

Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development

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DECLARATION

I declare that this thesis is my original work and that it has not been submitted for the award of a degree at any other University.

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SUMMARY

The point of departure of this dissertation is that notwithstanding the controversy about the right to development (RTD), the African human rights system expressly recognises it as a human right of a collective nature. The content of this right is a bundle of rights (civil and political as well as economic, social and cultural) which should be understood in their interdependency and interconnectedness. In addition, the RTD is a claim for a global justice characterized by a fair and equitable redistribution of the world's resources.

The purpose of this dissertation is to critically investigate the extent to which the RTD can be realised under the New Partnership for Africa's Development (NEPAD). NEPAD is the economic and development arm of the African Union which is compelled by its human rights mandate to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights including the RTD. The dissertation looks at how NEPAD could be used to realise the RTD in Africa.

After clarifying the theoretical and contextual links between NEPAD and the RTD, explaining the concepts pertaining to RTD, its nature and after locating its existence in the African human rights system, the dissertation examines the prospects for the realisation of this right through NEPAD. In doing so, it analyses NEPAD from a human rights perspective. It then goes on to look at the extent to which NEPAD's programmes on vulnerable groups and participation, are integrated into national development policies in Africa through case studies of Cameroon and South Africa. The dissertation also examines whether the new global partnership as prescribed by NEPAD is conducive to the realisation of the RTD.

The basic conclusion is that although NEPAD's plan to foster the provision of goods and services is not defined in terms of legal entitlements, with legal mechanisms to claim such entitlements, NEPAD's objectives and purposes are to improve human welfare, which is also the objective of the RTD. However, to enhance the prospects for the achievement of the RTD in Africa, NEPAD should establish and strengthen mechanisms for a full domestication and ownership of its plans and standards in African states. It should also strengthen the African Peer Review Mechanism (APRM) institutions at both continental and national levels. Further, it should involve the African Commission on Human and Peoples' Rights, which has

expertise in human rights, in its APRM. At the global level, among others, NEPAD should not only strive to be economically self-reliant, but its member states should speak with ‘one voice’ and present the African Union/NEPAD’s position at international fora and consistently ensure that Africa’s development contracts and agreements are informed by international human rights standards

TABLE OF CONTENTS

ACKNOWLEDGEMENT	3
SUMMARY	5
ABBREVIATIONS.....	11
CHAPTER 1 INTRODUCTION	14
1.1 Background to the study	14
1.2 Thesis statement	20
1.3 Research questions	20
1.4 Objectives of the study	21
1.5 Literature review.....	23
1.6 Research methodology	33
1.7 Limitations of the study.....	36
1.8 Scope of the study.....	38
1.9 Overview of chapters.....	38
CHAPTER 2 SETTING THE STAGE: CONCEPTUAL, CONTEXTUAL AND THEORETICAL FRAMEWORKS	41
2.1 Introduction	41
2.2 Conceptual framework	42
2.2.1 Concept of human rights in Africa.....	42
2.2.2 The notion of development	58
2.2.3 The RTD.....	67
2.2.4 Sustainable development.....	71
2.2.5 Poverty eradication.....	72
2.3 The RTD and NEPAD: Historical and theoretical contexts	73
2.3.1 The RTD: Historical context.....	73
2.3.2 The RTD: Theoretical context.....	76
2.3.2.1 Cosmopolitanism: A snapshot	76
2.3.2.2 A critique of cosmopolitanism.....	83
2.3.2.3 Cosmopolitanism in practice.....	86
2.4 NEPAD: Historical and theoretical contexts	94
2.4.1 NEPAD and the new institutionalism theory	102
2.4.1.1 Compulsory power.....	104
2.4.1.2 Institutional power	105
2.4.1.3 Structural power.....	106
2.5 A critique of NEPAD	107
2.6 Criticism of the APRM and its good governance underpinnings.....	112

2.7	Concluding remarks.....	117
CHAPTER 3 THE NATURE OF THE RIGHT TO DEVELOPMENT		119
3.1	Introduction	119
3.2	The content of the RTD	120
3.2.1	The RTD as an ‘inalienable’ human right.....	121
3.2.2	The right to participation as a cornerstone of the RTD.....	122
3.2.3	The RTD as a composite human right.....	124
3.2.4	The right to self-determination: An important element of the RTD	131
3.3	The RTD: A controversial human right.....	133
3.3.1	The controversy in academic arenas	133
3.3.1.1	The skirmishes on development law.....	133
3.3.1.2	The skirmishes on the RTD	141
3.3.2	Controversy at the UN.....	145
3.3.2.1	The politicisation of the debate.....	146
3.3.2.2	The reflection of the politicisation of the debate on the voting pattern of RTD resolutions	147
3.3.2.3	Different international organisations and different approaches <i>vis a vis</i> the RTD	151
3.4	The normative force of the RTD	152
3.5	Implementation of the RTD.....	162
3.5.1	The duty bearers of the RTD.....	162
3.5.1.1	The state	164
3.5.1.2	The international community	168
3.5.2	The right-holders of the RTD.....	188
3.5.2.1	Individuals.....	188
3.5.2.2	Peoples	189
3.5.2.3	The state	190
3.6	Concluding remarks.....	192
CHAPTER 4 THE RIGHT TO DEVELOPMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM		194
4.1	Introduction	194
4.2	Substantive provisions on the RTD in the African human rights system.....	195
4.2.1	The RTD in the ACHPR	195
4.2.2	The RTD in the Protocol to the ACHPR on the Rights of Women in Africa ..	201
4.2.3	The RTD in the African Charter on the Rights and Welfare of the Child	201
4.2.4	The RTD in RECs: The 1993 SADC Treaty	202

4.3	The RTD in African national laws – Case studies.....	202
4.3.1	Cameroon	203
4.3.2	Uganda	205
4.3.3	Malawi.....	206
4.3.4	Ethiopia	209
4.3.5	South Africa	210
4.4	The jurisprudence of the African Commission on the RTD.....	217
4.4.1	The <i>Bakweri Land Claims Committee v Cameroon</i>	218
4.4.2	<i>Democratic Republic of the Congo v Burundi, Rwanda, and Uganda</i>	218
4.4.3	<i>Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya</i>	221
4.4.4	<i>SERAC v Nigeria</i>	237
4.5	Concluding remarks.....	240
CHAPTER 5 NEPAD AND THE RIGHT TO DEVELOPMENT		242
5.1	Introduction	242
5.2	NEPAD and the holistic realisation of human rights	243
5.3	NEPAD’s legal status and the RTD	255
5.4	NEPAD and the right to participation	267
5.4.1	The birth of NEPAD - OMEGA/MAP: An impossible compromise.....	268
5.4.2	NEPAD/APRM and civil society participation.....	277
5.5	NEPAD, financial constraints and the RTD.....	304
5.6	Concluding remarks.....	310
CHAPTER 6 INTEGRATION OF NEPAD INTO NATIONAL DEVELOPMENT POLICIES: THE CASE OF CAMEROON AND SOUTH AFRICA.....		312
6.1	Introduction	313
6.2	NEPAD’s policies on integration of vulnerable groups and participation	314
6.2.1	NEPAD’s policies on vulnerable groups	314
6.2.2	NEPAD’s policies on participation.....	315
6.3	The Cameroonian subprogramme to integrate the vulnerable groups into the economy	317
6.4	NEPAD and the Cameroonian subprogramme to integrate the vulnerable groups in the economy	321
6.5	The right to participation in Cameroon	323
6.5.1	Participation through elections processes	324
6.5.2	Participation through decentralisation.....	329
6.6	NEPAD and the right to participation in Cameroon.....	333
6.6.1	NEPAD and the right to participation through elections in Cameroon.....	334
6.6.2	NEPAD and the right to participation through decentralisation in Cameroon	335

6.7	Integration of vulnerable groups through the New Growth Path in South Africa.....	336
6.8	NEPAD and the integration of vulnerable groups in South Africa	340
6.9	The right to participation in South Africa	342
6.9.1	The right to participation through electoral processes	342
6.9.2	The right to participation through decentralisation in South Africa	351
6.10	NEPAD and the right to participation in South Africa	359
6.10.1	NEPAD and the right to participation through elections in South Africa.....	360
6.10.2	NEPAD and the right to participation through decentralisation in South Africa ..	360
6.11	Concluding remarks	361
CHAPTER 7 NEPAD, THE NEW GLOBAL PARTNERSHIP FOR DEVELOPMENT AND THE RTD		363
7.1	Introduction	363
7.2	Brief overview of the concept of partnership	365
7.3	NEPAD and the new global partnership.....	367
7.3.1	Partnership between NEPAD and the G8	367
7.3.2	NEPAD in the WTO	371
7.3.2.1	The TRIPs agreement and the RTD.....	379
7.3.2.2	Agreement on Agriculture and the RTD.....	396
7.3.3	NEPAD, the ACP Agreement and the RTD	404
7.3.4	NEPAD, the EPAs and the RTD.....	409
7.4	Concluding remarks.....	416
CHAPTER 8 CONCLUSIONS AND RECOMMENDATIONS.....		418
8.1	Introduction	418
8.2	Summary of findings	418
8.3	Recommendations	424
SELECTED BIBLIOGRAPHY		429

ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACP-EC	African, Caribbean and Pacific Partnership Agreement with the European Community
ADB	African Development Bank
AFT	Aid-For-Trade
ANC	African National Congress
AoA	Agreement on Agriculture
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
CAADP	Comprehensive Africa Agriculture Development Programme
CDHR	Centre for Development & Human Rights
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CEMAC	Economic and Monetary Community of Central Africa
CEO	Chief Executive Officer
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CERDS	Charter of Economic Right and Duties of States
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Comission on Human Rights
CRC	Convention on the Rights of the Child
CSO	Civil Society Organizations
DFID	Department for International Development
DFL	Doctor For Life
DID	Droit international du développement
EAC	East African Community
EC	European Community
ECA	Environmental Conservation Act
ECOSOC	Economic Social and cultural Council
ECOWAS	Economic Community of West Africa
EDF	European Development Fund
EEC	European Economic Community
EPA	Economic Partnership Agreements
EU	European Union
FAO	Food and Agriculture Organisation
FDI	Foreign Direct Investment
FIDH	International Federation of Human Rights
FRA	Fuel Retailers Association
GATT	General Agreement on Tariffs and Trade
GM	Genetically Modified
GNP	Gross National Product
GRD	Global resources dividende

HFA 2000	Health for all 2000
HIPC	Heavily Indebted Poor Country
HSGIC	Heads of State and Government Implementing Committee
IBD	Inter-American Development Bank
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IFI	International Financial Institutions
IMF	International Monetary Fund
INGO	International Non Governmental Organisation
MAP	Millennium Africa Recovery Plan
MDG	Millennium Development Goals
MINATD	Ministry of Territorial Administration and Decentralisation
MOU	Memorandum of Understanding
NAI	New African Initiative
NALEDI	National Labour and Economic Development Institute
NAM	Non-Aligned Movement
NEO	National Election Observatory
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organizations
NGP	New Growth Path
NIEO	New International Economic Order
OAU	Organisation of African Unity
ODA	Official Development Assistance
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
POA	Programme of Action
POW	Panel of the Wise
PRSP	Poverty Reduction Strategy Paper
PSC	Peace and Security Council
REC	Regional Economic Communities
RTA	Regional Trade Arrangements
RTD	Right to Development
SADC	Southern African Development Community
SSA	Sub-Saharan Africa
TAC	Treatment Action Campaign
TRIPS	Trade Related Intellectual Property rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRTD	UN Declaration on the Right to Development
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organisation
URA	Uruguay Round Agreements
USA	United States of America

USAID	United State Agency for International Development
WHA	World Health Assembly
WHO	World Health Organisation
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

CHAPTER 1 INTRODUCTION

- 1.1 Background of the study
- 1.2 Thesis statement
- 1.3 Research questions
- 1.4 Objectives of the study
- 1.5 Literature review
- 1.6 Research methodology
- 1.7 Limitations of the study
- 1.8 Scope of the study
- 1.9 Overview of the chapters

This introduction starts out with the background of the study, identifies the research question, and outlines the aim and importance of the research. It also provides a literature review, sets out the thesis statement, highlights the methodology to be used, points out the limitations of the study, the scope of the study and finally provides a chapter overview.

1.1 Background to the study

One of the purposes of the United Nations (UN) Charter is

[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.¹

In the same vein, the Universal Declaration of Human Rights (the Universal Declaration) declares that ‘everyone is entitled to a social and international order in which all human rights can be fully realized’.²

¹ The UN Charter, art 3.

² Universal Declaration, art 28.

Out of these premises addressing human welfare, the right to development (RTD) was born. However, this right is the subject of a broad controversy. The lack of consensus on its status and significance is not limited to academics. Even at the United Nations (UN), the main forum for inter-governmental debates, the RTD remains a matter of serious contention. In fact, it has been 24 years since the UN General Assembly formally recognised the RTD,³ 17 years since an agreement involving all governments was reached on the RTD⁴ and 12 years since the establishment of an Open Ended Working Group (the Working Group) and the designation of an Independent Expert on the RTD,⁵ and 6 years since the UN High-Level Task Force on the implementation of the RTD was established⁶ (in the framework of the Working Group on the RTD). Nonetheless, in spite of this intense activity on the RTD, the international community is yet to have a legally binding agreement dealing with this right.

The African Charter of Human and Peoples' Rights⁷ (ACHPR) is the only human rights framework, together with its protocol on women's right in Africa in which the RTD is binding or has legal force. In other words, the ACHPR sets obligatory standards that states cannot bargain away, or negotiate. In fact, state parties to the ACHPR intended to create legal rights and duties. It could therefore be argued that in the ACHPR, the RTD is a legal right which should be fulfilled by state parties. Article 22(1) of the ACHPR reads as follows:

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.

³ The UNRTD was adopted by the UN General Assembly in its Resolution 41/128 of 4 December 1986.

⁴ The World Conference on Human Rights, Vienna Declaration and Programmes of Action (Vienna Declaration), June 1993.

⁵ Commission on Human Rights, Resolution 1998/72 adopted without a vote on 22 April 1998 appointed Arjun Sengupta as the UN Independent Expert of the RTD.

⁶ The fifth session of the Working Group on the right to development recommended among other things the constitution of a High Level Task Force for the Implementation of the RTD within the framework of the Working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights through its Resolution CHR 2004/7.

⁷ Adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 December 1986.

This development is viewed as an aspect of African contribution to the human rights discourse. Evans and Murray observed: ‘The African Charter is unique in codifying a legally binding right to development upon states’,⁸ and Baxi sees this inclusion as ‘the development of the right to development’⁹ by Africa. Nevertheless, in spite of this formal achievement, Africa remains one of the poorest or most underdeveloped regions in the world or rather the region where the RTD is far from being achieved.

This is not surprising given that in several African countries, poverty is part of life. There are hospitals without doctors or drugs, empty sheds used as classrooms which have no books, desks or teachers. Millions of children are killed either by mosquitoes or hunger and even thirst. Adults rarely reach 50 years of age. Towns are frequently without roads, bridges, electricity, telephone, and worse, without jobs. Actually, so many basic resources are lacking that Africa is in a state of an undeclared economic emergency.¹⁰ In quantifying the poverty crisis described above, the 2007 World Bank Africa Development Indicators Report noted that 41% of the population of Sub-Saharan Africa (SSA) lived on less than one dollar a day per person. The UN Secretary General 2006 Report observed that in SSA, only over a third of children of primary school age do attend school. The 2007 World Development Indicator revealed that the average life expectancy in SSA is 47 years. In addition, it was reported that one in five children in SSA die before the age of five,¹¹ one in 22 women in SSA died during pregnancy or child birth in 2005,¹² 25.8 million adults and children in SSA are living with

⁸ C Baldwin and C Morel ‘Group rights’ in M Evans & Murray (eds) *The African Charter on Human and Peoples’ Rights – The system in practice, 1986-2006* (2008) 270. The RTD is binding in the ACHPR (art 22) as well as in its protocol on the rights of women in Africa (art 19 which provides for the right to sustainable development for women). More discussion on the issue will be provided in the course of the study.

⁹ U Baxi *Human rights in post human world: Critical essays* (2007) 124.

¹⁰ For more on poverty in Africa, see H White *et al African poverty at the millennium: Causes, complexities, and challenges* (2001), also ‘poverty in Africa’ at <http://coza.com/WORLD-POVERTY-STORIES.PHP> (accessed on 2 March 2010).

¹¹ World Bank Report, 2005.

¹² Maternal mortality in 2005, World Health Organisation (WHO).

HIV¹³ and that the average annual real GDP growth across Africa from 1998 to 2008 was only 4.3%.¹⁴ Indeed Africa is very poor and underdeveloped. This sad situation informed the adoption 2000 UN Millennium Development Goals¹⁵ (MDGs) aiming to eradicate poverty amongst others by 2015.

In Africa, to tackle the problem, African leaders through the Organisation of the African Unity (OAU),¹⁶ adopted development plans such as the Monrovia Declaration of Commitment of Heads of States and Governments to the Guidelines for National and Collective Self-reliance in Social and Economic Development for the Establishment of a New International Economic Order in July 1979,¹⁷ the Lagos Plan of Action for the Economic Development of Africa, 1980-2000 (LPA) and the Final Act of Lagos;¹⁸ Africa's Priority Programme for Economic Recovery 1986-1990 (APPER),¹⁹ the Abuja treaty,²⁰ the African Charter for Popular Participation for Development (Charter on development) (1990);²¹ and most importantly the conversion of the Organisation of African Unity (OAU) into the African

¹³ UNAIDS 2007.

¹⁴ OECD 2007.

¹⁵ U N A/RES/55/2.

¹⁶ Adopted in Addis Ababa, Ethiopia, on 25 May 1963 & entered into force on 13 September 1963.

¹⁷ OAU Assembly of Heads of State and Government 16th Ordinary Session, Monrovia, Liberia, 17-20 July 1979; AHG/ST.3(xvi) Rev.1.

¹⁸ OAU Assembly 2nd Extraordinary Session of the Head of state and government held in Lagos, Nigeria July 1980.

¹⁹ Adopted at the OAU Assembly, Ordinary Session held in Addis Ababa, Ethiopia from 18-20 January 1985.

²⁰ OAU Assembly of Heads of State and Government, 27th Ordinary Session Nigeria, 3-5 June 1991; AHG/Res. 205 (XXVII) Resolution on the African Economic community. The Treaty entered into force in April 1994.

²¹ UN doc A/45/427 of 22 August 1990.

Union (AU)²² and finally the adoption of the New Partnership for Africa's Development (NEPAD)²³ and the African Peer Review Mechanism (APRM)²⁴ which are among the latest African initiatives.²⁵

Whereas NEPAD is the economic and development plan of the AU, the APRM aims at ensuring self-monitoring through the Declaration on Democracy, Political, Economic and Corporate Governance.²⁶ Rukato correctly notes that²⁷

[w]hile NEPAD is the programme of action for pursuing the socio economic objectives of the [AU] Constitutive Act, its APRM is an instrument for monitoring that the principles, priorities and objectives of the Constitutive Act are not only incorporated in the socio economic programmes of individual countries and regions, but also upheld and enforced.

In this vein, NEPAD is the developmental machine of the AU²⁸ which has a clear human rights mandate. According to this mandate, the AU has the obligation to 'promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure

²² Adopted in Lomé, Togo on 11 July 2000 and entered into force on 26 May 2001. The Assembly of the AU held its first meeting in Durban, South Africa, 8-10 July 2002.

²³ Adopted at the 37th Ordinary Session of the OAU Assembly, on 11 July 2001 in Lusaka, Zambia; AHG/Decl.1 (XXXVII).

²⁴ Adopted at the 1st Assembly of the AU held in Durban, South Africa, 8-10 July 2002; Declaration on the implementation of NEPAD, Assembly/AU/Decl.1 (I).

²⁵ It is important to note instruments referred to here are African based, not including UN and World Bank action such as United Nations Programme of Action for Africa's Economic Recovery and Development (UN-PAAERD), the World Bank and IMF sponsored Structural Adjustment Programme.

²⁶ Declaration on the implementation of the New Partnership for Africa's Development, Assembly AU/Decl.1(I), 8-10 July 2002, Durban, South Africa.

²⁷ H Rukato *Future of Africa - prospects for democracy and development under NEPAD* (2010) 66; also APRM Base document, para 2.

²⁸ Though its mandate came from the 2002 AU Durban Declaration; See the New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, adopted at the Assembly of Heads of State and Government, Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002 Durban, South Africa.

good governance and the rule of law’,²⁹ ‘to promote democratic principles and institutions, popular participation and good governance’;³⁰ to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights [including the RTD] and other relevant instruments’,³¹ to ensure the right to ‘participation of the African people in the activities of the Union’,³² to ‘ensure respect for democracy principles, human rights, the rule of law and good governance’;³³ to ‘promote gender equality’³⁴, ‘social justice to ensure balanced economic development’³⁵ and finally to promote human rights, the Union condemns and rejects ‘unconstitutional change of government’.³⁶

Against this background, the study proposes to look at how NEPAD, element of the ‘AU based system’,³⁷ could be used in combating poverty in order realise human rights, especially

²⁹ AU Constitutive Act, Preamble, para 10.

³⁰ Art 3(g).

³¹ Art 3(h).

³² Art 4(c).

³³ Art 4(m).

³⁴ Art 4(l).

³⁵ Art 4(n).

³⁶ Art 4(p).

³⁷ The ‘AU based’ system is made up of the Organisation of the African Unity (OAU) Charter of 1963, now 2001 AU Constitutive Act, the 1969 OAU Convention Governing the specific Aspects of Refugees in Africa, the 1981 ACHPR (which came into force in 1986) and its 1998 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (Protocol on the African Human Rights Court); its 2003 Protocol to the African Charter on Human Peoples’ Rights on the Rights of Women in Africa (Protocol on the Rights of Woman) and the 2008 Protocol on the Statute of the African Court of Justice and Human Rights and finally the 1990 African Charter on the Rights and Welfare of the child (African’s Children Charter). The AU based system will be further explained in the next chapter dealing with the conceptual and theoretical framework. For more on the link between NEPAD and the AU based human rights system, see E Baimu ‘Human rights in Nepad and its implication for the African human rights system’ (2002) 2

the RTD in Africa. The study is grounded in the fact that the implementation of human rights and the RTD does not happen in a vacuum, but through development policies, programmes and institutions such as NEPAD. Therefore, it aims to examine the role NEPAD can play in implementing the RTD as enshrined in the African human rights architecture. Incidental to this inquiry is reference and analysis of the APRM which is NEPAD's implementing tool.

1.2 Thesis statement

In terms of the African-based human rights instruments, there is absolutely no doubt that the RTD is binding in the African human rights system. However, as a matter of practical reality, Africa remains underdeveloped. Now, the continent has a development programme/institution known as NEPAD. Is NEPAD the missing link for the realisation of the RTD in Africa? Put differently, does NEPAD offer an effective solution for the realisation of the RTD as enshrined in the African human rights system?

Under this thesis statement, the hypothesis of the study means that NEPAD is the solution for the realisation of the RTD. However, the hypothesis should be understood as defined by the Oxford dictionary. Accordingly, the hypothesis is a supposition made as a basis for reasoning without assumption of its truth, or as a starting-point for further investigation from known facts. Therefore, the hypothesis that NEPAD is the solution for the realisation of the RTD should be validated or confirmed or contradicted by the research.

It is important to keep in mind that achieving the realisation of the RTD implies a holistic realisation of human rights at national level, and a sound partnership within the international community for the realisation of these rights.

To establish the validity of the problem stated above, the dissertation will address the following questions.

1.3 Research questions

African Human Rights Law Journal 312; for a dissenting view, see C Mbazira 'A path of realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development' (2004) 4 *African Human Rights Law Journal* 51.

The main research question is: To what extent can the advent of NEPAD improve the realisation of the RTD and, therefore, the fight against poverty in Africa? In answering the main question, the following sub-questions are clarified:

- What is the nature of the RTD?
- To what extent is the RTD enshrined in the African human rights system?
- To what extent can NEPAD enhance its realisation? Or, to what extent does NEPAD embrace a human rights approach to development?
- To what extent is the NEPAD plan integrated into national development plans of African states?
- Is NEPAD an ambitious proposal towards the establishment of the new global partnership needed for the realisation of the RTD?
- What measures should be taken to enhance NEPAD's capacity to deliver the RTD in Africa?

In seeking solutions to protect the poor, this research embraces the RTD framework. The process through which the RTD is to be implemented is the allocation of precise tasks to all stakeholders such as states, local authorities, transnational corporations, multilateral bodies, civil society and the international community at large.

However, since such a process can also be identified with programmes of development policies involving investments in infrastructure, education, science and technology, environment and partnership such as that found in the NEPAD Programme, this thesis intends to focus on the latter. In a critical analysis, and from a human rights perspective, the study tackles the question of NEPAD's ability to achieve the RTD in Africa.

1.4 Objectives of the study

This study seeks to:

- contribute to the scholarly debate on the nature of the RTD;
- assist policy development on the concept of the RTD;
- attempt to provide solutions which can enable Africa to ensure its development and realise the MDGs;

- complement the ongoing debate on NEPAD's appropriateness for meeting development challenges in Africa and looks at the role the organisation can play in defeating poverty and make the RTD a reality in Africa;
- assist both the local and international community in removing hindrances to the implementation of the RTD in the world and in Africa in particular; and
- to come-up with a well thought out frame towards effective implementation of NEPAD

In 1999, Koffi Annan, the former Secretary General of the UN, said that time was ripe for the international community to reach a consensus, not only on the principle that massive and systematic violation of human rights must be checked wherever they take place, but also on ways of deciding what action is necessary to be taken, when, and by whom.³⁸ This study takes on the challenge posed by the former Secretary General as far as the RTD is concerned.

The study is breaking new grounds on two accounts: first, by focusing on the synergy between NEPAD and national policies for the implementation of the RTD through national poverty reduction strategies in Africa with specific case studies of Cameroon and South Africa, and secondly, by looking at NEPAD from a RTD perspective, especially on a continent where the right in question is binding.

To summarise, NEPAD is at the centre of the research because it is an AU institution; and is Africa's latest response to development ills on the continent. Analysing NEPAD both its positives and negatives will educate African policy makers on what needs to be done or not, now and in the future. The research will unpack challenges facing NEPAD and propose recommendations that can always assist in building a better development plan or institution if NEPAD is to be improved or to be abandoned. The research findings can inspire African leaders on how to use NEPAD to animate development policies of AU member countries, and if this is not possible, it will reach such a conclusion which can assist in providing the way forward.

³⁸Speech of the former Secretary General of the UN at the 54th session of the General Assembly, 20 September 1999, SG/SM/7136GA/9596, para 147.

In addition, NEPAD is at the heart of the research because at the UN level, the High Level Task Force on the Implementation of the Right to Development had identified APRM and other development partnerships in the context of NEPAD as frameworks and ‘criteria for periodic evaluation of global development partnerships from the perspective of the right to development’.³⁹

In addition, as will be shown in the upcoming chapter, NEPAD is located in the institutionalism theory which is an entry point to the concept of cosmopolitanism on which the RTD is grounded.

1.5 Literature review

There are several studies on the RTD, but none of them examines NEPAD as a tool for its implementation. Nevertheless, the thesis builds on the existing literature on the RTD to look at it from the NEPAD standpoint. In order to unpack the RTD, the Centre for Development and Human Rights (CDHR) published *Reflections on the right to development*⁴⁰ in 2005 edited by Sengupta, Negi and Basu. This book is the collection of some of the papers presented at the third workshop on the Right to Development Project held in New Delhi, India in August 2003. Among other things, the book focuses on theoretical and historical features of the RTD, its normative content, clarifies the human rights approach to development, looks at the national poverty reduction strategy papers and the international economic regime as they relate to the RTD. These are some of the concerns of this thesis.

Based on the Right to Development Symposium held in Norway in 2003, Andreassen and Marks compile a number of articles on development as a human right.⁴¹ These articles deal with the legal, political and economic dimension of the RTD. The book offers insightful ideas

³⁹ Report of the High-Level Task Force on the implementation of the right to development on its third session established by the Human Rights Council resolution 1/4 UN Doc. A/HRC/4/WG.2/TF/2, 13 February 2007, at para. 27& 29.

⁴⁰ CDHR A Sengupta, A Negi & M Basu (eds) *Reflections on the right to development* (2005).

⁴¹ B Andreassen & S Marks (eds) *Development as a human right. Legal, political and economic dimensions* (2006).

on the conceptual underpinnings of the RTD, on the duties and responsibilities attached to the RTD, on national realities and challenges and the roles of international institutions and global processes *vis a vis* the right in question. In the same vein, *Human rights and development in Africa*⁴² is a compilation of articles by Claude Welch Jr and Ronald Meltzer. These articles clarify the link between human rights and development. In this book, Donnelly's chapter also points out 'how not to link human right and development'.⁴³ This book is of particular importance in so far as it deals with the substance of the RTD that will be discussed extensively in this study.

*The right to development in international law*⁴⁴ is a set of articles compiled by Chowdhury *et al.* The book addresses the status of the RTD in international law with Denters, De Waart opposing the view of Allan Rosas who maintains that the RTD is not located in international law. The book discusses the nature of the RTD which is of interest for this dissertation. In the same perspective, *International law of development: Comparative perspectives*⁴⁵ offers a real debate on development law. Francis Snyder and Peter Slinn put together 'insiders' or proponents and 'outsiders' or opponents of development law in the same book. This provides interesting discussions and offers a ground for a total analysis of the concept under study. In the same vein, the International Third World Legal Studies Association published *Human rights and development*⁴⁶ a symposium on human rights and development where over fifty

⁴² C Welch Jr & R Meltzer *Human rights and development in Africa* (1984).

⁴³ See Donnelly's chapter in the book ('The right to development - How not to link human rights and development'); for more on the RTD, see G Espiell 'The right to development' (1972) 5 *Revue Des Droits de l'Homme* 190; Glen, M J 'The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights' (1987) 9 *Human Rights Quarterly* 19; S Marks 'Misconceptions about the right to development' available at <http://www1worldbank.org/devoutreach/october06/article.asp?id=380> (accessed 5 February 2009); S Marks 'Obstacles to the right to Development' http://www.hsph.harvard.edu/fxbcenter/FXBC_WP17--Marks.pdf (accessed 23 May 2008).

⁴⁴ SR Chowdhury, E Denters and P Waart (eds) *The right to development in international law* (1992).

⁴⁵ F Snyder, & P Slinn (eds) *International law of development: Comparatives perspectives* (1987).

⁴⁶ The International Third World Legal Studies Association *Human rights and development* (1984).

participants⁴⁷ from both the developed and developing world addressed the relationship between human rights and development in respect to problems raised in both international and national fields of law, taking in consideration the concept of ‘human right to development’. The book is very instructive for this research in the sense that it addresses the definition, content and juridical basis of the RTD; it also looks at enforcement, accountability and collective action on the international plane and focuses on the implementation of development objectives in the domestic legal framework. These three items are amongst the focus of this study.

‘The right to development’ is a paper presented by Hansungule at the International Human Rights Academy organised by University of Western Cape, Utrecht University, Ghent University, and the American University in October 2005 in Cape Town, South Africa.⁴⁸ The paper sheds more light on ‘development’, the RTD as well as the controversy on the right in question.

In his chapter, ‘Article 22 of the African Charter on Human and Peoples’ Rights’ in *Essay in honour of Judge T O Elias*⁴⁹ Bello argues against the existence of the RTD. This view underpins Rosas’s chapter ‘The right to development’ in *Economic, social and cultural rights*⁵⁰ as well as Whyte’s ‘review of development as a human right’ in *Electronic Journal of Sustainable Development*.⁵¹ These materials reject the RTD, in contrast with proponents of the right and give more insight on the topic under investigation.

⁴⁷ The International Third World Legal Studies Association (1984) iii.

⁴⁸ On file with author.

⁴⁹ E Bello ‘Article 22 of the African Charter on Human and Peoples’ Rights’ in E Bello & B Adjibola (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992).

⁵⁰ A Rosas ‘The right to development’ in Abjorn Eide, Catarina Kraus & A Rosas (eds) *Economic Social and Cultural rights* (2001).

⁵¹ J Whyte ‘review of development as a human right’ *Electronic Journal of Sustainable Development*, 1, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

In the 2005 bpress legal series' working paper No 725 entitled 'Should any body be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to development',⁵² Murray-Bruce unpacks the concept of the RTD as it relates to *jus cogens*. The 73 page document is important for this research as it discusses the obligations of the international community and the *jus cogens* source of the RTD which are also the concern of this thesis.

*Global responsibility for human rights – World poverty and the development of international law*⁵³ touches directly on the issues under study. In the book, Margot investigates the normative basics for international justice and focuses on the role the RTD can play to eradicate or mitigate world poverty which is also the objective of this study. *Implementing the right to development – The role of international law*⁵⁴ is also fundamental for this research. In this book edited by Marks and published by the Friedrich-Ebert-Stiftung Foundation, various authors offer ideas and suggestions on how to use international law to advance the implementation of the RTD. By so doing, the book addresses one of the main questions which triggered the research. *Freedom from poverty as a human right – Who owes what to the poor?*⁵⁵ addresses questions related to the duties imposed by the human rights to basic necessities, duties to fulfill the human rights of the poor and the responsibility to eradicate poverty. It sheds some light on the notions of rights and duties which are discussed in the dissertation under the section allocated to the beneficiaries and duty bearers of the RTD. In this register, *World poverty and*

⁵² F Murray-Bruce 'Should any body be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to development' (2005) bpress legal series' working paper No 725.

⁵³ M E Salomon *Global responsibility for human rights – World poverty and the development of international law* (2007).

⁵⁴ S Marks (ed) *Implementing the right to development – The role of international law* (2008); for more on implementing the RTD, see Nwauche, E S and Nwobike, J C 'Implementing the right to development' (2005) 2 *Sur International Journal of Human Rights* 93.

⁵⁵ T Pogge (ed) *Freedom from poverty as a human right - Who owes what to the poor?* (2007).

human rights: Cosmopolitan responsibilities,⁵⁶ *Cosmopolitan global politics*⁵⁷ and *Global justice: Defending cosmopolitanism*⁵⁸ all dealing with global distributive justice are also significant in this thesis.

In *Human rights in a posthuman world - Critical essays*,⁵⁹ Baxi presents a series of critical essays of interest for this research. Amongst others, he re-examines the theory of human rights as proposed by Amartya Sen, assesses the concept of development, and asks questions on the hindrances to the development of the RTD.

Since the thesis pays a special attention to the RTD within the African human rights system, it is necessary to focus on literature focusing on several aspects of this system as they connect with the issues under investigation. In the *African Charter on Human and Peoples' Rights – A comprehensive agenda for human dignity and sustainable democracy in Africa*,⁶⁰ Ouguergouz examines the mechanisms of the protection of human rights under the ACHPR. It thoroughly analyses the rights provided for by the ACHPR including the RTD, looks at the African Commission on Human and Peoples' Rights (African Commission) without neglecting case law from the African Commission. This book is valuable for this study as it covers extensively the RTD in the ACHPR, the concept of peoples that is interesting in defining the beneficiaries of the right, the work of the African Commission that is important in understanding how the

⁵⁶ T Pogge *World poverty and human rights: Cosmopolitan Responsibilities* (2008).

⁵⁷ P Hayden *Cosmopolitan global politics* (2005).

⁵⁸ C Jones *Global Justice: Defending cosmopolitanism* (1999).

⁵⁹ U Baxi *Human rights in a posthuman world - Critical essays* (2007).

⁶⁰ F Ouguergouz *African Charter on Human and Peoples' Rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003). For more on the African human rights system see, V O Nmeihelle *The African human rights system: Its laws, practice, and institution* (2001); J Harrington 'The African Court on Human and Peoples' Rights' in Malcom Evans & Rachel Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice, 1986-2000* (2001), F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) (2004) *Human rights law in Africa*; R Eno 'The place of the African Commission in the new African dispensation' (2002) (2) *African Security Review* 68.

RTD can be claimed at regional level which are all important for this this research. The concepts of ‘peoples’ in the ACHPR is also addressed by Kiwanuka’s article ‘The meaning of “people” in the African Charter on Human and Peoples’ Rights’.⁶¹ The article thoroughly examines the concept, which is of interest for this thesis in its focus on the beneficiaries of the RTD.

*Africa’s human rights architecture*⁶² is the product of a seminar organised by the Centre for Conflict Resolution based in Cape Town South Africa. Edited by Akokpari and Zimbler, the book looks at the development of the African human rights framework, and is important for this thesis in the sense that it unpacks the human rights system of the continent and clarifies various concepts including ‘the conundrum of development and human rights in Africa’ on which the research is built. Following the same pattern, *the African Commission on Human and Peoples’ Rights – Practice and Procedure*⁶³ sheds some light on the nature of the African Commission and the substantive provisions of the African Charter on Human and Peoples’ Rights (ACHPR) including the RTD which are amongst the concern of this research.

In *International human rights law in Africa*,⁶⁴ Frans Viljoen gives an examination of human rights law as it relates to the African human rights system including African subregional economic communities, as it relates to African institutions such as NEPAD, APRM, the Pan African Parliament amongst others. This book is important for this study as it analyses the concepts of human rights in general and the African law in particular. More importantly, it is an important source on which to draw while comparing provisions of the African human rights law with those of other regions as well as the UN System. Following the same pattern, *The African Charter on Human and Peoples’ Rights – The system in practice, 1986-*

⁶¹ R Kiwanuka ‘The meaning of “people” in the African Charter on Human and Peoples’ Rights’ (1988) 82 *American Journal of International Law* 82.

⁶² J Akokpari ‘Human rights actors and institutions in Africa’ in J Akokpari & D Shea Zimbler (2008).

⁶³ E Ankumah *The Africa Commission on Human and Peoples’ Rights* (1996); C Heyns ‘The African regional human rights system: The African Charter’ (2004) 108 *Pennsylvania State Law* 691-692.

⁶⁴ F Viljoen *International human rights law in Africa* (2007).

2006⁶⁵ assesses the ACHPR in its human rights promotional and protective task. The book focuses on various human rights issues including the Charter's reporting procedure which interests this research, with a special attention to reporting on the RTD.

*Compendium of the key human rights documents of the African Union*⁶⁶ brings together all important instruments of the OAU/AU. The book is important for the study because it provides the most needed instruments to assess the African human rights architecture in general and the RTD in particular.

'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons'⁶⁷ analyses the protection of human rights on the continent by focusing on the normative framework, the structure, the content as well as the institutional mechanism set up to enforce human rights in Africa. More importantly, the paper analyses the challenges for sustainable human development which is the main focus of this thesis.

Udombana's 'The Third World and the right to development: Agenda for the next Millennium'⁶⁸ is also relevant for this research in the sense that it assesses the RTD as it relates to the third world. Amongst other things, it looks at how developing countries can prioritize development and find a synergy between economic growth and respect for human rights.

On the theory of the RTD, the novelty in this research is that it looks at the contribution of a primarily economic plan to the theory of development law. In this regard, the research also focuses on specific publications on NEPAD.

⁶⁵ M Evans & R Murray (2008).

⁶⁶ C Heyns & Killander (eds) *Compendium of key human rights documents of the African Union* (2007).

⁶⁷ J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons' (2000) 6 *Buffalo Human Rights Law Review* 39.

⁶⁸ N J Udombana 'The third world and the right to development: Agenda for the next Millennium' (2000) 22 *Human Rights Quarterly* 759.

Bade Omonide *et al* compiled a number of essays in honour of Adebayo Adedeji at seventy.⁶⁹ The book is an advocacy for the African development plans which preceded NEPAD. The authors try to prove that Africa does not need NEPAD. The book is important in so far as it shows what preceded NEPAD and why NEPAD is not necessary which is very instructive for this research. It enhances the understanding of NEPAD which is useful in assessing the plan within a RTD approach. In the same vein, the Johannesburg-based National Labour & Economic Development Institute (NALEDI) published a book made up of various articles addressing challenges facing NEPAD. It is *Building alternatives to neo-liberal globalisation: The challenges facing NEPAD*.⁷⁰ The book describes the challenges NEPAD will have to address to yield results. These challenges are educative while looking at NEPAD and APRM from a RTD perspective.

In ‘The African Peer Review Mechanism as an integrated part of the New Partnership of the Africa’s development’, Chris Stal exposes the NEPAD and APRM background, institutional framework, objectives and composition. The article is important in the sense that it unveils the articulation of the continental plan used in the study.⁷¹

*Thabo Mbeki and the African Renaissance*⁷² focuses on the examination on the emergence of a new African leadership for building a successful Africa. It meets the objectives of this research in the sense that it examines the socio-economic and political reawakening of Africa and makes recommendations on how to achieve success on the continent.

