaty obligations on the right to development seriously.<sup>83</sup>

It is uncertain that the Vision 2035 development plan, in which the government envisages to reconsider its development processes,<sup>84</sup> would be achieved under the present cooperation arrangement with France. Dependency theorists posit that developing countries can only advance by breaking their links with developed countries.<sup>85</sup> Following this logic, I argue that if Cameroon is to fulfil its obligations on the right to development, relations with France need to be ruptured to a great extent. It requires France to give up most of the privileges that it currently enjoys to ensure a shift in the balance of power in favour of greater autonomy for Cameroon in matters of domestic policy formulation. Of course, as Amuwo rightly observes, ‘France is hard put to close shop in Africa’, a sentiment that has been reiterated by French Heads of States ruling out the possibility of abandoning their colonial possessions in Africa.<sup>86</sup> Similar feelings have also been

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<sup>81</sup> *Kevin Gunme* (n 78 above) paras 1-19.

<sup>82</sup> *Kevin Gunme* (n 78 above) paras 100 & 215(1)(1).

<sup>83</sup> For example, none of the recommendations made by the African Commission in para 215 of the *Gunme* case have been respected by the government of Cameroon, defendant in the litigation. This has resulted in the ongoing crisis in the country since October 2016 where because of the continuous marginalisation, subjugation and forced assimilation, the peoples of the Northwest and Southwest regions of the country (historically known as Southern Cameroons) who constituted the complainants in the case have rose up again to claim as their ‘unquestionable and inalienable right to self-determination’ guaranteed by article 20 of the African Charter, the restoration of their sovereign statehood from annexation by *La République du Cameroun*.

<sup>84</sup> MINDEPAT (n 63 above) ix.

<sup>85</sup> Singh K *Rural Development: Principles, Policies and Management* (2003) 63.

<sup>86</sup> Amuwo (n 59 above) 2-4.



expressed by francophone African leaders who see cooperation with France as indispensable for the survival of their countries.<sup>87</sup>

Considered in relation to the right to development standards discussed in chapter two,<sup>88</sup> the nature of Franco-Cameroon relations is designed such that in spite of the right and the duty granted to states to formulate policies to uphold the right to development, Cameroon is unable to adopt any such policies that would jeopardise relations with France. With the understanding that the right to development demands action, and with evidence that it may not possibly be achieved through policy reforms or litigation the subjugated peoples are left as alternative remedy only with radical activism, probably on the basis of the right to self-determination, which Udombana asserts is of the same nature as the right to development.<sup>89</sup> Otherwise, this analysis has aimed to demonstrate how development cooperation negatively impacts on the realisation of the right to development in Cameroon, and thus justifies the need for a shift in paradigm to considering the right to development as a model for development as illustrated later.

### **2.1.2.2 Libya**

The following historical narrative explains the context within which socio-economic and cultural transformation took place in Libya, which I relate to the realisation of the right to development. Present-day Libya has at different stages throughout its history suffered conquest, subjugation and humiliation<sup>90</sup> as well as invasion by European powers.<sup>91</sup> Before the United Nations

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<sup>87</sup> Amuwo (n 59 above) 2; Late President Omar Bongo of Gabon is quoted to have remarked that ‘France without Gabon is like a car without petrol, Gabon without France is analogous to a car without a driver’, while Cameroonian President Paul Biya is remembered for his unapologetic public statement in which he declared himself the ‘best pupil’ of the then French President Francois Mitterrand.

<sup>88</sup> See sect 4.1.4 of chapter two.

<sup>89</sup> Udombana NJ ‘The third world and the right to development: Agenda for the next millennium’ (2000) *HRQ* 770.

<sup>90</sup> Monti-Belkaoui J & Riahi-Belkaoui A *Qaddafi: The Man and His Policies* (1996) 2; El Fathaly & Palmer (n 95 below) 15.

<sup>91</sup> Sklare A ‘Libya: Struggle for independence’ available at: <http://hj2009per4libya.weebly.com/struggle-for-independence.html> (accessed: 10 July 2015); Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 3-4.

resolution that granted Libya independence in 1951,<sup>92</sup> as El Fathaly and Monte Palmer have noted, Libya by every indication ranked poorest on the development scale.<sup>93</sup> However, with the discovery and commercial production of oil in 1959, the Senussi Monarchy that was established at independence under Mohammed Idris, in spite of its political weaknesses, managed to transform the country that initially ‘lacked people, skills, resources and even much hope...into a wealthy little state with enviable expectations’.<sup>94</sup>

Unmindful of the suppression that Libya endured under foreign invasion, Idris established his reign on a ‘stubborn loyalty’ to western powers whose primary interest was the thirst for Libyan oil, much to the annoyance of the Libyan people who yearned for total liberation from the ‘yoke of imperialism’.<sup>95</sup> Idris’ indebtedness and allegiance to the former colonisers led to many concessions that virtually traded off Libya’s autonomy.<sup>96</sup> Coupled with corruption and looting, the opulence that the oil economy brought to Libya saw very little trickling down to the rest of the population.<sup>97</sup> This scenario is not unlike the post-independence difficulties that other African countries faced in the 1960s, which I attribute to the fact that independence was achieved without an operational model for development.<sup>98</sup> Taking advantage of widespread anti-imperialist sentiments, Muammar Qaddafi masterminded the overthrow of Idris in 1969,<sup>99</sup> in a bloodless *coup d’état* that was welcomed across Libya with spontaneous popular support.<sup>100</sup>

In response to popular will and the interest of Libyan society, radical socio-economic and cultural reforms, including drastic reduction in rents to encourage property ownership, doubling of the minimum wage and nationalisation of foreign banks were introduced to purge the country

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<sup>92</sup> Wright J A *History of Libya* (2010) 175.

<sup>93</sup> El Fathaly OI & Palmer M *Political Development and Social Change in Libya* (1980) 1.

<sup>94</sup> Wright (n 92 above) 177.

<sup>95</sup> Wright (n 92 above) 179-184; Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 6-7.

<sup>96</sup> Wright (n 92 above) 182; Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 5.

<sup>97</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 8; El Fathaly & Palmer (n 93 above) 37-38.

<sup>98</sup> See sects 2.2.1.2 & 2.2.2 of chapter two.

<sup>99</sup> Wright (n 92 above) 181; Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 9.

<sup>100</sup> El Fathaly & Palmer (n 93 above) 41.

of colonial exploitation and ensure prosperity for the Libyan peoples.<sup>101</sup> Although Libya only ratified the African Charter in July 1986,<sup>102</sup> Qaddafi's governing ideology of 'post colonial third world development' signalled a pursuit of the right to well-being and an improved standard of living,<sup>103</sup> which is not unconnected to the concept of the right to development. However, because Qaddafi's policies clashed with western conceptions of development, his strategy to achieve revolutionary policies met with fierce criticism.<sup>104</sup> Considering that there is no unique model for development, it is of interest to note how the policies of the Libyan government contributed to advancing the right to development for the peoples of Libya.

To begin with, I argue that Libya did not need to pursue western capitalist conceptions of economic development underlined by the accumulation of wealth in the hands of a privileged few while the reality on the ground necessitated socialist redistribution of the country's wealth among the impoverished masses. Although not specifically formulated to respond to the right to development, it is possible to argue that the government's policies significantly complied with right to development standards, in respect of which the quality of life of the Libyan people is recorded to have improved dramatically.<sup>105</sup> Because of the oil wealth, Libya was capable of adopting and sustaining a radical self-reliant development policy without which, like many other African countries, it might have remained under foreign exploitation. This supports Sen's theory of development as freedom, which implies that when granted complete freedom from imperial domination the people are capable of self-sustainably shaping their own development trajectory.<sup>106</sup> Unfortunately, such freedom was not absolute in Libya, where despite enjoying the highest standard of living in Africa according to the UNDP human development ranking, Qaddafi's repressive leadership generally deprived the Libyan people of basic human rights.

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<sup>101</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 11; Deeb & Deeb (n 112 below) 116-117.

<sup>102</sup> Heyns & Killander (n 15 above) 504.

<sup>103</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 14.

<sup>104</sup> Sicker M *The Making of a Pariah State: The Adventurist Politics of Muammar Qaddafi* (1987) 21-22; Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 15.

<sup>105</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 15.

<sup>106</sup> See Sen *A Development as Freedom* (1999) 87-95.

The Declaration on the Right to Development requires states parties to formulate national development policies to ensure sustained livelihood and well-being through meaningful participation and the equitable redistribution of the benefits deriving from the development process.<sup>107</sup> As universally acknowledged, the right to development incorporates the right to self-determination, which implies asserting sovereign ownership over domestic natural wealth and resources.<sup>108</sup> In contrast to the practice of caution that has held back development in most African countries, Qaddafi confronted imperialism head-on, notably in formulating domestic policies which foreign stakeholders were obliged to comply with. It is noted that US President Nixon was constrained by these measures to compromise on his foreign policy to employ force and repression on Libya and rather opted to negotiate on business terms with Qaddafi, who held the trump card – Libyan oil.<sup>109</sup> Like Libya, the rest of Africa is endowed with valued resources which place the continent at a geostrategic advantage over foreign stakeholders. As a prerequisite to achieving the right to development, African governments are obligated as stipulated by the African Charter to ‘eliminate all forms of foreign economic exploitation’,<sup>110</sup> which as I argue, Libya managed to achieve.

Libya thus debunked the myth that Africa’s development agenda can only be determined by foreign powers, whereas international law recognises the sovereignty of every state to shape its own development policies. By adopting policies that favoured fair redistribution of the country’s resources to ensure better quality of life, Libya demonstrated that the right to development is achievable in Africa. It goes beyond theorising political ideologies<sup>111</sup> and necessitates ‘a highly pragmatic, nondoctrinaire approach to major national issues’.<sup>112</sup> It seems as Vandenberg has noted that states are often not comfortable with framing their domestic policies in light of the right to development.<sup>113</sup> This is evident in their promptness to compromise state sovereignty and

<sup>107</sup> DRtD (n 1 above) para 2(3).

<sup>108</sup> DRtD (n 1 above) para 1(2).

<sup>109</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 11.

<sup>110</sup> African Charter (n 1 above) art 21(5).

<sup>111</sup> Deeb MK & Deeb MJ *Libya since the Revolution: Aspects of Social and Political Development* (1982) 115.

<sup>112</sup> Amir S *Israel’s Development Cooperation with Africa, Asia and Latin America* (1974) 2.

<sup>113</sup> Vandenberg A ‘The right to development in international human rights Law: A call for its dissolution’ (2013) *NQHR* 202.

the right of independent policy formulation in favour of foreign interests.<sup>114</sup> In spite of their avowed commitments to ensure the realisation of the right to development, African governments are ‘yet to move adequately from the abstract to the concrete’, to get out of the theoretical sphere into the domain of ‘development in action’.<sup>115</sup> Having experienced colonialism, Qaddafi nursed a deep resentment against imperialism and exploitation.<sup>116</sup> Although his revolutionary foreign expeditions brought him into the bad books of international politics, he is credited for putting an end to foreign domination in Libya, at least during his time in power.<sup>117</sup>

Poor domestic political organisation no doubt created bureaucratic challenges that threatened the government’s ability to deal with the increased socio-economic demands from the masses.<sup>118</sup> Nonetheless, before NATO’s supposed humanitarian intervention, the peoples of Libya enjoyed a standard of living that rated the highest in Africa. Libya’s per capita income ranked as one of the highest in the world, access to socio-economic amenities such as education, health care and housing was free, the people enjoy a life expectancy of 74 years and in spite of several years of imposed economic sanctions the country survived on an absolutely debt-free economic balance sheet.<sup>119</sup> According to Monti-Belkaoui & Riahi-Belkaoui, women in Libya enjoyed extensive protection of human rights, unlike in most other Arab countries in Africa and the middle-east,<sup>120</sup> a view which unfortunately is not universally accepted, owing especially to Qaddafi’s repressive leadership and appalling human rights record.

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<sup>114</sup> See for example sect 2.2.2.1 above with the illustration on Cameroon.

<sup>115</sup> Amir (n 112 above) 5, 1.

<sup>116</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 18.

<sup>117</sup> Wright (n 92 above) 202-204.

<sup>118</sup> El Fathaly & Palmer (n 93 above) 7-8; Wright (n 92 above) 228.

<sup>119</sup> Chengu G ‘Libya: From Africa’s richest state under Gaddafi to failed state after NATO intervention’ (2014) *Global Research* available at: [www.globalresearch.ca/libya-from-africas-richest-state-under-gaddafi-to-failed-state-after-nato-intervention/5408740](http://www.globalresearch.ca/libya-from-africas-richest-state-under-gaddafi-to-failed-state-after-nato-intervention/5408740) (accessed: 29 December 2014); Chossudovsky M ‘Destroying a country’s standard of living: What Libya had achieved, what has been destroyed’ (2013) *Global Research* available at: [www.globalresearch.ca/destroying-a-country-s-standard-of-living-what-libya-had-achieved-what-has-been-destroyed/26686](http://www.globalresearch.ca/destroying-a-country-s-standard-of-living-what-libya-had-achieved-what-has-been-destroyed/26686) (accessed: 29 December 2014).

<sup>120</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 268.

Despite the high standard of living and the enjoyment of a wide range of socio-economic and cultural rights, the people of Libya were largely deprived of many civil and political rights, constituting a serious constraint to the full realisation of the right to development in that country. The situation is exacerbated following the revolution that ushered-in the National Transition Council, which Monti-Belkaoui and Riahi-Belkaoui, create uncertainty as to whether the high standard of living that the people once enjoyed will ever be restored.<sup>121</sup> Many of the constitutional guarantees that enabled the Libyan peoples to live a lifestyle incomparable with the rest of Africa have been scrapped by the National Transition Council. Compare for example, the radical promise contained in the preamble to the 1969 Libyan Constitution and the aspirational undertone contained in the preamble to the 2011 Constitution, which stipulate respectively as follows:

The Revolutionary Command Council, in the name of the Arab people in Libya, who pledged to restore their freedom, enjoy the wealth of their land, live in a society in which every loyal citizen has the right to prosperity and well-being, who are determined to break the restraints which impede their growth and their development,... who understand fully that the alliance of reaction and imperialism is responsible for their underdevelopment despite the abundance of their natural resources<sup>122</sup>

Based on the legitimacy of [the 17 February 2011] revolution, and in response to the desire of the Libyan people and their aspirations for achieving democracy and promoting the principles of political pluralism and statehood based on institutions, and aspiring to a society enjoying stability, tranquillity and justice which develop through science and culture, achieves prosperity and sanitary well-being and works on educating the future generations in the spirit of Islam and love of the good and of the country<sup>123</sup>

It is important to note the regression from the authoritative nature of the rights to well-being in the 1969 Constitution and the cursory manner in which rights envisaging a reasonable standard of living are crafted in the 2011 Constitution, which provide respectively as follows:

Work in the Libyan Arab Republic is a right, a duty, and an honour for earnable-bodied citizen...

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<sup>121</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 18.

<sup>122</sup> Libya Constitution 1969 preamble.

<sup>123</sup> Libya's Constitution of 2011 preamble.