⁶⁹ B Onimode *et al* *African development and governance strategies in the 21st century- Looking back to move forward. Essay in honour of Adebayo Adedeji at seventy* (2004).

⁷⁰ NALEDI ‘*Building alternatives to neo-liberal globalisation: The challenges facing NEPAD* (2000).

⁷¹ C Stals ‘The African Peer Review Mechanism as an integrated part of the New Partnership of the Africa development’ (2004) 4 *African Human Rights Law Journal* 164.

⁷² M Mulemfo *Thabo Mbeki and the African Renaissance* (2000).

In the *Future of Africa, Prospects for democracy and development under NEPAD*,⁷³ Rukato, former Deputy Chief Executive Officer (CEO) at the NEPAD Secretariat, presents an overview of NEPAD, from the background, to its implementation phase, its integration into the AU structure before focusing on its prospects for the future. The book is important for the research in the sense that understanding its substance is crucial for the examination of NEPAD from a RTD perspective.

*A human rights approach to the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM)*⁷⁴ examines NEPAD/APRM from a human rights perspective. Similar to the study, it examines these institutions as they seek the implementation of international human rights standards.

Kwadwo Appiagyei-Atua through 'Bumps on the road: A critique of how Africa got to NEPAD',⁷⁵ provides an analysis of plans which preceded NEPAD. Looking at the New International Economic Order (NIEO) framework and the RTD amongst others, he claims that NEPAD fosters the economic dependence of Africa. NEPAD neo-liberal approach can only enslave Africa and cannot be conducive to human rights realisation. This article is valuable for this thesis as it assists in understanding NEPAD *vis a vis* previous African plans.

'The African Union, NEPAD and Human Rights: The missing agenda',⁷⁶ is of interest for the study as it assesses NEPAD from a human rights perspective. Amongst others, it examines to what extent NEPAD draws on human rights language to emphasise its development objectives. Most importantly, the article questioned whether the departure from the OAU to AU and the adoption of NEPAD has an impact on human rights on the continent.

⁷³ Rukato (2010).

⁷⁴ International Federation for Human Rights (FIDH) *A human rights approach to the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM)* (2004).

⁷⁵ K Appiagyei-Atua 'Bumps on the road: A critique of how Africa got to NEPAD' (2006) 6 *African Human Rights Law Journal* 524.

⁷⁶ B Manby 'The African Union, NEPAD and Human Rights: The missing agenda' (2004) 26 *Human Rights Quarterly* 983 - 1027.

In ‘The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership of Africa’s development and the African Court’⁷⁷ and ‘What future for human and peoples’ rights under the African Union, New Partnership for Africa’s Development’, African Peer Review Mechanism and the African Court?’⁷⁸ Mbata Mangu discusses the changing human rights landscape in Africa since independence. He presents the evolution of human and peoples’ rights from the OAU era (through the law and the practice of states), to AU to NEPAD. On the last one (NEPAD) it looks at the human and peoples’ rights in the NEPAD document and the APRM before looking at how these rights are dealt with by AU member States who are important role players in NEPAD and those participating in APRM. The articles also look at human and people’s rights under the African Court. These articles are interesting for the research as they examine the NEPAD and APRM from a human rights perspective as the thesis does. In the same lines of thought, Mangu also looks at the role of the APRM in advancing good governance on the continent. This is done through ‘Assessing the effectiveness of the African Peer Review Mechanism and its impact on the promotion of democracy and political good governance’.⁷⁹ Whereas he believes that the new African instruments such as NEPAD and APRM are significant in spreading the culture of human rights on the continent, Akokpari stands against such view and argues that these projects are unable to lead to good governance⁸⁰ and therefore to the respect for human rights.

⁷⁷ A Mangu Mbata ‘The changing human rights landscape in Africa: Organisation of African Unity, African Union, New Partnership of Africa’s development and the African Court’ (2005) 3 *Netherlands Quarterly of Human Rights* 23.

⁷⁸ A Mangu Mbata ‘What future for human and peoples’ rights under the African Union, New Partnership for Africa’s Development’, African Peer Review Mechanism and the African Court?’ *South African Yearbook of International Law* (2004).

⁷⁹ A Mangu Mbata ‘Assessing the effectiveness of the African Peer Review Mechanism and its impact on the promotion of democracy and political good governance’ (2007) 7 *African Human Rights Law Journal* 354.

⁸⁰ J Akokpari ‘The AU, NEPAD and the Promotion of Good Governance in Africa’ (2004) 3 *Nordic Journal of African Studies* 13.

In 'A path of realising economic, social and cultural rights in Africa? A critique of the New Partnership for Africa's Development',⁸¹ Mbazira provides a background of NEPAD, describes its objectives and framework. In addition, he focuses on the APRM as an implementation strategy of NEPAD's objectives. Most importantly, the article makes a critique of NEPAD's human rights element before calling on NEPAD to be directly incorporated in the African human rights system. This article is important for the study as it focuses on the link between NEPAD and the African human rights system. Interestingly, in 'Human rights in NEPAD and its implication for the African human rights system',⁸² Baimu presents the exact opposite view to Mbazira⁸³ by arguing that NEPAD is part and parcel of the AU based system, which can only improve the quality of the analysis in the thesis.

A rare item that sees a connection between NEPAD and the RTD is an article written by Sengupta who in a few lines sees NEPAD as 'a remarkable development in the evolution of the international process of realising' the RTD.⁸⁴

This study is unique in looking at NEPAD through the lens of the RTD. In this respect, it interprets and analyses NEPAD documents from a human rights standpoint to find a connection between the RTD and the NEPAD programme. It looks at the core components of the RTD and assesses to what extent they are infused or can be achieved through the NEPAD programme/institution. By doing so, it looks at the extent to which the continental plan is conducive to poverty eradication, or to what extent its implementation will positively affect people's lives.

1.6 Research methodology

⁸¹ Mbazira (2004).

⁸² Baimu (2002) 312.

⁸³ Mbazira (2004) 4.

⁸⁴ A Sengupta 'Development cooperation and the right to development' at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP12--Sengupta.pdf (accessed 20 October 2007).

This study focuses on the contribution of a primarily economic plan to the theory of development law. In so doing, it examines NEPAD from a human rights perspective. Before getting to the details, it is important to clarify that the advent of NEPAD created different reactions. There are ‘NEPAD fundamentalists’ who believe strongly in NEPAD and are fully convinced that it is the answer for Africa’s development problems.⁸⁵ In addition, there are NEPAD sceptics and smashers who are of the view that ‘there is nothing inherently good or positive about NEPAD and that the entire programme and process’⁸⁶ and therefore must be removed from the scene. And finally, there is third group that could be called ‘NEPAD engagers made of those ‘who do not embrace or reject, but who assess NEPAD on balance and merit’.⁸⁷ The thesis locates itself within the third approach. In so doing, the thesis approaches NEPAD from a ‘problem solving’ perspective, it acknowledges the fundamentalists as well as sceptics’ views and proceeds to find out what could be done, changed or reformed to have a better continental plan/institution for development.

From this perspective, the thesis investigates to what extent the NEPAD plan can be the solution for the realisation of the RTD in Africa. To achieve its goals, this thesis portrays the RTD as a vital attribute of the bundle of rights that shields all human rights, civil and political rights as well as economic, social and cultural rights. It unveils the nature and content of the right at the global level as well as in Africa. In Africa, the research looks at the RTD from the main continental human rights framework and its reflection in national constitutions and legislations through the case study of Cameroon, Uganda, Malawi, Ethiopia which have provided for the RTD in their constitutions, and South Africa where socio-economic rights (elements of the RTD) are justiciable.

After establishing the existence of the RTD, the study scrutinises whether NEPAD is the institution through which the right can be achieved. Therefore, in examining NEPAD’s capacity to realise the RTD, the study looks at NEPAD’s strategies, and also focuses on the

⁸⁵ C Landsburg ‘The Birth and evolution of NEPAD’ in J Akokpari *et al* (eds) *The African Union and its institutions* (2008) 207-208.

⁸⁶ Landsburg (2008) 208.

⁸⁷ Landsburg (2008) 207.

APRM processes and applies them to the RTD in practice. It examines NEPAD efficiency in the fight against poverty, to what extent NEPAD follows a human rights approach; it also assesses how NEPAD reaches the grass roots by looking at its infusion into national policies through the case study of Cameroon and South Africa. Though all human rights are essential for achieving the RTD, it may be practically difficult to fulfil all of them at the same time.⁸⁸ It is therefore justifiable to start with the realisation of a few ‘basic rights’⁸⁹ without which the RTD will not be realised. Given that the RTD is made up of socio-economic and civil and political rights, the thesis will focus on the right to participation (civil and political rights) as well as the protection of vulnerable groups which encompasses socio-economic and civil and political rights in Cameroon and in South Africa. The thesis views right of vulnerable groups to be protected and the right to participation as ‘empowering rights’ and starting points for the RTD. Consequently, it examines the implementation of these rights through the national subprogramme to integrate vulnerable groups in the economy and assesses to what extent the ‘public action’⁹⁰ for the realisation of these rights in Cameroon is informed by NEPAD.

Following the same approach, the thesis also investigates whether the South African ‘public action’ towards the right to participation and the protection of vulnerable groups through the newly established New Growth Path (NGP) is informed by NEPAD. Cameroon is chosen as a case study because not only does it provide for the RTD in its Constitution, but also because the author is very familiar with the country and has a good personal knowledge of the legal system. South Africa is chosen for being a NEPAD founding country and because of the very good reputation of its Constitution in terms of human rights protection, because the author is very familiar with the South African law.

Finally, on the ground that international co-operation or partnership is an important component of the RTD, the research assesses to what extent the NEPAD strategy to ‘set up a new global partnership’ is feasible and conducive to the realisation of the RTD.

⁸⁸ A Sengupta ‘The political economy of legal empowerment of the poor’ in D Banik (ed) *Rights and legal empowerment in eradicating poverty* (2008) 37.

⁸⁹ ‘Basic rights’ is the title of the very important book written by Henry Shue in 1980.

⁹⁰ A Sen ‘Elements of a theory of human rights’ (2004) 3 *Philosophy & Public Affairs* 343.

Primarily a desk study, the research uses descriptive, analytical and prescriptive methods. It also uses primary and secondary sources of data.

Methods: Chapters 2, 3, 4, 5, 6 and 7 which clarify the concepts and theories on the RTD and NEPAD commitment, examine the nature of the RTD, focus on its place in the African human rights system, analyse its realisation through NEPAD, look at mainstreaming of NEPAD into national development plans, and appraise the global partnership from a RTD perspective are not only descriptive, but also analytical and prescriptive. Chapter 8, made up of the conclusion and recommendations, is more prescriptive in nature.

Sources: Primary sources used include treaties, declarations, resolutions and reports from national, regional and international institutions. Pronouncements of treaties bodies such as general comments and concluding observations on states parties' reports are also used. Various articles of the ACHPR will be looked at, and the NEPAD programme will be analysed in order to highlight why NEPAD is struggling or not to achieve the RTD on the continent.

Secondary sources relied upon are books, journal articles, newspapers, conference papers, conference reports and information from the internet.

The methods, sources and procedure used were chosen because they provide insights into the conceptual, historical and legal issues on the subject under inquiry. The study is basically a desk one since there was lack of financial resources to undertake field trips in all African countries to assess the implementation of NEPAD.

1.7 Limitations of the study

The study has various methodological limitations. First, the broad controversy around the RTD affects the availability of reliable data. Similarly, the controversy around NEPAD does not ease the research.

Secondly, it is very difficult to get an overall indicator for the RTD. This is due to the content of the right in question, which is a bundle of distinct rights. Since the conversion of distinct

rights to an index can be done through a process of averaging or weighting of each composite, the results lack unanimity and will be controversial.

Thirdly, while much has been written on NEPAD and its structures and processes, not much focus has been devoted to NEPAD's role in the implementation of the RTD in Africa, resulting in a lack of others' views and opinions in this regard.

Fourthly, the reluctance of donors and recipients countries to publicise information on NEPAD can also affect the quality of this study.

Fifthly, one key limitation of the study is that new institutional and normative changes continue to take place in the African human rights system. For example, the advent of the African Court of Human and Peoples' Rights on the 25 January 2004 which may in the future be merged with the African Court of Justice to become the African Court of Justice and Human Rights⁹¹ might bring changes with regard to the implementation of the RTD. In the same vein, NEPAD unfolds as it develops; for instance positive progress has been made to integrate NEPAD into the structures and processes of the AU.⁹² Many more changes are likely to happen; the euphoria which accompanied the birth of NEPAD is no more; as previous African development paradigms, NEPAD may even disappear from the scene.

⁹¹As of 3 February 2010 only Libya and Mali had ratified the Protocol on the Statute of the African Court of Justice and Human Rights (adopted in Sharm El-Sheikh, Egypt, on 1st July 2008). It is important to note that this Protocol and the statute annexed to it will come into force 30 days after the deposit of the instruments of ratification by fifteen member states. For more on this see <http://www.africa-union.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> (accessed 6 June 2010).

⁹² Among others, the NEPAD Secretariat submitted its 2010 budget, to the AU Commission which has since been included as part of the overall budget of the AU; In the same vein, important work has been done on the future issuing of AU Laissez-Passer to eligible staff of the NEPAD Secretariat. For more on the progress that has been made to integrate NEPAD into the structures and processes of the AU, see Dr Jean Ping AU Commission Chairperson's Opening remarks at the 22nd NEPAD Heads of State and Government Implementation Committee, Addis Ababa: 30 January 2010 available at www.africa-union.org (accessed 20 February 2010).

Nevertheless, the study aims to incorporate developments up to 31 March 2010. This means efforts were made to keep the thesis updated. For example by including a discussion on the January's 2010 developments on NEPAD integration in the AU, on the *Endorois* case⁹³ published in February 2010 and on the signing of the US health care bill into law on 23 March 2010. In any event, this study can be viewed as a continuous project that can be updated by other studies in the future.

Lastly, resources may also hamper the extent of the research. Participation in seminars, conferences and workshops to get more insight into NEPAD's activities requires financial resources, which may not be accessible, resulting in key information being missed.

1.8 Scope of the study

The dissertation examines the prospects for realisation of the RTD through an African institution, within the framework of the African human rights system where the right is legally binding. Nevertheless, the discussion on the right starts at a global level in order to explain and provide a broad understanding of the RTD.

1.9 Overview of chapters

This study will be divided into eight chapters:

Chapter 1 lays the foundation for the entire work. It clarifies the background of the study, introduces the problem to be investigated, sets out the aims of the research, describes the study methodology, reviews the available literature on the topic and outlines the problem encountered during the study.

Chapter 2 sets the stage for the study in providing the conceptual, contextual and theoretical frameworks. It focuses on the concepts and theories which will inform the discussions throughout the thesis.

⁹³ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya* (Communication 276/2003).

Chapter 3 investigates the nature of the RTD. It discusses the substance of the right, the controversy on the right within academic circles and at the UN; it also focuses on the implementation of the right in identifying the duty bearers as well as the right holders.

Chapter 4 looks at the place of the RTD in the African regional system. It examines to what extent the RTD flows from the main regional system to national constitutions and legislations through the case study of Cameroon, Uganda, Malawi, Ethiopia which have provided for the RTD in their constitutions, and South Africa which is said to have the best constitution in the world in terms of respect for human rights.⁹⁴ It also focuses on the RTD in regional economic communities (RECs) with special attention to the Southern Africa Development Community (SADC). To close on the RTD in Africa, the chapter looks at the jurisprudence of the African Commission on Human and Peoples' Rights on the RTD. In short, chapter 4 shows that the RTD is part and parcel of Africa's law at all levels and this provides room to look at it within the NEPAD context.

Chapter 5 discusses NEPAD and the RTD. It goes to the very core of the thesis and assesses to what extent the implementation of the NEPAD is informed by the human rights discourse and to what extent it is conducive to the realisation of the RTD.

Following the same perspective, chapter 6 assesses the integration of the NEPAD into national development policies with special reference to the case of Cameroon and South Africa. In other words, the chapter critically examines to what extent NEPAD reaches the grassroots and makes a difference in people's lives. Based on the fact that the RTD will happen through the implementation of rights, elements of the RTD, the chapter identifies and analyses the implementation of the rights to participation and the protection of vulnerable groups through the national sub programme to integrate vulnerable groups in the economy and assesses to what extent the state action towards the achievement of these rights in Cameroon is informed by NEPAD. Following the same move, the chapter also investigates if the South African action for fulfilling the right to participation and the protection of vulnerable groups through the NGP is informed by NEPAD.

On the ground that international co-operation or partnership is vital for the realisation of the RTD, chapter 7 explores to what extent the NEPAD strategy of setting up a new global partnership for development can yield positive results from a RTD approach. A quick look at the partnership

⁹⁴ J C Mubangizi *The protection of human rights in South Africa: A legal and practical Guide* (2004) 71.

between NEPAD and the G8 countries, the role of NEPAD in the World Trade Organisation (WTO) with specific attention to some aspects of the Trade Related Intellectual Property rights (TRIPS) Agreement and the Agreement on Agriculture (AoA), the agreements between African, Caribbean and Pacific countries and the European Economic Community (now EU) (ACP agreement) and the Economic Partnership agreements (EPAs Agreements) will show to what extent the much needed new global partnership is feasible.

Chapter 8 summarises the research, presents the findings and provides recommendations.

CHAPTER 2 SETTING THE STAGE: CONCEPTUAL, CONTEXTUAL AND THEORETICAL FRAMEWORKS

- 2.1 Introduction
- 2.2 Conceptual framework
 - 2.2.1 Concept of human rights in Africa
 - 2.2.2 The notion of development
 - 2.2.3 The RTD
 - 2.2.4 Sustainable development
 - 2.2.5 Poverty eradication
- 2.3 The RTD and NEPAD: Historical and theoretical contexts
 - 2.3.1 The RTD: Historical context
 - 2.3.2 The RTD: Theoretical context
 - 2.3.2.1 Cosmopolitanism: A snapshot
 - 2.3.2.2 A critique of cosmopolitanism
 - 2.3.2.3 Cosmopolitanism in practice
- 2.4 NEPAD: Historical and theoretical contexts
 - 2.4.1 NEPAD and the new institutionalism theory
 - 2.4.1.1 Compulsory power
 - 2.4.1.2 Institutional power
 - 2.4.1.3 Structural power
- 2.5 A critique of NEPAD
- 2.6 A critique of the APRM and its good governance underpinnings
- 2.7 Concluding remarks

2.1 Introduction

This chapter sets the stage for the entire study. Its aim is threefold: Firstly, it clarifies the concepts of human rights in Africa, development, RTD, sustainable development and poverty

eradication which are constantly used in the study. Secondly, the chapter provides a broader historical and contextual framework through which it establishes the relationship between the RTD and NEPAD. Thirdly, the chapter provides a critique of NEPAD/APRM.

2.2 Conceptual framework

2.2.1 Concept of human rights in Africa

This section examines *inter alia* the concepts of equality, non-discrimination and most importantly human dignity.

One of the main theories underlying the human rights discourse in Africa is the RTD. Though disputed across the world, in Africa, the RTD forms a central part of the paradigm or idea of human rights. At the level of law, African countries have understood the RTD as a right that can be claimed like any other right. According to this idea, every human being, men and women everywhere are entitled to dignity; to use the words of the American Declaration ‘they are created equal and endowed by their creator with certain unalienable rights [such as] life liberty and the pursuit of happiness’. Put differently, the idea of human rights

[r]eaffirms the faith in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standard of life in larger freedom.⁹⁵

However, the natural law theory preceded the concept of human rights. Natural law theory was first located in ancient religions that see all human beings as equal creation of God.⁹⁶ This is well illustrated by the Hinduism principle of ‘Non injury to others (*ahimsa*) [or simply] not causing pain to any living being at any time through the actions of one’s mind, speech or body’,⁹⁷ the Christian notion of being all children of God which led to the question ‘Am I my

⁹⁵ Preamble of the UN Charter; also Salomon (2007) 2.

⁹⁶ Free Legal Encyclopedia ‘Natural Law - Divine Natural Law, Secular Natural Law, Historical Natural Law’ available at <http://law.jrank.org/pages/8762/Natural-Law.html> (accessed 2 January 2011).

⁹⁷ P G Lauren *The Evolution of international human rights – Visions seen* (1998) 5.

brother's keeper?'⁹⁸ and by the Buddhism attitude calling for the abandon of specificity of 'castes and rank and become [equal] members of one and the same society'⁹⁹ further highlighted by the Dalai Lama's view that all global problem will come to pass 'if we understand each other's fundamental humanity, respect each other's rights, share each other's problems and sufferings'.¹⁰⁰

These important religious foundations became a platform for early philosophers such as the Chinese Mo Zi who developed a cosmopolitanist approach to relationships,¹⁰¹ Mencius who highlighted the 'infinite value of the individual' *vis a vis* the ruler.¹⁰² More importantly, from the principle of natural equality between human beings, other thinkers developed the natural law theory by arguing that there was no good quality of life outside a cosmopolitan set-up 'based on a clear recognition of individual rights',¹⁰³ that 'the oppressed man should seek protection under the law'¹⁰⁴ and moreover, orders consisted of ensuring that 'all is done according to the law, that custom is observed and the right of each man respected'¹⁰⁵ and finally that 'no one should be allowed to suffer...either because of poverty or of any deliberate action on the part of others'.¹⁰⁶

⁹⁸ Genesis, 4:9.

⁹⁹ Budha 'Disappearance of bhuddism' *Observer of Business and politics* (8 August 1993) as quoted by Lauren (1998) 6.

¹⁰⁰ Daila Lama *Ocean of wisdom: Guidelines for living* (1989)13as quoted by Lauren (1998) 6.

¹⁰¹ Mo Zi *La chine antique* (1927) 253-254 as quoted by Lauren (1998) 10.

¹⁰² Mencius in 'Evolution of human rights' *Weekly bulletin of the United Nations* 12 (1946) as quoted by Lauren (1998) 10.

¹⁰³ Hsun-tzu *Birthright of man*, 303, as quoted by Lauren (2007) 10.

¹⁰⁴ Hammurabi in J M Robert *History of the world* (1976) 48 as quoted by Lauren (1998) 10.

¹⁰⁵ P Modinos 'La Charte de la liberte de l'Europe' *Revue des Droits de l'Homme* 8 (1975) 677 as quoted by Lauren (2007) 10.

¹⁰⁶ Apastamba Dharmasutra II, 450-350 B.C *The birth right of Man* 94, as quoted by Lauren 2010.

The ancient ideas of natural law underpinned by equality between all was developed by Greek philosophers such as Plato, Aristotle, and Cicero; they were broadened by Roman thinkers who came up with the theory of *jus gentium* or law of the nations.

Based on the law of nature, Plato is of the view that social justice is achieved in situation with 'various classes performing their proper functions and individual justice as the proper functioning of the parts of the soul'.¹⁰⁷ Aristotle's natural law theory recognised the political nature of all human beings who are equal under the law.¹⁰⁸

This theory was further expanded upon by Christian philosophers such as Thomas Aquinas who described the natural law philosophy from a Christian perspective where by 'living out of justice' was equated to living out of the love for God.¹⁰⁹ This Christian theory was then developed to establish a bridge between natural law and right through Jesus Christ's teaching of 'loving one another [and] not to let the good be suppressed by force and to give every persons his rights'.¹¹⁰ In fact, Christianity prohibits discrimination, hence it could be argued that Christians have the duty not to discriminate. As correctly argued by Lauren, such a duty 'contributed to a considerable expansion of interest in justice, equality, and individual freedom, and thus to a corresponding shift from natural law as duties to natural law as rights'.¹¹¹ This development was interesting as people seeking freedom from state oppression kept referring to their natural rights to life, property, participation and to practice their religion.¹¹²

¹⁰⁷ P Hayden *Cosmopolitan global politics* (2005) 39.

¹⁰⁸ Aristotle *The politics and the Constitution of Athens* (1996) 127.

¹⁰⁹ Lauren (1998) 13.

¹¹⁰ J Hus in H Gordon Skilling *Charter 77 and human rights in Czechoslovakia* (1981) as quoted by Lauren (1998) 14.

¹¹¹ Lauren (1998) 14.

¹¹² A S P Whoodhouse (ed) *Puritanism and Liberty* (1938) 444 as quoted in Lauren (1998) 14.

The Christian-based natural law was developed by Locke and further expanded upon by philosophers of enlightenment such as Rousseau, Montesquieu, Hume, Hobbes, and Kant who focused on societal problems such as state's oppression to make their case for natural rights. These prolific thinkers were of the view that

[t]he fundamental rationality in the laws of nature could be applied to various aspects of the human condition, thus making humanity and society more rational and more perfectible through human effort.¹¹³

This reasoning finds its way through the second paragraph of the 1776 US Declaration of Independence in these words:

We hold these truths to be self-evident; that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness

As a result of this provision, natural rights were the subject of the US Supreme Court which held that

[T]he right to pursue happiness is placed by the Declaration of Independence among the inalienable rights of man, not by the grace of emperors or kings, or by the force of legislative or constitutional enactment, but by the creator.¹¹⁴

This approach was also followed by the same court that claimed that 'the founding fathers believed devotedly that there was a God and that inalienable rights of man were rooted in him'.¹¹⁵

¹¹³ Lauren (1998) 16.

¹¹⁴ *Powell v Pennsylvania* 127 US 678, 8 S. Ct. 127, 32 L. Ed. 253 (1888).

¹¹⁵ *Edwards v Aguillard* 482 US 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987).

Natural rights theory also appears in the declarative French political document, the ‘Declaration of the Rights of Man and Citizen’ which defines a set of individual rights and collective rights brought on by the 1789 French revolution. The expression ‘Rights of Man’ which highlights the natural character of human rights as well as their natural attachment to every human being. This idea also featured in the Universal Declaration which affirms that ‘everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’.¹¹⁶ Salomon correctly observes that the notion of human rights entails ‘the right to everyone to an adequate standard of living including food, clothing, housing and the right health, education and [others]’.¹¹⁷ This is in line with Grotius philosophy maintaining that the right to self-preservation possessed equally by all human beings is at the centre of natural law.¹¹⁸ For Donnelly,¹¹⁹ human rights are ‘the rights that one has simply because one is a human being, are held equally and inalienably by all human beings. They are social and political guarantees necessary to protect individuals from the standard threats to human dignity posed by the modern state and modern markets’.

However, in contrast to the natural law theory that posits that certain normative principles are true or ‘self-evident’ and exist independently of their codification or enforcement by human beings.¹²⁰ Positivism built upon the idea that norms are valid only insofar as they have been created upon a precise rule, and holds that law has nothing to do with morality. Its main proponents such as Auguste Comte and Thomas Hobbes derived their inspiration from well known Protestant philosophers of the enlightenment era such as Vattel, Kant and Hegel as well as twentieth century legal scholars like Kelsen and Dworkin to name a few. From an individualist perspective, such distance from the cosmopolitanist feature of the natural law theory are inclined towards the supremacy of the individual as well of the sovereignty and

¹¹⁶ Art 28 of the Universal Declaration.

¹¹⁷ Salomon (2007) 2.

¹¹⁸ Hayden (2005) 40.

¹¹⁹ J Donnelly *International Human Rights* (1998) 202.

¹²⁰ On the natural law theory, see in general J Finnis *Natural law and natural rights* (1980) 18.

power of the state represented by the ruler to whom ‘subjects are to obey’.¹²¹ According to this theory, people’s rights should be limited by the state power. Even some proponents of natural theory rejected the notion of natural rights, or ‘rights of man’ which were pure dreams and yielded the ‘monstrous fiction’ of human equality.¹²² Interestingly, even the utilitarian Bentham had strong views against natural rights. He wrote: ‘Rights is the child of law; from real law [originating from the state] come real rights; but from imaginary laws, from law of nature, come imaginary rights....Natural rights is simply non sense’.¹²³

It could be argued that Bentham’s rejection of natural rights is based on his belief to the right to property, otherwise how can a utilitarian distance himself from natural rights? His conception of human rights will definitely create a problem in the distribution of world’s resources as will be seen later. Other proponents of the right to property include Hume, Burke, Hamilton and Rousseau. The latter underlines the right to property as ‘the most sacred of all the rights of citizens [and] even more important in some respects than liberty itself’.¹²⁴ This view is also supported by Locke who may have used it as an excuse to own shares in the Royal African Company which was very much involved in the slave trade.¹²⁵

Having said that, it is important to note that the explosion of positivism was linked to the difficult operationalisation of the natural right theory. In fact, the Declaration of ‘the rights of Man’ did nothing for the rights of women, hence in 1791, Olympe de Gouge published her own Declaration of the Rights of Women and Citizens’ with the first article claiming the right

¹²¹ Lauren (1998) 22.

¹²² E Burke *Reflections and on the revolution in France* (1955) 313 and 341 as quoted by Lauren (1998) 22.

¹²³ J Bentham in B H Weston Human rights in R P Claude & B H Weston (eds) *Human rights in the world community* (1992) 16 as quoted by Lauren (1998) 22.

¹²⁴ JJ Rousseau ‘A discourse on political economy’ in *The social contract and discourses* (1950) 311 as quoted by Lauren (1998) 26.

¹²⁵ Lauren (1998) 30.

of equality between man and woman.¹²⁶ In addition, the 1789 Declaration on the rights of man did not reduce discrimination on the ground of race, social class and others.

Notwithstanding the challenges mentioned above, it could be argued that the natural law theory played a vital part in the birth of human rights as understood today. Nevertheless, the concept of human rights is not an easy one. The difficulties related to the concept were observed when the international community had to draft the International Bill of Rights.¹²⁷ It adopted the International Covenant on Economic Social and Cultural Rights¹²⁸ (ICESR) known to be from a socialist tradition on the one hand, and the International Covenant on Civil and Political Rights¹²⁹ (ICCPR) consistent with Western democratic origin¹³⁰ on the other.

The complexity of the concept was further highlighted when in 1979, the Czech Karel Vasak categorised human rights in terms of ‘generations’ of human rights.¹³¹ According to him, human rights were divided into three generations: first, second and third.

- *First generation rights*

¹²⁶ O de Gouges ‘Declaration des Droits de la Femme et de la Citoyenne, 1791’ *Oeuvres* (1986) 99-112 as quoted by Lauren (1998) 18.

¹²⁷ K Mclean *Constitutional deference, courts and socio-economic rights in South Africa* (2009) 91.

¹²⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.

¹²⁹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

¹³⁰ Mclean (2009) 91 ; also MCR Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 8.

¹³¹ K Vasak ‘International dimensions of human rights’, 1982; www.en.allexperts.com. The article in which the generation’s theory was first presented by Vasak is entitled: ‘A 30-Year Struggle. The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’, UNESCO Courier, November 1977, 29-30. Vasak became a French citizen.

Also known as civil and political rights, first generation rights include the right to life, personal liberty, freedom from torture, from slavery, from forced labour, right to property, to fair trial, to personal dignity and freedom of movement. These rights are subject to limitation except freedom from torture as well as the right to life. This entails for instance the abolition of the death penalty in protecting the right to life. The implementation of this right imposes negative obligations on the state;¹³² the state should abstain from torturing or encroaching upon rights which are viewed as natural or inalienable. Even in a circumstance of emergency created by a situation of war when rights may be subjected to derogation, the derogation should be proportional with the crisis it attempts to address. This was the position of the European Court of Rights in *Ireland v United Kingdom*¹³³ where the principle of proportionality alluded to earlier was established.

- *Second generation human rights*

Also called economic, social and cultural rights, second generation human rights which include the right to food, health, education, and housing amongst others were denied the attribute of human rights because of their so-called lack of enforceability, non universality of some of them, and the differences of level of economic development amongst states which lead to uneven levels of implementation.¹³⁴

Nevertheless, the international community has protected economic, social and cultural rights through the adoption of the 1966 International Covenant on Economic Social and Cultural Rights (ICESCR) and the adoption of its optional protocol.¹³⁵ These rights impose positive obligations on the state for their fulfillment, but the implementation is progressive as it

¹³² C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 18.

¹³³ *Ireland v United Kingdom* (1978) ECHR.

¹³⁴ A Eide 'Economic social and cultural rights as human rights' in Eide et al *Economic social and cultural rights: A textbook* (1995) 35-36.

¹³⁵ Adopted by the UN General Assembly Resolution A/RES/63/117 of 10 December 2008.

depends on the availability of resources in a specific country. Nevertheless, the lack of resources is not an excuse for their non implementation.¹³⁶

- *Third generation rights*

Also known as solidarity or groups rights, they include the right to self-determination, to a healthy and ecologically balanced environment, to development, to ownership of the common heritage of mankind and to national and international peace. Though controversial and therefore called ‘contested rights’,¹³⁷ these rights were informed by demands of the third world and African countries in particular, which were confronted to difficulties pertaining to colonialism and were excluded from the global economy,¹³⁸ hence the important place of group rights in the ACHPR.

The debate on the hierarchy of rights simply highlights the controversy on the universality of human rights. Proponents of the natural law theory are of the view that human rights are universal. Accordingly, every human, man or woman is a human being and is therefore endowed with universal and inalienable rights which are inherent to his or her personality; it is about human dignity which is defined by An-Na'im as ‘the particular cultural understanding of the inner worth of the human person and his or her proper political society’.¹³⁹ Furthermore, he argues that dignity is not a ‘claim right’, but a birthright or inherent right. The problem with An-Na'im's definition is linking dignity to a political society.

¹³⁶ Committee on ESCR, General Comment No 3 (1990) on the nature of state obligations under art 2 (1) of the ICESCR.

¹³⁷ Eide *et al* (1995) 241.

¹³⁸ W D Verwey ‘The new international economic order and the realization of the right to development and welfare - A legal survey’ in F E Snyder & S Sathirathai (eds) *Third World attitudes toward international law: An introduction* (1987) 25-26.

¹³⁹ A A An-Na'im (ed) *Human Rights in Cross-Cultural Perspective- A quest for consensus* (1991) 81.

In opposition to An-Na'im's view, human dignity should not be linked to a particular society, but to the human nature. This approach was advocated by Pope Pius, who from a Christian perspective, defined human dignity 'as something that is inherently a person's God-given inalienable rights'.¹⁴⁰ In this vein, it is argued that God created man with a special rank and thus, 'all social institutions, governments, states, laws, human rights and respect for persons originate in the dignity of man or his personhood. His dignity serves to be the foundation, cause and end of all social institutions'.¹⁴¹

It is also argued that dignity makes a difference between a man and a beast. Soman argues that treatment afforded to men compare to other creatures is nothing but 'the concept of dignity at work';¹⁴² it is 'a property that is supposed to belong to all people, in every condition, just by virtue of their humanity'.¹⁴³

Inclined towards the concept of dignity as defined above, Donnelly is of the view that all humans have rights by virtue of their humanity; and that a person's rights cannot be determined by gender, nationality, and ethnic origin. This view is supported by proponents of the universal validity and applicability of human rights. In this school of thought, Kannyo argues that most civilisations and cultures have given great importance to the preservation of life and the promotion of human welfare.¹⁴⁴ In the same vein, Asante says:¹⁴⁵

¹⁴⁰ E Soman 'Human dignity: A question of definition' (2008) available at <http://socyberty.com/philosophy/human-dignity-a-question-of-definition/> (accessed 9 May 2010).

¹⁴¹ Soman 'Human dignity: A question of definition' (2008) available at <http://socyberty.com/philosophy/human-dignity-a-question-of-definition/> (accessed 9 May 2010).

¹⁴² Soman (2008).

¹⁴³ Soman (2008).

¹⁴⁴ E Kannyo quoted from I G Shivji *The concept of human rights in Africa* (1989) 11.

¹⁴⁵ Asante quoted from Shivji (1989) 11&12.

I reject the notion that human rights concepts are peculiarly or even essentially bourgeois or western. Such notion confuses the articulation of the theoretical foundation of western concepts of human rights with the ultimate objective of any philosophy of human rights. Human rights quite simply are concerned with asserting and protecting human dignity and they are ultimately based on a regard for the intrinsic worth of the individual. This is an eternal and universal phenomenon, and is vital to Nigerians and Malays as to Englishmen and Americans.

Asante's opinion is supported by Dietrich who claims that 'beyond all formal standards, individual and society seem to have a common understanding of dignity and humiliation'.¹⁴⁶

However, these opinions ignore that the Universal Declaration uses individualistic expressions like 'everyone, his, no one shall', even though present in Africa, where concepts such as 'we, us and ours' are well established. Focusing on the African environment, Metz, while describing the African concept of *ubuntu* and African morality, uses the maxim of 'I am because we are' as a starting point.¹⁴⁷ Accordingly, African philosophy is community informed and not individual based. Mbiti views it as a 'cardinal point in the African view of man' and that '[w]hat is right is what connects people together; what separates people is wrong'.¹⁴⁸ Metz demonstrates how this philosophy which informs group rights in Africa is explained by African leaders such as Steve Biko who observed 'our action is usually joint community oriented action rather than the individualism which is the hallmark of the capitalist approach'.¹⁴⁹ This philosophy based on *ubuntu* differs from the Western philosophies. Metz defines the concept of *ubuntu* to mean 'an action is wrong insofar as it fails to honor relationships in which people share a way of life and care for one another's quality of life, and especially to the extent that it esteems division and ill will'.¹⁵⁰ In this

¹⁴⁶ W Dietrich quoted from N Koppensteiner 'Are human rights universal' available at <http://www.interpeacenet.org/rr/koppensteiner-humanrights.htm> (accessed 17 February 2008).

¹⁴⁷ T Metz 'Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights' (2010) 9 *Journal of Human Rights* 83.

¹⁴⁸ Metz (2010) 83.

¹⁴⁹ Metz (2010) 83.

¹⁵⁰ Metz (2010) 84.

context, the interests of the collectivity is paramount,¹⁵¹ hence the presence of collective rights in ACHPR. Using Akan proverbs, Appiagyei-Atua illustrates the concept of human rights in the African philosophy in these terms:¹⁵²

If you deny me the right to express myself, you are a murderer'; 'it is your responsibility to see to my welfare in my old age after I helped raise you up'; 'Two-headed crocodiles fight over food that goes to a common stomach because each relishes the food in its throat'; or 'I heard it and I kept it'.

Accordingly, every one has the freedom of expression, an individual is an integral part of the community and does not only have rights, but has duties as well.¹⁵³ In such a set-up, sharing should be the way of live and human rights are generally collective.

It is therefore submitted that the concept of human rights on the continent is informed by African philosophies extracted from the cultural, linguistic, and historical background of African folks.¹⁵⁴

The universalism of human rights is also questionable because among other things when the Universal Declaration was drafted, Asian and African countries except Ethiopia were still colonies and did not participate. The only non-westerners who were at the table were Chang from China and Malik from Lebanon.¹⁵⁵

¹⁵¹ A Cassese *Human rights in a changing world* (1990) 54.

¹⁵² K Appiagyei-Atua 'A rights-centred critique of African philosophy in the context of development' (2005) 5 *African Human Rights Law Journal* 335.

¹⁵³ D M Chirwa 'In search of philosophical justifications and suitable models for the horizontal application of human rights' (2008) 8 *African Human Rights Law Journal* 303.

¹⁵⁴ Appiagyei-Atua (2005) 347.

¹⁵⁵ V A Leary 'The effect of Western perspective on international human rights' in A A An-Naim & F M Deng (eds) *Human rights in Africa – Cross-cultural perspective* (1990) 20.

Put differently, issues related to culture, custom, religion and tradition have important roles in shaping human rights agenda. Therefore, the idea of the universality of rights becomes a difficult one and adds to the complexity of identifying and classifying human rights. Hence, the correctness of the argument that nowadays the scope and abstraction of the Universal Declaration hinders the understanding of the conceptual and practical connections of human rights.¹⁵⁶ In the same vein, MacIntyre argues that human rights only appear at particular historical moments to address particular societal issues.¹⁵⁷ Consequently, it could be argued that there are not human rights established in human nature as argued by the natural law theory.¹⁵⁸ This opinion is sustained by proponents of the relative validity of and applicability of human rights. Koppensteiner questions: ‘How, for example, does the right to life as the most basic of human rights relate to questions like suicide or abortion?’¹⁵⁹ Furthermore, the practice of child labour and female circumcision¹⁶⁰ gives some indication of how divergent moral perspectives can be. Moreover, to use Hansungule’s words, ‘the right to development is probably the best example of the group paradigm’ because while Africa does not believe in human rights without the RTD, the latter is irrelevant to the West.¹⁶¹

Nevertheless, the Vienna Declaration unanimously adopted by UN member states declared the ceasefire on the debate of universalism versus relativism of human rights. It declared all human rights universal, interdependent and indivisible.¹⁶² This thesis subscribes to this view; in other words, civil and political rights, economic, social and cultural rights, as well as the

¹⁵⁶ A Hanella & J Lagan (eds) *Human Rights in Americas: The struggle for consensus* (1982) 1.

¹⁵⁷ A MacIntyre *After virtue* (1981) 67.

¹⁵⁸ MacIntyre (1981) 69-70.

¹⁵⁹ N Koppensteiner ‘Are human rights universal’ available at <http://www.interpeacenet.org/rr/koppensteiner-humanrights.htm> (accessed 17 February 2008).

¹⁶⁰ AD Renteln *International human rights: Universalism v relativism (Frontiers of anthropology)* (1990) 57.

¹⁶¹ Hansungule, Good Governance Academy (2003) 8 (on file with author).

¹⁶² Para 2, 5, 32 and 37 of the Vienna Declaration.

RTD, are all universal and should be implemented simultaneously, and that neither set of rights should be paramount over the other. An-Na'im explains the interdependency of civil and political rights and socio-economic rights in these terms:¹⁶³

From a practical point of view, it is difficult to identify coherent and consistent criteria of classification. Indeed, the rights in both purported categories are indivisible and interdependent, collectively as well as individually, simply because they are all essentials for the well being and dignity of every person As a whole being. For example, freedom of expression will be the prerogative of the privileged few without a right to education that enables all people to benefit from that freedom. Conversely, a right to education is not meaningful unless a person also has the freedom to create knowledge and exchange information. Neither of these rights is practically useful for a person who lacks shelter and health care.

It is however important to note that the proclamation of the universality of human rights did not neglect the regional particularities; hence the important place of human rights at regional levels in general and in Africa in particular.

The term 'human rights in Africa' represents the African human rights architecture or African human rights system broadly. In this study, 'the African human rights system' should be understood broadly. In other words, it includes 'the regional' i.e. AU-based system and 'the subregional' such as the Southern African Development Community (SADC) or the Economic Community of West Africa (ECOWAS) and even national laws with its case law. In effect, the AU human rights system is based on the Organisation of the African Unity (OAU) Charter of 1963,¹⁶⁴ (now 2001 AU Constitutive Act),¹⁶⁵ the 1969 OAU Convention Governing the Specific Aspects of Refugees in Africa,¹⁶⁶ the 1981 ACHPR¹⁶⁷ and its 1998

¹⁶³ A A An-Na'im 'To affirm the full human rights standing of economic, social and cultural rights' in Yash Ghai & Jill Cottrell (eds) *Economic, Social and Cultural Rights in Practice* (2004) 12.

¹⁶⁴ Adopted in Addis Ababa, Ethiopia, on 25 May 1963 and entered into force on 13 September 1963; CIAS/Plen.2/REV.2 available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 6 May 2010).

¹⁶⁵ Adopted in Lomé, Togo, on 11 July 2000 and entered into force on 26 May 2001; AHG/Dec.143 (XXXVI). The AU Assembly held its inaugural meeting in Durban South Africa, in July 2002.

¹⁶⁶ Adopted in Addis Ababa, Ethiopia, on 10 September 1969 and entered into force on 20 June 1974; available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 6 May 2010).

Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights (Protocol on the African Human Rights Court);¹⁶⁸ its 2003 Protocol to the ACHPR on the Rights of Women in Africa (Protocol on the Rights of Women)¹⁶⁹ and the 2008 Protocol on the Statute of the African Court of Justice and Human Rights¹⁷⁰ and finally the 1990 African Charter on the Rights and Welfare of the Child (African's Children Charter).¹⁷¹

At this juncture, it is important to clarify why the thesis is of the view that human rights are the best way for achieving the RTD.

In 'the classic regime of sovereignty' which ran from 1648 to the early twentieth century,¹⁷² international law was based on the principle of equality between states which were concerned with a just and fair relation between them. The 'vertical' relationship between states and their citizens was a matter of national sovereignty which could be addressed nationally and was not included in the scope of international law.

However, after the end of the Second World War, the inclusion of human rights standards into interstate agreements takes international law beyond the law of states, and turns it into the law of peoples or *Jus gentium*. This development led to the adoption of numerous human rights instruments. More importantly, many non-states actors (IFIs, WTO and TNC) became major

¹⁶⁷ Adopted in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986 June 1974; OAU Doc. CAB/LEG/67/3/Rev5 (1981).

¹⁶⁸ Adopted in Ouagadougou, Burkina-Faso on 10 June 1998 and entered into force on 25 January 2004, available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 6 May 2010).

¹⁶⁹ Adopted in Maputo, Mozambique, on July 2003 and entered into force on 25 November 2005; available at http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm (accessed 6 May 2010).

¹⁷⁰ Adopted in Sharm El-Sheikh, Egypt, in July 2008; Ass/AU/Dec.196 (XI) DOC. ASSEMBLY/AU/13 (XI).

¹⁷¹ Adopted in Addis Ababa, Ethiopia, on 11 July 1990 and entered into force on 29 November 1999; OAU Doc. CAB/LEG/24.9/49 (1990).

¹⁷² D Held 'The changing structure of international law: Sovereignty transformed?' 1 at <http://www.polity.co.uk/global/pdf/GTReader2eHeld.pdf> (accessed 8 January 2011).

players in shaping world politics, international relations and international law; in fact they are the international order makers and their action should be informed by international human rights norms if the latter are to become a roadmap for the realisation of the RTD.

Nevertheless, in spite of various international undertakings on development and the RTD, much more needs to be done to ensure equity and global justice in the redistribution of world resources. For this to happen, the liberal discourse of the right to property should be substituted with a cosmopolitanist approach to human rights. In this context ‘the law [should not] be used to justify the political ... domination of one group over another’.¹⁷³ As pointed out by Baxi, the current globalisation is characterised by ‘the emergence of an alternate paradigm of human rights’¹⁷⁴ which abandons human rights standards as defined by the UDHR and focused on ‘trade-related, market friendly human rights’.¹⁷⁵ The latter is more concerned with the welfare of the corporate world without any attention to human wellbeing. Such an approach will not lead to the realisation of the RTD.

As much as the thesis believes that human rights are the best way to realise the RTD, it is also convinced that this will not happen if the architects of globalisation do not go back to the concept of human dignity that was behind the adoption of the UDHR. In this perspective, international order makers should be held accountable for human rights violations. Hence, the need to criminalise certain acts which will prevent the realisation of the RTD.¹⁷⁶ In this vein, the crime against the RTD should be made of

[I]nternational, regional, or national acts, as comprising intentional acts or omissions or patterns of behaviour designed to defeat, distort, deflect or detracts from laws directed to fulfil the core components of the [RTD].¹⁷⁷

¹⁷³ S Adelman & K Foster ‘Critical Legal Theory: The Power of Law’ *The Critical Lawyers' Handbook* Volume 1 available at http://www.nclg.org.uk/book1/1_7.htm (accessed 4 January 2011).

¹⁷⁴ U Baxi *The future of human rights* (2002) 132.

¹⁷⁵ Baxi (2002) 132.

¹⁷⁶ It is important to note that the criminalisation of such acts will not be enough because outside the municipal system, it will be necessary to identify which forum will hear such cases.

¹⁷⁷ Baxi (2007) 153.

Furthermore, the 2008 international economic crisis was the evidence that liberalism and its right to property need to be put aside. In fact, we witnessed the revival of state intervention in the world capital of liberalism (Washington) and this has the flavour of cosmopolitanism which could open doors for the eradication of poverty and the realisation of the RTD. In fact, for human rights to be the engine of the RTD, there is also a need to ensure that the nation-state and the international community at large play their role of ‘redistributionist’,¹⁷⁸ of resources through the realisation of socio-economic rights. It should be noted that if all the stakeholders comply with the universal standards of human rights, this will lead to global justice because the latter will not be realised if human rights are ignored. Therefore, advocating for ‘the language of global justice [and not] human rights [in] pursuit of global development policy’¹⁷⁹ is also correct if the end result is the realisation of the RTD.

Overall, human rights are the best way to realise the RTD, though there is a need to ensure that globalisation is human beings and human dignity friendly.

2.2.2 The notion of development

In the UN system, the link between human rights and development was first highlighted by the 1968 Teheran World Conference on Human Rights in these terms: ‘The achievement of lasting progress in the implementation of human rights is dependant upon sound and effective national and international policies of economic and social development’.¹⁸⁰ In other words, a successful realisation of human rights is directly linked to appropriate development frameworks. Nevertheless, this link does not necessarily translate into reality on the ground because amongst other factors, the concept of development is elusive.

¹⁷⁸ Baxi (2002) 135.

¹⁷⁹ Baxi (2007) 131

¹⁸⁰ The Proclamation of Teheran, para 13 in final Act of the International Conference on Human Rights, UN doc. A/CONF.32/41 (1968).

Like the word *peace*, the term development is used abundantly without provision for a definition. As a result, it is susceptible to different meanings in different societies, communities and countries. Besides its legal context, it could be interesting to try and investigate the concept socially in a mean society.

In the village of Baleng¹⁸¹ in West Cameroon for example, the expression '*pah loh long ngoh mbiaeh*' is commonly used. It simply means 'let's bring progress in Baleng'; development is understood to be progress. In Lingala, development is known as *Kobonga* while progress is known as *Konede Kiboso*. In Setswana, development is *Ditlhabololow* and progress is known as *Tswelelopele* and in Igbo, development is *Obodo ime pe*. In other words, development is part and parcel of African languages. The lack of it is 'poverty' known as *Mpong* in Baleng, *Mobola* in Lingala, *Lehuma* in Setswana and *Ogbenye* in Igbo. As testified by these expressions, the well-being of the human person matters in African communities. In general, the deficiency of welfare or poverty is associated with the lack of basic goods and services necessary to live with dignity. From this angle, in an underdeveloped community 'poor people cannot lead a life commensurate with the standards of civilised existence'¹⁸² characterised by electronics, appliances, plumbing and other technologies. Here, development is synonymous with 'modernisation'.¹⁸³ It can therefore be argued that a rich or developed man or woman is a person who lives in a building with modern toilets, televisions, and many other items of the 'modern world'. In short, though there are pockets of poverty in big cities, a developed or wealthy man or woman lives in a wealthy environment like New York in the USA or Sandton in Johannesburg and it can be argued that his or her dignity as a human being is ensured. From this angle, 'development' is perceived in the classical approach, where it is the accumulation of wealth and is measured by the Gross Domestic Product (GDP).¹⁸⁴

¹⁸¹ Baleng is the author's village located in West Cameroon.

¹⁸² A Sengupta 'Poverty eradication and human rights' Briefing presented at the UN Palais des Nations, Geneva, Switzerland, 31 March 2005.

¹⁸³ D Seers 'The meaning of development' (1969) 2 *International Development Review* 2; for more on the concept of development, see The World Bank '*Development and human Rights: the role of the World Bank*' (1998); The World Bank (2000) *Can Africa claim the 21st century?*

¹⁸⁴ The GDP is the total amount of goods and services produced by a country.

Nevertheless, this understanding of development is based on American hegemony as affirmed in President Truman's speech of 1949 in which he noted that America 'should make available to the peace loving peoples the benefits of our store of technical knowledge in order to help them in their aspirations for a better life'.¹⁸⁵ In this respect, from a hegemony perspective, development is a commodity brought to the 'underdeveloped' in order to dominate and conquer them. Escobar correctly observes that such development based on the accumulation of material as prescribed in the liberal ideology characterized by the right to property created the 'Third World'.¹⁸⁶ Such idea of development gave birth to the Third World because the same theory informed the creation of the WTO with its injustices, the 1980 Structural Adjustment Programmes that brought Africa to its knees. As observed by Baxi, the imposed classical theory of development is not informed by 'global justice' but by liberal policies tailored to impose 'the hegemonic project of modernisation'.¹⁸⁷

It could be argued that 'development' from Truman's perspective is hegemonic because it does not consider other people's beliefs. For instance, 'neoliberal development' does not have the same resonance with pygmies living in the forest of East and South Cameroon. In Cameroon, it is common knowledge that, for these people also called 'forest people',¹⁸⁸ development is not about accumulation of wealth or infrastructures. In fact, they retreat to the back of the forest as roads and other attributes of what is known as 'civilisation' are brought to their villages. Their way of life involves hunting for meat, gathering and fishing, eating

¹⁸⁵ Harry Truman's *Public papers of the presidents of the United States* [1949], 1969 quoted by Baxi 'The uncanny idea of development' in *Human rights in posthuman world - critical essay* (2007) 93.

¹⁸⁶ A Escobar *Encountering development: The making and the unmaking of the Third World* (1995) 4, as quoted by Baxi (2007) 93.

¹⁸⁷ Baxi (2007) 97.

¹⁸⁸ On forest people see in in general see C M Turnbull *The Forest People* (1987); also S Tetchiada 'For Cameroon's pygmies, no forest is impenetrable enough', press review, *News from Africa* 17 May 2005 available at http://www.newsfromafrica.org/newsfromafrica/articles/art_10269.html (accessed 9 May 2010); also 'African people and cultures' available at <http://www.africaguide.com/culture/tribes/pygmies.htm> (accessed 9 May 2010); also survival 'Pygmies' available at <http://www.survivalinternational.org/tribes/pygmies> (accessed 9 May 2010).

fruits and vegetables and having a strong belief in traditional medicine. In addition, they keep their bonds of family life and tribal solidarity alive.¹⁸⁹ In this era of mobile phones, they use drums to send messages miles away. In fact, bringing to pygmies what is known as ‘development’ in various parts of the continent will be hindering their development or under-developing them. In the same perspective, it can be argued that what is known as wealth in the classical sense brings pollution because machinery is the main destroyer of the environment. This approach of development is close to Gandhi’s *swaraj* understood as a development model informed by ‘a cosmopolitan republic of ideas, based on deeply understanding one’s own traditions, combined with a sincere respect for the traditions of the other’.¹⁹⁰

In addition, development is also viewed as culture. In this regard, there is a practical case in the hydropower dam in Uganda¹⁹¹ where Jjajja Bujagali, a spiritual leader was involved in the building of the dam. It is said that after the African Development Bank signed an agreement with the government of Uganda to develop the dam and hydropower, it went to the site and met with eight chiefs/spiritual leaders to introduce the project and ask for their co-operation.¹⁹² The eight spiritual leaders/chiefs consulted their spirits in the waters where the dam was to be sighted, asked them (spirits) for their ‘permission’ to establish the dam, were paid money by the Bank to perform rituals to please the spirits, etc. All this was done and it is said the spirits ‘agreed’ and in fact were taken out of the lake to give way to the construction of the dam and other related works. Jjajja Bujagali who according to an American

¹⁸⁹ Turnbull (1987); Tetchiada (2005).

¹⁹⁰ Baxi (2007) 98.

¹⁹¹ See Independent Review Mechanism 1st Monitoring Report on the implementation of findings of non-compliance and related actions to be undertaken by the ADB Management on the Bujagali hydropower and interconnection projects, 22 July, 2009, Courtesy of the Director, Compliance Review and Mediation Unit (CRMU); also M Lacey ‘Traditional Spirits Block a \$500 Million Dam Plan in Uganda’ *The New York Times* September 13 2001; J Kane ‘Eastern Uganda Grapples with Power Plant Project’ available at <http://www.npr.org/templates/story/story.php?storyId=12742926&ft=1&f=1025> (accessed 15 August 2009); also M Hansungule ‘Policing the African Development Bank: Review of the Independent Review Mechanism’ (2009) 4, Report of the Independent Expert at the ADB (on file with author).

¹⁹² Hansungule (2009) 4.

anthropologist hired by the African Development Bank, is more senior to the other eight spiritual leaders, but who was ignored at first. Jjajja Bujagali did not cooperate when approached because he thought he was ignored by the government and the African Development Bank and the World Bank as the two banks jointly funding the project. Jjajja Bujagali when finally approached, claimed his spirit (s) in the lake have refused to cooperate. He claimed to have spoken to them on several occasions to bless the project but they refused. It appeared what he wanted (according to the bank staff) was to be paid the same amount of money or more than what was paid to his colleagues before the spirits can agree.¹⁹³

This case just adds to the complexity of the concept of development. Belief in African spirits and ancestors is of course akin to belief in witches. People are supposed to have moved on, but the stubborn reality, however, is that it is still the case that many people continue to believe in them; it is their civilisation, culture and religion which are guaranteed as human rights. Though 'positive culture' should be emphasised, it is not yet elaborated what exactly constitutes the scope of culture and may just include beliefs like Bujagali spiritual beliefs. Perhaps there is a need to 're-define' development paradigm to mean modern and positive cultural beliefs and practices which (provided they are positive) help people identify themselves as who they are, and this is ignored by liberal hegemonic concept of development.

It is incorrect to advance material values over other values. To be rich is not only to have a full bank account or buildings, but it also implies 'increased skill and capacity, greater freedom, creativity, self-discipline and responsibility' as Walter Rodney¹⁹⁴ puts it.

During 2008 Alternatives' days in Canada,¹⁹⁵ on the first night of the event, as the participants were free and relaxing around a camp fire not far from a lake, this author held an informal

¹⁹³ Hansungule (2009) 4.

¹⁹⁴ W Rodney *How Europe underdeveloped Africa* (1973) 6, available at http://www.blackherbals.com/walter_rodney.pdf (accessed 15 August 2010).

¹⁹⁵ Alternatives' is a Canadian based NGO. Alternatives' days or the global solidarity forum aims to build a different world. From August 22 to 24 2008, this author participated to Alternatives' Days which took place in Saint-Alphonse-de- Rodriguez, in Montreal, Canada.

debate on ‘what is poverty? After listening to the theory which connects poverty to lack of technology and mechanisation, this author brought a different perspective in these words:

Cultural identity should not be viewed as poverty, connecting to nature is not being poor. We travelled 145 km to hold this conference in a rural area to be in touch with the nature, we are sitting around the fire at night next to a lake. We came here to connect with the nature, but when other people in Africa have these details as their way of life, they are viewed as poor people.¹⁹⁶

This view was sustained on Saturday 23 August 2008 by Raina, Programme Director at Alternatives in Asia and by Pedros Batista the Ecologist Award winner in Brazil who were not present at the informal discussion mentioned above. They used their different presentations to observe that back in 1972, the tiny East Asian country of Bhutan understood that determinants of human happiness go beyond mere economic growth.¹⁹⁷ Bhutan’s King Jigme Singye Wanchuck responding to criticism on the lack of economic growth in his kingdom emphasised the need to build an economy based on their cultural and spiritual values anchored in Buddhism.¹⁹⁸ In Bhutan, development is not defined by the GDP, but by ‘Gross National Happiness’ which defines the quality of life on more holistic and psychological terms. It takes into account culture and way of life. It looks at how many trees are standing, and not just how many roads and buildings are established; in brief, it considers the ecological relationship between humans and nature.¹⁹⁹

¹⁹⁶ S A Djoyou Kamga in an informal debate on poverty in Saint-Alphonse-de- Rodriguez, Montreal, Canada, 22 August 2008 (Alternatives’ Days 2008).

¹⁹⁷ V Raina, and P I Batista ‘Is a sustainable society compatible with capitalism?’ presented during 2008 Alternatives days (Axe 1 on political ecology) at Saint-Alphonse-de- Rodriguez, Montreal, Canada, 23 August 2008.

¹⁹⁸ ‘Gross National Happiness’ at http://en.wikipedia.org/wiki/Gross_National_Happiness; also Gross International Happiness at <http://www.grossinternationalhappiness.org/gnh.html> (accessed 25 August 2008).

¹⁹⁹ For more on Gross National Happiness in Bhutan see amongst others O Schell ‘Gross National Happiness’ at <http://www.pbs.org/frontlineworld/stories/bhutan/gnh.html> (accessed 25 August 2008); ‘Bhutan’s Gross National Happiness’ at <http://www.sepiamutiny.com/sepia/archives/002317.html> (accessed 25 August 2008).

Nevertheless, the fact that some people enjoy nature or consider themselves to be wealthy because of their cultural and ancestral values does not negate the fact that life without food, medicine, houses, schools and technology cannot always enhance human dignity, especially during this time when the world is becoming a global village. This author, while in Canada, regularly attended lectures with his friends who lived in Uganda, Kenya and South Africa. The lectures were delivered from Pretoria, Zambia or other countries in the world by Professor Hansungule. By so doing, the students are getting empowered through education which dignifies our humanity. This is possible because of the technology known as internet. It could therefore be argued that the mere fact of living in the 'dark' with no roads, toilet facilities, electricity, healthcare or schools reduces people's capability to live in dignity. A homeless man who has nothing is almost like an animal which has no place to stay. Indeed, he is a poor man and has no dignity or rights, hence the comment of the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) claiming that 'poverty constitutes a denial of human rights'.²⁰⁰

From another angle, development can be the equivalent of liberty. For instance, a black South African who had no rights under apartheid can claim to be developed now that he has the right to vote, freedom of movement as well as all his socio-economic and cultural rights protected by the South African Constitution under chapter two. In other words, following Sen's perspective, black South Africans can define development as 'freedom'.²⁰¹

'Development' can also be viewed through Julius Nyerere's eyes that see development as the art of investing in people, in education and human development. Commenting on the Arusha Declaration,²⁰² Nyerere said:

²⁰⁰ See Economic and Social Council 'Poverty and the International Covenant on Economic Social and cultural Rights' E/C.12/2001/10, 10 May 2001.

²⁰¹ A Sen *Development as freedom* (1999).

²⁰² The Arusha Declaration was made by the late Tanzanian President Julius Nyerere on 5 February 1967. It was a description of *Ujamaa* or Nyerere's vision of socialism to develop his country.

What we were doing, in fact, was thinking of development in terms of things, and not people....', based on post Arusha Declaration understanding that what we need to develop is people, not things, and that people can only develop themselves.²⁰³

In other words, development is not 'machinery' or mechanics, or roads and bridges, but the development of a human person to make these machines and roads as well as to respect others. Thus, it can be argued that Nyerere views development from Walter Rodney's perspective according to which development is moral²⁰⁴ and from the Sen's theory of development of human capabilities.²⁰⁵

According to the United Nations Development Programme (UNDP), development amongst others is the research of human well-being as well as the improvement of human capabilities.²⁰⁶ In the same vein, according to World Vision, a 'Christian relief, development and advocacy organisation whose purpose is to create lasting change in the lives of children, families and communities living in poverty',²⁰⁷ development is all about empowering poor communities by helping children move away from poverty to a fuller life. Accordingly, development is not only the provision of 'physical resources, but empowering communities to take ownership of their future and continue to improve their health and quality of life'.²⁰⁸ Though World Vision's developmental agenda is inspired by Christian values, the organisation assists all people regardless of religion, race, ethnicity or gender. Its agenda is

²⁰³ Julius Nyerere on the Arusha Declaration' at www.infed.org/thinkers/et-nye.htm (accessed 6 May 2008).

²⁰⁴ Rodney (1973) 6.

²⁰⁵ Sen's ideas on capabilities, development, freedom and human rights imply moving the focus of development economics from national income accounting to people centered policies. For more on this theory, see M Walker & E Unterhalter *Amartya Sen's capability approach and social justice in education* (2007).

²⁰⁶ Discussion with Ms Lopa Banerjee who is the Advocacy & Policy Advisor at the UNDP, Pretoria, South Africa, 20 April 2009.

²⁰⁷ L Ngcongwane, World Vision Human Resources Coordinator, in discussion with the author on 21 April 2009, also World Vision at <http://www.worldvision.org.za/content/view/13/28/> (accessed 22 April 2009).

²⁰⁸ In discussion with Ngcongwane (21 April 2009).

not discriminatory. Ms Lele observes that development is informed by the need to follow Jesus Christ's principle of helping the poor; it is based on charity and solidarity which is the right thing to do.²⁰⁹

The term development is a complex one and 'is in need of development itself'.²¹⁰ African politicians usually advance development as a reason to be voted into office while the incumbent party asks for more time to finalise its development programme, but none of them defines the concept of development. Nonetheless, as discussed earlier, development may imply disruption of the established way of life and be viewed as acculturation or rather connote increased living standards characterised by an improvement of the societal welfare in general. In the context of this study, development should be understood as a process to improve living standards with special emphasis on freedoms. The second paragraph of the Preamble of the 1986 UN Declaration on the right to development²¹¹ (UNDRTD) sheds more light on this view by defining development as:

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

In other words, development is a holistic human centered process underpinned by the establishment of national and international settings in which every individual and all peoples freely enjoy a sustainable improvement of the economic, social, cultural and political well-being. Such a concept of development entails the establishment of a world order characterised by global justice. Notwithstanding a critical view on this,²¹² it should be a world order where development is characterised by the following:

²⁰⁹ In discussion with Ngcongwane (21 April 2009).

²¹⁰ Statement by Nancy Rubin, U.S. Delegate to the UN Human Rights Commission, Comment on the Working Group on the Right to Development, 54th Sess (27 April 1998).

²¹¹ The 1986 UNDRTD adopted by General Assembly resolution 41/128 of 4 December 1986.

²¹² J Donnelly 'Human rights, democracy and development' (1999) 2 *Human Rights Quarterly* 625-626.

Empowerment – The expansion of men and women’s capabilities and choices increases their ability to exercise those choices free of hunger, want and deprivation. It also increases their opportunity to participate in, or endorse, decision-making affecting their lives.

Co-operation – With a sense of belonging important for personal fulfillment, well-being and a sense of purpose and meaning, human development is concerned with the ways in which people work together and interact.

Equity – The expansion of capabilities and opportunities means more than income – it also means equity, such as an educational system to which everybody should have access.

Sustainability – The needs of this generation must be met without compromising the rights of future generations to be free of poverty and deprivation and to exercise their basic capabilities.

Security – Particularly the security of livelihood. People need to be freed from threats, such as disease or repression and from sudden harmful disruptions in their lives.²¹³

2.2.3 The RTD

The RTD is at the centre of this research. Therefore, its analysis is dealt with in two chapters (chapter 3 and 4). Nevertheless, it should be understood as a right encompassing civil and political rights as well as socio-economic rights. In addition, it emphasises the right to participation.

According to the first article of the UNDRTD, ‘every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development’. In other words, through his or her participation, an individual or a group contributes, enjoys and realises his or her RTD. This is consistent with human rights being indivisible, interdependent, interrelated and universal.

The RTD also entails participation at regional or international level through South-South partnership, partnership between Africa and the rest of the world and puts human rights together interdependently under the same umbrella with the special objective to win the battle against poverty. Nonetheless, as will be shown in the upcoming chapter, the RTD is very controversial in most Western states with the USA as its main opponent.

²¹³ United Nations Development Programme ‘Governance for sustainable development: A UNDP policy document 2 (1997) as quoted by Donnelly ‘Human rights, democracy and development ‘ (1999) 2 *Human Rights Quarterly* 625.

However, there has been a recent development in the human rights discourse worthy to be noted. On 24 December 2009, the US Senate passed the landmark Health Reform Bill. Described by President Obama as ‘the most important piece of social legislation since the Social Security Act passed in the 1930s and the most important reform of our health-care system since Medicare passed in the 1960s’,²¹⁴ this Bill is credited both to late Senator Kennedy and current President Barack Obama. Having sailed through Congress recently, the Bill could shortly be signed into law after some reconciliations and modifications of conflicting clauses.

Most interesting is that this is happening in a country whose Constitution refuses to recognise socio-economic rights. None of the fourteen (14) Amendments to the American Constitution constituting the Bill of Rights refers to socio-economic rights. Yet the people on the ground recognise these rights and hence their representatives in the Senate overwhelmingly adopted the landmark bill by 60 to 39 and it was signed into law on 23 March 2010. People realise that health care is as important as liberty and instructed their representatives to vote for it. This development is important in this research because as mentioned above, socio-economic rights including the right to health is comprised in the RTD which, as will be shown in the next chapter, is always rejected by the USA. The inclusion of the right to health in the fourteen amendments stresses the interdependency of human rights and shows that all human rights are equal; in other words, first, second and third generation human rights are all equal.

During the Human Rights Week commemorating the 61st anniversary of the Universal Declaration, Hillary Rodham Clinton, the US Secretary of State clearly explained the interdependency of human rights in these terms:²¹⁵

Our human rights agenda for the 21st century is to make human rights a human reality, and the first step is to see human rights in a broad context. Of course, people must be free from the oppression of

²¹⁴ S Murray and L Montgomery ‘Senate passes health-care bill, now must reconcile it with House’ *The Washington Post* 25 December 2009 available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/24/AR2009122400662.html> (accessed 26 December 2009).

²¹⁵ H R Clinton ‘Remarks on the Human Rights Agenda for the 21st Century’ Georgetown University's Gaston Hall, Washington, DC, December 14, 2009 available at <http://www.state.gov/> (accessed 20 December 2009).

tyranny, from torture, from discrimination, from the fear of leaders who will imprison or “disappear” them. But they also must be free from the oppression of want – want of food, want of health, want of education, and want of equality in law and in fact.

This is actually how the substance of the RTD that the USA always opposes is understood. In other words, it encompasses freedom from fear and freedom from want. Nevertheless, the adoption of the 2009 Health Reform Bill brings a very big turn in the concept of human rights in the USA for two main reasons:

Firstly, under the Reagan Administration, equating economic, social and cultural rights with civil and political rights (as the Obama’s administration does today) was viewed as ‘distorting’ the concept of human rights.²¹⁶ This view was explained by Alston when presenting the Reagan administration’s opinion on the RTD. Accordingly,

[t]he right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights and to permit the Third World to “distort” the issue of human rights by affirming the equal importance of economic, social and cultural rights with civil and political rights and by linking human rights in general to its “utopian” aspirations for a new international economic order.²¹⁷

In other words, economic, social and cultural rights (second generation human rights) are definitely inferior to civil and political rights (first generation human rights) and the RTD (a third generation human right) was not even on the table. This view was in sharp contrast with Sengupta’s, the Independent Expert on the RTD arguing that the achievement of economic, social and cultural rights is vital to the implementation of the RTD and had chosen the rights to health, adequate food, and education for his studies on how to implement the right.²¹⁸ It is important to note that the Independent Expert on the RTD did not claim that economic, social and cultural rights were paramount or should be implemented to the detriment of civil and

²¹⁶ P Alston ‘Making Space for New Human Rights: The Case of the Right to Development’ (1988) 1 (3) *Harvard Human Rights Year Book* 20.

²¹⁷ Alston (1988) 20.

²¹⁸ Report of the Independent Expert on the Right to Development, U.N. GAOR, 55th Sess., at 11, 38, UN Doc. A/55/306 (2000).

political rights.²¹⁹ On the contrary, he stressed the interdependence of all human rights and noted that²²⁰

[i]t is not merely the realization of those rights [civil and political and economic, social and cultural rights] individually, but the realization of them together in a manner that takes into account their effects on each other, both at a particular time and over a period of time. Similarly, an improvement in the realization of the RTD implies that the realization of some rights has improved while no other right is violated or deteriorated.

Secondly, under the Bush Administration, socio-economic rights and the RTD was definitely not part of the human rights discourse in the USA. In 2003, the US delegate at the UN Commission on Human rights, (now Human Rights Council) rejected both the RTD and socio-economic rights in these terms:²²¹

In our estimation the right to development (RTD) is not a “fundamental,” “basic,” or “essential” human right. The realization of economic, social and cultural rights is progressive and aspirational. We do not view them as entitlements that require correlated legal duties and obligations. States therefore have no obligation to provide guarantees for implementation of any purported “right to development.”

Put differently, economic, social and cultural rights were not human rights because of their aspirational character. Following the same logic, the RTD was also neglected.

However, as mentioned earlier, the 2009 Health Reform Bill which equates socio-economic rights with liberties is a significant change in the USA human rights framework. Nevertheless, will the recognition of socio-economic rights on the same line with liberties lead to the official acceptance of the RTD by the USA? Or will the interdependence of human rights

²¹⁹ S Marks ‘The human right to development: between rhetoric and reality (2004) 17 *Harvard Human Rights Journal* 147 available at <http://www.law.harvard.edu/students/orgs/hrj/iss17/marks.shtml> (accessed 25 December 2009).

²²⁰ Third report of the independent expert on the right to development, Arjun Sengupta, 2 January 2001, UN Doc. E/CN.4/2001/WG.18/2, 5.

²²¹ United States Government, Statement at the U.N. Commission on Human Rights, 59th Sess., Comment on the Working Group on the Right to Development (10 February 2003).

apply only within the confines of the USA? Or, further still, will the adoption of the Health Reform Bill have a global impact with the USA leading a movement towards the adoption of an international legally binding instrument on the RTD? At this stage, only time will tell what the answers to the questions are.

2.2.4 Sustainable development

Sustainable development is development which caters for the needs of the present generation without compromising the ability of the future generation to meet its own needs.²²² The achievement of

[s]ustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire... At a minimum, sustainable development must not endanger the natural systems that support life on earth: the atmosphere, the waters, the soils, and the living beings...²²³

The duty bearer of sustainable development is the state.²²⁴ However, issues related to sustainable development go beyond the state's jurisdiction and might have transboundary effects.²²⁵ In fact, to ensure sustainable development, the nation-state should take appropriate institutional and other measures to realise lasting development, but such actions should be complemented by the international community through international co-operation. This concept will be further discussed because the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on the Rights of Women) makes sustainable development women's right in its article 19.

²²² The World Commission on Environment and Development *Our common future* (1987) 43.

²²³ The World Commission on Environment and Development, *Our Common Future* (1987) chap 2.

²²⁴ G Maggio and O J Lynch 'Human Rights, Environment, and Economic Development: Emerging Standards in International Law and Global Society' Revised Draft, November 15, 1997 at <http://www.ciel.org/Publications/olpapers3.html> (accessed 25 May 2006).

²²⁵ Maggio & Lynch (1997).

2.2.5 Poverty eradication

Poverty is a condition in which a person or a community lacks, a condition of insufficiency, which disfigures and destroy human grandeur, [human dignity], it is an evil that humanity should strive to eliminate'.²²⁶ Poverty eradication is the restructuring of society to avoid this situation. The UN had been instrumental in using the concept of 'poverty eradication' to address development issues. In its preamble, the UN Charter pledges to promote the economic and social advancement for all.²²⁷ The same instrument refers to the promotion of 'higher standards of living, full employment, and better conditions of economic and social progress and development'.²²⁸ Furthermore, the 2000 UN MDGs have the eradication of poverty by 2015 as their main objective. However, as mentioned earlier, poverty should not be understood only in terms of income or material goods. It can also mean the lack of capabilities and opportunities.²²⁹ The link between poverty eradication and the RTD was established by the MDGs which read: 'We are committed to making the right to development a reality for everyone and to freeing the entire human race from wants'.²³⁰ With regard to human rights, the Committee on ESCR highlights that poverty is nothing, but the 'denial of human rights',²³¹ and it is also the contention of this thesis. The Committee on ESCR also emphasises and this thesis agrees that 'the human rights dimensions of poverty eradication policies'²³² should be given more consideration, especially if the RTD is to become a reality.

²²⁶ T Matura 'The Franciscan concept of poverty' in *World Poverty – Franciscan reflections* (2007) 3.

²²⁷ Preamble of the UN Charter.

²²⁸ Art 55 of the UN Charter.

²²⁹ Poverty Group, World Bank *A Review of World Bank Participatory Poverty Assessments: Consultations with the Poor* (1999); also World Development Report 2000-01: *Attacking Poverty*.

²³⁰ UN Millennium Declaration, 2000, para 11.

²³¹ E/C.12/2001/10, 10 May 2001, paras 1&2.

²³² E/C.12/2001/10, 10 May 2001, paras 1&2.

2.3 The RTD and NEPAD: Historical and theoretical contexts

2.3.1 The RTD: Historical context

In its early days, the call by developing countries for the RTD was based on the claim for the establishment of the NIEO²³³ to eliminate world injustice and allow third world countries to enjoy their development. In 1974, this call led to the adoption of the UN Declaration and Program of Action of the New International Economic Order²³⁴ which was followed in the same year by the adoption of the Charter of Economic Rights and duties of the states.²³⁵ Though in principle these instruments aimed to empower the developing world, the latter did not have ‘the economic power to enforce implementation’,²³⁶ hence by the end of the 1970s, these documents had become irrelevant and the developing world poorer.

As a result of extreme poverty which yielded heavy debts and the inability to pay them, developing countries including African went back to the international community through the international financial institutions (IFIs), the pro-USA World Bank and International Monetary Fund (IMF) to beg for loans. This was the entry point of neo-liberal policies in developing countries. According to the neo-liberal theory, economic success is linked to the economic competition, the non involvement of the state, privatization of public enterprise, reduction of public spending in social spheres and reduction of ‘human rights to rights of personal autonomy and protection of property’.²³⁷ The neo-liberal theory opposes the Keynesian theory which believes in state intervention in the economy, in terms of regulations,

²³³ NIEO, UN G.A/ Res 3201 (S-VI), 1 May 1974.

²³⁴ UN GA/ Res 3201 (S-VI).

²³⁵ UN GA/ Res 3281 (XXIX).

²³⁶ A Eide ‘Human rights-based development in the age of globalization: Background and prospects’ in Andreassen and Marks (eds) *Development as a human right: Legal, political and economic dimension* (2006)228.

²³⁷ A Eide (2006) 231.

entrepreneurship and protection of small enterprises,²³⁸ for example. Neo-liberal theory stands for the supremacy of the individual²³⁹ *per* opposition to cosmopolitanism which believes in a world community and stands for global justice as will be discussed in the next section.

Neo-liberal policies entered Africa in the form of Structural Adjustments Programmes (SAPs). Such policies, implemented in Africa in the 1980s, were disastrous and contributed extensively to the acceleration of poverty and the marginalisation of the continent. Research shows that prior to the SAPS, 'from 1960-80 Sub-Saharan Africa's 'failed' statist economic model grew at an annual per capita rate of 1.6 per cent, [whereas, in SAPs time] Africa's GDP grew by annual capita rate of only 0.5 percent'.²⁴⁰ The SAPs imposed on developing countries by the IFIs were designed to serve western companies who were solely able to purchase public industries in the developing world and who could benefit from compulsory deregulations imposed by the donors.²⁴¹ It could be argued that developing countries' economies were hijacked for the benefit of the developed world. This situation was exacerbated by the adoption of the 'Washington Consensus' which called for more trade liberalisation, financial sphere liberalisation and more privatisation of public enterprise which led to an expansion of trade shortage, excluded small local entrepreneurs respectively.²⁴² For the architects of these policies of global capitalism, human rights, socio economic rights and the RTD were not in the equation.²⁴³ In fact, poor countries were expected to 'spend less on

²³⁸ A Eide (2006) 225.

²³⁹ V Morozov 'Is Cosmopolitan Community Possible? Liberalism, Global Solidarity and the Political' Paper to be presented at SGIR 7th Pan-European Conference, Stockholm, 9-12 September 2010 available at http://stockholm.sgir.eu/uploads/SGIR_September_2010.pdf 8 (accessed 13 December 2010).

²⁴⁰ D Green *from poverty to power – How active citizens and effective states can change the world* (2008) 299.

²⁴¹ Eide (2006) 232.

²⁴² Green (2008) 2 99 Auckland Park (South Africa).

²⁴³ A Eide (2006) 232.

education and healthcare in order to service their debts’²⁴⁴ to the North. In this vein, African people were deprived of ‘the rights to be and remain human’.²⁴⁵

In fact, under the so-called ‘globalisation’ characterised by the *diktat* of ‘undemocratic and unaccountable international, and regional financial institutions and multilateral treaty frameworks’, global justice is simply thrown in the dust bin.²⁴⁶

In this regard, as we shall show later, the WTO established on the ashes of the General Agreement on Tariffs and Trade (GATT)²⁴⁷ in order to regulate trade for the development of all became an organ of global capitalism whose rules do not favor the developing world. The WTO regime enables wealthy countries to ‘favour their own companies through tariffs, quotas, anti-dumping duties, export credits and huge subsidies to domestic producers’.²⁴⁸ In addition, the WTO’s TRIPS and AoA condemn third world citizens including Africans to death. This sad situation produces extreme poverty which deprives human beings of their dignity and humanity on which the claim of the RTD is grounded. Concretely, the claim of the RTD is informed by three important problems:

- 1) the impact on human rights derived of powerful actors *external* to the developing state advancing rules governing world markets that are widely criticized for being inequitable
- 2) the pervasive influence of international economic organizations that continue to espouse neoliberalism (or its more recent variant), and

²⁴⁴ T Pogge (ed) ‘Introduction’ in *Freedom from poverty as a human rights – Who owes what to the very poor* (2007) 5.