The state will endeavour to liberate the national economy from dependence and foreign influence, and to turn it into a productive national economy, based on public ownership by the Libyan people and on private ownership by individual citizens....

Education is a right and a duty for all Libyans....

Health care is a right guaranteed by the State through the creation of hospitals and health establishments in accordance with the law.<sup>124</sup>

As opposed to -

The state shall ensure equal opportunity and strive to guarantee a proper standard of living, the right to work, education medical care and social security to every citizen.... It shall guarantee the just distribution of national wealth among citizens and among the different cities and regions of the State.<sup>125</sup>

The above extracts illustrate that the present constitutional dispensation under the National Transition Council does not guarantee the enabling environment within which the right to development, which the peoples of Libya had enjoyed for over 40 years may ever again be exercised. This notwithstanding that the new Libya remains legally bound by its treaty obligations under the African Charter to ensure that development in the country is achieved with equity and justice. Consequently, if present-day Libya is to regain its position on the human development index, it would need to proactively assert the right to development guaranteed by the Charter rather than surrender the rebuilding of the country to foreign stakeholders.

Unlike in the case of Cameroon, the analysis on Libya has aimed to show how the country successfully established a post-colonial right to development dispensation through actual self-determination in domestic policy formulation, which however, has been brought to ruin by foreign stakeholders. Drawing from experience as illustrated in the analysis on Cameroon and Libya, the African Union Commission acknowledges that Africa remains exposed to the excessive influence of foreign stakeholders,<sup>126</sup> providing justification why it is of essence for Africa to consider substituting development cooperation for the reasons that I proceed to explain.

## **2.2. Rationale for a Paradigm Shift**

<sup>124</sup> Libya Constitution 1969 (n 122 above) arts 4, 7, 14 & 15.

<sup>125</sup> Libya's Constitution 2011 (n 123 above) art 8.

<sup>126</sup> AU Commission 'Agenda 2063' (n 19 above) para 58.

Based on the understanding that circumstances necessitating the realisation of the right to development are not unique, Ibrahim Salama submits that the only way to surmount the conceptual problematic as well as the legalistic debate on the scope of obligations on the right to development is to adopt a progressive, case-by-case functional approach to different situations.<sup>127</sup> Such differentiation is informed by the fact that the right to development provides the opportunity to choose between alternatives in development policy making with the aim to achieve justice and equity. The analysis in this section on the approaches through which development cooperation is operationalised is intended to provide options in making policy choices on what model may be suitable to pursue in advancing development in Africa.

### **2.2.1. Insufficiency in development cooperation approaches**

#### **2.2.1.1 Charity approach**

It may be necessary to commence by asking whether development as a process and the right to development as an entitlement to that process, could be achieved through charity. This question arises from the fact as illustrated in chapter three that the concept of development cooperation has been narrowed down to the provision of aid rather than genuine partnership based on sovereign equality.<sup>128</sup> This has meant that development cooperation is just a matter of charity, denoting some act of benevolence that involves extending a helping hand to the ‘needy’.<sup>129</sup> The charity approach to driving development in Africa thus represents a dependency-based relationship between the donor community at the giving end and African countries at the receiving end.<sup>130</sup> In this instance, the provision of development assistance is informed by compassion, which is motivated more by the political discretion of donor countries than by the

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<sup>127</sup> Salama (n 8 above) 53.

<sup>128</sup> See sect 2.2.2. (2.2.2.1 & 2.2.2.2) of chapter three.

<sup>129</sup> Rukare D ‘The role of development assistance in the promotion and protection of human rights in Uganda’ (2011) *LLD Thesis University of Pretoria* 84.

<sup>130</sup> Todaro MP & Smith SC *Economic Development* (2006) 115-118; Ngang (n 7 above) 272-282; Rukare (n 129 above) 84; Kirchmeier (n 9 above) 14.



developmental priorities of developing countries.<sup>131</sup> It is anchored on the assumption that Africa needs help rather than that the people are entitled to the right to development.<sup>132</sup>

On the contrary, Mesenbet Tadege argues that the right to development imposes a compelling obligation that cannot be reduced to charity.<sup>133</sup> Charity-based assistance provides little to Africa in terms of human development in the sense that it is offered like a ‘gift horse’, with the ‘beggar has no choice’ attitude, which generates dependency rather than promotes the right to development. The development challenges that Africa is confronted with are generally not caused by lack of material resources but by development injustices, which cannot be redressed through charity assistance. For instance, although conceptualised as development aid, French assistance to Cameroon as has been indicated earlier is generally not intended to meet the exigencies of the Cameroonian people but promote French interest in the country.<sup>134</sup>

In the landmark *Endorois* litigation that dealt comprehensively with the concept of the right to development as a legally enforceable entitlement, the African Commission established that the right to development does not imply dependency but represents an emancipating process that emphasises the importance of choice and liberty of action in achieving human well-being.<sup>135</sup> This jurisprudential interpretation makes clear that the right to development cannot be achieved through charitable assistance and therefore sets the parameters on which development cooperation should not be accepted in Africa, based particularly on the fact that the peoples of Africa are guaranteed the freedom to make their own development choices. Informed by the

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<sup>131</sup> Ilorah R ‘Africa’s endemic dependency on foreign aid: A dilemma for the continent’ (2011) *ICITI - ISSN: 16941225* 13.

<sup>132</sup> Bilal (n 6 above) 1.

<sup>133</sup> Tadege MA ‘Reflections on the right to development: Challenges and prospects’ (2010) 10 *AHRLJ* 329.

<sup>134</sup> Emmanuel NG ‘With a friend like this...: Shielding Cameroon from Democratisation’ (2013) 48:2 *Journal of Asian & African Studies* 145-160; Rousselot (n 50 above) 68-69; Ngwa (n 67 above) 8-10.

<sup>135</sup> Sing’Oei K ‘Engaging the leviathan: National development, corporate globalisation and the Endorois quest to recover their herding grounds’ in Henrard K (ed) *The Interrelation between the Right to Identity of Minorities and their Socio-Economic Participation* (2013) 395; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009) AHRLR 75 (ACHPR 2009) para 283.

capability model in dealing with issues relating to development and human rights, the right to development represents a moral commitment to achieve a better standard of living.<sup>136</sup> It entails activating human capabilities as a guarantee for the constant improvement of well-being and not charity, which has become the underlying modality of development cooperation.<sup>137</sup>

According to Richard Ilorah, whom I agree with, '[c]ountries that are less dependent on foreign aid are more likely to follow their own "home-grown" development routes, both politically and economically'.<sup>138</sup> From this analysis, I contend that the charity approach does not offer a realistic functional modality to ensure that the right to development is achieved, which supports my argumentation in favour of rejecting development cooperation in favour of the right to development as the suitable development paradigm for Africa. However, because some scholars think that the right to development is achievable through a claims approach as a viable alternative to the charity approach,<sup>139</sup> it makes sense to test the potential of the claims approach to achieve the right to development in Africa.

### **2.2.1.2 Claims approach**

The claims approach denotes a situation where African countries may be required to demand reparation for damages resulting from the actions of foreign stakeholders. It also depicts the context where African countries may need to demand development assistance as a matter of right, deriving from the legitimate expectation that such assistance has been promised and therefore, may justifiably be conceived as a claimable entitlement. In this regard, Sengupta holds

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<sup>136</sup> Nussbaum MC *Creating Capabilities: The Human Development Approach* (2011) 33-34.

<sup>137</sup> The DRtD stipulates in art 4(2) that 'States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development', art 3(3). It further states that 'effective international cooperation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development'.

<sup>138</sup> Ilorah (n 131 above) 3; see also Grabowski R 'Political development, agriculture, and ethnic divisions: An African perspective' (2006) 18:2 *African Development Review* 163-182.

<sup>139</sup> Golay C, Biglino I & Truscan I 'The contribution of the UN Special Procedures to the human rights and development dialogue' (2012) 7:17 *SUR – Int'l J Hum Rts* 21; Uvin P *Human Rights and Development* (2004) 129; Grover A 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (2011) *UN A/HRC/17/25* 49.

the view that when developing countries are unable to create the conditions necessary for exercising the right to development; they have the right to claim assistance from the international community.<sup>140</sup> How and to what extent this is possible leaves unanswered questions which I attempt to respond to by looking at practical commitments undertaken by developed countries under international law to assist developing countries.

Developed countries have formally undertaken the commitment to provide 0.7% of their GDP as overseas development assistance to developing countries.<sup>141</sup> Available information in this regard illustrates that only a few, mostly Scandinavian countries have actually met the target.<sup>142</sup> Sweden is said to have reached the target in 1974 followed by the Netherlands in 1975 and then Norway and Denmark in 1976 and 1978 respectively, and have since then consistently honoured their commitments.<sup>143</sup> Finland is said to have achieved the target once in 1999 while Luxemburg did so in 2000 and has since also remained consistent.<sup>144</sup> Thus in total, only five countries have kept the commitment, while it is stated that the weighted ODA average to developing countries has never exceeded 0.4% of the national income of donor countries,<sup>145</sup> implying that the target has never fully been met. With the global financial crisis and enduring austerity, Moody observes that there is increasing disquiet among European donors whether they should continue to set aside the promised 0.7% of their national income to assist developing countries.<sup>146</sup>

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<sup>140</sup> Sengupta A 'The human right to development' (2004) 32:2 *Oxf Dev't Stud* 186.

<sup>141</sup> Monterrey Consensus of the International Conference on Financing for Development adopted at the International Conference on Financing for Development, Monterrey Mexico *United Nations* 2002 para 42; United Nations Resolution 2626 (1970) *The International Development Strategy for the Second United Nations Development Decade*.

<sup>142</sup> OECD 'History of the 0.7% ODA target' (2010) *Original Text from DAC Journal* (2002) 3:4 III-9-III-11 revised June 2010; Sengupta 2004 (n 140 above) 195.

<sup>143</sup> OECD (n 142 above) 10.

<sup>144</sup> OECD (n 142 above) 10.

<sup>145</sup> OECD (n 142 above) 11.

<sup>146</sup> Moody A 'China has changed discourse on Africa: Africa Programme Head at Chatham House keen to forge links with Chinese institutions' *China Daily-Africa Weekly of 10-16 July 2015* 32.

Before it has actually come to the decision to terminate the provision of development assistance, it is possible to argue in accordance with the obligations imposed by articles 55 and 56 of the UN Charter that Africa is legally entitled to the 0.7% GDP quota promised by developed countries. However, in the absence of a claims mechanism, it is difficult to comprehend how a claim on such assistance can be achieved, which makes the claims approach functionally problematic.<sup>147</sup> This notwithstanding, I argue that the right to development is in effect not necessarily about the shipment of development assistance from the haves in developed countries to the have-nots in Africa but an expression of self-determination. The failure to fulfil the promise to provide development assistance is not likely to violate the right to development, just like the right to development is also unlikely to diminish as a result of the absence of development assistance.<sup>148</sup> It is uncertain that any African country can succeed with a claim on the violation of the right to development on the grounds of the failure by developed countries to make available the promised 0.7% quota of their GDP. Even so, I think that in the absence of a suitable model for development, whether the 0.7% quota is fulfilled in its entirety is immaterial and this therefore renders the claims approach irrelevant as an operational model for development in Africa.

In addition to the setbacks to development in Africa resulting from development cooperation as shown in chapter three<sup>149</sup> the insufficiencies in the cooperation approaches discussed above provide reason to question the *raison d'être* for embracing good governance in Africa.

### **2.2.1.3 Why good governance in Africa?**

As discussed throughout this thesis, the right to development has evolved for genuine reasons in the course of Africa's development history as an alternative model to colonial paradigms and imperialistic practices. In commemorating 50 years of independence, the AU Commission adopted a consolidated roadmap for development that provides a policy framework to harmonise national and regional efforts with the aim to achieve radical transformation through optimal use of the continent's resources to the benefit of the African peoples.<sup>150</sup> Although the transformation

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<sup>147</sup> See Rukare (n 129 above) 91-93.

<sup>148</sup> Sengupta 2002 (n 77 above) 877.

<sup>149</sup> See section 3.3 (3.3.1 & 3.3.2) of chapter three.

<sup>150</sup> AU Commission 'Agenda 2063' (n 19 above) paras 9-18.

agenda is envisaged to be achieved through ‘self-reliance’, ‘self-determination’ and ‘people-centred governance’,<sup>151</sup> Africa has rather embraced good governance as a tool for development policymaking.<sup>152</sup> As promising as it appears, the agenda for development leaves unanswered questions relating to the right to development enshrined in the African Charter and ancillary treaties<sup>153</sup> and, therefore, also begs the question, why good governance in Africa?

Good governance as Nicole Maldonado has noted, is an IMF/World Bank invention that came into use following the failure of the structural adjustment programmes in the 1990s.<sup>154</sup> A comprehensive understanding of the deficiency of the good governance model and its potential to derail development in Africa entails a scrutiny of how the structural adjustment programmes that gave birth to good governance adversely impacted on development in Africa. Following the collapse of commodity prices and the resulting economic crisis in the 1970s, the structural adjustment programmes were introduced as an economic recovery programme through which ‘conditional lending’ was provided to African countries.<sup>155</sup> Although the structural adjustment programmes appeared like sound economic policies, they were in effect a vehicle for driving free market capitalism into Africa. Countries targeted for debt relief were obligated to adjust their economic policies in favour of trade liberalisation; privatisation of state-owned enterprises; reductions in public expenditures through salary cuts and retrenchments of public service functionaries; closing down of state marketing boards; instituting export-driven agricultural reforms; undertaking currency devaluation; and implementation of fiscal austerity measures.<sup>156</sup>

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<sup>151</sup> See AU Commission ‘Agenda 2063’ (n 19 above) para 19.

<sup>152</sup> See AU Commission ‘Agenda 2063’ (n 19 above) para 27.

<sup>153</sup> Ngang CC ‘Towards a right to development governance’ (2018) 17:1 *Journal of Human Rights* 107.

<sup>154</sup> Maldonado N ‘The World Bank’s evolving concept of good governance and its impact on human rights’ (2010) *Doctoral Workshop Stockholm Sweden 29-30 May 2010* 4; Ake C *Democracy and Development in Africa* (1996) 32-40.

<sup>155</sup> Thomson A *An Introduction to African Politics* (2010) 197.

<sup>156</sup> Heidhues F & Obare G ‘Lessons from structural adjustment programmes and their effects in Africa’ (2011) 50(1) *Qtlly J Int’l Agric* 58; Dicklitch S & Howard-Hassmann R ‘Public policy and economic rights in Ghana and Uganda in Hertel S & Minkler L (eds) *Economic Rights: Conceptual, Measurement and Policy Issue* (2007) 327.

According to Dicklitch and Howard-Hassmann, the macro-economic policies that informed the structural adjustments programmes were intended to release the productive capacity of the African peoples and thus stimulate economic growth, without which as they claim, socio-economic rights would not be achieved.<sup>157</sup> On the contrary, Abouharb and Cingranelli argue that respect for human rights constitutes the pre-requisite for equitable economic growth, meaning that structural adjustment could only have been achieved to the extent that human rights, particularly socio-economic and cultural rights were respected.<sup>158</sup> In spite of the institutional commitment of the IMF and World Bank to ensure that human rights are not violated in the course of their operations, implementation of the SAPs significantly infringed on the socio-economic and cultural rights of the peoples of Africa, causing ‘overall economic failure’ with ‘destructive social consequences’.<sup>159</sup> Dismissing claims about the successful implementation of structural adjustment in Ghana, Odotayo argues that the structural adjustment policies failed in their intended objectives to alleviate poverty, improve living conditions, or promote economic growth but instead created the opportunity for the wanton exploitation of the country’s resources.<sup>160</sup> Kingston *et al* point out that in Uganda, structural adjustment took the form of trade liberalisation and privatisation, which disproportionately benefitted foreign stakeholders who purchased most of the privatised public enterprises, as opposed to the Ugandan people.<sup>161</sup> In Kenya also, Joseph Rono points out how the implementation of structural adjustment as a policy tool to accelerate economic growth instead resulted in ‘the marginalisation of the poor’,

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<sup>157</sup> Dicklitch & Howard-Hassmann (n 156 above) 325-327.

<sup>158</sup> Abouharb MR & Cingranelli D *Human Rights and Structural Adjustment* (2007) 40.

<sup>159</sup> Anghie A ‘Whose utopia?: Human rights, development and the third world’ (2013) 22:1 *Qui Parle: Critical Humanities and Social Sciences* 75; Logan F ‘Did structural adjustment programmes assist African development?’ (2015) available at: <http://www.e-ir.info/2015/01/13/did-structural-adjustment-programmes-assist-african-development/> (accessed: 4 May 2016); Abouharb & Cingranelli (n 158 above) 40.

<sup>160</sup> Odotayo A ‘Conditional development: Ghana crippled by structural adjustment programmes’ (2015) available at: <http://www.e-ir.info/2015/03/01/conditional-development-ghana-crippled-by-structural-adjustment-programmes/> (accessed: 4 May 2016).

<sup>161</sup> Kingston C *et al* ‘The impacts of the World Bank and IMF structural adjustment programmes on Africa: The case study of Cote D’Ivoire, Senegal, Uganda and Zimbabwe’ (2011) 1:2 *Sasha J Pol & Strat Stud* 121.

principally because the programmes were ill-conceived in a manner that ignored existing social structures and aspects related to human development.<sup>162</sup>

Originating from this background, the central premise underlying the good governance model obtains from the idea that the structural adjustment programmes failed not necessarily because they were ill-conceived but supposedly because of the incompetence of African governments in managing their economies.<sup>163</sup> Good governance was thus introduced as a model to remedy the failures by improving the ‘institutional performance’ of the state as a pre-condition for securing further loans from the World Bank.<sup>164</sup> Thus, the focus on good governance is justified by neoliberal claims that ‘better governance promotes economic development.’<sup>165</sup> Among the main components that Rachel Gisselquist identifies as making up the concept of good governance, the issue of human development, which constitutes Africa’s major development challenge, is unfortunately not included. This raises concerns as to the relevance of good governance as a development model for Africa, which as Gisselquist rightly contends, is not a useful concept for development analysis.<sup>166</sup> Although good governance makes mention of human rights, the Lawyers’ Committee for Human Rights (now Human Rights First) argues that ‘[t]he governance debate looks to human rights not for their intrinsic value but for their instrumental role in creating an environment in which effective and sustainable economic development can occur’.<sup>167</sup>

As stated above, good governance is more focused on the institutional performance of the state than the more pressing problem of human capabilities development. The concept of right to development on the other hand encourages meaningful participation and therefore places the power of development decision making in the hands of the people, whereas, good governance systematically excludes large segments of the African population from the development

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<sup>162</sup> Rono J ‘The impact of the structural adjustment programmes on Kenyan society’ (2002) 17:1 *Journal on Social Development in Africa* 81-98.

<sup>163</sup> Ngang 2018 (n 153 above) 116.

<sup>164</sup> Maldonado (n 154 above) 5-10.

<sup>165</sup> Gisselquist RM ‘Good governance as a concept and why this matters for development policy’ (2012) *UNU-WIDER* 1-3.

<sup>166</sup> Gisselquist (n 165 above) 2.

<sup>167</sup> Lawyer’s Committee for Human Rights *The World Bank: Governance and Human Rights* (1995) 61.



process.<sup>168</sup> Unlike good governance, which approaches the African problem from a foreign standpoint, the right to development paradigm envisages the formulation of appropriate development policies that are suited to African realities.<sup>169</sup> Democratisation, political reforms and institutional performance, which constitute good governance priority areas, are in effect of little livelihood value to the millions of African peoples who do not have an education, a roof over their heads and cannot afford sufficient food.<sup>170</sup> The right to development also envisages relieving Africa of dependency on development assistance and the associated debt burden, and in turn compels African governments to explore domestic sources of economic potential.

In resonance with the capabilities theory as a test to Africa's ability to achieve the right to development, it is certain that the continent is endowed with the potential to facilitate a sustainable management of the economy.<sup>171</sup> With an appropriate right to development policy framework, I argue that Africa is capable of redressing the myriad of development challenges on the continent much more than through the good governance model, which as indicated earlier is an imported model of the same patronising nature as development cooperation.

### **2.2.2. The right to development as a tool for policy making**

In line with the international law principle that guarantees state sovereignty, the Declaration on the Right to Development entitles states with the right and the duty to formulate national development policies to ensure improved well-being for their peoples.<sup>172</sup> This is also highlighted

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<sup>168</sup> Ngang 2018 (n 153 above) 116.

<sup>169</sup> Corrigan T 'Socio-economic problems facing Africa: Insights from six APRM country review reports' (2009) *SALIA Occasional Paper No 34* 8. Research conducted by Corrigan indicates that the central issues that need addressing in order to accelerate development in Africa are more of a socio-economic and cultural character.

<sup>170</sup> Gauri V & Brinks D (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) vii.

<sup>171</sup> Ayittey GBN 'Can foreign aid reduce poverty?: No' in Haas PM & Hird JA (eds) *Controversies in Globalisation: Contending Approaches to International Relations* (2009) 88-89; Boaduo NAP 'Africa's political, industrial and economic development dilemma in the contemporary era of the African Union' (2008) 2:4 *J Pan Afr Stud* 93; Moyo D 'Why foreign aid is hurting Africa' (2009) *The Wall Street Journal* available at: <http://www.wsj.com/articles/SB123758895999200083> (accessed: 6 December 2016).

<sup>172</sup> DRtD (n 1 above) art 2(3).



by the fact that the right to development derives from the right to self-determination,<sup>173</sup> which according to the African Charter requires the peoples of Africa ‘to freely determine their political status’ and to ‘pursue their economic and social development according to the policy they have freely chosen’.<sup>174</sup> Incidentally, the right to development is conceived as one of the rights-based alternative approaches to economic growth models to development that has gained currency in recent years.<sup>175</sup> It represents a policy mechanism that is informed not solely by the pursuit of economic growth objectives but simultaneously by aspirations to maximise well-being and thus envisages a framework for accountability against abuse, injustice and impunity within which the peoples of Africa can seek new ways of systematically advancing their productive capabilities. As a policy mechanism, the right to development envisages both legislative and regulatory measures to protect the African patrimony from the abusive exploitation by foreign stakeholders, a development process that is people-driven and an integrated system that guarantees equitable distribution of development gains.

However, faced with intensifying global inequalities, the challenge remains whether Africa is capable of fulfilling the duty to establish a policy framework for development of the sort.<sup>176</sup> The relevance of such a context-specific policy structure is explained by the absence of an African model for development in spite of the growing global quest for innovative models to replace outdated conventional paradigms.<sup>177</sup> Despite pioneering the right to development as a safeguard against injustice and impunity, it seems that Africa has lost track of its bearing to the prevailing circumstances on the continent. For instance, in adopting the ambitious 2063 agenda for development as a roadmap for ‘structural transformation’ across the continent,<sup>178</sup> the African

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<sup>173</sup> Anghie (n 159 above) 66; Udombana (n 89 above) 769-770, see also sect 3.1.1 of chapter two.

<sup>174</sup> African Charter (n 1 above) art 20(1).

<sup>175</sup> UN Human Rights *Realising the Right to Development* (2013) 495; Nagan WP ‘The right to development: Importance of human and social capital as human rights issues’ (2013)1:6 *Cadmus Journal* 30; Ibhawoh (n 9 above) 103; Udombana (n 89 above) 762.

<sup>176</sup> See Šlaus I & Jacobs G ‘In search of a new paradigm for global development’ (2013) 1:6 *Cadmus Journal* 2-3; The World Bank *Can Africa Claim the 21<sup>st</sup> Century?* (2000) 7.

<sup>177</sup> Šlaus & Jacobs (n 176 above) 4-5.

<sup>178</sup> AU Commission ‘Agenda 2063’ (n 19 above) paras 47-58.

Union Commission failed to specify the applicable model by which to deal concretely with the development aspirations contained in the document.

While Agenda 2063 makes mention of an African model for development and transformation,<sup>179</sup> it does not state in accurate terms what that model is and how it envisages driving the roadmap for development to effective realisation. I estimate that the envisaged African model ought to be anchored on the concept of the right to development as a policy tool that may be used to address the continent's development challenges resulting from external factors such as the overbearing influence of foreign stakeholders in the course of their operations in Africa.<sup>180</sup> With evidence of the development injustices perpetuated by external actors as illustrated in the previous chapters,<sup>181</sup> I make the case for a radical shift in development thinking in Africa towards greater focus on the right to development as a home-grown model, which I propose could be conceptualised as *right to development governance*.

### **3. Right to Development Governance**

My purpose in this section is to explore in greater detail the dimension of the right to development as a development paradigm as highlighted in chapter two.<sup>182</sup> In doing so, I describe in the sub-sections that follow, what the right to development governance represents in theory, the justification for having such a model and what its implementation entails in practical terms.

#### **3.1. Conceptual Formulation**

##### **3.1.1. Definition and justification for the model**

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<sup>179</sup> AU Commission 'Agenda 2063' (n 19 above) para 74(e) & (h).

<sup>180</sup> AU Commission 'Agenda 2063' (n 19 above) para 59. The African Union Commission acknowledges that African development space remains threatened by external influences and proposes (para 74) to address the problem by having recourse to an African model but does not explicitly state what the African model is.

<sup>181</sup> See sect 2.1 (2.1.1 & 2.1.2) of chapter two, sect 3.3 (3.3.1 & 3.3.2) of chapter three and sects 2.2.2.1 & 2.2.2.2 above.

<sup>182</sup> See sect 4.2 of chapter two.

I define right to development governance as an integrated rights-based development model, grounded in popular participation and the liberty of action in advancing human capabilities for the sustainable management of Africa's resources, and the propagation of the African identity and value systems within a legal framework that guarantees genuine accountability and equitable redistribution for improved well-being. Africa's all time record low human development indicators across all dimensions of measurement remains a major challenge despite significant gains in economic development. To address this challenge requires a development model that straightforwardly deals with the socio-economic and cultural realities in Africa. While the component ideas that make up the proposed right to development governance may not entirely be new, naming the concept as a home-grown model for Africa can significantly shape the manner in which development issues are conceived and prioritised as human rights and the manner too in which development cooperation is perceived.

In effect, right to development governance represents the right to be allowed the opportunity to advance beyond the circumstances that Africa is presently confronted with, which as I have indicated, is largely due to over-dependence on development cooperation as a model for development.<sup>183</sup> Thus, by advancing the argument for the right to development governance, I envisage an applicable paradigm of a similar nature like the 'social state principle' used in German constitutional law as an interpretative guide to the law and policy making.<sup>184</sup> Its application within the context of the right to development dispensation demands on the one hand an affirmation of the potential to take positive action in translating abstract principles into operational measures for implementation<sup>185</sup> and on the other hand, serves as the kind of policy tool envisaged in article 2(3) of the Declaration on the Right to Development.

Akinola highlights the relevance of the right to development in Africa by stating that every African government that has concern for its people, 'must accord [priority to] the right to

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<sup>183</sup> Ilorah (n 131 above) 1-36; Grabowski (n 138 above) 163-182; Ayittey (n 171 above) 89.

<sup>184</sup> King J 'Social rights, constitutionalism, and the German social state principle' (2014) 2 *Revista Electrónica De Direito Público* 13-14; Karpen U 'Effectuating the constitution: Constitutional law in view of economic and social progress' (2012) *Law Faculty, University of Hamburg* 10-11.

<sup>185</sup> See Amir (n 112 above) 2.

development in its governance of the country'.<sup>186</sup> The proposed model derives from the generic concept of the right to development and therefore, as a home-grown model has potential to respond to the socio-economic and cultural realities in Africa. It imports conceptual ideas from good governance, which has no doubt engineered political accountability, public sector reforms and democratisation, yet lacks the potential to redress the range of development challenges because of its more institutional focus on the state as the primary driver of national development. This is not intended to discount the role of the state, which as a duty bearer and holder of the right to development, constitutes as Rachel Murray highlights, 'an essential first, if not the most, important step in the transition to sustainable development'.<sup>187</sup>

However, it is contradictory to favour the development of the state over human development and expect to achieve people-centred sustainable development as envisaged in the 2063 agenda for development in Africa.<sup>188</sup> The right to development governance model proposes the basis for advancing the human potential through appropriate policies that respond to the realities of the largest majority of African peoples. As Winston Nagan has observed, the right to development approach demonstrates that development must be understood in terms of an all-inclusive value system as embodied in the concept of human rights and not simply in terms of the accumulation of wealth.<sup>189</sup> The right to development governance thus represents an integrated, inclusive and holistic model with the potential to address Africa's development challenges by incorporating socio-economic and cultural concerns and political governance into development programming. It is underlined by the fact that a systems change in Africa; entailing capabilities development, institutional strengthening, structural innovation, economic growth, social transformation and cultural reawakening can only be achieved by a liberated and empowered people.<sup>190</sup>

The following six reasons provide the account on which I base the proposition to divert focus from development cooperation to the right to development governance as a model to drive

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<sup>186</sup> Aguda TA *Human Rights and the Right to Development in Africa* (1989) 25.

<sup>187</sup> Murray (n 19 above) 242.

<sup>188</sup> AU Commission 'Agenda 2063' (n 19 above) paras 66(e) & 67.

<sup>189</sup> Nagan (n 175 above) 34.

<sup>190</sup> AU Commission 'Agenda 2063' (n 19 above) paras 47-58.

radical transformation in Africa: First, African governments owe the obligation to ensure that the stage is set for development to be achieved as a collective entitlement as guaranteed by the African Charter and associated instruments.<sup>191</sup> Second, owing to deep-rooted governance malpractices African governments equally owe the duty to become accountable in terms of ‘respect for democratic principles, human rights, the rule of law and good governance’.<sup>192</sup> Third, the peoples of Africa are lawfully entitled to freely and actively engage in determining their own well-being and to participate meaningfully in shaping Africa’s development future.<sup>193</sup> Fourth, owing to historical experiences and present-day realities, Africa’s framework for development, which I have described in the previous chapter as a right to development dispensation, necessitates an implementation model that is equally established on legality to combat impunity by upholding justice and equity in the development process.<sup>194</sup> Fifth, African governments are enjoined based on the right to self-determination and the principle of sovereign equality, to assert their autonomy against foreign domination.<sup>195</sup> Lastly, that development gains are equitably redistributed to ensure improved well-being and better conditions for the African peoples.<sup>196</sup>

The African Charter for Popular Participation acknowledges with conviction that:

<sup>191</sup> African Charter (n 1 above) arts 20 (1) & 22; DRtD (n 1 above) art 1(2).