²⁴⁵ U Baxi ‘From human rights to the right to be human: Some heresies’, in *Rethinking Human Rights* S Kothari and H Sethi (eds)(1989) 187.

²⁴⁶ Baxi ‘The development of the right to development’ in *Human rights in a post human world - Critical essays* (2007) 154.

²⁴⁷ The WTO will be thoroughly discussed in chapter 7 of this work.

²⁴⁸ T Pooge ‘World Poverty and Human Rights’(2005) 19 *Ethics & International Affairs* 6.

3) the corresponding reduction in domestic autonomy that limits the ability of states – particularly poor and less influential states – to decide independently their own economic and social policies.²⁴⁹

After a look at the historical context of the RTD, the following section focuses on its theoretical context.

2.3.2 The RTD: Theoretical context

The RTD is grounded in the cosmopolitanism philosophy which believes in global justice without consideration of state boundaries because all human beings have the same moral standards.²⁵⁰ This section will be divided into three parts: the first one will present an overview of the cosmopolitanism theory, the second one will provide its critique and the third one will focus on its application through Sen's and Pogge's approaches.

2.3.2.1 Cosmopolitanism: A snapshot

'Cosmopolitanism' is derived from the Greek words 'cosmos' which means world and 'polis' which means city, together forming 'cosmopolis' or world city.²⁵¹ The 'world city' originates from the stoic idea claiming that all human beings possess a natural faculty of reason and are therefore citizens of the same community notwithstanding their various differences.²⁵² Hence, cosmopolitanism is world citizenship without consideration of race, gender and other status. Diogenes declared himself being 'a citizen of the world'²⁵³ and not of Sinope, his country of

²⁴⁹ M E Salomon 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development Margot Salomon' *Implementing the right to development - The role of international law* S Marks (eds) (2008). 19.

²⁵⁰ H Janér 'Cosmopolitanism vs the political view: John Rawls and the debate on global justice', 5 available at <http://www.pafis.shh.fi/~henjan06/cosmo.pdf> (accessed 10 December 2010).

²⁵¹ For more on this see *Stanford Encyclopedia of philosophy*, available at <http://plato.stanford.edu/entries/cosmopolitanism/#1> (accessed 1 December 2010).

²⁵² See *Stanford Encyclopedia of philosophy* above.

²⁵³ *Stanford Encyclopedia of philosophy*, available at <http://plato.stanford.edu/entries/cosmopolitanism/#1> (accessed 1 December 2010).

birth. According to the cosmopolitanism theory, the individual is the subject of moral attention (individualism), the principle of equality applies to all human beings with attention to nationality and citizenship (universality) and the problem of all human beings should be attended to wherever they reside (generality).²⁵⁴ In support of this theory, while Singer is of the view that ‘neither race nor nation determines the values of a human being’s life and experience’,²⁵⁵ Hayden argues that ‘human status has a global scope’²⁵⁶ and ‘cosmopolitan justice’ knows no borders.²⁵⁷ In this respect, being a citizen means thinking of the good of the society in an abstract manner and forgetting about one’s personal interest, identity and culture and just views the world as a single community.²⁵⁸

According to this belief, justice is universal, knows no frontiers and all human beings have the responsibility to ensure justice to every other person on earth on the basis²⁵⁹ of the *jus gentium* or law of the people applicable to all countries.²⁶⁰ Cosmopolitanism philosophy informed the work of intellectuals such as Locke, Paine and Kant who stood for equality and respect for human rights in their different work.

²⁵³ See *Stanford Encyclopedia of philosophy*.

²⁵⁴ T Pogge *World poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2008) 178; also P Hayden *Cosmopolitan global politics* (2005) 11.

²⁵⁵ P Singer *One World: The Ethics of Globalisation* (2002) 154.

²⁵⁶ P Haden *Cosmopolitan Global Politics* (2005) 11.

²⁵⁷ K-C Tan *Justice without borders: Cosmopolitanism, Nationalism and Patriotism* (2004) 1.

²⁵⁸ B Szerszynski and J Urry, ‘Visuality, mobility and the cosmopolitan: Inhabiting the world from afar’ (2006) 57 *The British Journal of Sociology* 20.

²⁵⁹ C R Beitz *Political theory and international relations* (1999); also T Pogge *Realising Rawls* (1998) part III.

²⁶⁰ C Jones *Global justice: Defending Cosmopolitanism* (1999) 51.

In his *Perpetual Peace*,²⁶¹ Kant describes cosmopolitanism in the sense of morality. Accordingly, the world is a single community of a human family where all members of the family are morally equal. This theory was followed by Rawls through the concept of a postmodern state of nature - the 'original position'- where everyone forgoes all social, political, economic, and cultural specificities for the sake of choosing the first principles of a just society, though he acknowledges limits on the extent to which individuals can be subordinated to the general interest.²⁶² The idea of universal or global justice underneath cosmopolitanism informs the claim for the RTD.

According to the literature, there are three major forms of cosmopolitanism which are the utilitarianism, rights-based and the obligation based cosmopolitanism'.²⁶³

Utilitarianism theory

Utilitarianism entails moral universalism which is secured in the community of nations as understood by the stoics. For Harding, utilitarianism,

[I]s the moral theory that judges the goodness of outcomes - therefore the rightness of actions in so far as they affect the outcomes – the degree to which they secure the greatest benefits to all concerned.²⁶⁴

In this context, the result determines whether the act was right or wrong, any endeavour or action should benefit all members of the community without exception.²⁶⁵ In addition, from Pogge's perspective, it is not only about action, but also omission. Accordingly, no omission should harm a member of the community.²⁶⁶ It could therefore be argued that utilitarianism

²⁶¹ I Kant *Perpetual peace* (1795).

²⁶² J Rawls *A theory of justice* (1971) 12.

²⁶³ Jones (1999) 23.

²⁶⁴ R Harding *Morality within the limit of reason* (1998) XV.

²⁶⁵ Harding (1998) 24.

²⁶⁶ Pogge (2007) 20.

brings members of a community on the same scale by ensuring benefits from the common good. It ensures access to basic needs such as water, food and housing and so on which are necessary to have a good standard of living.²⁶⁷ On the international plane, the manifestation of utilitarianism should entail a significant ‘redistribution’ of world resources from wealthy to poor countries.²⁶⁸

However, it could be argued that utilitarianism is too exigent. Nevertheless, given the level of inequity in the world, utilitarianism seems to be the appropriate road to ensure that the poor do not die; it is the tool to ensure that every human being is given a fair share of resources needed for his or her subsistence.²⁶⁹

Nonetheless, who has the responsibility to ensure the survival of the poor? It would be ethically incorrect to deprive a rich individual of his wealth in order to ensure the well being of the poor. Hence, the need to transfer the burden on states and other institutions such as the IFIs, donors and governmental institutions²⁷⁰ (international order designers) that shall use a human rights informed approach in their activities to play their utilitarian role in the world. Moreover, Pogge’s utilitarianism approach sustains that there is no harm for individual intervention in assisting fellow human being where there is no institution to do so.²⁷¹

It could be argued that utilitarianism is important for the realisation of the RTD as it caters for the poor and the underdeveloped and calls for a global responsibility for human rights.

The rights-based cosmopolitanism

²⁶⁷ Harding (1998) 25.

²⁶⁸ T Pogge ‘World poverty and human rights’ (2005) 19 *Ethics and International Affairs* 4.

²⁶⁹ Jones (1999) 35; also Pogge’s Global Resource Dividend to be discussed later.

²⁷⁰ Jones (1999) 37; also Pogge (2007) 6.

²⁷¹ Pogge (2007) 6.

The rights-based cosmopolitanism stresses that the right not to be poor should be enjoyed at the national as well as at the international level bearing in mind that individuals and communities are morally obliged to assist fellow citizens as well as the broader family of human beings.²⁷² This theory encompasses a moral origin of human rights. Proponents of this theory such as Jones, Rawls and Shue use the concept of ‘basic human interests’²⁷³ or ‘basic rights’²⁷⁴ or the right to subsistence to argue that everyone should be afforded basic necessities such as food, water, housing without which he or she cannot live. At the core of their arguments is the belief that all human beings are entitled to the minimum needed to survive and those who lack the minimum shall claim it from those who can help.

However, ‘to every right, there is a correlative duty’.²⁷⁵ From this theory established by Wesley Hohfeld in 1919,²⁷⁶ the sentence ‘A has the right to food’ implies a claim right. It is a claim that A has against another entity, B who has the duty to provide. If A has the right to food, it implies that B has the duty to give food to A. It is a positive duty when B must take action to deliver food to A. Hence, ‘the right to subsistence is a positive right [as it calls for] positive action rather than mere omission’.²⁷⁷

The duty can also be a negative one, when B should not take any action which constraints A to enjoy his food. In this case, B should refrain from tampering with A’s ability to obtain

²⁷² P Haden *Cosmopolitan Global Politics* (2005) 11.

²⁷³ Jones (1999) 52.

²⁷⁴ H Shue *Basic rights: Subsistence, Affluence, and the US Foreign Policy* (1999) 60.

²⁷⁵ The notion of rights and duties will be further discussed below. However on this, see W N Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning* (1919). For a clear summary of his work, see J Waldron *Theories of Rights* (1984) 6-10; also A R. White, *Rights* (1984) 115-132; also A Heard ‘Human rights: Chimeras in sheep’s clothing at <http://www.sfu.ca/~aheard/intro.html>’ (accessed on 7 July 2009); also R W M Dias *Jurisprudence* (1970) Chap 8 & 9.

²⁷⁶ J Waldron (1984) 6-10.

²⁷⁷ Jones (1999) 63.

food. Shue refers to this as the ‘duty to avoid depriving right-holding individuals of the content of the right’.²⁷⁸ It is important to note that the duty bearer can be an individual, a state, a financial institution or the international community at large.

In general, the rights-based cosmopolitanism also entails ‘duties to protect the rights-holders from being deprived of the rights content and duties to aid deprived rights-holders when avoidance and protection have failed’.²⁷⁹ Under this doctrine, there is a universal right to assistance with a corresponding obligation to those in position to assist to do so.

Now, who is the duty bearer of the basic rights discussed earlier? The rights-based cosmopolitanism argues that all human beings have the duty to assist fellow human beings on the ground of their humanity²⁸⁰ and the international community of states shall assist through partnership, and here NEPAD comes into play as will be shown later. Put differently, the rights-based cosmopolitanism provides an appropriate framework to avoid the structural causes of human rights violation.

The weakness of this theory however, is its assumption that all activities are informed by human rights or that all human beings operate in a ‘human rights world’. Unfortunately, in reality, many people have no knowledge of human rights. Nevertheless, knowledge deficit in terms of human rights cannot justify the refusal of providing food or clean water to a fellow human being who needs them for his or her existence.

In opposition to rights-based cosmopolitanism, O’Neill acknowledges the obligation to help the poor, but does not believe that such obligation entails a right of the poor to be assisted.²⁸¹

²⁷⁸ Shue (1996) 51-64.

²⁷⁹ Shue (1996) 51-64.

²⁸⁰ Jones (1999) 58.

²⁸¹ Jones (1999) 92. More on O’Neill’s libertarian philosophy will be discussed shortly.

In this regard, the poor is not entitled to assistance, and the obligation to help is located in the sphere of ‘virtue, [and] not of right’.²⁸²

It is contended that applying a rights-based cosmopolitanism to the RTD may lead to the realisation of the right for two main reasons: Firstly, the nation-states remain the primary duty bearers of the right for their citizens and is therefore obliged to take all appropriate measures to provide the right, and the poorest states should be assisted by states in position to do so.

Secondly, in terms of negative duty, wealthy states have the obligation to keep away from actions or policies that hinder the realisation of the RTD in the developing countries. For instance, actions taken at international level through the WTO, the TRIPS and AoA agreements shall be conducive to the realisation of the RTD. These actions should not harm the poor or deprive them from the content of the right. Similarly, actions and policies from the IFIs should be RTD friendly. However, as will be demonstrated later, this is not happening.

Obligation-based cosmopolitanism

According to obligation-based cosmopolitanism theory, there is a right only if there is a positive obligation to realise it; it entails an obligation to fulfill without which the right is non-existent.²⁸³ This highlights Hohfeld theory claiming that ‘to any right, there is a correlative duty’ and referring to the right to entails ‘a counterpart obligation to provide that food which everyone has a right to’.²⁸⁴ From a libertarian perspective and in opposition to Sen,²⁸⁵ O’Neill is of the view that only clear and specific or perfect obligations are in the realm of rights while those aiming to eradicate poverty or imperfect obligation are from a moral or ethical domain.²⁸⁶ In opposition to Pogge,²⁸⁷ O’Neill is of the view that the abstract character of a

²⁸² Jones (1999) 93.

²⁸³ O’Neill ‘Hunger, needs and rights’ in S Luper-Foy (ed) *Problems of International Justice* (1988) 67-86,70.

²⁸⁴ O’Neill (1988) 67-68.

²⁸⁵ A Sen ‘Elements of a theory of human rights’ (2004)32 *Philosophy and Public Affairs* 315-356.

²⁸⁶ O’Neill *Towards justice and virtue: A constructive account of practical reasoning* ((1996) 127-128.

notion such as freedom from poverty hinders its accession to the realm of rights²⁸⁸ as well as in its enforcement.²⁸⁹

Sen disagrees and his position as we shall see later represents an important departure not only from libertarianism, but also from liberalistic theories that claim that ‘imperfect positive obligations’ to fight miseries such as hunger and, health problems, and illiteracy are ‘charity’ rather than ‘justice’ related – and do not belong to the realm of human rights.²⁹⁰

Nevertheless, O’Neill joins proponents of rights-based cosmopolitanism by accepting the notion of basic needs or interests as condition *sine qua non* for human subsistence and maintains that the duty to eradicate hunger rests on those in position to do so.²⁹¹

2.3.2.2 A critique of cosmopolitanism

Critics of cosmopolitanism advocate for self-reliance and self-sufficiency.²⁹² They believe in oneself without the assistance of others. According to them, the world is not a shopping mall where everything is free and at the disposal of all.²⁹³ Opponents of cosmopolitan philosophy include nationalism, individualism and liberalism as fundamentalist tenets in sustaining their theory.

²⁸⁷ Pogge (2007).

²⁸⁸ O’Neill (1996) 152.

²⁸⁹ O’Neill (1988) 76-77.

²⁹⁰ Sen’s Cosmpolitanism theory will be further discussed under the section allocated to the application of cosmopolitanism.

²⁹¹ O O’Neill *Faces of hunger: An Essay on poverty, justice and development* ((1986) 141-143.

²⁹² Haden (2005) 12.

²⁹³ M David *On nationality* (1995) 14.

Nationalism

Nationalists are against cosmopolitanism which ignores patriotism or the strong attachment to a nation.²⁹⁴ Schlosser says ‘it is better to be proud of one’s nation than to have none’.²⁹⁵ According to nationalists, cosmopolitanism is not practical and is mere idealism. Tan observes that the idea of cosmopolitan justice is ‘out of touch with what is of value to ordinary human beings’.²⁹⁶

However, in opposition to this view, Appiah believes that in the context of globalisation ‘the more familiar nation-state, citizen-of-a-single-country paradigm is just as ambiguous’. He adds:

National partiality is, of course, what the concept of cosmopolitanism is usually assumed to oppose, and yet the connection between the two is more complicated than this...Nationalism, too, exhorts quite a loftily abstract level of allegiance – a vast, encompassing project that extends far beyond ourselves and our families.²⁹⁷

Accordingly, people have no choice of their place of birth, or the culture and other attributes learned through the ‘nationhood’. Therefore, a cosmopolitan openness shall be encouraged.²⁹⁸

Liberalism/Individualism

²⁹⁴ M David (1995) 14.

²⁹⁵ J G Schlosser quoted in *Stanford Encyclopedia of philosophy*, available at <http://plato.stanford.edu/entries/cosmopolitanism/#1> (accessed 1 December 2010).

²⁹⁶ K-C Tan *Justice without borders: Cosmopolitanism, nationalism and patriotism* (2004) 2.

²⁹⁷ A K Appiah *The ethics of identity* (2005) 239.

²⁹⁸ A K Appiah *Cosmopolitanism: Ethics in a world of strangers* (2006) 5.

Modern-day rights discourse is informed by the classic liberal conception of the nature of the human person. It is a notion that imagines an individual living in an isolate island without fellow human beings, and watching carefully over his 'property' and liberty from Locke's perspective.²⁹⁹ The idea revolves around six words 'me, my, mine, myself and I'. In this register, Nozick views a society in terms of its individual members and sustains that 'there are only individual people, different individual people, with their own individual lives.'³⁰⁰ Even in a societal context where individuals have to live together, their choices and institutions governing them are informed by their individual self-centeredness without any attention to society as a group;³⁰¹ their choices are not informed by togetherness.

Proponents of liberalism such as Scheffler believe that their theory provides the necessary compromise between cosmopolitanism and nationalism as it allows for patriotism without threatening the principle of broad equality.³⁰² The problem with liberalism is that it does not provide the appropriate framework for poverty eradication and the realisation of the RTD as cosmopolitanism does. In fact, it could be argued that it advocates the right of the strongest and ignores the weakest as was demonstrated earlier.

In spite of its critics, cosmopolitanism seems to be the road map for the realisation of the RTD. Salomon correctly argues that

[t]he right to development typifies a cosmopolitan ethos that reveal its most distinctive and vital component: it is preoccupied, not with a state's duties to its own nationals, but with its duties to people in far off places. The duties of international cooperation for addressing poverty and underdevelopment that form its core, distinct from the classical human rights model, are thus interstate duties with the beneficiaries being the poor of developing countries. Far from being unprecedented under international law, this horizontal aspect of human rights protection has a rich pedigree.³⁰³

²⁹⁹ J Locke *Two treatises of civil government* (1689).

³⁰⁰ R Nozick *Anarchy state and utopia* (1974) 33.

³⁰¹ J Rawls *A theory of justice* (1971) 12.

³⁰² S Scheffler *Boundaries and allegiances* (2001) 67.

³⁰³ Salomon (2008) 24.

2.3.2.3 Cosmopolitanism in practice

This section will focus on cosmopolitanism as understood by Sen, look at its critique, before turning to Pogge's cosmopolitanism and its critique as well.

Sen and cosmopolitanism: Development as freedom

Sen departs from the libertarian and liberal theories that believe in negative rights and classifies positive rights in the realm of ethic. Proponents of these theories such as Hayek³⁰⁴ and Nozick³⁰⁵ posit that 'impartiality in ethics requires an 'end-independent' approach that focuses on procedures and rules, rather than consequences, outcomes and results'.³⁰⁶ Accordingly, the assessment of individual freedom shall disregard

(1) the fulfillment of individual needs, opportunities, desires and the ability or effective power to fulfil particular goals; 2) the outcomes of impersonal circumstances and processes (including market allocations and the outcome of socio-economic development and growth).³⁰⁷

In short, poverty does not restrict freedom. The libertarians are also of the view that negative obligations of non-interference (with someone's property) gives rise to negative duty easy to comply with and are therefore feasible, whereas positive obligations such as the obligation to assist the needy are associated with positive duty to assist which may not be feasible because of the lack of resources.³⁰⁸

³⁰⁴ F A Hayek *The Constitution of Liberty* (1960) as quoted in P Vizard 'The contribution of Amartya Sen in the field of human rights' Case paper 91 (2005) 7 available at <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper91.pdf> (accessed 3 December 2010).

³⁰⁵ R Nozick (1974).

³⁰⁶ P Vizard 'The contribution of Professor Amartya Sen in the field of human rights' Case paper 91 (2005) 10 available at <http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper91.pdf> (accessed 3 December 2010).

³⁰⁷ Vizard (2005) 10.

³⁰⁸ Nozick (1974) 28-30.

Distancing himself from this view, Sen sees the human person as the centre of development. He, through the ‘capability approach’ has provided a framework that brings freedom from poverty, hunger and starvation into the realm of fundamental human rights. Accordingly, poverty is not forcibly linked to the absence of growth but to the lack of freedoms, hence Sen’s argument that all development stakeholders should get rid of unfreedoms or hindrances to freedom which include ‘poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or activities of a repressive state’.³⁰⁹

In so doing, Sen calls for respect for human rights through restrictive measures such as non interference (like in negative freedom) and positive action through assistance,³¹⁰ though without clarifying who is the duty bearer. In any event, from a cosmopolitanism standpoint, Sen, like Pogge, believes that every one in a position to help should not hesitate to do so. In this register, Sen sustains the theory of ‘imperfect obligations’ which amongst other compels non-state actors, such as individuals, IFIs and international companies not only to abstain from violating human rights through their actions and policies (negative obligation), but also to take positive actions (positive obligation) to promote and fulfill human rights.³¹¹

In this perspective, Sen refutes the neo-classical evaluation of human well being informed by wealth and commodity by standing for the connection of economic wealth with the ability of people to choose their way of life.³¹² Hence, the correctness of the view that Sen’s contribution ‘include far-reaching proposals for incorporating individual entitlements, functionings, opportunities, capabilities, freedoms and rights into the conceptual foundations

³⁰⁹ A Sen *Development as Freedom* (1999) 3.

³¹⁰ Vizard (2005) 22.

³¹¹ Human Development and Capability Approach association ‘The human development capability approach and human rights’ Briefing note, 4 available at <http://www.capabilityapproach.com/pubs/HumanRights100306.pdf> (access 3 December 2010).

³¹² Sen (1999) 13.

and technical apparatus of economics and social choice'.³¹³ In this register, a person's entitlements 'are the totality of things he can have by virtue of his rights'.³¹⁴ Sen explains by suggesting that

[m]ost cases of starvation and famines across the world arise not from people being deprived of things to which they are entitled, but from people not being entitled, in the prevailing legal system of institutional rights, to adequate means for survival.³¹⁵

Hence, the emphasis is on the need to 'righten' basic needs or have them in the form of entitlements.

Functionings entails what matters to a person, what the person values doing or being which can be achieved if the person has the capability to do so. Therefore, capability empowers a person to 'achieve different combination of functionings'.³¹⁶ Nussbaum explains the functionings scheme in theses words:

Instead of asking "How satisfied is person A," or "How much in the way of resources does A command," we ask the question: "What is A actually able to do and to be?" In other words, about a variety of functions that would seem to be of central importance to a human life, we ask: Is the person capable of this, or not? This focus on capabilities, unlike the focus on GNP, or on aggregate utility, looks at people one by one, insisting on locating empowerment in *this* life and in *that* life, rather than in the nation as a whole.³¹⁷

³¹³ 'Economic theory, freedom and human rights: The work of Amartya Sen' ODI Briefing paper, November (2001)1 available at <http://www.odi.org.uk/resources/download/1564.pdf> (accessed 3 December 2010); also D Bilchitz *Poverty and fundamental rights – The justification and enforcement of socio-economic rights* (2007) 10-16.

³¹⁴ ODI briefing paper (2001) 2.

³¹⁵ ODI briefing paper (2001) 2.

³¹⁶ ODI briefing paper (2001) 2.

³¹⁷ Nussbaum 'Capabilities and human rights' (1997) 66 *Fordham Law Review* 285.

In other words, in the capability theory, what matters are not the resources, but how people are empowered to access the available resources.

In short, development encompasses improvement of capabilities and freedoms to the benefit of people during the development process.³¹⁸ Any development endeavor must advance political freedom, economic facilities, social opportunities and transparency³¹⁹ or good governance. Notwithstanding the success of East Asian countries that developed without democracy, Sen is of the view that democracy and good governance are very influential for development.

In any event, there is no tangible evidence that the economic success of Asian countries is linked to dictatorship because if it was the case, Africa could have been the most developed part of the universe.³²⁰

It could be argued that Sen and Nussbaum provide an appropriate framework for the protection of the poor against the negative effects of globalisation on which the claim for the RTD is based.³²¹ In this register, the so called ‘free market’ rules which underpinned the hegemonic idea globalisation shall be informed by human rights standards³²² and not restrict people’s capacity. To use Baxi’s words,

³¹⁸ J P Martin ‘development and right revisited: Lesson from Africa’ 4 *Sur International Journal of Human Rights* (2006) 98.

³¹⁹ Sen (1999) 38.

³²⁰ ODI briefing paper (2001) 3.

³²¹ Nussbaum (1997) 273 & 300.

³²² See in general Pogge (2007); and Pogge (2008).

[h]uman beings have basic needs, shelter, clothing, health, education [and] any process of growth that does not lead to their fulfilment –or even worse disrupt them- is a travesty of the idea of development.³²³

Sen's doctrine definitely protects poor people's 'humanity'.³²⁴ In the context of this study, Sen's theory will not only assist in identifying the duty bearers of the RTD, but it will also be useful in analysing to what extent NEPAD can assist in establishing a human rights friendly globalization. Put differently, it will assist to assess to what extent NEPAD enhances people capabilities in Africa.

A critique of Amartya Sen

Though the capability approach seems reasonable, the difficulty seems to be in its application as Sen does not prescribe a clear framework for its application. For instance, the criteria to assess the level of capabilities enjoyed by a person are not clear.

The other limit of the capability approach is that it forgets to stress the need to assist people with disabilities extensively as they are more in need of positive duty of those who can assist. They need what the Convention on the Rights of People with Disabilities calls 'reasonable accommodation',³²⁵ in the society.

In addition while Sen associates capabilities and equality, Nussbaum argues that 'these two concerns are logically independent' and argue that capabilities are actually indicators of what sort of equality is needed.³²⁶

³²³ Baxi (1989)188-189.

³²⁴ Baxi (1989) 187.

³²⁵ Adopted on 13 December 2006 and entered into force 3 May 2008, art 2.

³²⁶ Nussbaum (1997) 280.

In spite of these criticisms, Sen's cosmopolitanism approach provides a link between economics and human rights and had been adopted by the UNDP that relies on it to measure the quality of life based on human capability and functioning,

Thomas Pogge and cosmopolitanism

A great proponent of cosmopolitanism, Pogge supports the notion of realisation of global justice through the reform of global institutions. This approach seats well within the context of the RTD. In developing his theory, Pogge observes that several millions of people live in squalor and are therefore vulnerable and expose to unnecessary risk which may lead to their death.³²⁷ Inspired by Rawls who developed a theory of justice³²⁸ grounded on a social contract as an instrument of distributive justice, Pogge undertakes to implement Rawls' theory by defining individual as the vital aim of justice.³²⁹ According to Pogge's theory, the well-off who participate to institutional processes that produce severe poverty are to blame as their participation in such unjust processes develops poverty and creates generations of poor.³³⁰ Pogge is also of the view that without the wealthy person's support or participation to unjust world institutions which produce neoliberal policies such as the SAPs under the umbrella of globalisation, poverty would have been defeated.³³¹ He believes that 'there is a shared institutional order that is shaped by the better-off and imposed on the worse-off'.³³² Supporting such institutions amounts to the violation of 'moral duties not to harm'.³³³ This

³²⁷ T Pogge (ed) *Freedom from poverty as a human right: Who Owes What to the very poor?* (2008) 2.

³²⁸ J Rawls *A Theory of justice* (1971).

³²⁹ T Pogge *Realising Rawls* (1989) chap 2.

³³⁰ Pogge (1989) chap 2, 11.

³³¹ Pogge (1989) chap 2, 12.

³³² Pogge (2005) 4.

³³³ Pogge (2005) 5.

reasoning leads Pogge to go one step further than Rawls by underlining the negative duty not to harm the poor,³³⁴ whilst Rawls' focus was on the positive duty to assist the poor.³³⁵

Pogge's condemnation of institutions is interesting as this thesis assesses an African institution (NEPAD) in terms of realising the RTD. Furthermore, this thesis examines the WTO as well as some aspects of the TRIP Agreement within the RTD context, and Pogge has expressly blamed the WTO and these agreements for developing poverty on the one hand while protecting the interest of the wealthy on the other.³³⁶ Therefore, the road to poverty eradication goes through national and international institutions reforms.³³⁷ In fact, Pogge observes:

This institutional order is implicated in the reproduction of radical inequality in that there is a feasible institutional alternative under which such severe and extensive poverty would not persist. The radical inequality cannot be traced to extra-social factors (such as genetic handicaps or natural disasters) which, as such, affect different human beings differentially.³³⁸

A possible solution to poverty may be a full implementation of cosmopolitanism in terms of sharing natural resources. This entails establishing a 'global resources dividend' (GRD) where products of natural resources are distributed to the members of the society, in order to afford the basic needs of everyone.³³⁹ In practice, the GRD entails that 'states and their governments shall not have full libertarian property rights with respect to the natural resources in their territory, but can be required to share a small part of the value of any resources they decide to

³³⁴ T Pogge 'Assisting the global poor' in K Deen Chatterje (ed) *The ethics of assistance: Morality and the distant needy* (2004) 279; also Pogge (2007) 25.

³³⁵ J Rawls *The law of peoples: With the idea of public reason revisited* (1999) 42-43.

³³⁶ T Pogge *World Poverty and human rights: Cosmopolitan responsibilities and reforms* (2008) 18-23.

³³⁷ Pogge (2004) 263; also Pogge (2007) 26.

³³⁸ Pogge (2005) 4.

³³⁹ Pogge (2008) 202-220.

use or sell.³⁴⁰ The GRD provides a way to compel ‘those who make more extensive use of our planet’s resources [to] compensate those who, involuntarily, use very little’³⁴¹ A GRD may have the advantage to allocate more money to development assistance.

A critique of Thomas Pogge

Pogge’s theory on blaming the wealthy for the world’s poverty seems to be too radical, because natural disaster, inappropriate climates and other factors can also cause poverty.³⁴² In addition, domestic factors such as bad national institutions (bad governance) and a lack of technological capacity can also produce poverty. Cohen is of the view that poverty is the result of ‘a large concern, requiring technological innovation and not simply institutional renovation or better distribution’.³⁴³

Furthermore, the concept of ‘global order’ as understood by Pogge is vague and encompasses everything.³⁴⁴ The other shortcoming of Pogge’s argument seems to be the failure to indicate how reforming national and global institution will lead to the abolition of poverty. In this regard, Pogge’s argument seems to be mere speculation and does not rest on any reliable substantiation.³⁴⁵

On the GRD, the arbitrary feature of sharing GRD may affect its good intention. In fact, as Hayward puts it ‘a major element of arbitrariness in the proposal concerns its likely

³⁴⁰ Pogge (2008) 202.

³⁴¹ Pogge (2008) 204.

³⁴² D Satz ‘What do we owe the global poor’ Response to world poverty and human rights’ (2005) 19 *Ethics and International Affairs* 47-54.

³⁴³ J Cohen ‘Philosophy, social science, global poverty’ in A M Jaggar (eds) (2010) *Thomas Pogge and his critics* (2010) 19.

³⁴⁴ Cohen (2010) 20.

³⁴⁵ Cohen (2010) 20.

distributive effects³⁴⁶ as the distribution will be done randomly and will run the risk of disenfranchising several needy people who were the intended beneficiaries, especially if one has to consider that developing countries are not all at the same level of development/underdevelopment.³⁴⁷

Second, taxing products of natural resources while selling them to the North, will have a negative spill over effect as these taxes 'will be passed right back to poorer nations, in the form of higher prices for manufactured goods'³⁴⁸

Hayward is of the view that 'if any redistributive resource-based tax should be levied on nations, they [should be linked] to a nation's per capita utilisation of ecological space rather than the GRD'.³⁴⁹

2.4 NEPAD: Historical and theoretical contexts

After the independence years, Africa was bogged down by extreme poverty and as highlighted in the introduction of this work, this was the result of power imbalances between Africa and the developed countries. In his keynote address at the International Peace Academy Workshop, Adedeji observed that 'The NEPAD initiative is set within the context

³⁴⁶ T Hayward 'Thomas Pogge's global resources dividend: a critique and an alternative' 2.3 *Journal of Moral Philosophy* 317-332 available at <http://www.era.lib.ed.ac.uk/bitstream/1842/914/3/Hayward-on-Pogge.pdf> (accessed 10 December 2010).

³⁴⁷ Hayward 'Thomas Pogge's global resources dividend: a critique and an alternative' available at <http://www.era.lib.ed.ac.uk/bitstream/1842/914/3/Hayward-on-Pogge.pdf> (accessed 10 December 2010)

³⁴⁸ J Heath, 'Rawls on global distributive justice: A defence', online version <http://www.chass.utoronto.ca/~jheath/rawls.pdf>, p.20 as quoted in Hayward 'Thomas Pogge's Global Resources Dividend: A critique and an alternative' available at <http://www.era.lib.ed.ac.uk/bitstream/1842/914/3/Hayward-on-Pogge.pdf> (accessed 10 December 2010).

³⁴⁹ Hayward 'Thomas Pogge's global resources dividend: a critique and an alternative' 2.3 *Journal of Moral Philosophy* 317-332 available at <http://www.era.lib.ed.ac.uk/bitstream/1842/914/3/Hayward-on-Pogge.pdf> (accessed 10 December 2010).

of dismal economic performance by African states both in relative and absolute terms when compared to other regions of the world'.³⁵⁰ In an attempt to resolve the poverty crisis, the continent adopted several development plans referred to in the introduction and that will not be repeated here. Following the trend of seeking a new development paradigm, NEPAD, an initiative of African leaders to realise development in Africa, came into existence through the Millennium Africa Recovery Plan (MAP), conceived in 2000 by presidents Mbeki of South Africa, Obasanjo of Nigeria and Bouteflika of Algeria. MAP was later merged with Senegal's President Abdoulaye Wade's Omega Plan, resulting in the New African Initiative (NAI) in 2001. NAI was approved by the 37th OAU meeting of Heads of State and Government held in Lusaka, Zambia in July 2001 and its name was changed to NEPAD.³⁵¹ The NEPAD Declaration of Democracy, Political, Economic and Corporate Governance³⁵² clearly observes that NEPAD was established to eradicate poverty.

However, the non productivity of the neoliberal IMF and World Bank sponsored SAPs of the 1980's was the defining moment for the adoption of NEPAD.³⁵³ The main characteristics of neoliberalism (market fundamentalism, no state intervention, privatization of public assets, strong individualism, approval of inequality)³⁵⁴ mentioned earlier were behind the collapse of SAPs. As a result of this failure, NEPAD was born, but as will be shown shortly, it was

³⁵⁰ A Adedeji A. 2002b. 'NEPAD: A View from the African Trenches', keynote address, International Peace Academy Workshop, July. Page 3 as in quoted by C I Obi 'Reconstructing Africa's Development in the New Millennium Through NEPAD: Can African Leaders Deliver the Goods?'(2001) 4 *African Journal of International Affairs* 155.

³⁵¹ AHG/Decl.1 (XXXVII). The controversy on this official version of NEPAD will be addressed in chapter 5 of the study.

³⁵² Assembly of Heads of State and Government, 38th Ordinary Session of the OAU, 8 July 2002, Durban South Africa, NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I.

³⁵³ C I Obi 'Reconstructing Africa's Development in the New Millennium Through NEPAD: Can African Leaders Deliver the Goods?'(2001) 4 *African Journal of International Affairs* 147

³⁵⁴ A Giddens *The third way: The renewal of social democracy* (1998) 8.

criticised for being the resurgence of neoliberal policies which did not bring any happiness to the continent.

In any event, it is important to underline here that the advent of NEPAD and the claim for the RTD were both underpinned by poverty and international hegemonic policies; since the aims and objectives of both the RTD concept and NEPAD are to eradicate poverty. This said, however, while the theoretical framework of the RTD is clearly secured in the cosmopolitanism theory, the theoretical underpinnings of NEPAD is a topic of controversy.

For NEPAD architects, the continental plan is Africa's own plan underpinned by the theory of 'African renaissance' proposed by Thabo Mbeki, the former President of South Africa. The term was used to express his vision of a new Africa; a prosperous Africa underpinned by peace and stability, democracy, sustainable development, better life for all, equality amongst nations and fair global governance.³⁵⁵

However, this view was rejected by several analysts³⁵⁶ who correctly identified similarities between NEPAD and the neoliberal/Washington Consensus doctrine. The neoliberal characteristic of NEPAD can be found in its language which insists on 'capital flows', mainly in the structure of 'investment', within Africa and from abroad. In addition, NEPAD notes the '...urgent need to create conditions that promote private sector investment by both domestic and foreign investors'; it also provides for 'great opportunities for investment', especially through 'public-private partnerships', as well as 'lowering the risks facing private investors',

³⁵⁵ B M Magubane, 'The African renaissance in historical perspective' in MW Makgoba (ed) *The African renaissance - the new struggle* (1999) 21.

³⁵⁶ Most of these criticisms will be discussed in the section allocated to 'A critique of NEPAD. Meanwhile in general, see example Y Tandon 'NEPAD = SAP+GATs+DSB' (2002) *Southern and Eastern African Trade Information and Negotiations Initiative (SEATINA) Bulletin*. No. 5.4; J O Adesina, 'Development and the challenge of poverty: NEPAD, Post-Washington Consensus and beyond' (2002) Paper presented at the SASA Congress, East London, 30 June-3 July; (2004) *Africa Research Bulletin* 41; S K B Asante *NEPAD: A partnership of unequal partners* (2003) London: New African; P Bond 'Can NEPAD survive its proponents, sponsors, clients and peers?' (2003) Organisation for Social Research in Eastern and Southern Africa (OSSREA) Newsletter 21(3); P Bond *Fanon's warning: A civil society reader on the New Partnership for Africa's development* (2005) 28.

emphasises 'financial market integration', 'market enlargement', 'urgent need to diversify production', acknowledges 'the new trading opportunities that emerge from the evolving multilateral trading system' highlights 'the unparalleled opportunities that globalisation has offered to some previously poor countries', but that 'pursuit of greater openness of the global economy has created opportunities for lifting millions out of poverty' and calls for the urgent reintegration of Africa into the global economy.

In addition to the above, concepts such as 'governance', 'transparency', 'accountability', 'anti-corruption', 'trade liberalisation', and 'poverty reduction' which characterise the IFIs jargon are all over the NEPAD document. This led Obi to argue that NEPAD is the domestication of 'the macro-economic, macro-political frameworks and market-led growth policies' of the Bretton Woods institutions by African leaders',³⁵⁷ or rather a 'self-imposed structural adjustment programme'³⁵⁸ in Africa, to use Landsberg's words.

However, it is important to note that the advent on NEPAD created many reactions and interpretations including the view that NEPAD was not informed by neoliberal ideology, but was a post-Washington Consensus plan that reconciles positive aspects of social democracy and positive aspects of neoliberalism that can lead to the continent's development.³⁵⁹ Such a view cannot be discarded without examination.

From a classical social democracy perspective, NEPAD commits itself to invest in education, healthcare, infrastructure and to diversify the economy. Such commitments stand in contrast with the SAPs, hence the comment that they were not made 'as a means to placating the West'.³⁶⁰

³⁵⁷ Obi (2001) 148

³⁵⁸ C Landsberg 'NEPAD: What is it? What is missing?' paper written for NALEDI, 11, available at http://www.sarpn.org.za/documents/d0000550/P503_Landsberg.pdf (accessed 2 December 2010).

³⁵⁹ R M Tawfik 'NEPAD and African development: Towards a new partnership between development actors in Africa' (2008) 11 *African Journal of International Affairs* 64.

³⁶⁰ C Landsberg 'The birth and evolution of NEPAD' in J Akokpari, A Ndinga-Muvumba & T Murithi (eds) *The African Union and its institutions* (2008) 212.

In addition, apart from the neoliberal language observed earlier, NEPAD also puts emphases on the need to strengthen the state in recognising that ‘the weak state remains a major constraint to sustainable development’ and highlight the need to strengthen ‘the capacity to govern and to develop long term policies’.³⁶¹

Furthermore, NEPAD commits itself to develop ‘the entrepreneurial, managerial and technical capacities of the private sector by supporting technology acquisition, production improvements, and training and skills development; to ‘strengthen and encourage the growth of micro-, small and medium-scale industries through appropriate technical support from service institutions and civil society’.³⁶²

This way of mixing neoliberal ideas and classical democracy approaches led to the argument that NEPAD ‘advocates a partnership between state, market and civil society, with the main emphasis on the first two actors’.³⁶³ According to Tawfik, putting free trade and state involvement together was a way to accommodate MAP which praises state intervention as well as capacity building and UNECA’s Compact for African Recovery which believes in the role of the private sector.³⁶⁴ This reconciliatory approach was an attempt to have a plan which incorporates ‘components aimed at developing the private sector, the state (the public sector), the community, the family, and the individual’ to use the words of Stiglitz.³⁶⁵

³⁶¹ NEPAD 2001, para 23.