<sup>192</sup> AU Constitutive Act (n 20 above) art 4(m); AU Commission ‘Agenda 2063’ (n 19 above) paras 27 & 74(c); Aguda (n 186 above) 25

<sup>193</sup> Constitutive Act (n 20 above) arts 3(g) & 4(c); AU Commission ‘Agenda 2063’ (n 19 above) para 74(c). See also Perry R ‘Preserving discursive spaces to promote human rights: Poverty reduction strategy, human rights and development discourse’ (2011) *J Sust Dev’t L & Policy* 76.

<sup>194</sup> See UN Human Rights (n 174 above) 495; Nagan (n 175 above) 30; Ibhawoh (n 9 above) 103; Udombana (n 89 above) 762; Sengupta 2002 (n 77 above) 846.

<sup>195</sup> African Charter (n 1 above) arts 20(1) & 22; Constitutive Act (n 20 above) art 3(i); DRtD (n 1 above) art 1(2); AU Commission ‘Agenda 2063’ (n 19 above) paras 19, 59, 61 & 72(n).

<sup>196</sup> African Charter (n 1 above) art 22(1) stipulates that: ‘All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of *the common heritage of mankind*’ (emphasis added). See also Sengupta 2004 (n 140 above) 187-188.

[T]he crisis currently engulfing Africa, is not only an economic crisis but also a human, legal, political and social crisis. It is a crisis of unprecedented and unacceptable proportions manifested...glaringly in the suffering, hardship and impoverishment of the vast majority of African people...<sup>197</sup>

If human development is acknowledged to be Africa's major setback, right judgment would necessitate pursuing models that focus on developing the continent's human potential rather than models that consider the African peoples only as passive recipients of charity-based development assistance from foreign donors.<sup>198</sup> The Charter for Popular Participation underscores the fact that development policy-making must align with peoples' aspirations and incorporate rather than alienate African values systems.<sup>199</sup> It requires a 'development approach rooted in popular initiatives and self-reliant efforts'<sup>200</sup> devoid of preventable constraints and unwarranted external pressures<sup>201</sup> such as those perpetuated by foreign stakeholders in Africa.

Relating to why a development model should be lodged within the framework of the law, I use the South African experience to illustrate the need for subjugated peoples to have recourse to legal protection as an assurance for improved well-being. In designating South Africa's governance and development model of 'transformative constitutionalism', Karl Klare posits that the process of transformation must be guided by law.<sup>202</sup> Unlike many other African countries that

<sup>197</sup> African Charter for Popular Participation in Development and Transformation adopted in Arusha, Tanzania 1990 art 6.

<sup>198</sup> See AU Commission 'Agenda 2063' (n 19 above) para 72(o). As part of the commitment to speed up action for the realisation of the African agenda for development, the Assembly (Heads of State and Government) of the African Union agree to curb dependency on aid. African leaders, including for example, President Uhuru Kenyatta of Kenya, President Paul Kagame of Rwanda, former President Thabo Mbeki of South Africa and most recently Nana Akufo-Addo during the 2017 EU-Africa Summit, among others, have repeatedly made public statements calling for an end to dependency on foreign aid.

<sup>199</sup> African Charter for Popular Participation (n 197 above) art 23(a)(1); *Endorois* (n 135 above) para 291.

<sup>200</sup> African Charter for Popular Participation (n 197 above) art 4(b); see also AU Commission 'Agenda 2063' (n 19 above) para 19.

<sup>201</sup> AU Commission 'Agenda 2063' (n 19 above) para 59.

<sup>202</sup> Klare K 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 150. For a comprehensive account of transformative constitutionalism, see also Langa P 'Transformative constitutionalism' (2009) *Prestige Lecture Stellenbosch University* 2; Sibanda S 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 3 *Stell L Rev* 482-500;

plunged into chaos after independence, transformation in post-apartheid South Africa has been relatively sustainable. This may be attributed to the fact that the transition to democracy in South Africa was negotiated and established on a legal (constitutional) foundation as a safeguard against impunity and the injustices of a past that was characterised by gross human rights violations and the legacy of poverty and inequalities created by the apartheid system.<sup>203</sup>

Informed by the development injustices resulting from slavery and colonialism, I argue that post-colonial Africa needs an alternative development model established within a legal framework in the form of a collective recognition of the right to development. Outlining a development agenda as has been done under Agenda 2063 is an expression of political good will; making clear that the realisation of that agenda is owed to the peoples of Africa as a legal entitlement as guaranteed by the African Charter is crucial. However, in the absence of a functional model, efforts to actualise the ambitious development agenda may not be achieved as the continent remains exposed to the imperial influence of foreign stakeholders.<sup>204</sup> It begs the question why Africa continues to rely on development cooperation while it has the requisite capacity to advance the right to development governance as a substitute to development cooperation. On this note, it is important to highlight some guidelines requirement for implementing the right to development governance.

### **3.1.2. Functional requirements**

For the right to development governance model to be achieved, four requirements deduced from the conceptual nature of the right to development need to be met: requirements of objective, conduct, process and outcome. The requirement of objective entails the peoples of Africa as

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Rosa S 'Transformative constitutionalism in a democratic developmental state' (2011) 3 *Stell L Rev* 452-565; Van Marle K 'Transformative constitutionalism as/and critique' (2009) 2 *Stell L Rev* 286; Roux T 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without difference' (2009) 2 *Stell L Rev* 258; Pieterse M 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Pub L* 155.

<sup>203</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996(4) SA 744 (CC) para 5.

<sup>204</sup> African Charter (n 1 above) arts 20(1) & 22; Constitutive Act (n 20 above) art 3(i); DRtD (n 1 above) art 1(2); AU Commission 'Agenda 2063' (n 19 above) paras 19, 59, 61 & 72(n).



stipulated in legal and policy instruments to meaningfully engage with the state in defining national development priorities. African governments must marshal the political will, in turn, to recognise the right to development as both a moral and a legal obligation that they owe to all the peoples of Africa to ensure their improved well-being. It also entails the concrete allocation of rights and liberties to the peoples of Africa in asserting their entitlement to socio-economic and cultural development. The formulation of national development policies must therefore fundamentally be informed by objective obligations of this sort.

The requirement of conduct defines and regulates the behavioural pattern within the context of the right to development dispensation in Africa, which as contained in the relevant instruments, entails eliminating both exogenous as well as endogenous obstacles to development, including massive human rights violations, endemic corruption and the abuse of state power, which cumulatively hinder progress on the continent.<sup>205</sup> It structures relationships of transparency and accountability through which every actor within the right to development dispensation in Africa is enjoined to ensure that development is achieved without compromising the enjoyment of human rights. While the aspiration for a unified Africa as envisaged by the African Union Commission can only be achieved over the long term,<sup>206</sup> the requirement of conduct necessitates that in the meantime, domestic arrangements are made to safeguard the right to development both as a claimable entitlement by which to hold the state to greater levels of responsiveness and accountability and also as a development model to serve as an interpretative guide to the law,

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<sup>205</sup> DRtD (n 1 above) art 5; Convention on Preventing and Combating Corruption adopted in Maputo on 11 July 2003 art 3; Kar D & Cartwright-Smith D 'Illicit financial flows from Africa: Hidden resource for development' (d.n.a) *Global Financial Integrity* 5-6; see also Ayogu MD & Gbadebo-Smith F 'Governance and illicit financial flows (2014) *Political Economy Research Institute – Working paper series No 366* 1-36; Corruption Watch 'Mbeki: Illicit financial flows crippling the continent' (2015) *Corruption Watch* available at: <http://www.corruptionwatch.org.za/mbeki-illicit-financial-flows-crippling-the-continent/> (accessed: 12 September 2016); Transparency International 'Corruption on the rise in Africa poll as governments seen failing to stop it' (2015) available at: [http://www.transparency.org/news/pressrelease/corruption\\_on\\_the\\_rise\\_in\\_africa\\_poll\\_as\\_governments\\_seen\\_failing\\_to\\_stop\\_i](http://www.transparency.org/news/pressrelease/corruption_on_the_rise_in_africa_poll_as_governments_seen_failing_to_stop_i) (accessed: 4 May 2016).

<sup>206</sup> AU Commission 'Agenda 2063' (n 19 above) para 20.



policy making and development programming.<sup>207</sup> As indicated in chapter four, a number of African countries have enshrined the right to development as a domestic constitutional entitlement,<sup>208</sup> including provisions that could be interpreted purposively to imply the right to development like in the case of South Africa.<sup>209</sup> In accordance with the obligation to engage in collective action, the rest of Africa is enjoined to provide domestic guarantees on the right to development as a means of reinforcing the right to development dispensation in Africa.

The requirement of process necessitates the pursuit of people-centered and rights-based approaches to development, primarily because the fulfillment of human rights and the development of human capabilities remain major challenges to development in Africa. It entails forging a system of legality to ensure that in the process of creating development, human rights, particularly the right to development are not violated. This is illustrated by the *Endorois* case, which established the precedent that development cannot be carried out in contravention of the right to development.<sup>210</sup> In adjudicating the case, the African Commission held that the right to development is in effect an emancipating process that emphasises the importance of choice and liberty of action for the achievement of well-being.<sup>211</sup> In finding the Kenyan government in contravention of the right to development, the African Commission conveyed the fact that human well-being must precede economic growth or the welfare of the state economy. Although restitution of the land in question and the payment of damages is yet to be effected as the Commission ruled, the decision nevertheless set the standard that colonial-style invasion and land grabbing (especially of indigenous territories) is unlawful.

Finally, the requirement of specific forms of outcome is rooted in the principle of equitable distribution, which constitutes an important component of the right to development.<sup>212</sup> Outcome

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<sup>207</sup> See King (n 184 above) 13-14; Karpen (n 184 above) 10-11.

<sup>208</sup> See sect 2.1 (2.1.1 & 2.1.2) of chapter four.

<sup>209</sup> See Gutto S 'The right to development: An implied right in South Africa's constitutional order' in SAHRC *Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996)* (2006) 109-118.

<sup>210</sup> *Endorois* (n 135 above) paras 72-73 & 283; see generally sect 3.2.2 of chapter four.

<sup>211</sup> Sing'Oei (n 135 above) 395.

<sup>212</sup> See Sengupta 2004 (n 140 above) 187-188.

requirements ensure that specific material or abstract entitlements could be anticipated from the development process, either through policy measures to guide implementation in the development process or through judicial processes when a violation is established. Article 22(1) of the African Charter requires that the gains from development be shared; hence, the peoples of Africa legitimately should be able to expect to enjoy on an equitable basis the communal resources pertaining to the African patrimony. Agenda 2063 lays out the policy framework at the continental level for translating the abstract principles of law enshrined in the African Charter, but unfortunately does not define the model for its realisation.

In response to the global search for an innovative development paradigm owing to the failure of prevailing models in dealing with the challenges that confront humanity,<sup>213</sup> Nagan suggests that with proper clarification, the right to development could effectively be conceptualised as ‘a new global economic paradigm’.<sup>214</sup> While the quest for a new paradigm is important for the global economy, it is even more relevant to Africa. If the right to development governance as described above finds resonance with the 2063 policy agenda for radical transformation, it is likely to significantly shift the goalposts and therefore place Africa at a comparative advantage as an influential actor as highlighted in Agenda 2063.<sup>215</sup> It would mean the attainment of self-determination for Africa in shaping its development priorities in accordance with local realities and not otherwise where the rules and policy choices have often been determined by foreign stakeholders. Such an arrangement is of primary importance, in setting the attainable standards for development that should become binding under the right to development dispensation in Africa. Of interest is whether Africa has the capacity to make it possible.

### **3.1.3. Capacity to fulfil**

In looking at the capacity to fulfil in this section, I aim to show to what extent the right to development or better still the right to development governance could be achieved. Obtaining from the legal dimensions of the right to development as a human right concept and its

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<sup>213</sup> Nagan (n 175 above) 30; Šlaus & Jacobs (n 176 above) 1-2.

<sup>214</sup> Nagan (n 175 above) 30.

<sup>215</sup> AU Commission ‘Agenda 2063’ (n 19 above) paras 59-63.

developmental dimension as a development paradigm, the capacity to fulfil can appropriately be summarised into the legal capacity and the resource capacity.

### 3.1.3.1 Legal capacity

The UN High Commissioner for Human Rights (UNHCHR) defines legal capacity as ‘the capacity and power to exercise rights and undertake obligations [...] without assistance or representation by a third party’.<sup>216</sup> It presupposes the capability to be a potential holder of rights and obligations, implying the capacity to exercise those rights and the duty to initiate, to modify or terminate legal relationships.<sup>217</sup> The UNHCHR further indicates that legal capacity constitutes an important aspect relating to the sovereignty of states without which peoples ‘would be subject to injustice and injury without legal remedy’.<sup>218</sup> For instance, the granting of independence to Africa has meant autonomy only to the extent that the decolonised peoples can freely make political choices while the power of socio-economic policy-making is largely retained in the hands of the colonial masters. The right to development as Richard Kiwanuka has noted, culminates the process of dissociating from the injustices of imperial domination and as a result, affirms the socio-economic and cultural autonomy of African states *vis-à-vis* advanced societies.<sup>219</sup> The legal capacity that the right to development bestows thus broadly defines the autonomy that enables African states to engage with other states as subjects of international law on the basis of sovereign equality. It entails the liberty to assert the right to development based on the authority conferred by law in order that the outcomes of such actions may impose binding obligations, including on third parties.

The legal capacity conferred on the peoples of Africa to achieve the right to development is accompanied by the capability to determine what development entails in their situation and by extension to shape the African development agenda accordingly. It entails also the capability to

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<sup>216</sup> UN High Commissioner for Human Rights (UNHCHR) ‘Legal capacity’ *Background Conference Document-Office of the United Nations High Commissioner for Human Rights 4*.

<sup>217</sup> UNHCHR (n 216 above) 13.

<sup>218</sup> UNHCHR (n 216 above) 13.

<sup>219</sup> Kiwanuka R ‘The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights’ (1988) 82 *Am J Int’l L* 95.

discern the nature of development cooperation that is appropriate for Africa, and be able to seek remedy when the right to development is contravened or threatened. I have earlier alluded to the fact that the right to development empowers African states with the legitimacy to formulate appropriate development policies to ensure well-being and improved living standards for the populations.<sup>220</sup> Although African countries are individually recognised as sovereign states, they are enjoined by their obligations under the African Charter to jointly assert the right to development, which in my view constitutes an instrument for leverage and a collective bargaining strategy to forge negotiations at international fora and to broker cooperation agreements for development in Africa's favour.

With the understanding that implementation of the African Charter can most effectively take place at domestic level, states are enjoined to undertake necessary measures, including adopting domestic legislation,<sup>221</sup> to reinforce their legal capability in asserting the right to development. In the same manner that legal capacity is bestowed on the peoples of Africa to exercise the right to development, legal capacity also provides leverage and endows African states with the duty to protect the peoples of Africa when their entitlement to development is threatened, as discussed in chapter four.<sup>222</sup> States parties are required to demonstrate the legal capacity to access the African Commission through compliance with the admissibility criteria.<sup>223</sup> In the *DRC* case for example, the Democratic Republic of Congo exercised its legal capacity as a state party to the Charter by filing a communication against Burundi, Rwanda and Uganda in which the African Commission established among others a violation of the right to development.<sup>224</sup>

### 3.1.3.2 Resource capacity

<sup>220</sup> DRtD (n 1 above) art 2(3); see sect 2.2.2 above.

<sup>221</sup> DRtD (n 1 above) art 8.

<sup>222</sup> See sect 3.1 of chapter four.

<sup>223</sup> African Charter (n 1 above) arts 47-49.

<sup>224</sup> *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) para 87, Kwame ALP 'The justiciability of the right to development in Ghana: Mirage or possibility?' (2016) *Strathmore Law Review* 87-88; Oduwole O 'International law and the right to development: A pragmatic approach for Africa' (2014) *International Institute of Social Studies* 15; Sceats S 'Africa's new human rights court: Whistling in the wind?' (2009) *Chatham House – Briefing Paper* 8.

In terms of substantive development the obligation that the right to development imposes for its realisation is predominantly positive in nature, requiring the mobilisation of enormous resources, which developing countries are often, presumed to be unable to muster. Incidentally, the global arrangement has been designed such that developing countries are required to remain dependent on developed countries for assistance.<sup>225</sup> Such an arrangement derives from the perception that developing countries are incapable of self-sustainably mobilising the requisite resources to meet their human rights obligations. The result, as George Ayittey points out, ‘has been hopeless dependency on foreign aid’.<sup>226</sup> While Jeffrey Sachs argues in favour of foreign aid as a tool for assisting developing countries,<sup>227</sup> Ayittey as well as Moyo argue to the contrary that Africa really does not need foreign aid in the sense that the resources required for development are located in Africa.<sup>228</sup> Accordingly Nana Boaduo thinks that the ‘habit of begging and borrowing ... should be abandoned’ because ‘Africa has the potential to stand on its own feet to initiate its industrial and economic development agenda’.<sup>229</sup> However, on a balance of probabilities, Anup Shah estimates that ‘[w]hile the *reliance* on aid is not a good strategy for poor countries at any time, some [African countries] have little choice in the short term’.<sup>230</sup>

I argue in the previous chapter that development cooperation, especially when it only involves the provision of development assistance is not indispensable for the realisation of the right to development in Africa.<sup>231</sup> The question therefore is whether without the assistance that is made available through cooperation, Africa has the resource potential to self-reliantly achieve the right

<sup>225</sup> International Covenant on Economic, Social and Cultural Rights adopted by Gen Ass Res 2200A (XXI) of 16 December 1966 art 2(1); DRtD (n 1 above) art 4(2); Millennium Development Goals 2000 goal 8.

<sup>226</sup> Ayittey (n 171 above) 89.

<sup>227</sup> Sachs J ‘Can foreign aid reduce poverty?: Yes’ in Haas PM & Hird JA (eds) *Controversies in Globalisation: Contending Approaches to International Relations* (2009) 72-88.

<sup>228</sup> Ayittey (n 171 above) 88-89; Moyo (n 171 above); see also Kumar M ‘Arguments for and against foreign aid’ available at: <http://www.economicdiscussion.net/foreign-aid/arguments/arguments-for-and-against-foreign-aid/11838> (accessed: 6 September 2016).

<sup>229</sup> Boaduo (n 171 above) 93.

<sup>230</sup> Shar A ‘Foreign aid for development assistance’ (2014) *Global Issues* available at: <http://www.globalissues.org/article/35/foreign-aid-development-assistance> (accessed: 6 September 2016); Ayittey (n 171 above) 72-88.

<sup>231</sup> See sect 2.2.2.2 of chapter three.

to development? To give a straightforward answer to this question may not provide an accurate assessment of Africa's resource potential. Thus, I respond to the question by alluding to two instances where on the one hand, Libya unexpectedly survived economic sanctions imposed by the international community and on the other hand, where although rated as a developed country, France is able to survive economically only at the expense of its African colonies.<sup>232</sup>

Following Qaddafi's policies against imperialism and terrorist agenda that threatened the hegemony of the western world, the international community jointly authorised punitive economic sanctions and diplomatic isolation on Libya in 1986. Economic sanctions are generally intended to paralyse or destabilise the economic base of a target country with the aim to constrain the country to submit to international pressure.<sup>233</sup> This is usually achieved through the withdrawal of foreign assistance, the imposition of trade and arms embargos, the freezing of foreign assets as well as diplomatic isolation.<sup>234</sup> In spite of these measures imposed on Libya, the country not only survived the international pressure but surprisingly never got entangled in any foreign debts. Instead, the economy fared exceedingly well while the standard of living for the Libyan people is established to have increased steadily over the years from 0.741 in 2005 to 0.760 in 2011 according to the UNDP Human Development Index.<sup>235</sup> Owing to its abundant oil wealth, the sanctions only constrained Libya to explore internal strengths and opportunities to overcome weaknesses and threats posed by the international community.

It often does not add up that Africa is said to lack the resources needed for development yet, from time immemorial, it has supplied basically all the resources needed to feed the capitalist economies of developed countries. For instances, France is reported to be the largest provider of development assistance to its African colonies.<sup>236</sup> However, as contrary evidence has it, the

<sup>232</sup> Bart-Williams B 'Change your channel' *TEDTalk Berlin* (2015) available at: [https://www.youtube.com/watch?v=\\_pvNp9gHjfk](https://www.youtube.com/watch?v=_pvNp9gHjfk) (accessed: 30 October 2017); Koutonin (n 48 above).

<sup>233</sup> Hurungo J 'An inquiry into how Rhodesia managed to survive under economic sanctions: Lessons for the Zimbabwe government' (2010) *Trane and Development Centre – Discussion Paper* 8.

<sup>234</sup> Mlambo AS *A History of Zimbabwe* (2014) 36-44; Hurungo (n 233 above) 4-7.

<sup>235</sup> Libya 360° Archive 'Libya: UN HDI country profile' available at: <https://libyadiary.wordpress.com/2011/03/05/libya-un-hdi-country-profile/> (accessed: 28 July 2015).

<sup>236</sup> See generally OECD (n 60 above).

French economy is confirmed to be sustained only through the wealth that it takes ‘illegally’ from some fourteen African countries.<sup>237</sup> Former French President, Francois Mitterrand is said to have stated in 1957 that ‘without Africa’[s resources], France will have no history in the 21<sup>st</sup> Century’ while in 2008, Jacques Chirac also confessed in a TV interview that if all the wealth that France has accumulated through exploitation of African countries were to be returned, France would descend to the level of a third world country.<sup>238</sup> Contrary to the imperialist perception that Africa is incapable of self-sustained development and therefore, must look to developed countries for assistance, these illustrations justify the fact that Africa can, based on its resource potential, achieve the right to development without necessarily relying on foreign assistance. Of course, the resource-base in Africa is not evenly distributed and thus the resource potential may not be uniform for all African countries.

While a few African countries may be resource-deficient, Africa as a whole is largely endowed with huge mineral reserves alongside aquatic, flora and fauna resources, which make it even more imperative for consolidated action among African countries to ensure equitable redistribution of the common heritage of the African patrimony as a prerequisite for the realisation of the right to development as envisaged by the African Charter.<sup>239</sup> As long as Africa carries on with the habit of hand-stretching for assistance, it would never be able to make use of its enormous resources, which developed countries continue to exploit to feed their industrialised economies. Asserting the right to development in Africa entails rejecting dependency on development assistance, which provides good reason to productively utilise the continent’s resources to the benefit of the African people.<sup>240</sup> Otherwise, making the right to development governance a reality also requires giving consideration to contraventions that may be committed.

## **3.2. Operational Considerations**

### **3.2.1. Prevention approach**

<sup>237</sup> Le Vine (n 48 above) 2-6; Koutonin (n 48 above).

<sup>238</sup> Bart-Williams (n 232 above), Koutonin (n 48 above).

<sup>239</sup> African Charter (n 1 above) art 22(2).

<sup>240</sup> African Charter (n 1 above) art 21; DRtD (n 1 above) art 1(2); see also Ayittey (n 171 above) 88-89; Moyo (n 171 above); AU Commission ‘Agenda 2063’ (n 19 above) para 72(o).



Taking into account the fact that, in relation to the patronising nature of development cooperation, the right to development is perceived as counter measure against foreign domination, it is necessary to consider the prevention approach as a cautionary measure against the possibility of a setback to applying the right to development governance as a development model for Africa. The prevention approach suggests taking pre-emptive measures to avert foreseeable actions that may cause a violation on the right to development. It requires African governments as a matter of obligation to take appropriate legislative and other measures to define and regulate actions with regard to the right to development.<sup>241</sup> Given that development cooperation allows external actors active involvement in the development processes in Africa, the prevention approach would of necessity require foreign stakeholders to adopt operational guidelines that explicitly compel them to respect the right to development in Africa in the course of their operations.<sup>242</sup> Without undermining the goodwill of the donor community in seeking to assist Africa in its development efforts, rights-based standards require development cooperation to be exercised with ‘due diligence’ and ‘global standards of care’ in respect of the duty to prevent human rights violations.<sup>243</sup> The universal approach in this regard is underscored by the obligation to create better conditions for every human person.<sup>244</sup>

A default to these standards subjects the defaulting party to international reproach in respect of which sanctions have been imposed on some African countries. Economic sanction imposed by the European Union on Zimbabwe for a period of over fifteen years is reported to have inflicted acute socio-economic hardship on the people of Zimbabwe.<sup>245</sup> The sanctions, which include the withdrawal of development assistance, financial prohibitions, travel bans, arms embargoes, commodity boycotts, freezing of foreign assets and diplomatic isolation, have had a devastating

<sup>241</sup> African Charter (n 1 above) art 1.

<sup>242</sup> UN Human Rights *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) 16-17.

<sup>243</sup> Salomon ME *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007) 186; Skogly SI ‘Global responsibility for human rights’ (2009) 29:4 *OxfJ Leg Stud* 829.

<sup>244</sup> Skogly 2009 (n 243 above) 829.

<sup>245</sup> Mathaba.Net (n 173 above); ZANU-PF ‘Sanctions on Zimbabwe are real’ available at: [http://www.zanupf.org.zw/index.php?option=com\\_content&view=article&id=148:sanctions-on-zimbabwe-are-real](http://www.zanupf.org.zw/index.php?option=com_content&view=article&id=148:sanctions-on-zimbabwe-are-real) (accessed: 5 September 2015).



impact on the entire population rather than President Mugabe and the leadership of the ZANU-PF who constituted the primary targets.<sup>246</sup> As a result, the country that once was known as the ‘breadbasket of Africa’ has now been reduced to a famished land, where an ‘estimated 4 million rural poor suffer from food shortages’.<sup>247</sup> Mugabe’s controversial policies triggered mixed reactions domestically and of course attracted international sanctions,<sup>248</sup> which however, have remained an issue of controversy in the sense that they have not only failed to achieve their intended purpose but have contributed to worsening the human rights situation in the country.<sup>249</sup> Unable to endure the hardship, hundreds of thousands of Zimbabweans have been forced to flee into South Africa to seek better conditions.<sup>250</sup>

The Maastricht Principles make clear that it is wrong to impose embargoes and economic sanctions that would result in impairing the enjoyment of socio-economic and cultural rights.<sup>251</sup> Where such measures become necessary in order to fulfil international obligations, measures must be taken to ensure that human rights standards are fully respected.<sup>252</sup> It begs the question to what extent the international community takes the right to development seriously when interventions under the pretext of the responsibility to protect are carried out against a human rights defaulting country, considering such interventions may also aggravate the human rights

<sup>246</sup> Mlambo (n 234 above) 246-247.

<sup>247</sup> Peta B ‘Regime has turned “breadbasket of Africa” into famished land’ (2005) available at: [www.rense.com/general64/mugg.htm](http://www.rense.com/general64/mugg.htm) (accessed: 15 November 2014); Mlambo (n 234 above) 231 & 237.

<sup>248</sup> Tawanda H ‘Economic sanctions undermine Zimbabwe’s economy’ available at: [www.newzimbabwe.com/pages/sanctions32.13170.html](http://www.newzimbabwe.com/pages/sanctions32.13170.html) (accessed: 15 November 2014).

<sup>249</sup> Holman M ‘Sanctions have been counterproductive in Zimbabwe’ *The New York Times* of 21 November 2013 available at: <http://www.nytimes.com/roomfordebate/2013/11/19/sanctions-successes-and-failures/sanctions-have-been-counterproductive-in-zimbabwe> (accessed: 5 September 2015); see also Alston P ‘International trade as an instrument of positive human rights policy (1982) 4 *HRQ* 168 relating to the effectiveness of sanctions as a means by which to punish or to compel compliance with international legal norms.

<sup>250</sup> Ngang CC ‘Transgression of human rights in humanitarian emergencies: The case of Somali refugees in Kenya and Zimbabwean asylum seekers in South Africa’ (2015) *The Journal of Humanitarian Assistance* 4.

<sup>251</sup> Maastricht Principles (n 11 above) para 22; see also Bunn ID ‘The right to development: Implications for international economic law’ (2000) 15 *Am U Int’l L Rev* 1460.

<sup>252</sup> Maastricht Principles (n 11 above) para 22.

situation.<sup>253</sup> To my mind, no intervention purporting to protect human rights is justified if such an intervention renders the human rights situation worse than it would be without the intervention.<sup>254</sup> I make this point to justify the fact that if appropriate consideration is given to the right to development, circumstances of this nature could be prevented. The prevention approach thus offers a pragmatic option for actualising the right to development in terms of guaranteeing protection against violation, including by the state which is obligated to regulate the actions of foreign stakeholders.<sup>255</sup> As a practical measure, a state party to the African Charter may be able to seek remedy on behalf of its people in accordance with article 5(1)(d) of the Protocol on the African Human Rights Court, which grants access to the ‘state party whose citizen is the victim of a human rights violation’, to bring a case to the Court even though only against another state party.

### 3.2.2. Violations approach

A fundamental component of the right to development is the fact that it must inevitably lead to the constant improvement of human well-being, which provides reason to eliminate the possibility of a regression or deprivation in the exercise and enjoyment of that right.<sup>256</sup> When

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<sup>253</sup> Francioni F & Bakker C ‘Responsibility to protect, humanitarian intervention and human rights: Lessons from Libya to Mali’ (2013) *Transworld – Working Paper 15* 1-20. The authors argue that the NATO assault on Libya in 2011 supposedly under the pretext of the responsibility to protect was unjustified in the sense that the operation was actually not intended to protect the Libyan people against human rights violations but to effect a regime change in Libya with the resulting negative impact that the operation left on the human rights situation in the country.