³⁶² NEPAD 2001, para 164.

³⁶³ Tawfik (2008) 64.

³⁶⁴ Tawfik (2008) 64.

³⁶⁵ J E Stiglitz ‘Towards a new paradigm for development: strategies, policies and processes’ (1998) 24, Prebisch Lecture, Geneva: UNCTAD as quoted by Tawfik (2008) 63.

This is in line with the argument that ‘the way out of the African economic predicament is to be found in some form of market-friendly state interventionism’,³⁶⁶ to which what can also adds a ‘*society-friendly* private sector’.³⁶⁷ In this register, it could be argued that NEPAD sees the private market as instrumental, but does not ignore the need for state intervention to facilitate the functioning of the market, which could be called the ‘third way’³⁶⁸ to borrow Gidden’s expression. This way seeks to ‘transcend’ aspects of classical social democracy and neoliberalism.³⁶⁹ In this perspective, in looking at NEPAD, perhaps we should consider Kanbur’s view echoed by Kahn in these terms: ‘[B]oth proponents and opponents are arguing on too grand a scale – proponents are in danger of taking on too much, whereas opponents risk losing an opportunity to do some small things right’.³⁷⁰ Furthermore, Kahn argues that

NEPAD is to some extent a reaction to the Washington Consensus, taking some of the positive aspects and attempting to promote greater integration of Africa into the international economy from which it has been marginalised. It emphasises the collective responsibility of Africa to meet its developmental challenges and recognises the external constraints³⁷¹

Still in the contextual framework, the advent of NEPAD is also located in the era of the IFIs’ Poverty Reduction Strategy Papers (PRSPs). In this register, in 1996 the IFIs initiated the Heavily Indebted Poor Country Initiative (HIPC) before replacing it with Enhanced HIPC in 1999. These initiatives aimed to cancel debts owed by developing countries to the IFIs and regional development banks. To qualify, every applicant was asked to show that the

³⁶⁶ R Kamdiza, K Matlosa and A Mwanza (2004) *The role of the state in development in the SADC region: Does NEPAD provide a new paradigm ?* Harare: SAPES, as quoted by Tawfik (2008) 68.

³⁶⁷ Tawfik (2008) 68.

³⁶⁸ Anthony Giddens is author of *The third way: The renewal of democracy*. Giddens defines the ‘Third Way’ as ‘an attempt to transcend both old style social democracy and liberalism’ (1998) 26.

³⁶⁹ Gidden (1998) 26.

³⁷⁰ B Kahn ‘Africa and the Washington Consensus’ in J J Teunissen and A Akkerman (eds) *Diversity in Development: Reconsidering the Washington Consensus* (2004) 221.

³⁷¹ Kahn (2004) 221.

cancellation of debts under the Enhanced HIPC was going to reduce poverty. Applicant countries had to prepare what was known as a PRSP. To assist countries to design their PRSP, the World Bank produced a *Sourcebook on Poverty Reduction Strategies* which was basically the reference book on how to design a PRSP.³⁷² Amongst other things, the applicant had to emphasise participation, transparency at every level of society and also involve the media. Good governance characterized by the rule of law, transparency, total accountability as well as a focus on health, education and nutrition were also part of the requirements.³⁷³

The PRSPs' architects however, without mentioning the failure of the SAPs underpinned by free trade rules, sustain that free market with the explosion of the private sector is 'the engine for growth',³⁷⁴ and poverty alleviation. This position takes preeminence on the inclusion of the capability approach which calls on governments to provide specific policies in the realm of education, health, environment and others. This preeminence led to the comment that under the SAPs,

[F]ighting poverty becomes the newest justification for the aging prescriptions geared to increasing the overall opening of the "host country" to external economic actors and free market rules.³⁷⁵

The quote above highlights the place of neoliberalism policy (in the PRSPs) which hinders development processes. Nevertheless, it is important to highlight the inclusionary approach of

³⁷² J Klugman *A Sourcebook for Poverty Reduction Strategies* (2002) World Bank, also available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,contentMDK:22404376~pagePK:210058~piPK:210062~theSitePK:384201~isCURL:Y,00.html> (accessed on 24 December 2010).

³⁷³ N Girishankar *et al* 'Governance' in J Klugman (ed) *A Sourcebook for Poverty Reduction Strategies* (2002) chap 8.

³⁷⁴ C Mutasa 'How NEPAD can engage with poverty reduction strategies: Developing an appropriate framework' 1, paper presented to the Southern Africa Research Poverty Network (SARPN) and Center for Civil Society workshop on "Engaging NEPAD: government and civil society speak to one another" 4th July 2002, University of Natal, Durban, South Africa available at http://www.sarpn.org.za/documents/d0000066/P69_Mutasa.pdf (accessed 24 December 2010).

³⁷⁵ J Levinsohn 'The World Bank's Poverty Reduction Strategy Paper approach: Good marketing or good policy' (2002) 14, available at <http://www.g24.org/levintgm.pdf> (accessed 24 December 2010).

the PRSPs in which every government is in charge of drafting its first poverty reduction strategy (with the cooperation of its national ministries and civil society), even if sometimes they are exception to this rule.³⁷⁶

There are serious doubts however, on the efficiency of the so-called ‘inclusionary approach’, hence the comment that

[T]oo often, PRSP's fail to reflect a broader approach to poverty reduction that fully addresses dimensions related to security or empowerment as essential ingredients for poverty reduction.³⁷⁷

In other words, civil society is not included in the process of drafting the PRSPs or its contribution is simply discarded before the adoption of the final draft. Therefore, it could be argued that NEPAD came to live in an environment tailored to suit the needs of the West because as correctly observed by Levinsohn,

[a]lthough the PRSP documents are peppered with references to molding the particulars of a poverty alleviation program to the details of the country, the discussion of trade policy (as well as some of the macroeconomic prescriptions) seem to come from a one-size-fits-all mentality.³⁷⁸

It could be argued that the ‘one-size-fits-all mentality’ is the product of neoliberalism doctrine. Nevertheless, the 2008 international economic meltdown was the failure of neoliberalism which turned to social democracy approaches with massive state intervention in the form of ‘bail out’ in the developed world. This raises the question if it is the end of neoliberalism or a move towards a third way.

As much as this thesis recognises the claim that NEPAD is a neoliberal agency, it would like to consider dissenting opinions who welcomed NEPAD from a positive angle.³⁷⁹ Therefore,

³⁷⁶ Levinsohn (2002) 22.

³⁷⁷ Catholic Relief Services ‘Review of the Poverty Reduction Strategy Paper Initiative,’ December 2001, Catholic Relief Services, page 12. Available on-line at: <http://www.worldbank.org/poverty/strategies/review/crs1.pdf> as quoted by Levinsohn (2002) 15.

³⁷⁸ Levinsohn (2002)15.

without trying to protect NEPAD from its neoliberal criticism, the thesis will attempt to look at NEPAD from ‘a problem solving perspective’. In other words, the thesis will look at the shortcomings of NEPAD and APRM (neoliberal and others) to assess what can be done to ameliorate its performance or what can be reformed to enable the continental institution to yield development. This will be in line with Pogge’s cosmopolitanism that calls for a global ‘institutional reform’ in the fight against poverty, because not only international institutions shall be reformed, but regional as well as national institutions shall be reformed.

2.4.1 NEPAD and the new institutionalism theory

In Pogge’s cosmopolitanism, the realisation of the RTD in this time of globalisation goes through global institutional reforms.³⁸⁰ This provides an entry point for every institution that has a role to play in the eradication of poverty. Therefore, it is important to look at ‘NEPAD [which] partly represents a new continental international institution in response to [the] trends in governance and rule-making in the global order’.³⁸¹ In this analysis, NEPAD could be located in the theory of institutionalism which can be defined as ‘a belief in the usefulness or sanctity of established institutions’;³⁸² In fact, not only does NEPAD claim to be informed by the ‘functionalism’ theory which sustains that ‘social institutions and practices can be understood in terms of the function they carry out in sustaining the larger social system’,³⁸³

³⁷⁹ Z Kebonang ‘The New Partnership for Africa’s Development: Promoting foreign direct investment through moral political leadership’ 2005 *Africa Insight*, 35(1) April 2005, Africa Institute of South Africa; C Landsberg ‘Democratic governance pivotal from Africa’s future’ (2002) *Global Dialogue*, 73 Institute for Global Dialogue.

³⁸⁰ Pogge (2007) 29.

³⁸¹ E Jönsson ‘New Economic Partnership for Africa’s Development Power and State compliance’ (2009) <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1405429&fileId=1420818> (accessed 10 December 2010).

³⁸² ‘Institutionalism’ available at <http://www.yourdictionary.com/institutionalism> for more on institutionalism, see O R Keohane & L Martin ‘Institutional theory as research program’ in C Elman & M F Elman (eds) *Progress in international relations theory* (2003) 71-107.

³⁸³ A Heywood, *Key concepts in politics: Palgrave Key concepts* (2000) 89 as quoted by Landsberg (2008) 217-218.

but it also claims its place in the institutionalism theory which advocates for ‘an enduring and stable set of arrangements that regulate individual and/or group behavior on the basis of established rules and procedures’.³⁸⁴ Looking at NEPAD from an institutionalism perspective will give some clues on the challenges faced by the continental institution in the context of capitalistic international relations.

There are several forms of institutionalisms: The ‘old’ institutionalism which considers the historical background and a holistic approach to economics.³⁸⁵ This approach is criticized for its inability to confront ‘the classical hegemony’³⁸⁶ and therefore failed to influence the direction of modern economics.³⁸⁷

The rational institutionalism on the other hand attempts to clarify how institutions impact on individual behaviors.³⁸⁸ In this approach, actors’ attitude is shaped by the outcome of other actors’ behaviours,³⁸⁹ and finally the new institutionalism which will be used in this thesis.

Based on neoclassical economic theory, new institutionalism underscores the need to undertake ‘institutional analysis within a neoclassical economic framework and to include

³⁸⁴ Heywood (2000) 89 as quoted by Landsberg (2008) 217-218.

³⁸⁵ A Hira & R Hira ‘The new institutionalism: Contradictory notions of change’ *American Journal of Economics and Sociology* (2000) available at http://findarticles.com/p/articles/mi_m0254/is_2_59/ai_63295358/?tag=content;col (accessed 5 December 2010).

³⁸⁶ Hira & Hira (2000) available at http://findarticles.com/p/articles/mi_m0254/is_2_59/ai_63295358/?tag=content;col (accessed 5 December 2010).

³⁸⁷ R H Coase ‘The new institutional economics’ (1984) *Journal of Institutional and Theoretical Economics* 230.

³⁸⁸ P A Hall & R C Taylor ‘Political Science and the three New Institutionalisms’ (1996) 44 *Political Studies* 945 as quoted by Jönsson (2009) 11.

³⁸⁹ P A Hall & R C Taylor (1996) 44 *Political Studies* 945 as quoted by Jönsson (2009) 11.

institutional change as an important variable to be studied'.³⁹⁰ As a result, an institution is multidimensional and encompasses 'rules, norms, practices and values that constrain and shape behaviors [as understood by NEPAD]'.³⁹¹ New institutionalism provides room for the analysis of how powers influence international relations. The latter are shaped by concepts of powers which include compulsory power, institutional power and structural power.³⁹² It is important to analyse these powers because they are important to determine NEPAD's capacity to tackle poverty in the globalisation arena, or risk being drowned in the sea of liberalism politics.

2.4.1.1 Compulsory power

According to Barnett and Duvall, compulsory power exists in a partnership relation where an actor or a partner can apply direct power or influence on its counterpart to obtain a beneficial outcome.³⁹³ This sort of power could be exercised through material or ideological means. Quoting Dahl, Barnett and Duval identify three characteristic of compulsory which entails 'intentionality' from the strongest partner, a 'conflict of desires' between the partners and the success of the stronger party because of its ability to use 'material' or ideological means.³⁹⁴ It could be argued that generally, compulsory power is imposed through hegemonic ideologies such as neoliberalism or through material resources such as aid in the form of financial assistance³⁹⁵ or military equipment for example. In fact, it could be argued that the IFIs used

³⁹⁰ Ron and Ira (2000) available at http://findarticles.com/p/articles/mi_m0254/is_2_59/ai_63295358/?tag=content;col (accessed 5 December 2010).

³⁹¹ Jönsson (2009) 10.

³⁹² M Barnett & R Duvall 'power in global governance' in Barnett Duval (eds) *Power in global governance* (2005) 3.

³⁹³ Barnett and Duval (2005) 3.

³⁹⁴ R Dahl 'The concept of power' 1975 *Behavioral Science* 202-203 as quoted by Barnett and Duval (2005) 13.

³⁹⁵ M'baye (1972) 518-520

(its resources) compulsory power through the SAPs to shape policies in the borrowing developing countries in the 1980s.

The concept of compulsory power is interesting as it will assist in understanding whether such a power is applied on NEPAD, materially or in an ideological way (neoliberalism for example). If so, such a constraint will hinder NEPAD's ability to achieve the RTD on the continent and consequently, there will be a need for institutional reforms.

2.4.1.2 Institutional power

The scenario of institutional power is characterised by the exercise of power through an institution. It is an indirect control where the stronger partner uses an (international) institution or organisation on which he has control to oppress its partners.³⁹⁶ The control is more pronounced when the strongest partner can actually set the rule of the game through the institution. For instance, in assessing the relation or partnership between NEPAD and its northern partners, it will be interesting to look at the role of the WTO,³⁹⁷ the World Bank and IMF and who pulls the strings in these IFIs. The nature of such a relation can shed some light on the extent to which NEPAD can realise the RTD in Africa. It will also clarify cosmopolitanism through institutions, from Pogge's perspective.

It could be argued that the RTD and NEPAD fall in the same ambit in terms of fighting poverty. Though criticised for being neoliberal, in principle NEPAD is one of the institutions through which such a right can be realised, hence its important place in the thesis. In fact, in expressing their political will underpinning NEPAD, African leaders recognise that 'the right to development and the eradication of poverty' are key elements to be addressed in 'the new phase of globalisation'.³⁹⁸

³⁹⁶ Barnett and Duvall (2005) 3.

³⁹⁷ On 'compulsory and institutional power in the WTO context' see G Shaffer 'Power, governance and the WTO: A comparative institutional approach' in Barnett and Duvall (2005) 130-160.

³⁹⁸ NEPAD 2001, para 43.

2.4.1.3 Structural power

According to Barnett and Duvall, structural power addresses ‘the constitution of social capacities and interests of actors in direct relation to one another’.³⁹⁹ This form of power is exercised through the structure of international relations. This could be found in ‘the workings of the capitalist world-economy in producing social positions of capital and labor with their respective differential ability to alter their circumstances and fortunes’.⁴⁰⁰ Structural power and institutional power are therefore linked.

When structural power is exercised, the weaker party is pressurised through institutional power which targets its interests; the weaker party faces consequence for not complying with the will of the stronger.⁴⁰¹ In such a relation, the stronger party enjoys the privilege of a master while the weaker one is the slave;⁴⁰² and more importantly the *status quo* remains, even when the stronger party does not act to keep the pressure.⁴⁰³ It could be argued that structural power is generally exercised in the arena of international trade informed by unfair rules.

As mentioned earlier, the concept of powers on the international plane will be determinant in investigating NEPAD’s capacity to make a difference in people’s life on the continent.

The thesis looks at NEPAD from a new institutionalism perspective as this approach assists in understanding behaviors on the international plane and provides a framework to assess the game of power or what North calls the ‘the rules of the game in [the international society]’.⁴⁰⁴

³⁹⁹ Barnett and Duvall (2005) 3.

⁴⁰⁰ Barnett and Duvall (2005) 3.

⁴⁰¹ Barnett & Duvall (2005) 18.

⁴⁰² Burnett & Duvall (2005) 18.

⁴⁰³ Burnett & Duvall (2005) 18.

⁴⁰⁴ D C North *Institutions, Institutional Change and Economic Performance* (1990) 3.

used by different actors to reach their various objectives. In this register, NEPAD could be looked at from the obligation-based cosmopolitanism perspective which entails the need to build or reform institutions in charge of ensuring the effective operationalisation of cosmopolitan law to ensure global justice.⁴⁰⁵ In addition, looking at NEPAD from an institutionalism perspective is in line with Pogge's doctrine that believes in reforming global institutions including regional and even national one to eradicate poverty;⁴⁰⁶ it is also in line with Rawls' teaching that establishes a causal link between poverty and national institutions.⁴⁰⁷ In addition, the link between the RTD is underlined by Sengupta who considers NEPAD as 'a remarkable development in the evolution of the international process of realising the right to development',⁴⁰⁸

The other link between NEPAD, APRM and the RTD could be located in the work of the UN High Level Task Force on the Implementation of the Right to Development. Under the auspices of this institution, the APRM and other development partnerships (United Nations Economic Commission for Africa (ECA) and Organization for Economic Cooperation and Development (OECD)-Development Assistance Committee (DAC) Mutual Review of Development Effectiveness) in the context of NEPAD were included among the frameworks through which the 'criteria for periodic evaluation of global development partnerships from the perspective of the right to development' could be applied.⁴⁰⁹

2.5 A critique of NEPAD

⁴⁰⁵ P Haden (2005) 35.

⁴⁰⁶ Pogge (2007) 29.

⁴⁰⁷ J Rawls 'The law of people' in Shute and Hurley (1993) as quoted by Pogge (2007) 31.

⁴⁰⁸ A Sengupta 'Development cooperation and the right to development' at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP12--Sengupta.pdf (accessed 20 October 2007).

⁴⁰⁹ Report of the High-Level Task Force on the implementation of the right to development on its third session established by the Human Rights Council resolution 1/4 UN Doc. A/HRC/4/WG.2/TF/2, 13 February 2007, at para. 27& 29.

NEPAD had been widely criticised. Amongst other reasons, the African economic plan is informed by neoliberal ideologies and has similarities with the IMF and World Bank sponsored SAPs which had aggravated underdevelopment in Africa.⁴¹⁰ According to Bond,⁴¹¹

[T]he neoliberal economic policy framework at the heart of the plan repeats the structural adjustment policy packages of the preceding two decades and overlooks the disastrous effects of those policies

NEPAD embraces the forces of neoliberal globalisation, and promotes these forces as a cure for Africa's ills. This argument has to do with the fact that NEPAD aims to reduce state intervention in social and economic development to the benefit of the market and the private sector, hence the comment that NEPAD is nothing, but the expression of the 'Washington Consensus' and the reimplementation of the SAPs.⁴¹² In fact, neoliberal leaders showed a great enthusiasm about NEPAD and multiplied various actions to sell the plan to Africans. In this respect, Tony Blair the former Great Britain Prime Minister in his speech to the Nigeria Parliament said:

The New Partnership for Africa's Development presents a profound opportunity to turn a page in human history. Implementing its principles is not just the right thing to do. It is good investment. An investment in our common future. In our collective security and common humanity. ...So, I applaud the

⁴¹⁰ I Lesufi 'South Africa and the rest of the continent: Towards a critique of the political economy of NEPAD' (2004)52 *Current Sociology* 2, available at <http://csi.sagepub.com/content/52/5/809> (accessed 9 December 2010).

⁴¹¹ P Bond 'Cultivating African anti-capitalism' *Zmagazine* (2003) available at Z Net - The Spirit of Resistance Lives <http://www.zcommunications.org/cultivating-african-anti-capitalism-bypatrick-bond> (accessed 5 December 2010); also P Bond *Fanon's warning: A civil society reader on the New Partnership for Africa's Development* (2005) 33; see also M J Kankwenda 'Revisiting the African development trajectory: From LPA to NEPAD in J C Senghor and N K Poku *Towards Africa's renewal* (2007); L Diamond 'Promoting real reform in Africa' in E Gyimah-Boadi (ed) *Democratic reform in Africa – The quality of progress* (2004) 277.

⁴¹² P Bond *Talk left, walk right – South Africa's frustrated global reforms* (2004) 103; For a counter-argument, see P Mashele 'The New Partnership for Africa's Development – Four years of a promising attempt or hollow optimism?' ISS paper 125 (March 2006) 3-4.

efforts of the NEPAD committee to devise a coherent set of codes and standards for economic and political governance.⁴¹³

This support to NEPAD was reiterated by the G8 Africa action plan in these terms:

We, the Heads of State and Government of eight major industrialized democracies and Representatives of the European Union, meeting with African Leaders at Kananaskis, welcome the initiative taken by African states in adopting the *New Partnership for Africa's Development* (NEPAD), a bold and clear-sighted vision of Africa's development.⁴¹⁴

As a result of western support, it could even be argued that NEPAD came from the corridors of wealthy countries and not from Africa. In fact, Wade's Omega plan was first presented at the Franco-African Summit held in Yaounde in January 2001 and was formally launched 6 months later at the International Conference of Economists on the Omega plan, attended by selected African and non African states.⁴¹⁵

Furthermore, before NEPAD was drafted and tabled at the OAU Summit, its architects had started mobilising for support through meeting with the USA, Britain, Russia, Japan, the Nordic countries, the European Council, the World Bank and IMF before even consulting with the African National Congress (ANC) of South Africa⁴¹⁶ where Mbeki comes from. It was after all these meetings with foreign powers that Mbeki briefed his colleagues at the OAU Summit with the intention to welcome on board the willing countries to join in the actualisation of his proposals and not to make his plan an all-African initiative.⁴¹⁷ In fact, this approach shows that the exclusionary approach used by NEPAD which did not consult or

⁴¹³ 'An Address by Prime Minister of Great Britain before the Nigerian Parliament, Friday 7 February 2002' available at <http://www.waado.org/NigerDelta/FedGovt/ForeignAffairs/TonyBlair.html> (accessed 10 December 2010). Also *The Guardian On-Line* - <http://ngrguardinannews.com> (accessed 10 December 2010).

⁴¹⁴ Obi (2001) 162.

⁴¹⁵ B Omonide *et al* (2004) 238.

⁴¹⁶ Omonide *et al* (2004) 238-239.

⁴¹⁷ Omonide *et al* (2004) 239.

allow the African folks to participate as will be discussed in chapter 5 of this study. Thus, NEPAD is elitist both in conception and in architecture because of its top-down approach. Popular participation is the key of a people-centered development vision and because it is not paramount in NEPAD, Bade Onimode thinks that NEPAD was established for the fame of its founders.⁴¹⁸

More significantly, the NEPAD structure does not provide any following process to ensure civil society's participation in future NEPAD policy and implementation.⁴¹⁹ Therefore, one can assume that the future of NEPAD will continue to be a closed, top-down approach.⁴²⁰

NEPAD has also been criticised for relying abundantly on international assistance and its inability to rely on itself.⁴²¹ While Mbazira argues that Africa should begin to eradicate its problems by utilising the locally available resources as opposed to seeking solutions from the outside,⁴²² Moyo correctly shows that in terms of resources mobilisation, NEPAD relies almost exclusively on external financial support,⁴²³ and expect more foreign direct investment from the North.⁴²⁴

⁴¹⁸ Omonide *et al* (2004) 235- 239.

⁴¹⁹ R Naidoo 'The New Partnership for African Development (NEPAD): Where to from here?' in *Building alternatives to neo-liberal globalisation: The Challenges facing NEPAD* (2004) 2.

⁴²⁰ Naidoo (2004) 2.

⁴²¹ I Taylor *Nepad - Toward Africa's development or another false start?* (2005) 88.

⁴²² Mbazira (2004) 47.

⁴²³ T Moyo 'The Resource Mobilization Strategy (RMS) of the New Partnership for Africa's Development (NEPAD): A Critical Appraisal' in Peter Anyang' Nyong'o, Aseghedech Ghirmazion, Davinda Lamba (eds.), *New Partnership for Africa's Development: A New Path?* (2002) 183-208.

⁴²⁴ Moyo (2002) 207.

Much also had been said on the vagueness of NEPAD programme which is too ambitious. Herbert argues that⁴²⁵

[T]he Nepad text and even its sectoral documents fall far short of any common sense definition of a plan or a strategy. They organise the many African development problems into a structure, but offer no guide about which problems must be solved first. The Nepad text and subsequent documents say nothing about how, given the many priorities competing for scarce resources, governments should choose strategically from those competing priorities. They also offer wish lists but fail to note how funds will be raised or how the proffered solutions would do more than tinker expensively around the margins.

Quoting Rukato, the former NEPAD Deputy CEO in her 4 June 2009 presentation in Pretoria, Killander observes 'NEPAD brings together stakeholders that can build a road but does not build the road itself',⁴²⁶ hence, its tendency to claim ownership for every development initiative including those that preceded its adoption.⁴²⁷

As far as human rights are concerned, NEPAD faces the criticism of lacking human rights-based to development. To use Manby words, 'NEPAD's endorsement of human rights is segregated from its discussion of objectives in relation to infrastructure, health, education, and other areas.'⁴²⁸ Furthermore, issues of discrimination (including on the ground of gender) and systematic violations of human rights is inappropriately covered.⁴²⁹

⁴²⁵ R Herbert 'The survival of Nepad and the African Peer Review Mechanism: A critical analysis' (2004)11*South African Journal of International Affairs* 24.

⁴²⁶ M Killander 'The role of the Africa Peer Review Mechanism in inducing compliance with human rights' LLD thesis (2009) 43, University of Pretoria.

⁴²⁷ Herbert (2004) 27, Taylor (2005) 92. For a positive overview of the impact of NEPAD see D Malcolmson 'Implementation of the Nepad initiative – Overview' (2004)11 *South African Journal of International Affairs* 11-20. R K Edozie 'Promoting African "owned and operated" development: A reflection on the New Partnership for Africa's Development' (2004) 3(2) *African and Asian Studies* 145-173.

⁴²⁸ B Manby 'The African Union, NEPAD, and human rights: The missing agenda' (2004) 26 *Human Rights Quarterly* 1003.

⁴²⁹ Manby (2004) 1005.

In addition to the above, even the concept of good governance *a la* NEPAD (under the APRM) was criticised.

2.6 Criticism of the APRM and its good governance underpinnings

Adopted at the first AU summit in Durban,⁴³⁰ ‘the APRM is the cornerstone of NEPAD’,⁴³¹ It is a tool for enhanced collective responsibility within the family of African countries; it is voluntarily acceded to by AU member states; it is an instrument and criterion for measuring African governments’ compliance with their commitments encompassed in the Declaration on Democracy, Political, Economic and Corporate Governance. According to the APRM Memorandum of Understanding (MoU), its primary purpose is to

[f]oster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated subregional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies and assessing the need for capacity building of participating countries.⁴³²

In short, the APRM is known to be the engine of good governance in the NEPAD programme. Nonetheless, good governance under APRM will hinder development if it does not ‘entail substantial reworking of the value of ‘participation’ that resists appropriation by the libertarian notion of rights, governance and justice’.⁴³³

According to the World Bank, good governance is described ‘as the manner in which power is exercised in the management of a country’s economic and social resources for development’.⁴³⁴ The definition provided by the World Bank entails three aspects.⁴³⁵

⁴³⁰ Adopted at the 1st Assembly of the AU held in Durban, South Africa, 8-10 July 2002; Declaration on the implementation of NEPAD, Assembly/AU/Decl.1 (I).Assembly /AU/Decl.1 (I).

⁴³¹ International Federation for Human Rights (FIDH) (2004) 121.

⁴³² MoU para 8; APRM Base Document para 3.

⁴³³ Baxi (2007) 148.

⁴³⁴ World Bank *Governance and Development*, (1992) 1.

- The structure of a political regime
- The methods by which authority is exercised in the management of a country's resources
- The ability of a government to formulate and implement policies and the way in which it fulfills its functions.

According to Bowao and Samb, based on a pursuit of well being, good governance is the

[D]esire, constantly renewed over time, for liberty, justice and growth that fuels the drive and determination, admittedly controversial but never incomplete, of human society. This contradictory yet universal quest which, under diversified and historically changing forms, merges with the refusal to accept any kind of oppression, alienation, social hardship or moral decay...⁴³⁶

Good governance is also 'creating well functioning and accountable institutions (political, judicial and administrative) which citizens regard as legitimate and in which they participate in respect of all decisions that affect their lives and by which they are empowered'.⁴³⁷

However, the World Bank's view sustaining that human rights, democracy and good governance are prerequisites for socio-economic development is the dominant model in Africa.⁴³⁸ This view is sustained by the AU and African leaders who believe that democracy, good political as well as corporate governance and government accountability are fundamentals for Africa's development.⁴³⁹ This reflects that improper political environments,

⁴³⁵ B Campbell 'Quelques enjeux conceptuels, ideologiques et politiques autour de la notion de bonne gouvernance' in *Bonnes Gouvernance et Developpement en Afrique*, (1997) 65-94.

⁴³⁶ C Bowao & M Samb, 'La bonne gouvernance: une nouvelle ethique du developpement?' [Good Governance: A New Development Ethic?] in *Bonne Gouvernance et Developpement en Afrique* (1997) 64.

⁴³⁷ K Annan *NEPAD/AU country Self-Assessment for the African Peer Review Mechanism* 17 available at www.nepad.org (accessed 20 December 2010).

⁴³⁸ O Deme 'Between hope and scepticism, civil society and the African Peer Review Mechanism *Insights* (2005) 11 available at http://idl-bnc.idrc.ca/dspace/bitstream/10625/27418/1/121268_e.pdf (accessed 8 January 2011).

⁴³⁹ C M Fombad 'The African Union, Democracy and Good Governance' in H Melber (ed) *AU, NEPAD and the APRM: Democratisation Efforts Explored* (2006) 10.

in particular poor governance, have been recognized as major hindrances to economic reforms and growth.⁴⁴⁰

Nevertheless, the historical practices of certain non-democratic countries such as Germany under Hitler, North Korea and South Africa under apartheid have demonstrated that the causal link between good governance and development is not always true⁴⁴¹ because these countries were developed, but had no good governance. The other counterfactual case to Sen's opinion that links poverty to lack of democracy is Malawi, where in over 20 years of dictatorship, the country did not experience hunger and today, under a democratic dispensation, the country is facing severe famine.⁴⁴² Onis notes that South Korea, Taiwan, Singapore and Thailand, which are the main success stories of economic growth in the third world, did not happen in democratic settings, but rather under developmental states.⁴⁴³

It is argued that democracy and good governance interfere with African sovereignty in the field of development cooperation.⁴⁴⁴ The good governance and democracy theories were introduced to hinder the main economic and social forces in Africa, so removing any popular basis for contesting the implementation of SAPs. To this end, economic forces should participate in adjustment policies and also have confidence in their political leaders, who in

⁴⁴⁰ E E Otobo 'Contemporary external influence on corporate governance: Coping with the challenges in Africa', in Omonide *et al African development and governance strategies in the 21st Century, Looking back to move Forward, Essay in Honour of Adebayo Adedeji at Seventy* (2004)101.

⁴⁴¹ A A Dieng, 'Gouvernance et developpement'['Governance and development'], in *Bonne gouvernance et developpement en Afrique* (1997) 101- 109.

⁴⁴² J O Adesina 'NEPAD and the Challenge of Africa's Development: towards a political economy of a discourse' Paper prepared for the 10th General Assembly of the Council for Development of Social Science Research in Africa 8th to 12 December (2002) 1-2 , Kampala, Uganda.

⁴⁴³ O Ziya 'The logic of the developmental state' *Comparative Politics*, October 1991.

⁴⁴⁴ M Kankwenda 'Forty years of development illusion: Revisiting development policies and practices in Africa' in Omonide *et al African Development and Governance Strategies in the 21st Century. Looking Back to Move Forward; Essays in Honour of Adebayo Adedeji at Seventy* (2004) 12.

turn are required to be accountable to their people and economic social stakeholders.⁴⁴⁵ Mbaya believes that good governance *à la* Bretton Woods or NEPAD does not cater for peoples' interest.⁴⁴⁶ According to Arts,⁴⁴⁷ developing countries are being bogged down by numerous standards including democracy and governance.⁴⁴⁸ Bond shares this view and argues that 'good governance' was introduced in NEPAD/APRM to disguise 'the neo-colonial relationship during the period of the 2000s – in the wake of two decades of rampant structural adjustment that demolished living standards except for newly empowered political, financial and commercial elites'.⁴⁴⁹ He emphasises that the neocolonial direction of the [APRM] is similar to that 'imposed by the IMF, the US State Department and Brussels', ⁴⁵⁰ and Samir adds:

Unquestionably, the NEPAD document lines up with liberal thought on the discourse of "good governance." This is a concept that is useful as a way to dissociate democratic progress from social progress, to deny their equal importance and inextricable connection with one another, and to reduce democracy to good management subjected to the demands of private capital, an "apolitical" management by an anodyne civil society, inspired by the mediocre ideology of the United States. ⁴⁵¹

⁴⁴⁵ Kankwenda (2004) 12.

⁴⁴⁶ Kankwenda (2004)12.

⁴⁴⁷ K Arts *Integrating human rights into development cooperation: The case of the Lome Convention* (2000) 136.

⁴⁴⁸ Arts (2004) 12.

⁴⁴⁹ P Bond 'Removing neocolonialism's APRM mask: A critique of the African Peer Review Mechanism' (2009) *Review of African Political Economy* 596-597. For dissenting views, see R Herbert, & S. Gruzd 'Taking stock of the African Peer Review Mechanism' (2007) 14 *South African Journal of International Affairs*. 5–28; also R Herbert and S Gruzd *Le mecanisme Africain d'évaluation par les pairs : Lecons des poinniers* (2008).

⁴⁵⁰ Bond (2009) 596-597.

⁴⁵¹ S Amin 'The Millennium Development Goals: A Critique from the South' *Monthly review* (2006) available at <http://www.monthlyreview.org/0306amin2.php> (accessed 9 December 2010).

In a similar vein, Olukoshi is of the view that NEPAD's democracy and governance proposal is tailored to feed the donor's interest and not the African populace.⁴⁵²

In spite of its commitment to ensure the respect of rule of law, human rights, transparency and accountability, the APRM, has also been criticised for its 'soft' character or non-binding features; its reliance on a simple memorandum to which countries access voluntarily. It was argued that the process is weak as

[I]t does not prescribe sanctions or penalties and as such it runs the risk of being ineffective. Unless there are penalties or sanctions, the review will become a sham and attempts at achieving sustainable development through the adoption of best practices will fail.⁴⁵³

Furthermore, the APRM documents were also criticised for their lack of harmony. In this regard, Gruzd observes:⁴⁵⁴

The rules and regulations governing the process are loose. Later documents contradict earlier ones, without revoking or revising them. The wide-ranging flexibility afforded to countries in developing their national APRM structures — particularly their national governing council or national commission and local APRM secretariat — has spawned a variety of different institutional models. This permissive approach has mollified some nations to be apprehensive about the process but it has also undermined the ability of the system to establish governance norms or bring about genuinely improved dialogue around governance reform. The Panel has been reluctant to publicly challenge governments even when their APRM plans are contrary to the written and verbal guidelines.

Moreover, just like NEPAD, the APRM had been criticised for being too ambitious.⁴⁵⁵

⁴⁵² A Olukoshi 'Governing the African political space for sustainable development: A reflection on NEPAD', in Peter Anyang' Nyong'o, Aseghedech Ghirmazion, Davinda Lamba (eds) *New Partnership for Africa's Development: A New Path?* (2002) 90.

⁴⁵³ Z Kebonang & C M Fombad 'The African Peer Review Mechanism: Challenges and Prospects' in H Melber (ed) *AU, NEPAD and the APRM: Democratisation Efforts Explored* (2006) 51.

⁴⁵⁴ Gruzd (2007) 24.

⁴⁵⁵ Gruzd (2007) 24.

2.7 Concluding remarks

The aim of this chapter was to set the stage for the study. To attain this objective, the paper looked at three main issues: Firstly, it explained the main concepts and terminologies used in the study. Secondly, it offered a broader historical and contextual framework through which it established the relationship between the RTD and NEPAD. Thirdly, it provided a critique of NEPAD/APRM.

On the first issue, the chapter clarifies *inter alia* the concepts of human rights in Africa, the natural law theory, the debate on the hierarchy of human rights, addresses the concept of human dignity, equality and non-discrimination; it also focuses on the debate on universalism versus relativism of human rights before providing a definition of human rights as understood under the African human rights system. In addition, the chapter unpacks the concept of development, RTD, sustainable development and poverty eradication. While looking at the concept of human rights, the chapter argues that human rights are the best way for the realisation of the RTD, provided all development actors' activities are informed by human dignity as initially understood during the adoption of the UDHR.

On the second issue, while addressing the historical context of the RTD, the chapter showed that in its early days, the claim for the RTD was based on the request for the establishment of a NIEO by developing countries; then the claim evolved to be linked to the effects of the World Bank, IMF sponsored SAPs as well as the WTO unfair trade rules which impoverished Africa. Finally, the claim for the RTD was based on the request for global justice and fairness in the distribution of world's resources.

In terms of theory, the chapter located the RTD in the cosmopolitanism philosophy which sees the world as a global village where based on their humanity, all human beings are equal. It identified the utilitarianism, rights-based cosmopolitanism and obligation-based cosmopolitanism as theories through which global justice can be achieved. It however, presented the critique of cosmopolitanism which revolves around the nationalism, liberalism and individualism theories that maintain that the individual is paramount and advocates for the right to property.

In attempting to further clarify the cosmopolitanism theory, the chapter examined the application of cosmopolitanism through Sen's capability approach which revolves around 'development as freedom', assessed Pogge's theory which revolves around global responsibility for human rights with

special attention to the role of the affluent countries and their citizens as well as the role of global institutions. In addition, the chapter offered a critical analysis of Sen and Pogge's theory.

Shifting its attention to NEPAD, historically, the chapter located the African institution in the context of development policies which preceded its advent, the context of widespread poverty in Africa before concluding that the defining moment for its adoption was the poverty crisis caused by the neoliberal SAPs in Africa.

In terms of theory underpinning NEPAD, the chapter showed that the theoretical foundation of NEPAD was controversial. While fundamentalists supported by functionalists argued that NEPAD was secured in the African renaissance theory, sceptics were of the view that NEPAD was a neoliberal organisation. As result of this disagreement, the thesis approaches NEPAD from a 'problem solving perspective', not from fundamentalist or sceptic viewpoints, but from an 'engagist' perspective. In doing so, the chapter located NEPAD in the institutionalism theory which believes in the sanctity of institutions. This approach examined the role of institutions in eradicating poverty; it assessed the game of power (compulsory, institutional and structural power) at global level. This was the entry point for NEPAD in the cosmopolitanism theory (and the link with the RTD) where Pogge encourages the study or reform of institutions at global, national and even regional level whereas Rawls focuses on the institutions at national level. The other link between NEPAD and the RTD was identified by Sengupta who considered NEPAD as 'a remarkable development in the evolution of the international process of realising the right to development'. Furthermore, the UN High Level Task Force on the Implementation of the Right to Development included the APRM and other development partnerships (United Nations Economic Commission for Africa (ECA) and Organization for Economic Cooperation and Development (OECD)-Development Assistance Committee (DAC) Mutual Review of Development Effectiveness) in the context of NEPAD as frameworks to monitor periodically the performance of global development partnerships within the context of the RTD.

On the final issue, the chapter showed that NEPAD is widely criticised for its neoliberal ideology, its lack of resources, its overdependence on aid, its exclusionary policy characterised by the lack of popular participation, its over ambitious programme and its lack of human rights approach to development. In a similar register, the APRM is criticised for being toothless, ambitious, for being neoliberal, resourceless and over dependant on aid.

CHAPTER 3 THE NATURE OF THE RIGHT TO DEVELOPMENT

- 3.1 Introduction
- 3.2 The content of the RTD
 - 3.2.1 The RTD is an 'inalienable' human right
 - 3.2.2 The right to participation as a cornerstone of the RTD
 - 3.2.3 The RTD as a composite human right
 - 3.2.4 The right to self-determination: An important element of the RTD
- 3.3 The RTD: A controversial human right
 - 3.3.1 The controversy in academic arenas
 - 3.3.1.1 The skirmishes on development law
 - 3.3.1.2 The skirmishes on the RTD
 - 3.3.2 Controversy at the UN
 - 3.3.2.1 The politicisation of the debate
 - 3.3.2.2 The reflection of the politicisation of the debate on the voting pattern of the UN resolutions on RTD
 - 3.3.2.3 Different international organisations and different approaches *vis a vis* the RTD
- 3.4 The normative force of the RTD
- 3.5 Implementation of the RTD
 - 3.5.1 The duty bearers of the RTD
 - 3.5.1.1 The state
 - 3.5.1.2 The international community
 - 3.5.2 The right-holders of the RTD
 - 3.5.2.1 Individuals
 - 3.5.2.2 Peoples
 - 3.5.2.3 The state
- 3.6 Concluding remarks

3.1 Introduction

This chapter answers the following question: What is the nature or substance of the RTD?