<sup>254</sup> See Rishmawi M ‘The responsibility to protect and protection of civilians: The human rights story (d.n.a) *Office of the High Commissioner for Human Rights* 91. Rishmawi points out that responsibility to protect operations must be informed by the ‘requirement that the obligations for the protection of fundamental human rights are not affected’ entailing the duty to prevent, to protect and to respect established rights.

<sup>255</sup> See D’Aspremont J *et al* ‘Sharing responsibility between non-state actors and states in international law: Introduction’ (2015) 62 *Neth Int’l L Rev* 49-67; Ronen Y ‘Human rights obligations of territorial non-state actors’ (2013) 46 *Cornell Int’l L J* 21-50; Clapman A *The Human Rights Obligations of Non-State Actors* (2006) 25-58; Danailov S ‘The accountability of non-state actors for human rights violations: The special case of transnational corporations’ (1998) 1-74; Cassel D ‘Corporate initiatives: A second human rights revolution?’ (1996) 19 *Fordham Int’l L J* 1963.

<sup>256</sup> DRtD (n 1 above) art 2(3); Sengupta 2004 (n 140 above) 184.

prevention fails and a violation takes place it necessitates a remedy to ensure that the ultimate goal of increasingly improving the human condition is retained. To halt that process would amount to a violation of the right to development, which in law necessitates a remedy, the achievement of which sometimes may be through litigation. With this in mind, it is important to establish what will constitute a violation of the right to development in Africa. The right to development in Africa involves an entitlement to self-determination in setting development priorities freely, without external interference or economic coercion.<sup>257</sup> It involves the right to formulate development policies that aim at constantly improving human well-being, guaranteeing freedoms, expanding opportunities and choices and advancing peoples' productive capabilities.<sup>258</sup> It also entails non-regression in the enjoyment of existing rights.<sup>259</sup> In addition to the right to development, the African Charter makes provision for the rights to self-determination and freedom from domination.<sup>260</sup> In sum, these guarantees demand the adoption of appropriate domestic laws to regulate the actions of foreign stakeholders against violations of the right to development that they may commit in the course of their operations in Africa.

Thus, the right to development in Africa would be violated when peoples' entitlement to sustained livelihood is not respected and protected, when the liberty to choose between development alternatives is denied and/or when the right to formulate national development policies is hijacked by dominant political or economic forces. The right to development will also be violated under any circumstance that leads to a regression in the enjoyment of well-being and standard of living that is valued by the peoples of Africa to whom the right to development is guaranteed. In the *Endorois* and *Ogiek Community* cases for instance, the African Commission and the African Court, respectively held that by evicting the indigenous communities from their ancestral lands (significantly affecting their well-being), the Kenyan government violated their right to socio-economic and cultural development.<sup>261</sup> The violations approach thus entails the

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<sup>257</sup> Van der Have NS 'The right to development and state responsibility: Can states be held to account?' (2013) *SHARES Research Paper 23* ACIL 4.

<sup>258</sup> DRtD (n 1 above) art 2(3).

<sup>259</sup> DRtD (n 1 above) art 2(3); *Endorois* (n 135 above) para 294.

<sup>260</sup> African Charter (n 1 above) arts 19 & 20(1).

<sup>261</sup> *Endorois* (n 135 above) para 294; *African Commission on Human and Peoples' Rights (Ogiek Community) v Republic of Kenya* (2017) Appl No 006/2017 paras 210-211.

right to seek a remedy when a threat to or a violation of the right to development is established. Incidentally, both rulings highlight the fact that the lack of proper consultation and meaningful participation in decisions affecting their well-being, denial of the opportunity to make a choice or to exercise ‘liberty of action’, the use of coercion and intimidation in the development process and exclusion from sharing in development gains violates the right to development.<sup>262</sup> The African Commission as well as the African Court found that by restricting the Endorois and the Ogiek peoples from access to their place of habitation, they were virtually deprived of the right to the constant improvement in their well-being.<sup>263</sup>

On the contrary, the failure to provide development assistance – the basis on which development cooperation is largely structured – might not necessarily amount to a violation of the right to development, especially if such failure does not affect human well-being in a negative way. The fundamental factor in advancing the right to development in Africa is the duty to prevent violations; to ensure that peoples’ freedoms are not denied, that human capabilities are not diminished and that they are not dispossessed of the productive capacity for development. The Maastricht Principles provide that global actors are obligated to respect, to protect and to fulfil human rights extraterritorially.<sup>264</sup> This notwithstanding, the globalisation practice has created the scenario where the domestic policies and practices of states are controlled by external actors, consequently affecting the human rights situation in fragile developing countries adversely.<sup>265</sup> When foreign stakeholders fail in their extraterritorial human rights obligations, they are by law – although so far just in principle – responsible for their actions.<sup>266</sup>

However, because of the overbearing influence that foreign stakeholders enjoy, they have often contravened the right to development in Africa with impunity, which begs the question why they remain insulated from legal action. Through the imposed structural adjustment programmes for

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<sup>262</sup> *Endorois* (n 135 above) para 269-298; *Ogiek Community* (n 261 above) para 210.

<sup>263</sup> *Endorois* (n 135 above) para 144; *Ogiek Community* (n 261 above) paras 210 & 216.

<sup>264</sup> Maastricht Principles (n 11 above) para 3.

<sup>265</sup> Sengupta 2004 (n 140 above) 194.

<sup>266</sup> See generally UN Human Rights *Guiding Principles on Business and Human Rights* (2011); see also sec 2.2.2.2 of chapter four for a detail analysis on the liability of foreign stakeholders relating to violations of the right to development in Africa.

example, the World Bank/IMF helped to wreck the economies of many African countries, and by so doing, transgressed article 22 of African Charter.<sup>267</sup> However, as an external actor (not party to the African Charter), the World Bank cannot be held accountable under the African human rights system, which unfortunately does not make provision allowing for legal action against non-state entities.<sup>268</sup>

A regression in the enjoyment of existing rights and freedoms or in an established and valued standard of well-being would amount to a violation of the right to development.<sup>269</sup> For instance, before the supposedly humanitarian NATO intervention in 2011, the peoples of Libya enjoyed a standard of living that rated the highest in Africa, with one of the highest per capita incomes in the world, free access to socio-economic amenities, life expectancy of 74 years, a completely debt-free economy<sup>270</sup> and respect for women's rights unlike in most Arab countries.<sup>271</sup> The NATO intervention caused the dismantling of the socio-economic gains achieved over a period of forty years and as a result, Chossudovsky estimates that the country is certain to be dragged into an endless debt trap under a possible World Bank/IMF post-war reconstruction programme.<sup>272</sup> Under the circumstances, it is unlikely that the peoples of Libya will ever be able to enjoy the same standard of living that they have previously been entitled to.

In essence, to ensure the actualisation of the right to development governance within the context of the right to development dispensation in Africa, it is crucial to factor in how violations of the right to development may effectively be remedied as a guarantee for the constant improvement in the living standard of the African peoples. In this way foreign stakeholders, as the Maastricht Guidelines stipulate may be compelled to respect human rights in the jurisdictions where they

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<sup>267</sup> Lopes C 'Structural adjustment policies and Africa: A reply to Shantayanan Devarajan' *Think Africa Press of 15 November 2013* available at: <http://allafrica.com/stories/201311252050.html> (accessed: 5 September 2015).

<sup>268</sup> See Viljoen F *International human rights law in Africa* (2012) 300-302.

<sup>269</sup> Skogly 2002 (n 55 above) 8.

<sup>270</sup> Chengu (n 119 above); Chossudovsky (n 119 above).

<sup>271</sup> Monti-Belkaoui & Riahi-Belkaoui (n 90 above) 268.

<sup>272</sup> Chossudovsky (n 119 above).

exercise influence.<sup>273</sup> As underscored by the UN Commission on Human Rights, a rights-based approach to development cooperation would ensure that development assistance is properly targeted to ensure that all parties to the development process are equally accountable.<sup>274</sup> This is still largely problematic, possibly because of the lack of appropriate avenues for redressing violations, particularly against foreign stakeholders for interfering with the enjoyment of the rights enshrined in the African Charter.<sup>275</sup>

The provisions of the Charter highlight the same human rights standards recognised by international law, which foreign stakeholders are required to comply with in the course of their extraterritorial actions. According to Thomas Pogge, poverty is generated and sustained by the unjust processes and practices in which global actors engage in their operations.<sup>276</sup> These conditions create inequalities, which as he further explains, amount to human rights violations, necessitating the responsibility of advanced societies towards the poor within the framework of the right to development.<sup>277</sup> Although the world has experienced a precipitation of global action in recent years, characterised by the systematic transfer of aid to developing countries through the Millennium and Sustainable Development programmes, without clarity about the actual responsibilities of states, Pogge expresses reservation about the framing of such actions in dealing with the inequalities created by the global system.<sup>278</sup> In spite of Mathias Risse's scathing

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<sup>273</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights adopted by the International Commission of Jurists 1997.

<sup>274</sup> Commission on Human Rights, 'The right to development and practical strategies for the implementation of the Millennium Development Goals, particularly Goal 8' *Note by the Secretariat E/CN.4/2005/WG.18/TF/CRP.1* 2 November 2005.

<sup>275</sup> According to foundational principle 12 of the UN Guiding Principles on Business and Human Rights (pg 13), non-state actors are required to respect 'internationally recognised human rights expressed in the International Bill of Human Rights' even though they are not parties to the treaties. It is further stated (pg 14) that depending on the context, 'additional standards beyond the International Bill of Human Rights' may also apply, which does not exclude regional human rights treaties such as the Africa Charter.

<sup>276</sup> Pogge T (ed) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2008) 2-11.

<sup>277</sup> Pogge 2008 (n 276 above) 52.

<sup>278</sup> Pogge T 'The sustainable development goals: Brilliant propaganda?' (2015) *Annals of the University of Bucharest – Political Science Series ISSN 1582-2486* 1.

critique of Pogge's thesis as fallacious,<sup>279</sup> the reality as Bailey and Golan rightly point out is that global arrangements usually only provide the opportunity to foreign stakeholders to impose their policy choices (with the accompanying consequences) without Africa's active involvement in the decision-making processes.<sup>280</sup> Owing to the recognition that non-state actors are equally accountable for human rights offences, for purposes of proper safeguard, my argument supports the need for developing an African jurisprudence 'on holding non-state actors accountable for human rights violation in Africa'.<sup>281</sup>

In adjudicating on provisions of the Charter, the African Commission is mandated to draw inspiration from international law, comprising the African instruments on human and peoples' rights, the UN Charter, the international bill of human rights, general or specialised international conventions and other instruments adopted by the United Nations.<sup>282</sup> To draw inspiration from the UN Charter, for example, means that the African Commission needs to interpret the purpose of international cooperation enshrined in the Charter as entailing respect for and advancement of human rights and fundamental freedoms.<sup>283</sup>

### **3.3. Relevance of the Right to Development Governance to Africa**

In addition to the discussion in the early sections of this chapter with regard to the challenges in implementing the right to development in Africa, this section is intended to provide an even more vivid picture of the actual scenario, to substantiate why it is relevant to give the right to development governance particular consideration. With the level of backwardness in Africa as

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<sup>279</sup> Risse M 'Response to world poverty and human rights: Do we owe the global poor assistance or rectification?' (2003) *Ethics & Int'l Aff* 9-18.

<sup>280</sup> Bailey F & Dolan AM 'The meaning of partnership in development: Lessons for development education' (2011) 13 *Policy & Practice: A Development Education Review* 35.

<sup>281</sup> Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa 2009 preamble.

<sup>282</sup> African Charter (n 1 above) arts 60-61.

<sup>283</sup> Charter of the United Nations adopted in San Francisco on 26 June 1945 art 3(1).



compared to other parts of the world,<sup>284</sup> Jamie Whyte is right in asking whether pursuing the right to development can in effect bring about development.<sup>285</sup> It is important not to lose sight of the fact that the right to development in Africa relates more to livelihood sustainability issues and thus, for Bianca Gawanas, development should aim to enhance peoples' capability to overcome poverty, social and economic challenges and human rights violations.<sup>286</sup> It explains why, as Alberto Melo ascertains, issues relating to poverty eradication have constituted the primary essence of development.<sup>287</sup> By recognising the human person as the central subject of development, it is affirmed that through their active participation the challenges posed by poverty and human rights violations can be overcome.<sup>288</sup> Accordingly, theoretical guarantees suppose that the right to development should translate into practical assurances of freedom from want and fear of socio-economic deprivation.<sup>289</sup>

However, the African narrative proves the contrary, where according to Ivan Illich, development has rather been programmed to generate poverty.<sup>290</sup> Of the 55 countries that make up the African Union, 38 are ranked within the bracket of 'least developed' or 'heavily indebted poor countries'.<sup>291</sup> According to Melo, development in Africa as it has been shaped by global politics

<sup>284</sup> Vickers B 'Africa and international trade: Challenges and opportunities' (d.n.a) *Thabo Mbeki Leadership Foundation – International Trade and Economic Development Division* 9.

<sup>285</sup> Whyte J 'Book review: Development as a human right edited by Bard A Andreassen and Stephen P Marks Harvard University Press London England 2006' (2007) 1:1 *The Elect J Sust Dev* 't 47.

<sup>286</sup> Gawanas B 'The African Union: Concepts and implementation mechanisms relating to human rights' in Bosl A & Diescho J (eds) *Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 145.

<sup>287</sup> Melo A 'Is there a right to development?' (2008) 1:2 *Rizoma Freireano – Instituto Paulo Freire de España* 4.

<sup>288</sup> DRtD (n 1 above) art 2.

<sup>289</sup> UN Universal Declaration of Human Rights adopted by GA Res 217 A(III) of 10 December 1948 preamble.

<sup>290</sup> Illich I 'Development as planned poverty' in Rahnema M & Bawtree V *The Post-Development Reader* (1997); Melo (n 287 above) 3.

<sup>291</sup> World Bank 'Least developed countries: UN classification' available at: <http://data.worldbank.org/region/LDC> (accessed: 12 October 2015); see also World Bank 'Heavily indebted poor countries (39 countries)' available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260049~menuPK:64166739~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html> (accessed: 12 October 2015).



has become just another aspect of the warfare economy that has pervaded the history of humankind and hijacked opportunities for advancement through diverse forms of domination.<sup>292</sup> The resultant scenario has been one of perpetual dependence through a structured world order that basically deprives the majority of African peoples of the capability to compete on a fair and equitable basis with the rest of the world. Pogge and Salomon estimate that the unjust world order violates fundamental human rights through the systematic dispossession of marginalised peoples of their proportional share in the allocation of resources, which has resulted in large-scale deficits in human well-being.<sup>293</sup> Of course, as Van der Have has also rightly observed, deprivation of this nature hinders the development process and thus negates people's right to participate in a manner consistent with universally acceptable human rights standards.<sup>294</sup>

Coupled with Africa's corrupt and irresponsible leadership, which accounts for the internal setbacks to development on the continent, the peoples of Africa are also confronted with the problem of dispossession of their productive capabilities for development, stemming largely from the dominant practices of foreign stakeholders. According to the former UN High Commissioner for Human Rights Navi Pillay, dispossession stems from 'denial of [the] fundamental human right to development'.<sup>295</sup> On the contrary, Ibrahim Salama highlights the fact that the essence of the right to development is to establish an environment that enables or at least does not hinder the enjoyment of basic human rights and freedoms; an environment that is free from structural and unfair obstacles to development.<sup>296</sup> Salama's view is not divorced from the reasons for which Africa championed the cause for the right to development, essentially to

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2015). Out of the 48 countries classified as least developed 34 are African countries and of the 39 countries classified as heavily indebted 33 are also African countries.

<sup>292</sup> Melo (n 287 above) 4.

<sup>293</sup> Pogge T 'World poverty and human rights' (2005) 19:1 *Ethics & Int'l Aff* 3-5; Salomon M 'International economic governance and human rights accountability' (2007) *Law, Society and Economy Working Paper No 9* 1-28.

<sup>294</sup> Van der Have N 'The right to development and state responsibility: Towards idealism without a sense of realism?' (2012) *LLM Thesis University of Amsterdam* 9.

<sup>295</sup> Sengupta A 'A rights-based approach to removing poverty' in Ingram JK & Freestone D (eds) *Human Rights & Development* (2006) 8.

<sup>296</sup> Salama (n 8 above) 67 & 53.

ensure while striving to achieve substantive development that justice in development also prevails across the continent.

As a treaty provision, the right to development sets the standard that dispossession of the peoples of their resources and productive capacity would amount to a violation. This legal principle has been upheld in case law, where, alluding to the exploitative attitude of European colonisers, the African Commission noted in the *SERAC* case that:

[T]he human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation.<sup>297</sup>

With this observation, it is worthy to recall, as Rajagopal makes clear that the right to development was conceived to achieve a 'fundamental transformation of global governance'<sup>298</sup> and as Kiwanuka posits, to culminate the process of dissociating from colonial domination.<sup>299</sup> Because the right to development in Africa has evolved as an extension of the de-colonisation project that only resulted in nominal political independence,<sup>300</sup> the prevailing circumstances require a radical shift from development models that mostly only perpetuate paternalism to considering the right to development governance, which guarantees actual self-determination in making the policy choices that are applicable to the context in Africa.

#### **4. Concluding Remarks**

Faced with the reality that Africa's development agenda is still predominantly determined by foreign stakeholders whose actions impact adversely on the well-being of the African peoples, I explored the extent to which the right to development could be conceptualised as an alternative

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<sup>297</sup> *SERAC* (n 14 above) para 56.

<sup>298</sup> Rajagopal B 'Right to development and global governance: Old and new challenges twenty-five years on' (2013) 35:4 *HRQ* 893.

<sup>299</sup> Kiwanuka (n 219 above) 95.

<sup>300</sup> Anghie (n 159 above) 66.

model to development cooperation. In doing so, I found reason to first of all look at the extent to which the right to development has been actualised both at the continental and domestic levels in relation to the obligation to adopt appropriate policies to ensure its realisation. Drawing from the conceptual nature of the right to development in Africa, which is intended to be achieved either through collective or individual state action, the African Union and its development agency NEPAD as well as national governments are identified as the mandated policy frameworks within which the right to development is envisaged to be achieved. Through a cursory analysis of these entities, I point out the challenges involved in the realisation of the right to development as a result of the patronising nature of development cooperation that sustains the *status quo* of dominance over the development processes in Africa.

Not until the *status quo* of foreign domination has changed, the realisation of the right to development in Africa will remain a major challenge. I provide explanation to this claim by looking at the deficiencies in development cooperation models as a justification for my argumentation in favour of a shift in paradigm from development cooperation to considering the right to development as a suitable development model for Africa. As opposed to the inordinate dependence on development cooperation, which only perpetuates foreign domination and exploitation that retards progress on the continent, the right to development provides the opportunity for actual self-determination in making alternative development choices. Owing to the absence of a home-grown functional development model, the assurance that the right to development may accomplish much more for Africa than development cooperation is premised on the fact that it is by nature conceived as a tool for development policy-making.<sup>301</sup>

The right to development governance as it is presented in this chapter as a home-grown substitute to development cooperation is thus conceived from the combined conceptual formulation of the generic perception of the right to development as a policy tool and also as a development paradigm. The right to development governance model is designed to relate to the practical on-the-ground realities that the peoples of Africa are confronted with on a daily basis in accordance with which I demonstrate how and what implementation of the model entails to be able to drive transformation on the continent. Implementation of the right to development,

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<sup>301</sup> DRtD (n 1 above) art 2(3), African Charter (n 1 above) art 20(1); see generally sect 2.2.2 above.

particularly when it has to do with policy measures for the achievement of substantive development is, as Sengupta has rightly stated, more important than legal enforcement.<sup>302</sup> However, the well-being of the peoples of Africa is not only compromised through denial of material entitlements but also through development injustices that contravene the law that protects the right to development in Africa. Because the right to development dispensation imposes an obligation for compliance with the law both by African states and foreign stakeholders involved in the development process in Africa as highlighted in chapter four,<sup>303</sup> making the right to development governance a reality also entails looking at the operational considerations with regard to the potential for violation. I argue in this regard that when the prevention approach fails and a violation is established, due process of the law must proceed not only because the right to development is anchored in the law but essentially because its realisation guarantees improved well-being for the peoples of Africa.

With evidence that development cooperation cannot practically ensure the realisation of the right to development as I have pointed out throughout this thesis, and in presenting the right to development governance as a suitable alternative as I have done in this chapter, my purpose is to advance the argument for a paradigm shift in developing thinking across Africa. When the peoples of Africa opted for self-determination against imperial domination under colonial rule, it took decisive collective action to break the chains of subjugation.<sup>304</sup> Comparatively, the manifestation of imperial domination under the present circumstances is more ideological and therefore, also needs decisive collective action but more in terms of policy making to effect a systems change from the pre-existing models that continue to hold the peoples of Africa in subordination to foreign stakeholders. To this end and in relation to the African agenda for transformation and sustainable development, the need for a home-grown functional model for development, which obtains from the range of commitments to prioritise the right to development as illustrated in this chapter, necessitates further concrete measures on the basis of which I move on to outline some policy recommendations in the concluding chapter.

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<sup>302</sup> Sengupta A 'Right to development as a human right' (2001) 36:27 *Econ & Pol Wkly* 2533.

<sup>303</sup> See sects 2.2.1 & 2.2.2 of chapter four.

<sup>304</sup> See sect 2.2.1 of chapter two.

## CHAPTER SIX

### Conclusion and Recommendations

*Development – real development – is about freedom from fear and freedom from want, for all people, without discrimination. Any more narrow analysis, focused entirely on economic growth, or private investment, or governmental structures, is destined to fail.*

Craig Mokhiber, UN Human Rights Office, LDC-IV 2011.

#### 1. Concluding Observations

In this concluding chapter, I highlight the primary enquiry, which has been to determine whether and to what extent the right to development in Africa is achievable through development cooperation. In making the determination, I first of all tried to identify the root causes to Africa's development challenges, which I establish emanate from a compromised history of engagement with European invaders for a period of close to six centuries. I identify that the right to development emerged from that background not as a solicitation for development assistance but rather as an expression of self-determination against subjugation. With this background knowledge, I point out that there is indeed a right to development in Africa that has evolved as a claimable human right but most importantly as a development paradigm that is yet to be explored. In this way, I contend that the right to development, being itself a development paradigm, cannot be achieved through development cooperation, which as a development paradigm in its own terms, only subjects Africa to the patronage and benevolence of developed countries. I explain Africa's inordinate dependence on foreign assistance as a model for development by the absence of an operational development model for the continent, which has meant the inability to make alternative development choices that are relevant to Africa.

Drawing from the dual dimension of the right to development as a human rights concept and a development paradigm as illustrated in chapter two, I make the argument that its full realisation entails exploring its dimension as a development paradigm, envisaged as a tool for policy making and suitable model for development. In the absence of a functional model for

development, I make the proposition to substitute development cooperation with the right to development governance. On account of the fact that Africa remains exposed to foreign domination and exploitation, I advance the argument, as part of the operational consideration in implementing the right to development governance for African countries to exercise the right to self-determination in formulating appropriate national legislation and development policies to regulate and limit the influence that these actors exert in their operations in Africa.<sup>1</sup> This motivates the position I take in advancing the argument for a paradigm shift from development cooperation to the right to development governance as an assurance that the right to socio-economic and cultural development guaranteed to the peoples of Africa, is adequately protected.

In section 1.1 that follows, I provide a summary of the main findings. I go on in section 1.2 to describe the transformative potential of the right to development governance as a substitute to development cooperation, which I argue is not suitable as a model for development in Africa. I then proceed in section 2 to make some policy recommendations relating to priority actions that need to be taken at the continental level by the African Union/NEPAD in section 2.1 and at the domestic level by state governments in section 2.2.

### **1.1. Summary of Main Findings**

In this section, I discuss the main findings of this thesis in relation to the research questions set out in chapter one. Pertaining to the central enquiry to determine whether the right to development in Africa is achievable through development cooperation, I established that conceptually, development cooperation is opposed and in fact, contradicts the African conception of the right to development. As a justification for this claim, I set out in chapter two to illustrate that there is indeed a right to development that has evolved in Africa not as a solicitation for development assistance but as an assertion of self-determination against the injustices perpetuated in Africa through various forms of domination. The analysis reveals that by nature, the right to development in Africa is formulated on the one hand, as a human rights concept to ensure that development processes are regulated by the principles of justice and equity and on the other hand, as a development paradigm intended to achieve improved well-being for

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<sup>1</sup> See sect 3.2.2 of chapter five.

the peoples of Africa. The African conception of the right to development therefore not only adds value to the discourse on human rights and development, its recognition as a legal entitlement creates a unique dispensation that allows for justice in development to prevail and for substantive development to be achieved.<sup>2</sup> I established that the realisation of the right to development entails the fulfilment of three normative requirements: First, that African countries exercise sovereignty in formulating national development policies; second, that obstacles to development, including foreign domination and external interference are eliminated<sup>3</sup> and third, that an enabling environment is established to ensure that the right to development is effectively put into practice.

As to whether the right to development could be achieved through development cooperation, I explore in chapter three the mechanism of development cooperation in relation to the right to development in Africa. Through a critical analysis, I establish that the probability to achieve the right to development through development cooperation is extremely minimal, especially considering the primary motives behind prevailing patterns of development cooperation that aim primarily at safeguarding the interests of foreign stakeholders.<sup>4</sup> Owing to its patronising nature, I find that development cooperation basically runs contrary to the entitlement to self-determination that guarantees the right to make policy alternatives. Based on this finding, I make the argument that studies in the area of human rights and development in Africa ought to shift focus from development cooperation towards exploring the right to development as a suitable alternative, importantly because of the exigency to craft a functional development model to drive the continent's agenda for radical transformation.

Looking at the right to development dispensation, which as indicated is established in Africa, which provides for actual self-determination in making development alternatives, as shown in chapter four, I point out that effective implementation remains problematic due on the one hand to internal constraints and insufficiencies and on the other hand to the dominant influence of foreign stakeholders in shaping Africa's development agenda. With regard to the latter, even

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<sup>2</sup> See sect 5 (concluding remarks) of chapter two.

<sup>3</sup> Declaration on the Right to Development Gen Ass Res 41/128 1986 arts 5.

<sup>4</sup> See sect 3.2.1 of chapter three.

though it has been argued that non-state actors, including foreign stakeholders are obligated to respect human rights extraterritorially and therefore, equally accountable for wrongful action,<sup>5</sup> my analysis reveals that those operating in Africa are largely insulated from accountability. The right to development dispensation not only entitles the peoples of Africa to claim entitlement to development as a matter of right, it also makes provision for the enforcement of that right through litigation although its full realisation cannot depend exclusively on judicial processes. With regard to legal accountability, I point out the challenges posed by the pre-emptive application of international law and the inadequacies in regional and domestic laws, which do not envisage legal action against foreign stakeholders whose actions and excessive influence often, contravene the right to development in Africa with impunity.

On account of the foregoing, I set out in chapter five the need to explore the practical dimensions of the right to development as a development paradigm necessitating the setting of alternative priorities.<sup>6</sup> By conceptual formulation, in terms of which the right to development is envisaged as integral to the right to self-determination, I establish that the peoples of Africa are indeed entitled to shape the development future of the continent through contextually relevant policy choices in dealing with actual realities on the ground. However, a cursory analysis of the African Union (AU)/NEPAD and two African countries shows that the right to development is yet to become a practical reality as envisaged by the range of instruments that establish the right to development dispensation in Africa. Examined in relation to the deficiencies in development cooperation approaches, I demonstrate the need for a paradigm shift towards greater focus on the right to

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<sup>5</sup> D'Aspremont J *et al* 'Sharing responsibility between non-state actors and states in international law: Introduction' (2015) 62 *Neth Int'l L Rev* 50; Okafor OC "'Righting" the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples' Rights' in Marks SP (ed) *Implementing the Right to Development: The Role of International Law* (2008) 60; Chirwa DM 'Toward revitalizing economic, social and cultural rights in Africa: *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*' (2002) 10:1 *Hum Rts Brief* 16; Frankovits A 'Rules to live by: The human rights approach to development' (2002) 17 *PRAXIS-The Fletcher J Dev't Stud* 9; UN Universal Declaration of Human Rights adopted by General Assembly resolution 217 A(III) of 10 December 1948 preamble; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights adopted by the International Commission of Jurists on 28 September 2011 para 27.

<sup>6</sup> Sengupta A 'Right to development as a human right' (2001) 36:27 *Econ & Pol Wkly* 2533.



development governance as an alternative development model for Africa. In terms of functional modalities, I set out among other considerations Africa's capacity to ensure the actualisation of the right to development governance, including through the prevention or violations approaches against setbacks to effective implementation. Taking the right to development governance as the principal finding and more so, the central focus on which the proposition for a paradigm shift is formulated, I proceed to expatiate on its potential as a transformative model suited to Africa.

## **1.2. Transformative Potential of the Right to Development Governance**

By looking at the transformative potential of the right to development in this section, I aim to reiterate the need, if Africa is to make progress, to consider the right to development governance as a suitable alternative to development cooperation paradigms that only promote dependency and foreign ascendancy that has held back progress in Africa by several decades. Unlike development cooperation, the right to development governance provides the opportunity for independent policy making as illustrated in chapter five,<sup>7</sup> to ensure the realisation of the aspirations for radical transformation contained in Agenda 2063.<sup>8</sup> As a rights-based model, the right to development governance provides the platform for the realisation of the composite of human rights, which otherwise may not be achieved in isolation. Where specific rights are not explicitly provided for, the right to development governance could be used as an interpretative guide,<sup>9</sup> to establish the existence of such rights. For instance, although the right to food is not enshrined in the African Charter, the African Commission established in the *SERAC* case that it is implied in article 22 on the right to socio-economic and cultural development.<sup>10</sup> Thus, to violate the right to development would amount to violating the range of associated rights.