The RTD is one of the most contentious issues in the human rights discourse. Located in the third generation human right or solidarity rights, the RTD was first introduced in 1972 by Keba M'baye, the Chief Justice of Senegal (later a judge at the International Court of Justice

(ICJ)) in his address at the International Institute of Human Rights in Strasbourg, France.⁴⁵⁶ As mentioned in the introductory chapter of this work, this was followed by several international undertakings aiming to incorporate the right in global standards.⁴⁵⁷ Nevertheless, the right remains controversial. While developing countries base their claim for resources transfer on the RTD perceived as a fundamental right, developed countries believe the right is a myth.⁴⁵⁸

The aim of this chapter is to examine the nature of the RTD and to look at its implementation mechanisms. Focusing on the right at a global level, this chapter is a background to the next one that looks at the right in the African human rights system.

The chapter is divided into five parts including this introduction. The second part examines the content of the RTD, the third part focuses on the controversy on the right in academic arenas and at the UN level; the fourth one focuses on its implementation by looking at the duty bearers on the one hand and the right holders on the other and the fifth and final part provides concluding remarks.

3.2 The content of the RTD

This subsection investigates the substance and the nature of the RTD. It provides a brief overview of the right as described by the UNDRTD. However, a thorough analysis of the right will be the feature of the subsections addressing the controversy on the right,⁴⁵⁹ as well as its implementation.⁴⁶⁰ Article 1 of UNDRTD defines the RTD as:

⁴⁵⁶ K M'baye 'Le droit au développement comme un droit de l'homme' (1972) 5 *Revue des droits l'homme* 505 - 534.

⁴⁵⁷ Examples: Human Right Commissions Resolutions 4 (XXXIII) of 21 February 1977, 4 (XXXV) of 2 March 1979, 36 (XXXVII) of 11 March 1981, and 1985/44 of 14 March 1985.

⁴⁵⁸ E.S Nwauche and J.C. Nwobike 'Implementing the right to development' (2005) year 2, No 2 *Sur International Journal of Human Rights* 93.

⁴⁵⁹ Sec 3.3.

⁴⁶⁰ Sec 3.4.

1. an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

According to this provision, the RTD has five main characteristics:

- The RTD is inalienable.
- It is a process securing the right to participation.
- It is a process in which all human rights and fundamental freedoms should be realised
- It is an individual and collective right.⁴⁶¹
- The RTD underlines the right of people to self-determination.

3.2.1 The RTD as an ‘inalienable’ human right

The word ‘inalienable’ of the first paragraph of the 1986 UNDRTD underscores the importance of the RTD that cannot be encroached upon, that cannot be bargained away. It derives from the natural law theory discussed earlier. Apart from the 1986 UNDRTD, the inalienable character of the RTD is also underlined by, the 1994 International Conference on Population and development (ICPD).⁴⁶² Accordingly, the RTD cannot be set aside for any reason including the lack of development. The right is inherent to the nature of mankind and should be fulfilled in a sustainable manner. In this register, human beings are the subject of development, hence there is a rejection of the theory of ‘developmentalism’⁴⁶³ characterized by free market and profit seeking at all cost.

⁴⁶¹ This will be discussed under the section allocated to the discussion on the right holders; sec 3.4.2.

⁴⁶² ICPD, principle 3.

⁴⁶³ Baix (2007) 132.

However, the RTD loses its inalienable character when the state is at the same time duty bearer and beneficiary of the right. In this context as will be seen while analysing the concept of people in the African human rights system, people's rights are easily sacrificed by the state.

3.2.2 The right to participation as a cornerstone of the RTD

Though the RTD incorporates all human rights and freedoms, the prescription on the right to participation⁴⁶⁴ is clearly spelt out through the expression 'every human person and people are entitled to participate'.⁴⁶⁵ Participation is the cornerstone of development. The entitlement to participate ensures that no one is left out on any ground, whatsoever. The right to participation underscores the prohibition of discrimination and highlights the need for transparency and accountability in the development process. Women,⁴⁶⁶ youth,⁴⁶⁷ indigenous groups⁴⁶⁸ should be part of the process and be part of the sharing of the benefit of development. In fact, the right to participation builds on article 21 of Universal Declaration according to which:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives
- (2) Everyone has the right of equal access to public service in his country
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures

⁴⁶⁴ This right will be further discussed in chapter 4 through the *Endorois* case and chapter 6 while looking at the prospect for the RTD in Cameroon and South Africa.

⁴⁶⁵ The 1986 UNDRTD, art 1.

⁴⁶⁶ ICPD, principle 4; Beijing Declaration, art 13.

⁴⁶⁷ ICPD, principle 6.13.

⁴⁶⁸ ICPD principle 14; Declaration on indigenous people, art 41.

This provision clearly highlights the importance of participation to any society. In the same vein, building from article 25 of the ICCPR⁴⁶⁹ and the common article 1 of the two 1966 Covenants, the importance of the right to participation was underscored by the 1990 African Charter for Popular Participation in Development and Transformation⁴⁷⁰ which aimed to ensure a meaningful participation of African peoples to Africa's development.⁴⁷¹

Drawing from the natural law theory according to which all human beings are created with natural rights, it could be argued that the right to participation is an inalienable human right and sits well with the RTD, though it is important to note that participation without sufficient resources will not lead to the achievement of the RTD

⁴⁶⁹ Art 25 of ICCPR reads: 'Every citizen shall have the right and the opportunity without any of the distinctions mentioned in articles 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country'.

⁴⁷⁰ The African Charter for Popular Participation in Development and Transformation; UN doc. A/45/427 of 22 August 1990.

⁴⁷¹ Art 3 reads: 'The Conference was organized out of concern for the serious deterioration of the human and economic conditions in Africa in the decade of the 1980s, the recognition of the lack of progress in achieving popular participation and the full appreciation of the role popular participation plays in the process of recovery and development'. According to article 4, the objectives of the African Charter for Popular Participation for Development and Transformation were to:

- 'a) Recognise the role of people's participation in Africa's recovery and development efforts
- b) Sensitise national governments and the international community to the dimensions, dynamics, processes and potential of a development approach rooted popular initiatives and self-reliant efforts
- c) Recommend actions to be taken by governments, the United Nations system as well as the public and private donors agencies in building environments for authentic popular participation in the development process and encourage people and their organizations to undertake self-reliant development initiatives.'

The African Charter for Popular Participation for Development and Transformation will be further discussed in chapter 5 of this study.

3.2.3 The RTD as a composite human right

The article under study underscores the composite character of the RTD by underlining that not only does development have to deal with economic, social, cultural and political wellbeing, but it is also a process in which no human right or freedom should be forgotten. It includes ‘all human rights and fundamental freedoms’. In other words, economic, social and cultural rights as well as civil and political rights are the substance of the RTD. Prior to the 1986 UNDRTD, the ACHPR which is the only instrument in which the RTD is binding, clearly underlined the composite character of the RTD which includes economic, social and cultural rights with a strong stance for respect of freedoms. Its article 22 reads:

1. All people 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

Accordingly, the RTD far from been based on favour or charity, but is an entitlement. However, as will be demonstrated in the next chapter, this seems to be a case for disagreement on the right in question because some members of the international community like the United States of America (USA) for example want to associate the RTD with charity, humanism, and matter of foreign policy.

Similar to the 1986 UNDRTD and the ACHPR, the Vienna Declaration recognises and exposes the composite aspect of the RTD in these words:

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the right to development, as a universal and inalienable human right and an integral part of fundamental human rights.⁴⁷²

⁴⁷² Vienna Declaration, part I, para 10.

Put differently, the Vienna Declaration which was universally approved recognises that the RTD implies a process ensuring the realisation of ‘all human rights and fundamental freedoms’. More importantly paragraph 5 of the Vienna Declaration reads:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The composite character of the RTD should be understood from Baxi’s perspective which argues that the vital factor is the ‘organic linkage between human rights’ and not the individual recognition of each human right.⁴⁷³ He goes on to show that the liberal concept of ‘rights’ is rather confusing in the context of the RTD where the ‘emphasis is placed on a large number of ‘neighbouring rights’ considered indispensably interlinked to the task of the realisation of the right to development’.⁴⁷⁴ The composite feature of the RTD could also be understood within the context of Sen’s capability theory discussed earlier. In this perspective, realising the RTD entails empowering people through various freedoms including from fear and from want. Other human rights are straightforward and the RTD is not, hence the controversy on the nature of the RTD which is multifaceted.⁴⁷⁵

In terms of duties, as will be discussed later, the state is the primary duty bearer of a composite right, but should be assisted by the international community through cooperation.

Baxi sheds some light on the nature and content of the RTD. While the human rights discourse debate on the place of civil and political rights (freedom) versus socio-economic rights (bread) in the RTD context, Baxi says ‘the issues is not really “ bread” and or

⁴⁷³ Baxi ‘The New International Economic Order, basic needs and rights: Note towards development of the right to development’ (1983) 23 *India Law Journal* 235.

⁴⁷⁴ Baxi (1983) 235.

⁴⁷⁵ The composite feature of the RTD underscores the indivisibility and interdependency of human rights elements of the RTD.

“freedom” but rather who has how much of each, for how long, at what cost to others and why [?].⁴⁷⁶ According to Baxi, the RTD should be informed by equity and fairness in the sharing of world resources; the main question should be centred on ‘redistribution, access and needs’.⁴⁷⁷

On a different note, Sengupta refers to the RTD as a vector of rights and correctly contends that the RTD will be on the right track if at least one element of the vector is realised while none of other elements are tempered with.⁴⁷⁸ This view sustained by this thesis is under furious attack by Jamie Whyte who argues that Sengupta’s view would imply that ‘Chinese’, whose civil rights are systematically violated, have experienced no development in the last ten years, or perhaps they have developed, but without their right to development improving’.⁴⁷⁹

In response to what Whyte sees as incoherence, this thesis, argues that, to be a constitutive element of the RTD, ‘economic growth must satisfy the basic conditions of facilitating the realisation of all other human rights.’⁴⁸⁰ Hence the need to ensure consistency between policies implemented to enhance economic growth with human rights standards.

This view is secured in Sen’s capability theory which also highlights the composite character of the RTD. In this register, the RTD is an empowering right through which other human rights are realised. It calls for the removal of ‘unfreedoms’. Accordingly, the realisation of the RTD goes through the realisation of the right to education, health, food and association which

⁴⁷⁶ U Baxi ‘Human rights, accountability and development (1978) 18 *Indian Journal of international law* 279 as quoted by Baxi (1984) 234.

⁴⁷⁷ Baxi ‘Human rights, accountability and development (1978) *Indian Journal of international law* 279 as quoted by Baxi (1984) 234.

⁴⁷⁸ Sengupta (2006) 17.

⁴⁷⁹ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol 11, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁸⁰ A Sengupta ‘Development cooperation and the right to development’ at http://www.hsph.harvard.edu/fxbcenter/FXBC_WP12--Sengupta.pdf (accessed 20 October 2007) 4.

empower the poor to reach their potential, and such freedoms multiply people's choice in their realisation. According to the human capability theory, the RTD is consistent with article 28 of the UDHR and can be defined as a people's 'claims to social and economic arrangements that protect them from the worst abuses and deprivations, and that enable them to enjoy their security and dignity as human beings'.⁴⁸¹ It is the right to 'functionings' or the right to the things that a person can do or be.⁴⁸² Hence, assessing the RTD implies a critical examination of the overall development process. Such an examination should take into account the allocated financial resources, the planning and should give equal attention to development objectives and their strategies of implementation, without neglecting the causes of underdevelopment.⁴⁸³

As discussed in the previous chapter of this work, the capability theory shifts poverty from non rights (liberal theory) to rights and compels everyone, state or institution in a position to help to do so, as will be discussed in the section allocated to duty bearers. This is in line with the UNDP's perspective claiming that eradicating poverty is more than a major development challenge, but a human right one.⁴⁸⁴

From a different angle, the multidimensional character of the RTD does not serve the purpose of the RTD in question which is to eradicate poverty. This association of human rights renders the RTD vague, complicates its implementation and keeps it in a stage of mere rhetoric.⁴⁸⁵

⁴⁸¹ P Vizard 'Human Development capability association' the human development capability approach and human rights' (2006) 4, briefing note, available at <http://www.capabilityapproach.com/pubs/HumanRights100306.pdf> (accessed 8 January 2011).

⁴⁸² Nussbaum (1997) 285; also D, Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 10-17.

⁴⁸³ Alessandro Sitta 'The role of the right to development in the human rights framework for development' 21, available at http://www.capabilityapproach.com/pubs/5_1_Sitta.pdf (accessed 10 September 2009).

⁴⁸⁴ UNDP Report 2005, 73.

⁴⁸⁵ E Bello 'Article 22 of the African Charter on Human and Peoples' Rights' in E Bello & B Adjibola (eds) *Essay in Honour of Judge Taslim Olawale Elias* (1992) 462.

Sharing this view, Allan Rosas calls for a comprehensive clarification of the right.⁴⁸⁶ In other words, the significance of the RTD is unclear. The more the RTD is expanded to include all possible aspects of development, the more difficult it becomes to specify what would count as a violation or infringement of the right, since almost anything may count as such, and the responsibility of not fulfilling it becomes correspondingly diffused and unidentifiable. In other words, it does not help to have the entire planet packed with human rights if none of them can be fulfilled. In this light, Donnelly argues that ‘the paradox of rights is that the fewer you possess, the more important they become’,⁴⁸⁷ hence the argument that the content of the RTD should be narrowed down and not include all aspects of development, but rather focus on the context of ‘economic development’ which was at the origin of the right in question.⁴⁸⁸

The criticism of the composite aspect of the RTD and even its existence raises the questions of its justiciability and feasibility. In other words, the RTD is not justiciable and feasible. This is the liberal concept of ‘right’ secured in Dworkin’s philosophy which argues that rights are exclusively individual,⁴⁸⁹ or ‘individualistic, adversarial, and negative and therefore must be susceptible to a private judicial remedy’.⁴⁹⁰ This thesis disagrees and contends that political agitation/naming and shaming as well as public interest litigation (PIL) can assist in ensuring respect for collective rights.

On the first point, though the rule of law is necessary to enforce human rights, it is not the only road. In fact, social and political agitations can give birth to appropriate legislations and raise awareness on the issues in order to change the conditions. Supposing that there is no law

⁴⁸⁶ A Rosas ‘The right to development’ in Abjorn Eide, Catarina Kraus & A Rosas (eds) *Economic Social and cultural rights* (2001) 251.

⁴⁸⁷ Donnelly, quoted from J K Hansen & H-Otto Sano ‘The implications and value added of a right based approach’ in Andreassen & Marks (2006) 19.

⁴⁸⁸ D Bentham ‘The right to development and its corresponding obligations’ in Andreassen & Marks (2006) 83.

⁴⁸⁹ R Dworkin *Taking rights seriously* (1977) xi.

⁴⁹⁰ J M Woods ‘Justiciable social rights as a critique of the liberal paradigm’ (2003) 38 *Texas International Law Journal* 766.

or legislation involved, this study posits that social and political pressure, naming, awareness raising and disgracing are other ways to compel violators of human rights to stop their evil deeds and protect human dignity. The power of popular insurrection was seen in Ukraine during what was called the ‘Orange Revolution’ in 2006, when citizens, in the middle of winter, insurrected and forced the President of the Republic out of office without using a legal process. A similar situation happened in November 2008 in Thailand where the population peacefully forced the Prime Minister out of office without any legal process. According to the Nobel Prize winner Amartya Sen, the value of a human right is not linked to its feasibility.⁴⁹¹ In other words, the aptitude to make something a legal entitlement is not necessary to make that thing a human right.⁴⁹² Therefore, if the state lacks the capacity to establish a legal system to protect the RTD, it does not affect the nature of the right which is inherent to all human beings.

Standing against such views, Jamie Whyte argues that ‘Sen rejects the idea that the standard of human rights implies corresponding obligation, that if you have a proper claim to something, then some individual or institution is obliged to provide you with that something’.⁴⁹³ He further argues that Sen confounds the RTD with belief in this right.⁴⁹⁴ Before Whyte, this reasoning led Donnelly to reject the RTD because of its non justiciability. Accordingly, individuals cannot hold it against their states, or individual *qua* individual.⁴⁹⁵

⁴⁹¹ A Sen ‘Human rights and development’ in Andreassen & Marks (2006) 3.

⁴⁹² Sen (2006) 3.

⁴⁹³ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol1, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁹⁴ J Whyte ‘Review of development as a human right’ *electronic journal of sustainable development*, vol1, Issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed on 10 December 2008).

⁴⁹⁵ J Donnelly ‘In search of the unicorn: the jurisprudence and politics of the right to development’ (1985) 15 *California Western International Law Journal* 485.

This thesis posits that human rights should not be confounded with legal rights because human rights precede law and derived from the concept of human dignity.⁴⁹⁶ Human rights are first and foremost ‘commitments to social ethics’.⁴⁹⁷ To use Sen’s words,

[t]he validity of these rights can be questioned only by showing that they will not survive public scrutiny, but not – contrary to a common temptation – by pointing to the fact that in many repressive regimes that prevent open public discussions in one way or another, these rights are not taken seriously.⁴⁹⁸

Why hide behind the justiciability of the RTD to claim that it is not a right? Is there any international court to sue states that do not comply with the provision of the ICESCR or the ICCPR? For instance, according to the ICESCR, education should be free, but various African countries are still charging school fees. At national level, the provisions pertaining to socio-economic rights are very often located in general principles of states’ policy and are therefore not justiciable. This does not make socio-economic rights less human right. Consequently, the non justiciability of the RTD should not destroy its qualification as a human right.

Nonetheless, it is worth noting that if someone is deprived of his or her socio-economic rights or civil and political ones, he or she can petition the relevant body and not so for the RTD, though the natural character of the latter gives it a significant value.

On the second point of public interest litigation, this thesis argues that the RTD, though very often located in general Principles of State Policy⁴⁹⁹ may just be as justiciable as any right contained in a national bill of rights. This can be done through the public interest litigation mechanism which is a reading of the law by the judiciary which allows the judge to interpret

⁴⁹⁶ Baxi (1989) 187.

⁴⁹⁷ Sen (2006) 3.

⁴⁹⁸ Sen (2006) 3.

⁴⁹⁹ Principle of state policy are generally not justiciable.

the law in order to protect public interest in infusing into the constitutional provisions the spirit of social justice.⁵⁰⁰ This approach is well demonstrated by the Indian jurisprudence.⁵⁰¹

3.2.4 The right to self-determination: An important element of the RTD

The right to self-determination is another cornerstone of the RTD. It is underlined by article 1(2) of the UNDRTD. According to this provision, the RTD will never be a reality if there is no right to self-determination. In this regard, the second purpose in article 1 of the UN Charter is to ‘develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace.’ Accordingly, relations amongst states should be based on the principle of equality between them. This equality implies their right to freedom to choose their political system, to administer their wealth and resources which can be understood as their right to self-determination. This is fundamental in realising universal peace as well as fighting poverty or providing ‘adequate standard of living’.

According to this provision, there is no doubt that the beneficiary of the right to self-determination is a sovereign state on the international plane. This interpretation of self-determination is substantiated by the provision of the ICESCR and the ICCPR in their common article 1(1) according to which ‘all peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their

⁵⁰⁰ For more on PIL, see Circle of Rights – Economic, Social & Cultural Rights Activism: A Training Resource ‘Justiciability of ESC [Economic Social and Cultural] Rights-the Indian experience at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm> (accessed on 1 January 2011).

⁵⁰¹ See for example *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225, para 1707; *Bandhua Mukti v Union of India* (1984) 3 SCC 161; *Shanti Star Builders v Narayan K. Totame* (1990) 1 SCC 520; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

economic, social and cultural development’. This provision is confirmed by the Vienna Declaration,⁵⁰² the Charter of Economic Rights and Duties of States (CERDS),⁵⁰³ the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expressions⁵⁰⁴ as well as the UN Declaration on the Rights of Indigenous Peoples.⁵⁰⁵

For most of these instruments, self-determination is a group right or ‘people’s right’. But it seems that in the international arena, self-determination refers to sovereign entities like states.⁵⁰⁶

However, keeping in mind that the concept will be thoroughly analysed in chapter 4 of the thesis, what is important here is to note that the right to self-determination is a composite element of the RTD.

In sum, the RTD is inalienable, connected or ‘interlinked’ with the right to self-determination and is a multifaceted human right which comprises civil and political rights as well as socio-economic and cultural rights. It emphasises the right to participation, the right to self-

⁵⁰² Vienna Declaration, part 1, para 2; also art 4 of the NIEO Declaration, 26 (k) and 14 (e) of Copenhagen Declaration.

⁵⁰³ Art 2 ‘Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities’.

⁵⁰⁴ Art 2 (2).

⁵⁰⁵ Art 3.

⁵⁰⁶ For more on the nature of the RTD see: Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8; Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999); Concluding Observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999); Concluding Observations on Australia, UN Doc. CCPR/CO/69/AUS (2000); M Scheinin ‘Advocating the right to development through complaint procedures under human right treaties’ in Andreassen & Marks (eds) *Development as a human right. Legal, political and economic dimensions* (2006) 276; Communication No 547/1993 *Makuika et al v New Zealand* (27 October 2000) where it is argued that the right to self-determination is an individual human right; See 2000 Report of the Human Rights Committee, Vol. II, UN Doc. A/56/40 (Vol. II), 11-29.

determination and the principle of universality, interdependency and indivisibility of human rights. As will be shown later, it is an individual as well as a collective right. However, this description of the RTD, though based on the first article of the UNDRTD, is very controversial.

3.3 The RTD: A controversial human right

This section argues that the RTD is a subject of disagreement in academic arenas as well as at the UN level.

3.3.1 The controversy in academic arenas

In academics circles, the debate on the nature of the right under study goes from the concept of development law to the RTD *per se*.

3.3.1.1 The skirmishes on development law

Under this subsection, it is important to understand the link between the law of development⁵⁰⁷ and the RTD. The theory advanced here is the positivist one claiming that law is the source of rights and that a right emanates from the law. From this standpoint, it could be said that the law of development sets out the legal or normative framework for pursuing development by the addressees in that law i.e. states both as individual or collectives. The law of development which may be in the form of customary international law, treaties, statutes, case law, charity law amongst others consists of principles, objectives and even steps to be taken towards attaining development or particular levels of development. The RTD is therefore secured in the law of development. The latter, also called international development law or international economic development law, was fashioned by a group of academic lawyers around *l'Annuaire Francais de Droit International* with prominent names such as Michel Virally and Maurice Flory in the driving seat.⁵⁰⁸

⁵⁰⁷ For more on this concept, see G Schwarzenberger 'Meanings and functions of international development law' in Snyder & Slinn (eds) *International law of development: Comparatives perspectives* (1987) 49.

⁵⁰⁸ Schwarzenberger (1987) 49.

The discussion about international law and development may be seen as a feature of the broader controversy about the nature and the identity of international law between those who view international law as a normative system and those who discard the notion of rules in favour of a process and a policy, goal-orientated approach.⁵⁰⁹ It is a question opposing supporters of the Fitzmaurice School of thought who believe in the classic sources of international law made of a set of neutral value-free rules, to be impartially and universally applied to the supporters of French School of the *Droit international du développement* (DID) who are of the view that international legal norms are shaped by social, economic and ideological factors.⁵¹⁰

According to the Fitzmaurice School of thought, the only sources of international law are the traditional ones listed in article 38 of the ICJ Statute established in 1922. The wording of article 38 of ICJ is as follows:

- 1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states
 - (b) International custom, as evidence of a general practice accepted as law
 - (c) The general principle of law recognized by civilized nations
 - (d) Subject to the provision of article 59,⁵¹¹ judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
- 2) This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*⁵¹² if the parties agree thereto.

⁵⁰⁹ P Slinn 'Differing approaches to the relationship between international law and development' in Snyder & Slinn (eds) *International law of development: Comparatives perspectives* (1987) 28.

⁵¹⁰ Slinn (1987) 28.

⁵¹¹ Art 59 of the ICJ Statute reads: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

⁵¹² To decide a case *ex aequo et bono* means to decide otherwise than in accordance with the applicable law.

The ICJ Statute clearly identifies the sources of international law. According to the Fitzmaurice School, to be included in international law, development should find its sources in article 38 of the ICJ statutes. From this standpoint, there is no such thing as the RTD.

However, since 1922 when the ICJ was established, international law has evolved and unilateral acts, equity, resolutions of the UN General Assembly or Declarations and *Jus Cogens* were added to the traditional sources of international law.⁵¹³ This view is sustained by the French school of thought which believes that international law is not static, but develops in response to societal needs. In responding to societal needs, law can be used to eradicate poverty, address social inequities and encourage interdependence between nations. Opponents of this theory warn about confusion of law as it is (*lex lata*) with law as it should be (*lex feranda*). For instance, they argue that it is an illusion to believe that there is a system of international law underpinned by the principle of social interdependency of states and functioning in the interest of all.⁵¹⁴ In this respect, Slinn argues that confusing *lex lata* and *lex feranda* will lead to a vagueness which will affect the reliability of the international legal system and create confusion between law, morality and ideology.⁵¹⁵ In the same vein, Sir Robert Jennings offered a caution related to the concept of the NIEO in these terms:⁵¹⁶

Unless the formal test of what it is international law and what it is not can be tightened, clarified and disciplined, we shall find international law becoming more and more a series of expressions in juridical guise of the ambitions of different political and economic pressure groupings.

⁵¹³ H Thirlway 'The sources of international law' in Evans (ed) *International law* (2006) 135; for more on the *Jus Cogens* nature of the RTD, see F Murray-Bruce 'Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to Development' (2005) bpress legal series' working paper No 725.

⁵¹⁴ B Cheng *International law, teaching and practice* (1982) 514; also Slinn (1987) 30.

⁵¹⁵ Slinn (1987) 31.

⁵¹⁶ Slinn (1987) 31.

This view is shared by Alfredsson who believes that claiming the RTD on the ground of the NIEO and other resolutions is a ‘risky form of legal gymnastics’ and cautions about using political preferences as law.⁵¹⁷ From this standpoint, it is important to abandon the concept of development law because it is legally incompatible with other basic concepts of international law, it is not binding and it is therefore not part of classical international law. Consequently, it can be argued that the form of an instrument is the only criteria to evaluate the intent to be bound. If parties want to be bound by an agreement, the best way to show that they are serious about the agreement and accept its binding character is to put it in a treaty form and not wait for their intention to be guessed or subjected to speculation. Following this logic, Kratochwil argues that a non binding instrument or soft law is nothing, but ‘a weak institutionalization of the norm-creation process by prodding the parties to seek more specific law-solutions within the space laid out in the declaration of intent.’⁵¹⁸ In other words, an international agreement not concluded as a treaty (sources of classical international law) is everything, but not law. The logical conclusion would be that outside Africa, the law of development is not binding since it is grounded on declarations at a global level.

Nevertheless, general principles of law as recognised by civilised nations constitute international law. Therefore, aspects of the development law, though grounded in general principles, are a source of the RTD. However, this view remains the subject of controversy. In this regard, Alfredsson basing his argument on the hierarchy of sources of international law aptly argues that a general principle of law cannot overcome a vigorous states’ opposition to the development of the same principle to treaty and customary rank.⁵¹⁹ According to him, it would not happen because a general principle ‘fills gaps in existing laws and does not override the other two primary sources [International convention and international custom] or to preempt on ongoing legislative debate which is loaded with disagreement and opposition or significant reservations by major participants’.⁵²⁰

⁵¹⁷ G Alfredsson ‘The right to development: Perspective from human rights law’ in L A Rehof & C Gulmann (eds) *Human Rights in domestic law and development assistance policies of the Nordic countries* (1989) 84.

⁵¹⁸ Kratochwil quoted from G Maggio (1997).

⁵¹⁹ Alfredsson (1989) 84.

⁵²⁰ Alfredsson (1989) 84.

Though this view makes sense, it can be put aside on the ground that based on the sovereign equality of all states, international rules are equivalent, sources are equivalent, and procedures are equivalent⁵²¹ since all of them express the will of states.⁵²² More importantly, international law is evolutive and addresses problems of the international society as they arise. It should be responsive of society problems. Are poverty and underdevelopment international problems? If the answer is yes, then the international community shall take action through international law to address such issues. Stressing the importance of non binding instruments, Brownlie claims that when a resolution of the UN General Assembly (non binding) touches on subjects that deal with the UN Charter, it may be regarded as an 'authoritative interpretation of the Charter'.⁵²³ It could therefore be argued that the RTD, though secured in a UN General Assembly Resolution, but dealing with 'the better standard of living' incorporated in the UN Charter, has a normative force.

Furthermore, international law is dynamic and is frequently adjusted to respond to international crises whether they are linked to genocide, terrorism or abject poverty. In this perspective, the binding force of an instrument is not always in its form or label. The core question lies in the substance of the text and the intent to be bound. In other words, what is the true intention of the parties while signing the agreement? What is the content of the agreement?

⁵²¹ P-M Dupuy *Droit International Public* (1995) 14 & 16; for more on the debate on the normative force of the sources of international law, see C M Chinkin 'The Challenge of soft law: Development and change in international law' (1989) 38 *International and Comparative Law Quarterly* 549; P M Dupuy 'Soft law and the international law of environment' (1991) 12 *Michigan Journal of International Law* 420.

⁵²² In this regard, see the '*Lotus judgment* (1927), PCIJ, Ser A, No10, 18.

⁵²³ I Brownlie *Principles of public international law* (2003) 715 - 663.

The *Qatar-Bahrain Maritime Delimitation* case⁵²⁴ demonstrates that the binding character of an agreement does not lie in its form, but in its content and in the intent of the parties. In a matter of Maritime delimitation and territorial dispute between Qatar and Bahrain, under the mediation of Saudi Arabia, the two countries agreed to transmit the dispute to the ICJ in case they did not reach a compromise. The agreement was made through an exchange of letters and a document called 'Minute' and signed by the parties as well as Saudi Arabia. However, when Qatar took the matter to the ICJ, Bahrain in its counter argument claimed that both parties had agreed to submit the dispute to the ICJ jointly and argued that the letters and 'Minute' giving jurisdiction to the ICJ were not legally binding instruments and were not treaties. The ICJ found that these instruments were 'international agreements creating rights and obligations for the parties'. It cited the *Anglo-Iranian Oil Co case*⁵²⁵ to highlight that an agreement between a state and another entity may be binding even if it is not a treaty. Viewed from this angle, it could be argued that the law of development is law with a binding force at a global level. For those who believe that the law of development is nothing but a 'nice aspiration', Pellet replies that

[t]he law is not an ideal philosophy or a kind of mental game, but rather a guide for concrete social behaviour. International law does not appear in an abstract way, but in a social environment, in a given society.⁵²⁶

In the same perspective, the ICJ stated:⁵²⁷

⁵²⁴ *Maritime Delimitations and territorial questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, Qatar v Bahrain* (1994) 1 July at <http://www.icj-ij.org/docket/index.php?sum=441&code=qb&p1=3&p2=3&case=87&k=61&p3=5> (accessed 23 May 2008).

⁵²⁵ *Anglo-Iranian Oil Co. Preliminary Objections, United Kingdom v Iran*, Judgment (22 July 1952) ICJ Reports 93.

⁵²⁶ A Pellet 'A new international legal order: what legal tools for what changes?' in Snyder & Slinn (1987) 118.

⁵²⁷ I.C.J. Advisory Opinion of December 20, 1980, interpretation of the agreement of 25 March 1951 between the W.H.O and Egypt, No 10, Rep, 16.

A rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.

According to these two views, international law is more than just pure *lex lata*. It should respond to the needs of the international community at a given time. In fact, it could be argued that development law is a law which addresses development issues that were not on the table when the sources of international law as provided for by the ICJ Statutes were drafted. According to Flory, the DID is '*cette nouvelle réalité juridique qu'est l'inégalité économique des Etats*',⁵²⁸ in other words, the international development law is this new legal reality which addresses economic inequality between states. Again, the form of the instrument or its location in the traditional sources of international law is not the yardstick of its normative force. In fact, non binding instruments have many valuable attributes and may well be a substitute to law making treaty. In law-making through non binding instruments, states agree to more details because the consequences of non-compliance are limited, the mechanism avoids the slowness attached to treaty ratification and the resulting document is flexible and may be the evidence of international support and consensus on a given topic.

However, it is difficult to consider mere declarations, codes of conduct, guidelines and other promulgations from the UN as law. The same applies to operational directives of multilateral development institutions as well as resolutions and other statements by NGOs. All these instruments are mere objectives with no legal strength. By the same token, Dupuy refers to soft law as 'either not yet or not only law'.⁵²⁹ Accordingly, soft law is different from law as it is non binding and the use of treaties or conventions as law making process should be the rule. In this perspective, Alliot argues that, the law of development can develop successfully by 'the elaboration of individual initiatives between two or more states, rather than by attempting the creation and imposition of an elaborate structure from above'.⁵³⁰ In other words, Alliot is a

⁵²⁸ Slinn (1987) 31.

⁵²⁹ Dupuy quoted from G Maggio & O J. Lynch (1997).

⁵³⁰ A Alliot 'The law of development and the development of law' in Snyder & Slinn (eds) *International law of development: Comparatives perspectives* (1987) 84.

proponent of treaty law for the development of development law. Nonetheless, he does not address how the shortcomings of treaty law such as slowness and wastage of time (for examples) attached to treaty ratification will be addressed in the process. Alliot condemns the use of legislation as tools of emphasising desirable future goals, without any real hope of their being implemented.⁵³¹ He further argues that this approach may weaken the authority of the law itself.⁵³² Sharing his view, Chamelier believes that development cannot be a legal objective and maintains that the international legal system is incapable of transformation towards the realisation of development goals.⁵³³ This view was sustained by Dupuy in the *Texaco v Libya* case⁵³⁴ when he said that article 2 of the 1974 CERDS⁵³⁵ ‘must be analysed as

⁵³¹ A Alliot ‘Towards the unification of laws in Africa’ (1965) 14 *International Comparative Law Quarterly*, 366.

⁵³² Alliot (1965) 366.

⁵³³ M Chemelier-Gendreau ‘Relationship between the ideology of development and development law’ in Snyder Slinn (eds) (1987) 57; also M Hansungule ‘The right to development’ 18, paper presented at the International Human Rights Academy jointly organised by University of Western Cape, Utrecht University, Ghent University, American University; October 2005, Sea Point, Cape Town, South Africa.

⁵³⁴ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1978) (1) *International Legal Material* 30.

⁵³⁵ A/RES/29/3281, CERDS, art 2 (1). Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.

(2). Each State has the right:

- a. To regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
- b. To regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
- c. To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned

a political rather than as a legal declaration concerned with the ideal strategy of development and as such, supported only by non industrialised states'.⁵³⁶ In other words, article 2 of CERDS, was not law, but a political provision; it was not *lex lata*. This position clearly establishes that development law is an ideal morality lacking enforceable legal standards because of its location in non binding or soft instruments.⁵³⁷

Closer to the French school of thought, this thesis contends that international law is dynamic and changes according to contemporary problems. For instance, in the past climate change was not an issue of international law, but these days, it is.⁵³⁸ Similarly, today in the context of globalisation, international law should address poverty; in fact international law is so fluent that Virally concluded that 'today there is a lack of sources of international law'.⁵³⁹ As correctly argued by Flory, though international law is still concerned with peace and a sound relationship between states in the international community, the demands of this community are now broader than before and include economic and social matters⁵⁴⁰ in order to ensure human welfare.

3.3.1.2 The skirmishes on the RTD

that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

⁵³⁶ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v Libya* (1978) (1) *International Legal Material* 30.

⁵³⁷ P H Brietzke 'Development as a human rite' in *The International Third World Legal Studies Association* (1984) 25.

⁵³⁸ Climate change issues are addressed through the Kyoto Protocol which is an international agreement linked to the UN Framework Convention on Climate Change.

⁵³⁹ M Flory 'A North-South legal dialogue: The international law of development' in Snyder & Slinn (eds) *International law of development: Comparatives perspectives* (1987) 21.

⁵⁴⁰ Flory (1987) 21.

The scholarly disagreements on the law of development demonstrate that the RTD itself is not universally accepted. Commenting on the book *Development as human right - Legal, political and economic dimensions*,⁵⁴¹ Whyte claims that the book is an intellectual disaster,⁵⁴² whereas Louise Arbour, former UN High Commissioner for Human Rights believes that it is an ‘excellent scholarly writing’.⁵⁴³ This testifies the controversy on the right in question. In the same vein, while the Algerian Bedjaoui and others see the RTD as the most important human right or ‘the necessary condition for the achievement of all other human rights’,⁵⁴⁴ or as a ‘right to rights’,⁵⁴⁵ as a ‘basic right’, as Henry Shue⁵⁴⁶ put it or ‘enabling right’⁵⁴⁷ to use Abi-Saab words, it is also claimed that

[t]he right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights [and that] it also permits the Third World to “distort” the issues of human rights by affirming the equal importance of economic, social and cultural rights and by linking

⁵⁴¹ Andreassen & Marks (2006).

⁵⁴² Whyte ‘Review of development as a human right’ *electronic journal of sustainable development* 1, issue 1 at http://www.ejsd.org/public/journal_bookreview/1 (accessed 10 December 2008).

⁵⁴³ Andreassen & Marks (2006) iii.

⁵⁴⁴ M Bedjaoui ‘The difficult advance of human rights towards universality in a pluralistic world’ proceedings at the colloquy organised by the Council of Europe in co-operation with the International Institute of Human Rights, Strasbourg 17-19 April 1989; 32-47.

⁵⁴⁵ V Dimitrievic ‘Is there a right to development?’ paper presented at the annual convention of the International Studies Association, Cincinnati, March 1982.

⁵⁴⁶ Shue (1980) 19-20.

⁵⁴⁷ M E Salomon ‘Legal cosmopolitanism and the normative contribution of the right to development’ in Marks (ed) (2008) 17.

human rights in general to its “utopian” aspiration for a new international economic order.⁵⁴⁸

This strong stand against the RTD is supported by Donnelly who sees no legal or even moral reason for a RTD.⁵⁴⁹ Even though he believes that it is correct to link human rights and development,⁵⁵⁰ he also believes that ‘the right to development is neither philosophically [nor] legally justified nor a productive means to forge such a linkage’,⁵⁵¹ and he proceeds to explain ‘how not to link human rights and development’⁵⁵² because such a right is a hindrance in the search for how to link human rights and development.⁵⁵³

Not far from Donnelly, Shivji, distancing himself from the cosmopolitanism understanding of the world, claims that the RTD is grounded ‘on an illusory model of co-operation and solidarity’⁵⁵⁴

To Donnelly’s claim that the RTD has no philosophical foundation, M’baye responds that any development endeavour has a human dimension that can be ‘moral, spiritual and [even] material’,⁵⁵⁵ and to Shivji, he speaks as a cosmopolitan and locates the RTD in the realm of

⁵⁴⁸ P Alston ‘Making space for new human rights: The case of the right to development’ (1998) 3 (1) *Harvard Human Rights Journal* 20.

⁵⁴⁹ J Donnelly ‘In search of the unicon: The jurisprudence and politics of the right to development’ (1985) 15 *California Western International Law Journal* 473.

⁵⁵⁰ Donnelly (1985) 477.

⁵⁵¹ Donnelly (1985) 478.

⁵⁵² Donnelly (1984) 261.

⁵⁵³ Donnelly (1985) 478; also Donnelly (1984) 274.

⁵⁵⁴ I Shivji *The concept of human rights in Africa* (1989) 82.

⁵⁵⁵ M’baye ‘le droit au developpement comme un droit de l’homme’ (1972) 5 *Revue des droits de l’homme* 513.

international ‘solidarity which must be at the centre of all conducts, of all human politics, [of] man himself.’⁵⁵⁶

In total disagreement with Mbaye’s contention, Bello criticises the RTD on the ground that it is

[t]oo woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; ...The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and “directionless;” it strikes a cord of the advent of the good Samaritan.⁵⁵⁷

Sharing this view, Rosas argues that ‘the precise meaning and status of the right is still in flux’.⁵⁵⁸ In other words, the significance of the RTD is unclear. In support of this opinion, Gudmundur observes that it may be just to sustain that the RTD at least as provided for by the UNDRTD is not yet binding on states.⁵⁵⁹ In this register, one of the most radical rejections of the RTD is from Ghai who argues that the right is dangerous for the human rights discourse as it

[W]ill divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights and provide increasing resource and support for state manipulation (not to say repression) of civil society and social groups and [lead] the international community for many years in senseless and feigned combat on the urgency and parameters of the right.⁵⁶⁰

⁵⁵⁶ M’baye ‘le droit au developpement comme un droit de l’homme’ (1972) 5 *Revue des droits de l’homme* 523.

⁵⁵⁷ E Bello (1992) 462.

⁵⁵⁸ A Rosas ‘The right to development’ in Eide, Krausus & Rosas (eds) *Economic social and cultural rights* (2001) 251.

⁵⁵⁹ Alfredsson (1989) 84.

⁵⁶⁰ Y Ghai ‘Whose human rights to development’ Human Rights Unit Occasional Paper (1989) as quoted by Baxi (2007) 124.

Ghai's position is too extreme and seems to be a threat to the concept of human dignity itself, hence the correctness of Baxi's view that qualifies Ghai's as 'cynical perspective'.⁵⁶¹ In fact, the law of development is 'not only a new discipline but also...a juridical technique for carrying on the struggle against underdevelopment',⁵⁶² and this is in line with Eleanor Roosevelt's view, which in the early days of the UDHR observed: 'We are writing a Bill of Rights for the world, and ...one of the most important rights is the opportunity for development'.⁵⁶³ In agreement with this view and basing their arguments on the UN Charter,⁵⁶⁴ on the Universal Declaration,⁵⁶⁵ and on the 1966 International Covenant on Economic, Social and Cultural Rights,⁵⁶⁶ Chowdury and De Waart claim that the RTD is a human right in international law.⁵⁶⁷

Before assessing the RTD at the UN level, it is important to note that the RTD remains very controversial amongst scholars and this controversy filters to the UN system.

3.3.2 Controversy at the UN

At the UN level, the disagreement on the RTD is characterised by the politicisation of the debate, the reflection of such politicisation in voting resolutions on the right and different approaches *vis a vis* the right by international organisations.

⁵⁶¹ Baxi (2007) 124.

⁵⁶² G Espiell 'The right to Development' *Revue des droits de l'homme* 5 (1972) 190.

⁵⁶³ M Glen Johnson, 'The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights' (1987) 9 *Human Rights Quarterly* 19 – 48.

⁵⁶⁴ Art 55 & 56.

⁵⁶⁵ Art 28.

⁵⁶⁶ Art 2.

⁵⁶⁷ S R Chowdhury & P J IM De Waart (1992)10.

3.3.2.1 The politicisation of the debate

The idea of the RTD was designed by developing countries in the 1970s when they came together to claim the establishment of the NIEO⁵⁶⁸ to eliminate world injustice and allow third world countries to enjoy their development. Right from the start, there were two opposing camps: One developed and the other developing. The latter made up of countries in the Non-Aligned Movement (NAM) complained about their poverty and underdevelopment which could not be resolved through years of decolonisation process as well as years of development co-operation⁵⁶⁹ in which ‘developing countries continue to face difficulties in participating in the globalisation process, and that many risk being marginalised and effectively excluded from its benefits’.⁵⁷⁰ This claim did not sit well with the developed countries with the USA in the driving seat. As a result, throughout the numerous Working Groups on the RTD and the Open Ended Working Group led by Sengupta the Independent Expert on the right,⁵⁷¹ the latter was the topic of ideological and political battles.

The fighters were divided in four camps: The most dynamic members of the NAM in the Working Group on the RTD, known as the ‘Like-Minded Group’ made of Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam.⁵⁷² This group views the RTD as the roadmap to reduce global inequities and stand for the institution of fair trade rules, technology transfer from the North to the South and the abolition of developing countries debts amongst others.

⁵⁶⁸ NIEO, UN G.A Res 3201 (S-VI), 1 May 1974.

⁵⁶⁹ Marks (2004) 139.

⁵⁷⁰ G.A. Res. 56/150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/56/150 (2001).

⁵⁷¹ G.A. Res. 1998/72.

⁵⁷² G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/2890 (2001).

A second group is made of more cautious developing countries that want to use human rights based approach in their national development plans and intend to keep good relations with the donor community at large.⁵⁷³

A third group comprises countries in transition and some wealthy countries. This group views the RTD as a bridge to enhance the North-South dialogue and is inclined to support the implementation of the right. The position of this group, especially the European Union (EU), is not always predictable because as Marks correctly observes, ‘they will go along with a resolution if nothing particularly objectionable is inserted or will abstain’.⁵⁷⁴

The fourth group or the ‘outsiders’ is the one in which the USA always leads the votes against resolutions on the RTD. Japan, Denmark, Israel and Australia are the other members of this group. It is worth to note that the US rejection of the RTD is linked to its hegemonic ideologies implemented through the globalisation of capitalism.⁵⁷⁵

3.3.2.2 The reflection of the politicisation of the debate on the voting pattern of RTD resolutions

This division on the RTD characterises the proceedings at the international level. The disagreement was manifest during the vote of the General Assembly Resolution 41/128 of 1986 proclaiming development as a human right, where the USA cast the only negative vote and eight other countries abstained.⁵⁷⁶ Even after 1986, the debates remain polarised at the UN. From 1998 to 2008, several resolutions on the RTD were adopted (some without votes) at the Commission on Human Rights (CHR or the Commission), (from 2006 Human Rights Council), and at the General Assembly.

⁵⁷³ Marks (2004) 141.

⁵⁷⁴ Marks (2004) 141.

⁵⁷⁵ Baxi (2007) 128.

⁵⁷⁶ Denmark, Finland, Federal Germany, Iceland, Israel, Japan, Sweden and Great Britain.

An examination of the voting pattern on the resolutions on the RTD at the UN level shows the following lack of unanimity:

In 1998, the resolution E/CN.4/RES/1998/72 was adopted at the CHR without a vote whereas at the General Assembly, 125 votes in favour, 1 vote against and 42 abstentions were recorded for the resolution A/RES/53/155. In 1999, the resolution E/CN.4/RES/1999/79 was adopted at the CHR without a vote and at the General Assembly 119 votes for, 10 against and 38 abstentions were recorded for the resolution A/RES/54/175. In 2000, the resolution E/CN.4/RES/2000/5 was adopted without vote at the CHR and the resolution A/RES/55/108 was also adopted without a vote at General Assembly. At the CHR in 2001 the EU (except the UK) was for the RTD, 3 abstentions (UK, Canada and the Republic of Korea) were recorded and Japan and the USA voted against.⁵⁷⁷ The same year (2001), at the 56th session of the General Assembly (September–December) 123 votes in favor and 4 against (Denmark, Israel, Japan, and the USA), with 44 abstentions were recorded.⁵⁷⁸ The abstaining countries included Australia, Austria, Belgium, France, Germany, Norway, Sweden, and the UK, who had voted for the resolution in the previous year.⁵⁷⁹

At its 57th session in December 2002, where the General Assembly adopted the conclusions of the Open-Ended Working Group on the RTD, it recorded 133 votes in favor, 4 votes against (United States, Australia, the Marshall Islands and Palau), and 47 abstentions.⁵⁸⁰

At the CHR in April 2002, when the Commission (in the absence of the USA) was preparing the endorsement of the conclusions adopted by consensus at the third session of the Open Ended-Working Group, 38 countries voted for the RTD, 15 countries including the EU

⁵⁷⁷ Commission on Human Rights Res. 9, U.N. ESCOR, 57th Sess., at 68, UN Doc. E/CN.4/2001/167 (2001) (adopted by a vote of 48 to 2, with 3 abstentions).

⁵⁷⁸ G.A. Res. 150, U.N. GAOR, 56th Sess., Supp. No. 49, at 341, UN Doc. A/2890 (2001) (adopted on Dec. 19, 2001).

⁵⁷⁹ GA Res. 55, U.N. GAOR, 55th Sess., Supp. No. 49, at 405, UN Doc. A/55/49, vol.1 (2000).

⁵⁸⁰ G.A. Res. 556, U.N. GAOR, 57th Sess., Supp. No. 49, UN Doc. A/57/49 (2002) (adopted on Dec. 18, 2002, by a vote of 133 to 4, with 47 abstentions).

(incorporating the UK), Canada, Japan, South Korea abstained and there was zero vote against, perhaps because the USA was not member of the CHR in 2002.⁵⁸¹

The disagreement between UN member states was also visible in 2003 when the Commission decided to call upon its Sub-Commission on the Promotion and Protection of Human Rights to prepare a concept document assessing the avenues for the implementation of the RTD, including the adoption of an international legally binding instrument on the right amongst others.⁵⁸² 47 countries voted for the resolution; the USA, Australia and Japan voted against and 3 abstentions were recorded. In this vote, the USA stood strongly against the paragraph of the resolution considering the option of an international legal standard of a binding nature and attracted the attention of the General Assembly on the recorded votes of Australia, Canada, Japan, and Sweden on the paragraph which were identical to its own.⁵⁸³ The USA stood against the paragraph because it was not discussed in the Working Group⁵⁸⁴ and on the ground that it was going to lead to wastage of resources. Danies, the USA Representative to the commission stated that:

[The USA's] delegation opposed the proposal that the Sub-Commission should prepare a concept document on a legally binding instrument on the right to development because it would devote scarce resources to a project that would be unlikely ever to garner significant support.⁵⁸⁵

⁵⁸¹ Commission on Human Rights Res. 69, U.N. ESCOR, Supp. No. 3, at 292, U.N. doc. E/CN.4/2002/200, Part I (2002); also The right to development: a review of the current state of the debate. Report for the Department for International Development, April 2002 available at www.odi-org.uk/rights/Publications/rights_to_dev.pdf, 18 (accessed 23 August 2007).

⁵⁸² U.N. Human Rights Commission, Summary Record of the 63rd Meeting, 59th Sess; U.N. Doc. E/CN.4/2003/SR.63 (2003).

⁵⁸³ *Economic and Social Council Official Records*, U.N. Commission on Human Rights, 59th Sess., Supp. No. 3, at UN Doc. E/2003/23/E/CN.4/2003/135 (2003), available at <http://www.unhchr.ch/html/menu2/2/59chr/voting25pm.htm> (accessed 23 February 2010).

⁵⁸⁴ U.N. Human Rights Commission, Summary Record of the 63d Meeting, 59th Sess., at 3, 5. UN Doc. E/CN.4/2003/SR.63 (2003).

⁵⁸⁵ Statement by Joel Danies, U.S. Representative to the U.N. Human Rights Commission, Summary Record of the 63d Meeting, 59th Sess., at 5, 15, UN Doc. E/CN.4/2003/SR.63 (2003).

A similar trend of divergence on the RTD was observed in the same year (2003) at the General Assembly when 173 votes in favor, 3 against and 5 abstentions were recorded for the resolution A/RES/58/172.

In the subsequent years the voting pattern on the RTD at the UN did not change, hence the following statistics:

In 2004 at the CHR, 49 votes in favour, 3 against and 0 vote were recorded for the resolution E/CN.4/RES/2004/7 whereas at the General Assembly 181 votes for, 2 against and 4 abstentions were recorded for the resolution A/RES/59/159. In 2005 at the CHR, 48 votes for, 2 against and 0 abstention were recorded for the resolution E/CN.4/RES/2005/4 and at the General Assembly 172 votes for, 2 against and 5 abstentions were recorded for the resolution A/RES/60/157. In 2006, the first resolution of the Human Rights Council on the RTD (resolution A/HRC/RES/1/4) was adopted without vote, whereas at the General Assembly, 134 votes in favour, 54 against and no abstention were recorded for the resolution A/RES/61/169. The 2007 Human Rights Council Resolution (A/HRC/RES/4/4) including issues related to the adoption of a legally binding instrument on the RTD was adopted without vote and the same concerns yielded 136 votes in favour, 53 against and 0 abstention for the resolution A/RES/62/161 at the General Assembly.

Again, the same pattern was followed in 2008 at the Human Rights Council when the resolution, A/HRC/RES/9/3 was adopted without vote; but interestingly, the General Assembly (including developed countries) voted overwhelmingly for the resolution A/RES/63/178 that not only endorsed the Working Group conclusions and the work plan of the High Level Task Force, it encompassed the language related to the ‘consideration of an international legal standard of a binding nature’⁵⁸⁶ which almost created chaos at the same forum in the previous year.⁵⁸⁷ The 2008 General Assembly resolution was adopted by 182

⁵⁸⁶ Resolution on the right to development, adopted by the GA on its 63rd session on 18 December 2008, U.N Doc A/RES/63/178. Decide if you are going to use UN or U.N.

⁵⁸⁷ See General Assembly resolution on the right to development, adopted on its 62nd session, 13 March 2008 U.N Doc. A/RES/62/161, para 10 (d).

votes in favour, 4 against (Marshall Islands, Palau, Ukraine and the United States), and 2 abstentions (Israel and Canada).

The shift in position by developed countries on the need to have a binding instrument on the right seems to suggest that a consensus on the right may not be far away. Nevertheless, it also seems that the unwillingness to have such a convention remains strong. In fact, by the look of things, the debate on the RTD at a global level has nothing to do with the concept of a human right to development *per se*, but is rather a political debate. Marks correctly observes that

[t]he political discourse of the various working groups on the RTD and the Commission on Human Rights is often characterised by predictable posturing of political positions rather than practical dialogue on the implementation of the right to development.⁵⁸⁸

After the examination of UN member states' attitudes *vis a vis* the RTD, the next subsection assesses the behavior of international organisations in respect of the right at the UN level.

3.3.2.3 Different international organisations and different approaches *vis a vis* the RTD

The lack of agreement on the RTD reaches international organisations at the UN level. These organisations have different approaches in taking part in debates on the RTD at the CHR. For instance, the EU participates very often through EU member states and common EU position.⁵⁸⁹ The International Monetary Fund (IMF) does not participate actively, but presents its views and updates on its programmes, while the World Bank participates fully through its

⁵⁸⁸ Marks (2004) 141.

⁵⁸⁹ L- H Piron 'The right to development – A Review of the Current State of the Debate for the Department for International Development' 20 available at [www.odi-org.uk/rights/Publications/rights_to_dev.pdf](http://www.odi.org.uk/rights/Publications/rights_to_dev.pdf), (accessed 28 December 2010).

Geneva representative and tries to better the RTD.⁵⁹⁰ Lastly, the UNDP contributes concrete ideas to the discussion.⁵⁹¹

In spite of these divergences on the RTD, the latter is now universally recognised and confirmed as shown at the 1993 World Conference on Human Rights in Vienna Declaration⁵⁹² where the juridical character of the RTD was reiterated without a single abstention or negative vote.

Notwithstanding the controversy on the right under study, this thesis shares Alston's view when he says:⁵⁹³

In terms of international human rights law, the existence of the right to development is a *fait accompli*. Whatever reservations different groups may have as to its legitimacy, viability or usefulness, such doubts are now better left behind and replaced by efforts to ensure that the formal process of elaborating the content of the right is a productive and constructive exercise.

As correctly argued by Okon, the RTD is now acknowledged by all⁵⁹⁴ and the main question should focus on its implementation.

3.4 The normative force of the RTD

The aim of this section is to underline that notwithstanding its soft character, the RTD has a normative force. Non-binding instruments (such as the UNDRTD) are fundamental in

⁵⁹⁰ Piron (2002) 20.

⁵⁹¹ Piron (2002) 20.

⁵⁹² Vienna Declaration and Programme of Action (Vienna Declaration) 14- 25 June 1993, UN General Assembly A/Conf.157/23 12 July 1993.

⁵⁹³ P Alston 'Development and the rule of law: Prevention versus cure as a human rights strategy', in International Commission of Jurists (ed) *Development, human rights and the rule of law* (1981) 31.

⁵⁹⁴ E Okon 'Poverty alleviation and the control of public revenue in Nigeria: Legal and equitable issues' (2007) 1 *Pretoria Student Law Review* 7.

testifying the state practice and proving the *opinio juris* or intention to be bound as a proof of customary law. Following this perspective, Kratochwil argues that ‘...by legitimizing conduct which might diverge from the existing practices, soft law provides an alternative which can become a legally relevant crystallization for newly emerging customs or more explicit norms.’⁵⁹⁵ From this standpoint, it can be argued that the RTD’s source is in customary law because 25 years have passed since the UN General Assembly officially recognized the right in a Declaration,⁵⁹⁶ 18 years since a consensus involving all governments was reached on it,⁵⁹⁷ and 13 years since the Open Ended Working Group was established and an Independent Expert on the right⁵⁹⁸ was appointed as mentioned earlier. In addition, the UN High-Level Task Force on the Implementation of the RTD was established⁵⁹⁹ and remains operational. This extended and intense activity on the RTD demonstrates that it enjoys international recognition.

To the argument that the RTD enjoys a general international recognition, but is still short of state practice to gain the status of customary law,⁶⁰⁰ it can be argued that for a practice to become customary law, the duration does not matter. What is needed is the consistency and

⁵⁹⁵ Kratochwil quoted G Maggio and O J Lynch ‘Human Rights, Environment, and Economic Development: Emerging Standards in International Law and Global Society’ Revised Draft, November 15, 1997 at <http://www.ciel.org/Publications/olpapers3.html> (accessed 2006/05/25).

⁵⁹⁶ The UNDRTD was adopted by the UN General Assembly in its Resolution 41/128 of 4 December 1986.

⁵⁹⁷ Vienna Declaration and Programme of Action 14- 25 June 1993, UN General Assembly A/Conf.157/23 12 July 1993.

⁵⁹⁸ Commission on Human Rights, Resolution 1998/72 adopted without a vote on 22 April 1998 appointed Arjun Sengupta as the UN Independent Expert of the RTD.

⁵⁹⁹ The fifth session of the Working on the right to development recommended among other things the constitution of a High Level Task Force for the Implementation of the RTD within the framework of the working Group. This recommendation was adopted at the 60th session of the Commission for Human Rights in its Resolution CHR 2004/7.

⁶⁰⁰ Sengupta ‘The human right to development’ in Andreassen & Marks (2006) 9 & 10.

generality of the practice.⁶⁰¹ It is instructive to note that even one practice is enough to create international customary law.⁶⁰² In this perspective, Professor Cheng sustained that a well worded General Assembly Resolution can create ‘instant’ customary law.⁶⁰³ In this regard, Salomon argues that a mandatory language indicates ‘the intent of parties to provide certain legal assurances’.⁶⁰⁴ The language used in the UNDRTD is a well crafted and mandatory language. For instance, the first article reads ‘the right to development is an inalienable human right’ and clearly highlights the individual and popular character of the right when it underlines that ‘every human and all people’ are entitled to. Salomon observes that the UNDRTD is ‘direct, unambiguous and leaves little scope for debate as whether the intention of the General Assembly was to declare the existence of a legally guaranteed right to development’.⁶⁰⁵

Nevertheless, General Assembly resolutions need a strong consensus because non binding undertakings may be entered into in order to demonstrate the will of the international community to solve an urgent global matter over the objections of few states. Agreeing with such a perspective, Shelton is of the view that a resolution can be a parade to gather a consensus on an international urgent matter.⁶⁰⁶ In such a case, the obligatory character or efficiency of the law remains questionable.

Nonetheless, in the case of the RTD, it can be argued that assessing *opinion juris* and defining the binding character of the law is less complicated. The 1986 UNDRTD was adopted by a

⁶⁰¹ I Brownlie *Principles of public international law* (2003) 7.

⁶⁰² B Cheng ‘United Nations Resolutions on outer space: ‘instant’ customary law?’ (1965) 5 *Indian Journal of International Law* 23-24.

⁶⁰³ Cheng (1965) 23-24.

⁶⁰⁴ Salomon (2007) 89.

⁶⁰⁵ Salomon (2007) 89.

⁶⁰⁶ D Shelton ‘International law and relative normativity’ in Evans M D Evans (ed) *International Law* (2006) 163.

very large majority with the only dissenting opinion coming from the USA. The 1993 Vienna Declaration produced a unanimous consensus, including that of the USA, that the RTD was a human right, hence the contention of this thesis that the recognition of the RTD as a human right (through the 1986 UNDRTD and 1993 Vienna Declaration) was the acknowledgement of its contribution to the norm creating process and should have been in that account recognised as a norm of customary law. The RTD should have been binding by now because in 1984, one of the main arguments against it was that though the Commission on Human Rights was working ‘on a Declaration on the topic’ there was no international instrument recognising it,⁶⁰⁷ but now there have been various instruments. So far, there are important developments as testified by the 1986 UNDRTD, 1993 Vienna Declaration, the appointment of a UN Independent Expert on the RTD and a UN Task Force on it as already mentioned.

In the same vein, Hansungule argues that though the UNDRTD, a product of a resolution of the UN General Assembly, is not legally binding, it ‘may nevertheless be construed to constitute law or at the very least would evolve into law all factors being equal’.⁶⁰⁸ In the same vein, Brownlie claims that when a resolution of the UN General Assembly touches on subjects that deal with the UN Charter, it may be regarded as an ‘authoritative interpretation of the Charter’.⁶⁰⁹ From this angle, it can be claimed that the UNDRTD is binding because it deals with human well-being which is fundamental in the UN Charter and the ICESCR.⁶¹⁰ To use Baxi’s words, ‘the jurispotency of the Declaration (UNDRTD) has survived, and will transcend the well-manicured scepticism’.⁶¹¹

⁶⁰⁷ Donnelly (1984) 267.

⁶⁰⁸ Also M Hansungule ‘The right to development’ 14, paper presented at the International Human Rights Academy jointly organised by University of Western Cape, Utrecht University, Ghent University, American University etc..., October 2005, Sea Point, Cape Town, South Africa (on file with author).

⁶⁰⁹ I Brownlie *Principles of public international law*, (2003) 15 & 663.

⁶¹⁰ ICESCR, art 11.

⁶¹¹ Baxi (2007) 126.

In spite of these strong views on the normative force of the UNDRTD, it is important to note that the latter remains in principle non binding in international law and as such, its lack of universal legal backing stands on its way of becoming a hard law instrument.⁶¹²

Nonetheless, the development of international law led the world to a point of recognising obligations that transcend states' concern; these obligations are *erga omnes*, engaging the legal interest of the world at large, and are known as *jus cogens*. To use Kamrul Hossain's words '*Jus cogens* is the technical term given to those norms of general international law, that are argued as hierarchically superior, the literal meaning of which is compelling'.⁶¹³ Article 53 of the 1969 Vienna Convention on the Law of Treaties,⁶¹⁴ repeated *verbatim* by article 53 of the 1986 Vienna Convention on the Law of treaties⁶¹⁵ states:

A treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.

In other words, a norm of *jus cogens* should be recognised as a norm of general international law; it should be accepted by the international community of states as a whole, enjoy immunity from derogation and be amendable only by a norm of the same rank. In its judgment in the *Nicaragua* case,⁶¹⁶ the ICJ confirmed that the doctrine of *Jus cogens* was part

⁶¹² Gudmundur (1989) 84.

⁶¹³ K Hossain 'The concept of *jus cogens* in international law' *The Daily Star* No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶¹⁴ The Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

⁶¹⁵ The Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 1986, UN Doc. A/Conf.129/15 (1986).

⁶¹⁶ Military and paramilitary activity in and against Nicaragua (*Nicaragua v USA*) (27 June 1986) (1986) ICJ Reports (1986) 100.

and parcel of international law. It used the prohibition of the use of force to demonstrate ‘a conspicuous example of a rule of international law having the character of *jus cogens*.’⁶¹⁷

The RTD meets the criteria of *jus cogens*. Anchored in the promotion and protection of ‘higher standards of living’ for all, the RTD is recognised as a norm of general international law; the 1986 UNDRTD was passed with the blessing of 146 states, 8 abstentions and only one vote against.⁶¹⁸ The 1993 Vienna Declaration confirming the human rights nature of the RTD was unanimously applauded and so far has not been amended. In fact, the binding character of a *jus cogens* norm happens prior to the codification of the norms. This is clearly explained by Hossain who argues that codified norms such as ‘treaties can at best be contributing factor in the development of *jus cogens* rules’⁶¹⁹ because ‘a treaty cannot bind its parties not to modify its terms, nor to relieve themselves of their obligation under it, through a subsequent treaty to which all the parties to the first treaty have consented’.⁶²⁰ He further argues that ‘all existing, generally accepted *jus cogens* rules apply universally and none of the treaties which have codified these rules, have been universally ratified’.⁶²¹ It can therefore be argued that the RTD, anchored in the natural law theory had been a norm of *jus cogens* before its codification by the ACHPR, the UNDRTD and the Vienna Declaration.

Proponents of positivism are of the view that ‘there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*’.⁶²² Starting the

⁶¹⁷ *Nicaragua v USA* (27 June 1986) (1986) ICJ Reports (1986) 100.

⁶¹⁸ Only the USA voted against the 1986 UNDRTD.

⁶¹⁹ Hossain ‘The concept of *jus cogens* in international law’ (2005) *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²⁰ Hossain (2005) ‘The concept of *jus cogens* in international law’ *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²¹ Hossain (2005) ‘The concept of *jus cogens* in international law’ *Daily Star*, No 74 available at <http://www.thedailystar.net/law/2005/01/03/alter.htm> (accessed 28 December 2010).

⁶²² 2 *Yearbook of International Law Commission* (1966) 247-248, as quoted by G M Danilenko ‘International *jus cogens*: Issues of law-making’ (1991) 2 *European journal of international law* 45.

debate from the case between *France v Turkey*⁶²³ or the *Lotus* case in which the Permanent Court of International justice has stated that

[I]nternational law governs relations between independent states. The rule of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law,⁶²⁴

Consensualists can argue that though the *Nicaragua* case recognised *jus cogens*, the same case also acknowledged that ‘in international law there are no rules, other than such rules as may be accepted by the state concerned’.⁶²⁵ In other words, a rule of *jus cogens* is not binding on states which object it or which are persistent objectors. Nevertheless, to use the words of the International Law Commission, ‘it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the [International Law] Commission, give it the character of *jus cogens*’.⁶²⁶ Therefore, echoing Rozakis, Danilenko is correct in arguing that

[O]nce adopted, the peremptory norms bind the entire international community and in consequence a state can no longer be dissociated from the binding peremptory character of that rule even if it proves that no evidence exists of its acceptance and recognition of the specific function of that rule, or moreover, that it has expressly denied it.⁶²⁷

In the same line of thoughts, the chairman of the Drafting Committee during the Vienna Conference on the Law of Treaties, Yasseen explains that the sentence of article 53 of the Vienna Convention on the Law of Treaties ‘accepted and recognised by the international

⁶²³ *France v Turkey* PCIJ (7 September 1927), Series A, No. 10.

⁶²⁴ *France v Turkey* PCIJ (7 September 1927), Series A, No. 10, 19.

⁶²⁵ *Nicaragua* case, ICJ Reports (1986) 135.

⁶²⁶ 2 *Yearbook of International Law Commission* (1966) 247, as quoted by Danilenko (1991) 45.

⁶²⁷ Ch L Rozakis *The concept of Jus Cogens in the law of treaties* (1976) 78 as quoted by Danilenko (1991) 50.

community of states as a whole' did not mean that the universal acceptance and recognition of a rule of *jus cogens* was necessary.⁶²⁸ He said:

There was no question of requiring a rule to be accepted and recognised as peremptory by all states. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule by the international community as a whole would not be affected.⁶²⁹

In any case, the RTD passes the test; not only is it anchored in the natural law theory, but it also enjoys the support in modern legal theory. Apart from the adoption of the 1986 UNDRTD and Vienna Declaration, mentioned earlier, article 53 of the Vienna Convention on the Law of Treaties is declaratory of an already active international law with reference to *jus cogens*. As Murray-Bruce puts it

[W]ith the DRD's [Declaration on the right to development] purposes and objectives enshrined in the UN Charter – a peremptory norm of international law, a *jus cogens* from which there is no derogation – the Right to Development automatically espouses normative value and imposes legal and non derogable obligations on its duty holders.⁶³⁰

This view does not, however, meet universal acceptance and is very much contested. Laure H Piron argues that there is no legally binding item on the RTD, though she acknowledges its 'moral or political force'.⁶³¹ Even though she has a good point, perhaps she should reconsider her view because there are instances where the binding character of an 'ambiguous obligation' is linked to the obligation deriving from its rights which are already part of a clear and precise obligation. In this regard, the RTD which might be viewed as an 'ambiguous obligation' made

⁶²⁸ 2 *Yearbook of International Law Commission* (1976 II) 119, as quoted by Danilenko (1991) 54.

⁶²⁹ Danilenko (1991) 52.

⁶³⁰ F Murray-Bruce 'Should anybody be poor – An analysis of the duties and obligations of the international community to the eradication of poverty and growth of sustainable development in light of the *jus cogens* nature of the Declaration of the Right to development' (2005) bpress legal series' working paper No 725, 16.

⁶³¹ Piron (2002) 14.

of socio, economic, civil and political rights, might be binding because its constituent rights are attached to the two International Covenants that are not ambiguous.⁶³² Furthermore, some obligations can be unclear or loose, but still be indispensable. Calling them ‘imperfect obligations’ Kant argues that they are important duties which can be attached to better formulated obligations called ‘perfect obligations’.⁶³³ For instance, the RTD can co-exist with the civil and political as well as socio-economic and cultural rights which are perfect obligations with a binding force. From this perspective, it will be correct to argue that the right in question is grounded in the ICESCR and the ICCPR.

This thesis claims that there is more than just moral force to the RTD because it can be argued that the binding force of the RTD derives from the principles of the UN Charter: sovereign equality of states, non discrimination, and the principles of inter-dependence and international co-operation.⁶³⁴ Soft laws appear to be very instrumental to the creation of hard law. The path which led to the adoption of the two 1966 covenants seems to be followed by the RTD. This evolution clearly shows that a ‘soft’ instrument can produce hard ones and is therefore not a waste of time. A similar evolution seems to be happening on the RTD because 7 years after its declaration, a unanimous programme of action was undertaken by the international community. This evolution seems to indicate that a convention on the RTD is not far away. In fact, on behalf of the Non-Aligned Movement, Cuba recently called for the establishment of a convention on the RTD.⁶³⁵

However, perhaps the strengthening of development law does not depend on the adoption of a binding instrument, but rather on ‘interdependence–based reading and development informed reading of human right treaties [or instruments]’.⁶³⁶ As De Feyter correctly observes, this will

⁶³² Sengupta (2006) 10.

⁶³³ I Kant ‘Critique of practical reason, quoted from A Sen ‘Human Rights and Development’ in Andreassen & S Marks (2006) 7.

⁶³⁴ See UN Charter, chap1 art 1 & 2 addressing the purpose and principles of the UN.

⁶³⁵ Twelfth session Working Group on the Right to Development, High-level task force on the implementation of the right to development, Fifth session (Geneva, 1-9 April 2009), A/HRC/12/WG.2/TF/2,para 11.

⁶³⁶ K De Feyter ‘Towards a multi-stakeholder Agreement on the right to development’ in Marks (2008) 98.

be in line with the Vienna Convention on the Law of treaties⁶³⁷ according to which ‘treaties [and other human rights instruments] are interpreted in the light of their context and their object and purpose’.⁶³⁸

In any event, the UNDRTD, though a soft instrument, has a normative value. In 1997 however, Nagendra Singh, President of the ICJ stated during a speech at the Vrije University (Free University, Amsterdam) affirmed that the RTD unquestionably exists, and that it is grounded on the essential principles of the UN Charter, especially those concerning the sovereign development of states, non discrimination, interdependence and international cooperation.⁶³⁹ In the same perspective, Professor Rais A Touzmohammadov argues that

[T]he normative aspect of the content of the RTD is of course connected to those aspects that make it legally binding. It would be wrong to categorically reject the normative character of the right just because there is no appropriate multilateral treaty. In addition to the source of the right to development, there are now a number of aspects of the right to development that comes under the category of customary law.⁶⁴⁰

In other words, the mere fact that the expression ‘right to development’ is not explicitly mentioned in documents comprising the bill of rights does not destroy the validity of the right.

⁶³⁷ 1969 Vienna Convention on the law of treaties, art 31, para 1.

⁶³⁸ K De Feyter ‘Towards a multi-stakeholder Agreement on the right to development’ in Marks (2008) 98.

⁶³⁹ ‘What does “defending the right to development” mean nowadays? Human Rights Commission 2002; Statement of the Working Group on the right to development. Joint written statement submitted by Centre Europe-Tiers Monde (CETIM) and AAJ. E/CN.4/2001/WG.18/CRP.15.

⁶⁴⁰ ‘What does “defending the right to development” mean nowadays? Human Rights Commission 2002; Statement of the Working Group on the right to development. Joint written statement submitted by Centre Europe-Tiers Monde (CETIM) and AAJ. E/CN.4/2001/WG.18/CRP.15.

Nevertheless, as correctly observed by Baxi, separating the UNDRTD from the initial texts on which it was based has weakened the document.⁶⁴¹ For instance, the UNDRD does not refer to the very empowering instruments such as the 1944 Declaration concerning the Aims and Purposes of International Labour Organisation (ILO) which amongst others condemn poverty, does not mention the Declaration on Social Progress and development,⁶⁴² the 1974 Declaration on the establishment of a NIEO and its Program of Action and the 1975 Charter on Economic Rights and duties of the States (CERDS). Referring to these documents would have added more clarity to the UNDRTD which, though well recognised, is quite vague.

However, despite its broad recognition which gives it a normative force, at the national level, unlike in the African human rights system (to be discussed in the next chapter) the right remains non binding as it is yet to be secured in a treaty or convention.

3.5 Implementation of the RTD

Implementing the right means achieving or realising the right. It entails applying Hohfeld theory that stipulates that ‘to every right, there is a correlative duty’.⁶⁴³ In other words, there is a positive duty (on the duty bearers) to deliver the RTD and a negative one not to hinder the realisation of the right.⁶⁴⁴ In fact, claiming that the RTD is a human right implies identifying who is the duty bearer and who is the beneficiary or the right holder. Answering these questions will be the main focus of this subsection.

3.5.1 The duty bearers of the RTD

⁶⁴¹ Baxi (2007) 134.

⁶⁴² G A Res 2542 (XXXI) 11 December 1969.

⁶⁴³ W N Hohfeld, *Fundamental legal concepts as applied in judicial reasoning* (1919). For a clear summary of his work, see J Waldron, *Theories of rights* (1984) 6-10; also A R White, *Rights* (1984) 115-132; also A Heard ‘Human rights: Chimeras in sheep’s clothing at <http://www.sfu.ca/~aheard/intro.html>’ (accessed 7 July 2009). R W M Dias *Jurisprudence* (1970) chap 8 & 9 and T Pogge (2007); L Henkin ‘International human rights as “rights”’ in Morton E (ed) *The philosophy of human rights* (1989).

⁶⁴⁴ See chap 2, section allocated to the rights based cosmopolitanism.

In terms of global responsibility for human rights, the duty bearers of the RTD include the state, the international community, multinational organisations like oil companies, individuals, individual legal persons and multilateral bodies like the WTO and the IMF. This prescription is located in the cosmopolitanism theory which perceives the world as a global family of human beings bound by their humanity. Accordingly, everyone, every state and every institution in position to help shall do so.

Article 3 of the UNDRTD underlines the duty bearers of the RTD. It reads:

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.
2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

In its first paragraph, the article clearly identifies states as main duty bearers having the ‘primary responsibility’ to ensure the realisation of the right. The second paragraph is equally clear in stressing the vital place of international co-operation among states in compliance with the UN Charter. In other words, states should come together as one in ensuring human welfare as provide for by articles 55 and 56 of the UN Charter. This is also the substance of paragraph 3 of the same article.

In short, the duty bearer of the RTD is the state at the national level and the international community at an international level. This is reiterated by the Vienna Declaration,⁶⁴⁵ the International Covenant on Civil and Political Rights⁶⁴⁶ (ICCPR) and the UNDRTD.⁶⁴⁷ The

⁶⁴⁵ Part 1, para 10 (5) which reads: ‘Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level’.

⁶⁴⁶ Art 2.

next subsections will unpack and examine the responsibilities of the state and the international community which are the duty bearers of the RTD.

3.5.1.1 The state

Traditionally, the nation-state has the primary responsibility for the realisation of human rights. According to the Preamble of the UNDRTD, ‘the creation of conditions favourable to the development of people and individuals is the primary responsibility of their states’.⁶⁴⁸ This responsibility is further stressed by the CERDS which clearly emphasises the key responsibility of the state to uphold the economic, social and cultural development of its people.⁶⁴⁹ In the same vein, in addition to article 3(3) above, article 8 of the UNDRTD provides:

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

This provision clarifies in details what is the state line of action in ensuring the RTD. This action should be broad enough and should encompass all human rights; civil and political and

⁶⁴⁷ Art 4 reads: ‘1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

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

⁶⁴⁸ The Preamble of the 1986 UNDRTD.

⁶⁴⁹ CERDS, art 7.

economic as well as social rights. In the process, women should not be forgotten and the right to participation of all minorities should be ensured.⁶⁵⁰

Similarly, the UNDRTD⁶⁵¹ reiterates the duty of the state which has the primary mandate for the establishment of national and international environments necessary for the realisation of the RTD.

Put differently, the state must adopt development strategies, approaches and programmes informed by the interest and aspirations of the people and which integrate values and economic, social, cultural, political and environmental realities. In the same perspective, article 4(1) of the UNDRTD provides: ‘States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitate the full realisation of the right to development and article 2(3) of the same instrument also reads:

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

The 1993 Vienna Declaration in its paragraph 1 reads: ‘Human rights and fundamental freedoms are the birth right of all human beings; their protection and promotion of human rights is the first responsibility of governments’ and paragraph 10 of the same instrument provides:

Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

In the same vein, article 2 of the ICCPR reads:

Each State Party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available

⁶⁵⁰ Art 21 UN Declaration on the Rights of Indigenous People.

⁶⁵¹ Art 3(1).

resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

All these provisions present national governments as the main provider of the RTD. The state is bound by the obligation to provide for its citizens. This obligation confirms the traditional approaches to human rights law whereby individuals are the beneficiaries of rights that should be fulfilled by the state which is the duty-holder. To fulfil human rights, the state is bound by four types of duties:⁶⁵²

- The duty to respect human rights calling on the state to avoid any action or measure which may encroach upon somebody's human rights.
- The duty to protect which calls upon the state to take action to ensure the enjoyment of human rights if the latter are threatened or are at risk.
- The duty to promote which calls upon the state to educate the right holders (the people) on their rights and how to claim them as well as prepare itself to carry out its obligations.
- The duty to provide which compels the state to supply goods and services to all without discrimination.

In fact, wherever there is a human rights crisis or poverty, the first question asked is on whether the state is a failed state. Ordinarily, the state has no way out, but to deliver, hence the argument that

[g]overnments should promote and protect all human rights and fundamental freedoms, including the right to development, bearing in mind the interdependency and mutually reinforcing relations between democracy, development and respect for human rights, and should make public institutions more responsive to people's needs...⁶⁵³

⁶⁵² See in general Asbjorn Eide, Catarina Krause and Alan Rosas (eds) (2001); also Marks 'The human rights approach to development: seven approaches' in Sengupta, Negi & M Basu (eds) (2005) 45- 46. In the human rights discourse, state obligations are known as 'the Maastricht principles'.

⁶⁵³ Report of the World Summit for Social Development, Copenhagen, para 71, 6-12 March 1995. UN Doc. (see earlier comment on UN or U.N.)A/CON.166/9, 19 April 1995.

However, it is not enough to have a myriad of instruments telling the state its obligations. How does it do it? What if a state is poor and has no resources? It can well be argued that the state has no resources or means to achieve its citizens' development. Such an argument does not hold and the state should take actions to institutionalise human rights and the RTD in particular. In practice, it should establish a constitution, with a strong separation of powers, a correct mechanism to provide remedies for victims of human rights violations and sanctions for violators. In fact, the mission of the state is to:

Provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and especially an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice.⁶⁵⁴

In other words, the state should be at the forefront for the realisation of the right. However, the state's action may not succeed if the formulation of national development policies suffers from external intrusion. In other words, the right to self-determination and peoples' right to freely dispose their wealth and natural resources should be a reality.⁶⁵⁵

Furthermore, at national level, the state success is also conditioned by a strong civil society which oversees its action. NGOs, ⁶⁵⁶ churches, the media and others should come into play as helpers, observers or watchdogs of the state's actions towards the realisation of human rights

⁶⁵⁴ 1993 Vienna Declaration, part 1, para 27.

⁶⁵⁵ Art 2(1) of the 1986 UNDRTD reads: 'the human person is the central subject and should be the active participant and beneficiary of the right to development'.