As a justiciable entitlement, the right to development imposes an obligation for legal accountability and thus guarantees protection against impunity. Litigating related violations is

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<sup>7</sup> See sect 2.2.2 of chapter five.

<sup>8</sup> African Union Commission 'Agenda 2063: The Africa we want' (2015) *African Union* para 66(b).

<sup>9</sup> See sect 3.1.1 of chapter five.

<sup>10</sup> *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* Comm 155/96(2001) AHRLR 60 (ACHPR 2001) para 64.

certain to have wide-ranging impact and therefore dramatically improve human well-being in Africa. As an interpretative guide, the right to development governance provides the basis for gauging the standards of development to be attained in Africa and as a home-grown model; it also provides a platform for development to be achieved with justice, allowing for the realisation of human rights while simultaneously pursuing economic growth objectives in an equitable manner. The right to development governance model accords priority to people-centered development programming and accordingly orients policy formulation, development planning and corresponding modalities for integrated governance. Unfortunately, prevailing theories have often stood in direct opposition to effective action.<sup>11</sup> This is explained by the fact that although Africa has pioneered and remains the pace-setter on the right to development, in formulating the continental policy agenda for transformation, the AU Commission failed to take cognizance of the right to development as a suitable model to drive the transformation process.<sup>12</sup>

Similar to the haphazard manner in which independence was achieved, the vision for a new Africa outlined in Agenda 2063 includes an ambitious roadmap for development but fails to specify the applicable model for addressing concretely the issues at stake, particularly the development injustices and endemic human rights violations on the continent. Africa is burdened not only by a human development crisis but more crucially by a systems problem that requires a transformative model to ensure an overhaul of the system. While the Agenda 2063 document makes mention of an African model and approach to development and transformation,<sup>13</sup> it neither states concretely what the model or approach is nor does it describe how to drive the transformation process to effective realisation. The Agenda is established to be rooted in pan-Africanism and African renaissance, which, of course, are valuable political ideologies that reflect the vision for a new Africa.<sup>14</sup> However, these ideologies need to be harnessed and guided by the home-grown right to development governance model, which, as I have endeavoured to

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<sup>11</sup> Šlaus I & Jacobs G 'In search of a new paradigm for global development' (2013) 1:6 *Cadmus Journal* 2-3.

<sup>12</sup> The Agenda 2063 document only passively makes mention of the right to development in the last paragraph (para 76) where it is stated that 'regard, we reaffirm the Rio principles of common, but differentiated responsibilities, *the right to development* and equity, mutual accountability and responsibility and policy space for nationally tailored policies and programmes on the continent'.

<sup>13</sup> AU Commission 'Agenda 2063' (n 8 above) para 74(e)&(h).

<sup>14</sup> AU Commission 'Agenda 2063' (n 8 above) para 1.

point out in this thesis, is conceived in conformity with the pan-African renaissance philosophy of African solutions to African problems.

In coming to the conclusion in favour of a paradigm shift in human rights and development thinking as a prerequisite for radical transformation, I further state the claim that change of the magnitude that is envisaged for Africa can only be achieved through rigorous policies and a compelling development model in the form of the right to development governance. While this thesis opens up avenues for further research on the right to development governance model, on account of its pragmatic nature, requiring concrete action for its realisation, I proceed to make the following recommendations with the aim to address the central concerns relating to the lack of a functional model to redress the set-backs to development on the continent.

## **2. Policy Recommendations**

Because the right to development is envisaged to be achieved collectively through the concerted effort of all African countries and also through individual state action, the recommendations made in this section are intended to provide the baseline for priority measures that need to be taken at the continental and domestic levels.

### **2.1. African Union/NEPAD**

#### **2.1.1. Common policy position on the right to development**

As custodian of the regulatory instruments on issues relating to human rights and development, the AU/NEPAD in its policy-making and standard-setting role needs to harmonise and promote a common policy position on the right to development that should become lawfully and uniformly applicable through general mainstreaming into development practice in Africa. The obligation to do so derives from the Constitutive Act that compels member states to adopt common positions on issues of relevance to Africa.<sup>15</sup> The need for harmonisation draws from the fact that the formulation of the right to development in Africa is not standardised. For instance, while the

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<sup>15</sup> Constitutive Act of the African Union adopted in Lomé Togo on 11 July 2000 art 3(d); AU Commission 'Agenda 2063' (n 8 above) para 61.

African Charter enshrines the right to development as a collective entitlement aiming at socio-economic and cultural development, other instruments include the individual dimension and additionally envisage its realisation to incorporate civil and political development.<sup>16</sup> Discrepancies of this nature render the realisation of the right to development haphazard.

Harmonisation necessitates considering the possibility of incorporating the right to development governance as a home-grown model to address the question of lack of a functional model to drive radical transformation on the African continent. A common policy position on the right to development has the advantage to ensure coordinated action that can significantly influence decision-making processes in global consultations relating to development in Africa. Thus, although Agenda 2063 calls on ‘the international community to respect Africa’s vision and aspirations and to align their partnerships appropriately’,<sup>17</sup> I contend that only a rigorous policy framework in the form of the right to development governance can indeed compel the international community to align with the African agenda for development. There certainly is a need for further research into the practical dimensions of the right to development governance, to determine how it can effectively be applied as a model for development in Africa.

As the principal development agency of the AU, NEPAD owes a crucial role in advancing the right to development governance. Based on the finding that the right to development is not achievable through development cooperation, NEPAD needs to balance its neoliberal and donor-driven approach through committed mainstreaming of right to development standards both in its programming for development and its relations with foreign stakeholders. The African Peer Review Mechanism could be used as the platform to engage African governments to become more committed to their legal obligations on the right to development, especially in terms of espousing the proposed right to development governance model for domestic implementation. The reasoning is that by using the right to development governance model as a benchmark in assessing the performance of African governments, they can be held to greater accountability for

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<sup>16</sup> See sects 2.1 & 2.2 of chapter five for details on how the various treaty and constitutional provisions that enshrine the right to development are formulated.

<sup>17</sup> AU Commission ‘Agenda 2063’ (n 8 above) para 76.

the fulfilment of the full range of human rights in their entirety as well as for the realisation of development objectives as a guarantee for the attainment of an improved standard of living for the peoples of Africa.

### **2.1.2. Pan-African fund for development**

The need for an African development funding mechanism is imperative. As a counter measure to dependency on foreign assistance and at the same time to maintain a consistent flow of development funding for the purpose of collective realisation of the right to development, the AU/NEPAD needs to establish a *pan-African fund for development* to which, as a policy measure, every African country is obligated to make mandatory contributions. By a pan-African fund for development, I envisage something similar to the Global Fund, which is however, limited to funding only malaria, tuberculosis and HIV/AIDS programmes in Africa and more so, is only managed from abroad, and therefore, cannot adequately redress the myriad of development challenges in Africa. The pan-African fund should be design to also attract a steady flow of funding from the African corporate sector, philanthropic organisations, private foundations and most importantly, compulsory payments of royalties and corporate social responsibility levies by the African corporate sector and foreign multinational corporations operating in Africa.

The relevance of the fund is justified by the fact that the right to development engenders positive obligations requiring the mobilisation of enormous resources and also by the commitment to turn away from aid dependency towards self-sufficiency.<sup>18</sup> As long as Africa remains dependent on external funding, it risks remaining predisposed to the patronage of foreign donors, which as shown in chapter three,<sup>19</sup> constitutes a major hindrance to socio-economic and cultural self-determination. As an additional remedy to financing development on the continent, the African Union needs to consider reviving the initiative to create an African Monetary Fund as an alternative source of investment finance for Africa.<sup>20</sup> I estimate that it is only with full control over its own sources of funding that Africa can be able to gainfully manage its resources in

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<sup>18</sup> AU Commission 'Agenda 2063' (n 8 above) para 72(o).

<sup>19</sup> See sect 2.2.3 of chapter three.

<sup>20</sup> See sect 3.3.2 of chapter three.

relation to the development priorities on the continent, particularly, the need to advance the productive capabilities of the African people.

The pan-African fund should of necessity be administered by NEPAD, which should have as additional mandate to develop and diligently manage a donor database, particularly of foreign multinationals and the African corporate sector besides other donors and in collaboration with state governments and regional development banks and other financial institutions, device modalities for the collection of the requisite payments. The funds should be designated to the realisation of extensive developmental programmes and projects such as the construction of educational, healthcare, water and sanitation and housing facilities as well as ensure food security for collective benefit and well-being of the peoples of Africa as a whole.

### **2.1.3. Technology transfer in exchange for Africa's resources**

The AU/NEPAD needs to adopt a firm continental policy on the question of technology transfer, which although has been the subject of broad consensus in international fora,<sup>21</sup> has never concretely been implemented. Unlike the 0.7% promise of development assistance that has never been achieved,<sup>22</sup> the issue of technology transfer is claimable and achievable. For instance, in keeping with the resolve to '[t]ake measures to ensure technology transfer',<sup>23</sup> it is in Africa's legitimate interest to ascertain that undertakings committed to by industrialised countries are fulfilled. Although natural resources constitute an essential determinant in the realisation of the right to development,<sup>24</sup> Africa's resources have been the object of wanton and abusive exploitation by industrialised countries. In way of redress, Africa needs to adopt a robust policy with emphasis on the transfer of relevant technology as a precondition for resource exploitation by foreign stakeholders.

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<sup>21</sup> Amin S *Imperialism and Unequal Development* (1977) 169; See also United Nations *Compendium of International Arrangements on Transfer of Technology: Selected Instruments* (2001).

<sup>22</sup> See sect 2.2.1.2 of chapter five.

<sup>23</sup> AU Commission 'Agenda 2063' (n 8 above) para 72(o).

<sup>24</sup> See sect 4.2.1.1 of chapter two & sect 3.1.3.2 of chapter five.

Putting such a policy in place guarantees not only gainful utilisation of the continent's resources but also ensures that the acquisition of new technology provides the opportunity to the peoples of Africa to develop their productive capabilities. The leverage to accomplish this objective might pose a challenge. However, Africa possesses the requisite resources for driving technological advancement, which could be used as a bargaining chip to secure the transfer of the necessary skills and technology to process the raw material resources at their source. Creating the necessary leverage requires, as indicated above, a common policy framework that can uniformly be applied across Africa.

#### **2.1.4. Legal protection**

In view of ensuring adequate protection against abuse and exploitation by foreign stakeholders, I recommend expanding understanding of the right to development in Africa. In accordance with article 66 of the African Charter that allows for the adoption of special protocols to complement provisions of the Charter, the Africa Union needs to adopt a policy instrument in the form of an additional protocol on the right to development to provide conceptual and normative clarity on the duty of member states to create the enabling environment for the realisation of the right to development. The protocol would need to highlight the right to development governance as an interpretative guide to all laws and policies that regulate development processes in Africa.

Otherwise, because adopting an additional protocol may be arduous, as an interim measure, the African Commission may need to adopt General Comments on article 22 of the Charter to enable an in-depth understanding of the African conception of the right to development in terms of substantive contents, scope of application and modalities for realisation. Relating to litigation, the African Commission needs to improve on the nature of remedies it awards so that complainants could be able to anticipate the outcome of the adjudication process proportionately to the purpose of the right to development that promises improved well-being.

## **2.2. States Governments**

### **2.2.1. The inherent duty to protect**

Besides the measures that need to be taken at the continental level as shown above, by virtue of the legal commitments undertaken under the Constitutive Act, the African Charter and other related instruments, domestic implementation remains elemental to the realisation of the right to development. In this regard, as highlighted in chapter four, state governments in Africa should demonstrate, as an integral part of the right to self-determination, the political resolve and clarity of purpose in concretely ensuring that the right to development is achieved.<sup>25</sup> It entails translating the legal commitments undertaken under treaty instruments into domestic laws and appropriate national development policies. With regard to the exploitative and abusive conduct of foreign stakeholders, it weighs on African states to improve on or adopt domestic legislation that explicitly includes provisions on regulating the activities of these external actors.

Domestic laws may not necessarily need to impose a positive duty compelling foreign stakeholders to fulfil the right to development in Africa but unavoidably must emphasise on the negative obligation to refrain from violations. National development policies should be designed to conform to the conceptual reading of the right to development as a tool for policy making that entitles African states with actual self-determination in crafting concrete and realistic plans of action that must seek to improve the well-being of the African peoples.<sup>26</sup> On account of the finding that development cooperation is inherently lopsided, paternalistic and counter-productive to socio-economic and cultural self-determination; African states need to demonstrate uncompromised commitment to advancing the right to development governance as a suitable alternative development model.

The right to development governance guarantees the choice to either remain perpetually subordinate to foreign stakeholders or rise above prevailing forms of domination to tilt the balance of power relations in global development politics in Africa's favour. Given that economically powerful countries are increasingly creating cooperation groupings to wield more influence, it is even more strategic if domestic policies are progressively aligned among African countries to ensure standardised application. While it is a sovereign right bestowed on each African country to adopt a policy framework to drive national development processes, it is

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<sup>25</sup> See sect 3.1 of chapter four.

<sup>26</sup> See sect 2.2.2 of chapter five.



irrational to seek to do so in isolation when greater benefits could be achieved by pulling efforts together in accordance with the requirement to ensure collectively that the right to development is achieved.

Notwithstanding the gains that may accrue to some African countries through development cooperation structures that are established outside of the pan-African network, a decisive collective shift from development cooperation arrangements has the potential to project Africa into greater levels of hegemony. It demands shared political conviction and unity of purpose, which I posit is attainable through the right to development governance. It is only by embracing the home-grown and context-specific model that African states can effectively disengage from dependency on foreign assistance and the bondage of development cooperation.

### **2.2.2. Accountability**

Conceptually, the right to development demands genuine accountability for its realisation as illustrated in chapter five.<sup>27</sup> It implies that if the right to development governance is to be achieved, domestic policies must factor in the aspect of accountability, especially with regard to foreign stakeholders. Based on the finding that non-state actors are imposed with an extraterritorial obligation to abide by universal human rights standards,<sup>28</sup> foreign stakeholders are compelled, at least negatively to refrain from actions that may infringe on the right to development in Africa. It is important to emphasise as I have endeavoured to illustrate in the previous chapters that accountability within the context of the right to development governance does not exclude legal action against foreign stakeholders when a threat or violation is alleged.<sup>29</sup>

As such, if the realisation of the right to development in Africa is to become effective, it is crucial for African states to ensure that national legislation and development policies adequately make provision for legal accountability, including ensuring that domestic courts are appropriately equipped and empowered to adjudicate on the right to development. This is important on the most part because the admissibility of cases at the level of the African

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<sup>27</sup> See sect 3.1.1 of chapter five.

<sup>28</sup> See sect 3.1.3.2 of chapter five.

<sup>29</sup> See sect 2.2.2.2 of chapter four & sect 3.2.2 of chapter five.

Commission and the African Court depend largely on the prior accessibility of domestic courts as jurisdictions of first instance, in satisfaction of the requirement to exhaust local remedies. This imposes an even greater duty on African states that have not yet domesticated the African Charter, to proceed to do so in order to expand the jurisdiction of domestic courts to be able to enforce and make the right to development a reality at the domestic level.

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