⁶⁵⁶ On the role of NGOs in ensuring human rights, see Brett R 'Non-governmental actors in the field of human rights' in R Hanski & M Suksi (eds) *An introduction to the international protection of human rights* (2000).

including the RTD. In this regard, Sengupta argues that an NGO has the duty to apply the principle of participation, accountability and transparency in implementing the RTD,⁶⁵⁷ though some NGOs are not always able to perform their duties because of the lack of adequate funding and capacity.

In any event, the state responsibility in terms of realising the RTD at national level is perhaps the less controversial aspect of the RTD.

After an examination of the duty of the state's obligations in providing the RTD, the next subsection will focus on the international community's duties.

3.5.1.2 The international community

The international community is made of state members of the UN, international non states actors, international Non Governmental Organisations (INGOs) and the IFIs. Though in terms of global responsibility for human rights, each of these groups has the responsibility to protect human rights, the focus of this section will be to address the obligation of the UN member states (including the UN High Level Task Force's contribution to the achievement of the RTD) and the IFIs.

The UN member states

UN member states should cooperate in fighting poverty or realising the RTD. The UNDRTD in its article 4 reads:

- 1) States have the duty to take steps individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
- 2) Sustained action is required to promote more rapid development of developing countries. As complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

⁶⁵⁷ A Sengupta 'Implementing the right to development' 17, available at <http://www.hsph.harvard.edu/fxbcenter/Implementing%20the%20RTD.pdf> (accessed 22 May 2008).

According to the first paragraph of this provision, the duty to formulate appropriate policies for the RTD is not limited within the states' boundaries. In fact, the state can act 'individually and collectively'. This statement clearly emphasises the collective role of UN member states in realising the RTD. The second paragraph of the provision is clearer. The call for an 'effective international co-operation' to ensure the RTD is well pronounced and obliges the community of states to take action. This is reinforced by article 6(1) of the 1986 UNDRTD⁶⁵⁸ and paragraph 4 of the Vienne Declaration.⁶⁵⁹ Accordingly, not only is global co-operation the appropriate path for the achievement of human rights, it should be done without any discrimination. The Vienna Declaration explains further:

In fact, after recognising the inalienable character of the RTD and its place in fundamental human rights,⁶⁶⁰ the Vienna Declaration stressed that 'democracy, development and human rights are interdependent and mutually reinforcing' and emphasised that 'the international community should support the strengthening and promoting of democracy, development and human rights and fundamental freedoms in the entire world'.⁶⁶¹ More interestingly, the same instrument provides that:

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international co-operation for the realisation of the right to development and the elimination of obstacles to development.⁶⁶²

⁶⁵⁸ Art 4 UNDRTD 'All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance for all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion'.

⁶⁵⁹ Vienna Declaration, para 4 'The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principle, in particular the purpose of international co-operation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community'.

⁶⁶⁰ The Vienna Declaration, part1, para 10.

⁶⁶¹ The Vienna Declaration, part 1, para 8.

⁶⁶² The Vienna Declaration, part 1, para 10.

This call is also the substance of the UNDRTD in its article 3(3)⁶⁶³ and it is worth noting that the improvement of international co-operation on the field of human rights is fundamental in realising the purposes⁶⁶⁴ of the UN Charter⁶⁶⁵ which includes ending poverty.

The international community responsibility is grounded on international solidarity,⁶⁶⁶ and is also based on moral universalism which proposes that ‘individuals and political communities have moral obligation to [their fellow citizens, and to] other societies in the form of both the wider society of states and the universal community of mankind’.⁶⁶⁷ In this perspective, the affluent have the obligation not to harm the poor.⁶⁶⁸ In fact, from an utilitarian perspective, the affluent should be able to forgo their personal interests for the benefit of a greater objective, the good of all. In opposition to liberalism, this theory puts emphasis on the need to have an ‘equal access to the means of personal and collective advancement and fulfillment in a climate of respect for the civilisations and cultures, both national and worldwide’.⁶⁶⁹ In fact, modern cosmopolitanism expresses itself through the RTD ‘which establishes an emerging principle in international law that there is a collective international responsibility for the human condition’.⁶⁷⁰

⁶⁶³ UNDRTD, art 3(3) reads: ‘States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights’.

⁶⁶⁴ Art 1 of the UN Charter.

⁶⁶⁵ Vienna Declaration, part 1, para 1.

⁶⁶⁶ R Malhotra ‘Right to development’ where are we today? in Negi, & Basu (2005) 130 &131.

⁶⁶⁷ P Hayden *Cosmopolitan global politics* (2005) 34.

⁶⁶⁸ Pogge (2005) 74.

⁶⁶⁹ Malhotra (2005) 131.

⁶⁷⁰ Woods (2003) 793.

In this vein, the 2000 Millennium Declaration⁶⁷¹ stresses the ‘collective responsibility of states to uphold the principles of human dignity, equality and equity at the global levels’.⁶⁷² The MDG number 8⁶⁷³ emphasises the vital place of the international partnership to eradicate world poverty and to ‘making the right to development a reality for everyone and to freeing the entire human race from want’⁶⁷⁴ amongst others. From this standpoint, the UN High Level Task Force on the Implementation of the Right to Development set up by the Commission on Human Rights in its resolution 2004/7 as endorsed by the Economic and Social Council in its decision 2004/249, within the structure of the intergovernmental open-ended Working Group on the Right to Development used the MDG number 8 as its vehicle towards the implementation of the right.⁶⁷⁵ In so doing, it has developed a set of criteria based on the targets of goal 8 which are:

- ‘Develop further an open, rule-based, predictable, non-discriminatory trading and financial system’;⁶⁷⁶
- Address the special needs of least developed countries,⁶⁷⁷ landlocked countries and small island developing states’.⁶⁷⁸

⁶⁷¹ Millennium Declaration, GA res A/55/2, 8 September 2000.

⁶⁷² Millennium Declaration, GA res A/55/2, 8 September 2000, Sec I.2.

⁶⁷³ The targets for goal 8 are aid, trade and debt relief.

⁶⁷⁴ Millennium Declaration, GA res A/55/2, 8 September 2000, Sec III.12.

⁶⁷⁵ In its resolution 2005/4, the Commission on Human Rights requested the task force to examine Millennium Development Goal 8 and to suggest criteria for its periodic evaluation with the aim of improving the effectiveness of global partnerships with regard to the realization of the RTD. The Human Rights Council, in its resolution 9/3, and the General Assembly, in its resolution 63/178, endorsed the workplan for the task force for the period 2008-2010, as recommended by the Working Group in its report on its ninth session (A/HRC/9/17, para. 43).

⁶⁷⁶ Target 8a.

⁶⁷⁷ Target 8b.

- Deal comprehensively with developing countries' debt through national and international measures in order to make debt sustainable in the long term.⁶⁷⁹

However, amongst others, this criteria was criticised for being based exclusively on Goal 8 whereas the RTD framework is much broader 'than a well conceived partnership for development or the MDG 8';⁶⁸⁰ for not covering thoroughly the human rights standards as related to the RTD,⁶⁸¹ and for the 'overlapping scope of many of the existing criteria' which could not facilitate the operationalisation of the criteria.⁶⁸²

In response to these criticisms, the Task Force went back to the drawing board and came out with another 'Right to Development Criteria' or 'interim draft version' to be improved and submitted in 2010 in compliance with the objectives set out in relevant provisions of the Human Rights Council resolution 9/3. The Interim Draft Version of the Right to Development Criteria as revised at the fifth session of the High Level Task Force from the first to nine April

⁶⁷⁸ Target 8c.

⁶⁷⁹ Target 8d.

⁶⁸⁰ R Malhotra 'Implementing the right to development- a review of the task force criteria and some options' A/HRC/12/WG.2/TF/CRP.6; para 26; 31 March 2009.

⁶⁸¹ Malhotra (2009) para 27.

⁶⁸² Malhotra (2009) para 30; also the UN document A/HRC/8/WG.2/TF/CRP.5 by Bronwen Manby where she highlights the need to revise the criteria with a view to make them more focused on the mission reports of the High Level Task Force.

2009 in Geneva,⁶⁸³ is human centered,⁶⁸⁴ addresses the appropriate or enabling environment⁶⁸⁵ as well as social justice and equity⁶⁸⁶ which are vital for the realisation of the RTD.

The ‘enabling environment’ deals with the role of the international community in implementing the RTD. It underlines the vital places of international co-operation and assistance, national policy space and autonomy to design such policy, rule of law and good governance and peace, security and disarmament.

This provision calls upon the international community to ensure technology transfer, fair trade rules for all and equality between states ‘subject to effective accountability mechanism ’ to realise the RTD. In addition, the national policy space and autonomy should be respected; in other words, there should not be external interferences with national development strategies and at the same time national as well as global good governance should be the rule of the partnership.

Though the Task force should be applauded for its work, one wonders how the international community at large will cooperate in realising the RTD without the adoption of a legally binding instrument on the RTD.

On a different note, how can the IFIs be effectively held accountable? They are not parties to international agreements between states and therefore, it becomes almost impossible to identify a binding obligation upon them in terms of achieving human rights.

As for the UN member states, they are are compelled by the UN Charter to work together to ensure universal better life.⁶⁸⁷

⁶⁸³ A/HRC/12/WG.2/TF/2.

⁶⁸⁴ A/HRC/12/WG.2/TF/2, Annex IV, para a, b, c, d & f.

⁶⁸⁵ A/HRC/12/WG.2/TF/2, Annex IV, para g, h, i, j, k, l, m, n, o & p.

⁶⁸⁶ A/HRC/12/WG.2/TF/2, Annex IV, para q, r, s, t, u.

⁶⁸⁷ Art 55 of the UN Charter reads:

From a utilitarian perspective, states have the obligation to realise the RTD. This perspective was summarised by Jeremy Bentham's 'fundamental axiom' according to which 'it is the greatest happiness of the greatest number that is the measure of right and wrong'.⁶⁸⁸ In fact, this theory is enshrined in the French legal system. Accordingly, it is a 'criminal liability of omissions' due to 'a failure to provide reasonable assistance which a person is expected (or required) to provide to another'.⁶⁸⁹ In the common law, the same theory applies under the law of tort. This theory stands for the transnational responsibility of states. Rejecting the libertarian philosophy and drawing from the utilitarianism one, Henry Shue argues that the international community has the duty to 'avoid depriving, to protect from deprivation [and] to aid the deprived'.⁶⁹⁰ In other words, just like a national government, the international

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and condition of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. Universal respect for and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

See also art 56 of the same instrument; art 1(3) of the UN Charter, art 22 UDHR, art 2(1) and 11 of the ICESCR, art 4, 23(4) and 24(4) of the CRC and art 32 of the Convention on Rights of People with Disabilities

⁶⁸⁸ Marks 'Obligation to implement the right to development: Philosophical, political and legal rationales' in Andreassen & Marks (2006) 64.

⁶⁸⁹ Sen 'Human rights and development' in Andreassen & Marks (2006) 7. On the theory of criminal liability of omission, see A Ashworth and E Steiner 'Criminal omission and public duties: The French experience' (1990) *Legal Studies* 10; G Williams, 'Criminal omission: The conventional view' (1991) *Law Quarterly Review* 107.

⁶⁹⁰ H Shue *Basic rights: Subsistence, affluence and the U.S foreign policy* (1996) as quoted by Marks 'Obligation to implement the right to development: Philosophical, political and legal rationales' in Andreassen & Marks (2006) 66.

community must respect, protect and provide a higher standard of living for those in need. In the same perspective, it is reported that

[T]he enormous and continuing increases in the capacity of richer states, and other actors in richer societies mean that very often they can provide assistance effectively...Their capacity also confers added responsibilities. This responsibility is set out in international human rights law, which state that richer societies have an obligation to assist poorer states through international co-operation, within their means to achieve protection of [human] rights.⁶⁹¹

‘Our common humanity’ and interdependency create a sense of collective responsibility for one another,⁶⁹² hence the Franciscan theory arguing for ‘the right of the poor to receive what is necessary for their life and dignity’.⁶⁹³ Nevertheless, individualists argue that the resources are scarce and therefore everyone shall take care of himself. This thesis disagrees and sustains Baxi in his claim that the problem lies in the ‘redistribution’⁶⁹⁴ of world resources. The problem should be addressed in terms of who owns what and why? who sets the rules of the redistribution ? as correctly argued by Woods ‘World poverty is a function not of scarcity, but of distribution’⁶⁹⁵ In agreement with Pogge on the responsibility of the affluent to assist the poor, Walzer argues that ‘Men and women who appropriate vast sums of money for themselves while needs are still unmet act like tyrants, dominating and distorting the distribution of security and welfare’,⁶⁹⁶ hence the need to hold them accountable. In this register, Baxi argues that the RTD will loose its significance

⁶⁹¹ International Council on Human Rights Policy (2003) *Duties sans frontiers: Human rights and Global social justice* 73 (Geneva) as quoted by Marks in Marks & Andreassen (2006) 73.

⁶⁹² C Fried *Right and wrong* (1978) 118 as quoted by Woods (2003) 775.

⁶⁹³ O F M Thaddee Matura ‘The Franciscan concept of poverty’ in *World Poverty – Franciscan reflections* (2007) 3.

⁶⁹⁴ Baxi (1984) 234.

⁶⁹⁵ Woods (2003) 792.

⁶⁹⁶ M Walzer *Spheres of justice: A Defense of Pluralism and Equality* (1983) 75-76 as quoted by Woods (2003) 792.

[I]f it can be ethically said that the national of affluent societies owe no human rights obligations to non-nationals adversely and manifestly affected by economic and military policies of their governments.⁶⁹⁷

The theory of international responsibility for human rights was codified through the UN Charter which does not only list conditions to ensure development, but also urges member states to act for the achievement of these purposes. The betterment of human life should be in the interest of every human being. The fact that the community of nations agrees on such a principle and records it in a charter testifies to their willingness to go the extra mile for the sake of humanity. The pledge made by the international community to take action individually and collectively to ensure international societal well being implies taking action beyond state's borders or at least actions with effects beyond their borders. This can be interpreted as an agreement to give up some attribute of their sovereignty to promote and protect others from the worst form of human rights violations, which is poverty.⁶⁹⁸ Thus, if the community of states is ready to be held accountable for each other's well being, it is actually a compromise of their sovereignty. In this regard, M'baye convincingly argues that the mere fact that member states of the UN show concern for poverty and are willing to compromise their sovereignty in the name of human rights constitutes a legal basis for the RTD.⁶⁹⁹

Furthermore, M'baye, like Pogge, believes that wealthy countries are responsible for world poverty. They are international law and policy makers, hence they should be held responsible for those policies and their consequences.⁷⁰⁰ M'baye argues:

⁶⁹⁷ Baxi (2007) 149-150.

⁶⁹⁸ M'baye (1972) 505-534.

⁶⁹⁹ M'baye (1972) 505-534. See also M'baye 'Emergency of the right to development as a human right in the context of the new economic order', paper presented to the UNESCO Meeting of Experts on Human Needs and the Establishment of a New International Economic Order, Paris, 19-23 June 1978.

⁷⁰⁰ M'baye (1972) 522.

They [wealthy countries] decide about peace or war, the international monetary regime, the conditions of international relations, impose ideologies, etc. etc. They do and undo the knots of politics and the world economy. What would be more natural than that they should assume the responsibility for the events and the state of affairs of which they are the authors?⁷⁰¹

He maintains that ‘the harm that they cause should be the responsibility of those that provoked them; [and that] this is an elementary principle of justice’.⁷⁰²

However, it is difficult to hold one state accountable for another state’s RTD. In fact, the renunciation of sovereignty in articles 55 and 56 of the UN Charter seems to be very limited because as Donnelly puts it ‘States merely accept an obligation to take (unspecified) co-operative action to further (unspecified) human rights and they do not oblige themselves to undertake any particular course of action, let alone to protect or realise any particular human right’.⁷⁰³ In other words, the international community has no obligation to ensure the realisation of the RTD. Allan Rosa observes that claiming that the RTD is grounded on international law, is a mere affirmation without any clear and substantial argument.⁷⁰⁴

Nevertheless, from a different angle, the commitment of the international community to promote ‘higher standards of living, full employment, conditions of economic and social progress and development, universal respect for, and observance of human rights and fundamental freedoms for all without distinction of race, sex, language or religion’ (as provided by articles 55 and 56 of UN Charter) is a good attempt to better human conditions, ensure human dignity and the RTD. In fact, grounded in the UN Charter, the mandate of the

⁷⁰¹ Mbaye (1972) 522.

⁷⁰² Mbaye (1972) 522.

⁷⁰³ Donnelly (1984) 262.

⁷⁰⁴ A Rosas ‘The right to development’ in Asbjorn Eide, Catarina Krauses and Allan Rosas (2001) 251.

UNDP is to ensure human well-being or the RTD, even if it cannot force donors to provide development assistance, but obtain it through multilateral or bilateral negotiations.⁷⁰⁵

Furthermore, the purposes of the UN Charter are also enshrined in the 1948 Universal Declaration⁷⁰⁶ as well as the ICESCR⁷⁰⁷ and are therefore specified human rights with legal sources. In fact, the UN Charter represents an international consensus on the fight against poverty to ensure the RTD. In this regard, Aaronson and Zimmerman correctly argue that

[t]he signing of the UN Declaration by the community of States was a commitment through multilateral mechanisms to further the enjoyment by all States...of access, on equal terms, to the trade and the raw materials of the world which are needed for their economic prosperity; to bring about the fullest collaboration between all nations in the economic field with the object of securing for all, improved labour standards, economic advancement and social security;...and they hope to see established a peace ... which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.⁷⁰⁸

In the same vein, Salomon argues that under the

[UN] Charter, UN member states relinquish a degree of their sovereignty and instead accept international co-operation in the respect for, and observance of, human rights as a common purpose of their contemporary collective activities.⁷⁰⁹

This is cosmopolitanism at its best. However, in practice, contemporary international law is informed by liberalism ideologies which do not consider human dignity. Hence, it is difficult

⁷⁰⁵ Discussion with Lopa Banerjee who is the Advocacy and Policy Advisor at the UNDP, Pretoria, South Africa, 20 April 2009.

⁷⁰⁶ The Universal Declaration, art 28 for example.

⁷⁰⁷ Art 11.

⁷⁰⁸ S A Aaronson and J M Zimmerman *Trade imbalance: The struggle to weigh human rights concerns in trade policymaking* (2008) 12.

⁷⁰⁹ Salomon (2007) 21.

to obtain compliance with international instruments including the UN Charter. More importantly, it is even more difficult to hold members of the international communities accountable on the ground of non binding instruments such as the UNDRTD for example.

Nevertheless, it is believed that the RTD could be claimed on the ground of international solidarity. This view was sustained at the Conference on Development and Human Rights held in Dakar in September 1978 which concluded that

[t]here exists a right to development. The essential content of this right is derived from the need for justice, both at the national and international levels. The right to development draws its strength from the duty of solidarity, which is reflected in international co-operation. It is both collective and individual. It is clearly established by the various instruments of the United Nations and its specialized agencies.⁷¹⁰

Accordingly, amongst others, international solidarity was the source of the RTD. In this perspective, developed countries had made a commitment since 1970 through Resolution 26/26 of 24 October 1970 at the International Conference on Financing Development, reaffirmed in 2002 in Monterrey, Mexico. They committed themselves to allocate 0.7% of their Gross National Product (GNP) to development assistance. However, only Sweden, Norway, Denmark, Holland and Luxemburg are meeting this target.⁷¹¹

Nonetheless, in the context of their foreign policy (not in a RTD context), the US established the Millennium Challenge Account and made it public at the 2002 Monterrey Conference on Financing Development. It was the opportunity for former President Bush to take a position on co-operation. He said:⁷¹²

Developed nations have the duty not only to share our wealth, but also to encourage sources that produce wealth: economic freedom, political liberty, the rule of law and human rights.

⁷¹⁰ The 1978 Dakar conference quoted from Malhotra (2005)130 &131.

⁷¹¹ OECD, *Development co-operation: efforts and policies of the Members of the Development Assistance Committee 1998 Report*; also OECD, *development co-operation Annual Report 2000*.

⁷¹² Statement by the US President George W Bush, Monterrey, Mexico, March 22, 2002.

The consensus document adopted at the Conference viewed ‘respect for human rights including the right to development, and the rule of law, gender equality, market orientated policies, and overall commitment to just and democratic societies’ as elements of sustainable development.⁷¹³

However, this seems to be mere words because there is no international treaty on the RTD obliging developed countries to assist developing ones. In fact, the RTD ‘refers to the responsibility of nations *ad intra*’⁷¹⁴ or within the confine of the state. Guevara stresses that wealthy countries’ obligation to help poor ones can be based on the past relation between them, particularly after the end of colonialism.⁷¹⁵ In this vein, international assistance can be given on humanitarian grounds or to ensure collective self-interest. There is no obligation based on a RTD. The example in mind is from Tanzania. In fact, during his visit to Tanzania, former President Bush claimed his happiness to have signed the ‘largest Millennium Challenge Account (\$700 million) in the history of the US’.⁷¹⁶ He also mentioned that it is the ‘way we have conducted our foreign policy with Africa. We come to the continent not out of guilt, but out of compassion’.⁷¹⁷ Most importantly, he said ‘absolutely, it is in our national interest that America helps deal with hopelessness; and it’s in our moral interests that we help brothers and sisters who hurt’.⁷¹⁸ In other words, nothing was done for Tanzania because of

⁷¹³ Monterrey Consensus of the International Conference on Financing for Development, Annex, para 11.

⁷¹⁴ J Guevara ‘Poverty and the right to development: An international human right approach’ 2, SELA 2005, Panel 5: “Poverty and the International Order”, 6 available at [http://islandia.law.yale.edu/sela/SELA%202005/Jose%20Guevara%20\(Final%20English%20Version\)%20v%201.0.pdf](http://islandia.law.yale.edu/sela/SELA%202005/Jose%20Guevara%20(Final%20English%20Version)%20v%201.0.pdf) (accessed 25 December 2009).

⁷¹⁵ Guevara (2005) 6.

⁷¹⁶ The White House’ President Bush participates in joint press availability with President Kikwete of Tanzania’ 8 February 2008 at <http://www.whitehouse.gov/news/releases/2008/02/20080217.html> (accessed 26 February 2008).

⁷¹⁷ The White House (2008).

⁷¹⁸ The White House (2008) 7.

their entitlement to the RTD and even the 0.7% commitment mentioned above was not referred to. Indeed, President Bush's words were unambiguous on the issue.

This is the implementation of the Truman text discussed earlier. In this context, development is a way to project American power and seek domination, hence it has nothing to do with 'fairness', 'rights'⁷¹⁹ or justice.

In fact, this is an attempt to change human rights standards as established in the UDHR and the UN Charter which recognised the right to everyone for a better life. The USA is a major player in shaping international policies which influence people life in Tanzania. For instance the US is the main sponsor of the IFIs whose SAPs destroyed people's life in Tanzania; it is the main player in the WTO which regulations hinder Tanzania's ability to have access to medicine; through globalization, the US shapes the world with its neoliberal policies 'to which the right to development talk presents an irritating moral nuisance'.⁷²⁰ In fact, if it was not for the US imposed (through globalisation) 'new idea' about political economy',⁷²¹ Tanzania could have developed. Hence, from Pogge perspective the US's and its citizens who are beneficiaries of the international order have the obligation to make sure that all Tanzanians are well off.

Human well-being should not be informed by foreign policies; it should not be 'an affair of North largesse',⁷²² but should be informed by international human rights standards with the aim to achieve global justice.

Though this remains a challenging task, the human family as a whole should strive to find a way to ensure that the international community respects human rights everywhere because as correctly observed by Eide and Rosas 'fundamental needs should not be at the mercy of

⁷¹⁹ M D Adler and C W Sannchirico 'Inequality and uncertainty: Theory and legal application' University of Pennsylvania, Politics, law and legal theory working paper (2006) 8 at <http://www.srn.com> as quoted by Baxi (2007) 116.

⁷²⁰ Baxi (2007) 129.

⁷²¹ Baxi (2007) 129.

⁷²² Baxi (2007) 141.

changing governmental policies and programmes, but should be defined as entitlements.⁷²³ Defined as entitlements, all state members of the international communities will be duty bearers of human rights which should be realised through various means with international co-operation as the defining factor.

In sum, holding the international community of states accountable for human rights and the RTD beyond their jurisdictions seems very complicated. Nonetheless, the human family as a whole should strive to find a way to ensure that the international community respects human rights everywhere.

Global institutions' obligations

According to the UDHR, not only is everyone entitled to an 'adequate standard of living for himself and his family',⁷²⁴ he or she is also 'entitled to an international order in which [his] rights and freedom can be fully realized.'⁷²⁵ In other words, these provisions compel 'international order makers' to ensure their actions are conducive to the realisation of human rights; given their vital role in 'the determination of the development policies and the creation of development condition for states',⁷²⁶ the IFIs, the WTO/the G7 and even the transnational companies have the responsibility in terms of human rights. In fact, their pre-eminence in these times of globalisation reduces sovereignty of states in terms of domestic policies.⁷²⁷ Pogge through a cosmopolitan justice theory establishes that IFIs have a moral obligation to respect human rights; they have a 'negative duty' not to harm the poor;⁷²⁸ in other words,

⁷²³ A Eide & A Rosas 'Economic, social and cultural rights: a universal challenge' in A Eide *et al* (1995) 18.

⁷²⁴ Art 25

⁷²⁵ Art 28.

⁷²⁶ S I Skogly 'The role of the international financial institutions in a rights-based approach to the process of development' in Andreassen and Marks (eds) (2006) 288; also I Skogly *The human rights obligations of the World Bank and the International Monetary Fund* (2001).

⁷²⁷ S Kogly (2006) 297.

⁷²⁸ Pogge (2007) 20.

international institutions shall ‘refrain from (actively) causing other’s human rights not to be fulfilled’.⁷²⁹

This section will briefly focus on IFIs and the WTO’s obligations.⁷³⁰ In their early days, the main objectives of the IFIs were to cater for economic growth, thus they play a fundamental role in the development arena. In this register, as mentioned earlier, they designed the SAPs for the developing world, and their effects on human rights will not be repeated here. In fact, these institutions failed to protect the poor through their policies, they did not respect their negative duty not to harm the poor. Pogge extends this responsibility to the affluent who shall refrain from taking part in IFIs activities which hinder the eradication of poverty.⁷³¹

In fact, the negative obligation of the IFIs was emphasised by the UN Committee on Economic, Social and Cultural Rights who called upon them to ‘pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programme’.⁷³² Furthermore, a similar call was made in relation to the right to food.⁷³³ More importantly, the fiasco of the SAPs led an Intergovernmental Group of Experts to call the IFIs to order in these words:

The Bretton Woods institutions (World Bank and IMF) should take account of the right to development in their guiding principles, decision-making criteria and programmes. The same is true of NGO’s work at the international and national levels and whose activities relate to human rights, development and democracy. From this point of view, the ties between the World Bank and the IMF on the one hand, and the United Nations General Assembly and the Economic Social Council, on the other, should be strengthened. The IMF and the World Bank should be required to submit regular reports to the General

⁷²⁹ Pogge (2007) 20.

⁷³⁰ Chapter 7 will further assess the WTO and the G8.

⁷³¹ Pogge (2007) 20.

⁷³² UN Committee on Economic, Social and Cultural Rights, General Comments No 14 on the right to health, para 66.

⁷³³ UN Committee on Economic, Social and Cultural Rights, General Comments No 12 on the right to Adequate Food, para 41.

Assembly and the Economic and Social Council to keep them informed of the extent to which these institutions are taking account of the right to development in their programmes and activities.⁷³⁴

As a result of this call, when the IFIs shifted their policies to the PRSPs (discussed in the chapter 2 of this work), in an attempt to underline the IFIs obligations in terms of human rights, the UN High Commissioner for Human Rights drafted the 2002 Guidelines which reads as follows:

... global actors must be subject to accessible, transparent and effective monitoring and accountability procedures. If global actors fail to establish appropriate monitoring and accountability mechanisms in relation to their poverty reduction and human rights responsibilities, others should take steps do so.⁷³⁵

Unfortunately, the Guidelines do not call for celebration as there were addressed to states and not the IFIs who are in charge of PRSPs. Consequently, it could be argued that the IFIs do not accept human rights responsibility. This does not however stop Skogly from arguing that in addition to negative duty, IFIs also have positive duties which compel them 'to take positive steps to achieve a certain result'.⁷³⁶ In this respect, she emphasises the responsibility of the IFIs to take action to ensure that their sub-contactors respect human rights while implementing their projects.⁷³⁷

Unfortunately, the IFIs do not respect such positive obligations. For example, in June 2000, it was reported that the World Bank approved the Chad-Cameroon oil pipeline project without looking at its impact on the *Bagyeli* people's rights.⁷³⁸ These indigenous people were not

⁷³⁴ UN Doc, E/CN.4/1997/22, 21 January 1997, para 5.

⁷³⁵ The UN High Commissioner for Human Rights *Human rights in development: Draft Guidelines: A human rights approach to Poverty Reduction Strategies* (2002) as quoted by Skogly (2006) 296-297.

⁷³⁶ Skogly (2006) 289.

⁷³⁷ Skogly (2006) 289.

⁷³⁸ See Forest Peoples Project: Annual Report 2001, 6 -7 available at http://www.forestpeoples.org/documents/ann_rep/fpproj_ar_01.pdf (accessed 28 December, 2010).

informed on the likely consequences of the project in their community and were not compensated for the effects of the pipelines crossing their lands. They did not participate in decision making process and an Indigenous Peoples Plan aiming to alleviate the effects of the pipeline on the indigenous group failed to comply with the World Bank's policy to protect individuals from harm caused by operations of the Bank.⁷³⁹

In any event, IFIs are not exempted from human rights obligations. They have legal personalities and can be brought to court for human rights violations.⁷⁴⁰ This is elaborated by the ICJ in its argument that international organisations are subjects of international law and are bound by any obligations incumbent upon them under general rule of international law, under their constitutions or under international agreements to which they are parties.⁷⁴¹

Furthermore, IFIs has been taken to court to comply with their human rights obligations. In the *Chixoy Dam case*⁷⁴² submitted by the Centre for Housing Rights and Evictions to the Inter American Court of Human Rights against the government of Guatemala, the World Bank and the Inter-American Development Bank (IBD) were taken to court to compensate for the violation of human rights of indigenous Rio Negro people in Guatemala. As indicated on the website of the Centre for Political Ecology,⁷⁴³ these people were violently displaced to make room for the construction of the Bank and IBD sponsored Pueblo Viejo-Quixal Hydroelectric Project. While the decision of the Court is still awaited, it is important to note that the IFIs have human rights responsibilities.

⁷³⁹ See Forest Peoples Project: Annual Report 2001, 6 -7 available at http://www.forestpeoples.org/documents/ann_rep/fpproj_ar_01.pdf (accessed 28 December, 2010).

⁷⁴⁰ For more on the IFIs legal personality, see Skogly (2001) 64-70.

⁷⁴¹ See *WHO v Egypt*, ICJ (25 March 1951) (1951) ICJ Reports 89-90.

⁷⁴² For more on this case see <http://www.cohre.org/store/attachments/chixoy-petition-CIDH.pdf> & <http://www.centerforpoliticalecology.org/chixoy.html> (accessed 10 September 2009).

⁷⁴³ Chixoy Dam Legacy Issues Study <http://www.centerforpoliticalecology.org/chixoy.html> (accessed 28 December 2010).

Opponents of this view such as Cohen⁷⁴⁴ and Rawls are of the view that global institutions are not the causes of poverty. For Rawls, the culture, religion and corruption are the real causes of poverty in the developing world.⁷⁴⁵ The counter argument to this view is that corruption in the developing world is very often sponsored by Northern countries that benefit from it.⁷⁴⁶

As far as the WTO is concerned, severe poverty is created and sustained by its arrangements. It uses several aspects of its TRIPs agreement to keep the poor unhealthy, and uses its agreements on agriculture (AoA) to keep them hungry.⁷⁴⁷ Pogge claims that developing countries are poor as a result of protectionist policies imposed on them by developed countries, which are actually responsible for their suffering.⁷⁴⁸ By so doing, developed countries violate their obligation not to harm the poor. As will be shown in chapter 7 of this research, the WTO is like a big enterprise where only wealthy countries can make profit; to use Pogge's words, it is tailored 'toward a better accommodation of the interests of the governments, corporations and citizens of the affluent countries'.⁷⁴⁹ *The Economist* magazine summarises the situation in these terms:

Rich countries cut their tariffs by less in the Uruguay round than poor ones did. Since then, they have found new ways to close their markets, notably by imposing-antidumping duties on imports they deem 'unfairly cheap'. Rich countries are particularly protectionist in many of the sectors where developing countries are best able to compete, such as agriculture, textile and clothing. As a result, rich countries' average tariffs on manufacturing imports from poor countries are four times higher than those on imports from other rich countries. This imposes a big burden on poor countries... that could export

⁷⁴⁴ Cohen (2010) 19

⁷⁴⁵ Pogge (2007) 31.

⁷⁴⁶ Pogge (2007) 46.

⁷⁴⁷ Pogge (2008) 21.

⁷⁴⁸ Pogge (2004) 278.

⁷⁴⁹ Pogge (2007) 34.

\$700 billion a year by 2005 if rich countries did more to open their markets. Poor countries are also hobbled by lack of know-how [in terms of WTO processes].⁷⁵⁰

Furthermore, severe poverty is the result of the TRIPs agreement which offers twenty years of ownership to the inventor of a new medicine. As a result, the global poor and most needy are kept away from the drugs because of high pricing, and researchers focus on diseases from the Western world, hence 'of the 1393 new drug approved between 1995 and 1999, only 13 were tropical diseases – of which five by products of veterinary research on the health and two commissioned the military'.⁷⁵¹

Indeed the current world order does nothing to eradicate poverty; on the contrary, there is a global policy to ensure the longevity of poverty. This is justified by the fact the most rich countries do not comply with their commitment to give 0,7% of their gross national income to official development assistance (ODA).⁷⁵² In the contrary as correctly observed by Pogge, there was a reduction of ODA from 0,33% in 1990 to 0,22% in 2000.⁷⁵³ The resurgence of ODA which reached 0,33% in 2005 was linked to financing the so-called 'war on terror' and did not make a difference on 'basic social services [such as] basic education, primary health care, nutrition programs' and others.⁷⁵⁴

All beneficiaries of this neoliberal approach to globalisation are harming the poor. For those who blame poor countries for accepting such deals, it could be argued that these countries have no choice; in fact they find themselves between a rock and a hard place because the 'one who failed to sign up [to the WTO regime] would find its trading opportunity even more severely curtailed'.⁷⁵⁵

⁷⁵⁰ *The Economist*, 25 September 1989, 89 as quoted by Pogge (2007) 34.

⁷⁵¹ Pogge (2007) 37.

⁷⁵² This commitment was made for the first time in 1970 and was reiterated at the International Conference on Financing for Development held in Monterrey, Mexico in 2002, A/CONF.198/11.

⁷⁵³ Pogge (2007) 27.

⁷⁵⁴ Pogge (2007) 27.

⁷⁵⁵ Pogge (2007) 37.

Overall, international institutions have human rights obligations and should comply with them. These obligations are negative, which entails ‘obligation of conduct’ and positive which entails ‘obligation of results’.⁷⁵⁶ Not only should international institutions’ conduct not harm the poor, their actions should also enhance the realisation of human rights. Furthermore, beneficiaries of an unjust world order are all accomplices in harming the poor and should therefore be held responsible, hence the need to criminalise the RTD.⁷⁵⁷

After an examination of the duty bearers of the RTD, the next subsection will focus on the right-holders of the RTD.

3.5.2 The right-holders of the RTD

Traditionally, individuals are rights-holders or beneficiaries of human rights. However, from an RTD standpoint, individuals, peoples and even the state (the latter is usually the duty bearer) are all beneficiaries of the right.

3.5.2.1 Individuals

The UNDRTD states: ‘the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in...’⁷⁵⁸ In this sentence, the beneficiary is an individual right when the provision refers to the entitlement of ‘every human person’. Similarly, in defining development as a process aiming at the constant development of the ‘well-being of the entire population and all individuals’,⁷⁵⁹ the individual

⁷⁵⁶ Skogly (2006) 299.

⁷⁵⁷ Baxi (2007) 153.

⁷⁵⁸ Art 1.

⁷⁵⁹ UNDRTD, Preamble, para 2.

character of the beneficiary of the right is highlighted under the concept of ‘all individuals’.⁷⁶⁰ Furthermore, the individual character of the right is also exposed by article 2 (1) of the UNDRTD which provides that ‘The human person is the central subject of development and should be the active participant and beneficiary of the right to development’.

Even the USA, a main opponent of the RTD would give it a chance if it is understood to mean an individual and not a collective right. At the 61st Commission on Human rights, Danies, the US representative claimed that for his country

[t]he RTD implies that each individual should enjoy the right to develop his or her intellectual capabilities to the maximum extent possible through the exercise of the full range of civil and political rights.⁷⁶¹

This is consistent with the liberalism theory which believes exclusively in negative rights, hence the reference to civil and political rights by the US representative whose claim views the RTD as a burden on individuals without involvement of the state and a positive obligation on international community. It fails to understand that human potential or capabilities cannot be developed in a context of dictatorship, hunger or poverty which should be avoided by the state and the international community. More importantly, the USA links the RTD to civil and political rights only, and refutes its composite aspect discussed earlier.

3.5.2.2 **Peoples**⁷⁶²

The sentences that the RTD is a right in which ‘all peoples are entitled to participate in...’⁷⁶³ and that the RTD is a process aiming at the constant development of the ‘well-being of the

⁷⁶⁰ The collective aspect of the rights included in these provision will be discussed in the subsection dealing with people as rights holders of the RTD; sec 3.4.2.2.

⁷⁶¹ Explanation of the vote on right to development, 61st Commission on Human Rights’ Statement delivered by Joel Danies US Delegation to the 61st Commission on Human Rights, April 12, 2005.

⁷⁶² The concept of ‘peoples’ will be covered extensively while looking at the RTD in the African human rights system in the next chapter of this work.

⁷⁶³ Art 1 of the UNDRTD.

entire population...⁷⁶⁴ show the collective feature of the RTD; here, peoples are right-holders of the RTD. In other words, communities or collectivities and groups are beneficiaries of the RTD.

Questions related to the beneficiary of the RTD are always on the table. Responding to Donnelly's query on the individual or collective character of the right, Bedjaoui argues that it is not a problem whether the RTD is a collective or individual right; he states, 'the right to development is the right of human race in general'.⁷⁶⁵ Similarly, at the twelfth session of the Working Group and the fifth session of the High Level Task Force on the implementation of the RTD,⁷⁶⁶ China argued that whether the RTD was a collective or individual right, it was urgent to implement the right in question and not waste time examining whether the RTD necessitates national or international obligations, whether it was an individual or collective right.⁷⁶⁷

Apart from Donnelly's assertion, these arguments are inclined towards catering for human well being in general and this thesis is of the view that the RTD is an individual as well as a collective right and indeed human welfare should be paramount in any circumstances. Nevertheless, the state is also perceived as a beneficiary of the RTD.

3.5.2.3 The state

The usual duty bearer of rights, the state is also identified as the beneficiary of the RTD. Article 2(3) of the UNDRTD is clear:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of

⁷⁶⁴ UNDRTD, Preamble, para 2.

⁷⁶⁵ Bedjaoui (1989); also Hansungule (2005) 12.

⁷⁶⁶ Twelfth session Working Group on the Right to Development, High-level task force on the implementation of the right to development, Fifth session (Geneva, 1-9 April 2009), A/HRC/12/WG.2/TF/2.

⁷⁶⁷ Twelfth session Working Group on the Right to Development (2009) para 12.

their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

Even though the provision refers to the duty of the state, the interesting part here is ‘States have the right...’ In this instance, the state is the beneficiary in the sense that it has the right to formulate its development policies without any interference; it should exercise its sovereignty in defining national development policies. This principle is further stressed by the Declaration on the Establishment of a New International Economic Order.⁷⁶⁸ In this vein, Swanson argues that the RTD is the collective right of a developing country to the establishment of a new international order and underscores the role of international co-operation for its realisation.⁷⁶⁹

Nevertheless, the provision could also mean that the state has human rights and can claim them against the international community at large. However, since a state is not human, it can only claim such a right on behalf of its people. In this case, it is the representative of its people; Crawford stresses that the involvement of the state as the main negotiator of the right does not make it the beneficiary, but the tool used for the interest of individuals;⁷⁷⁰ the ‘state plays the role of the equivalent legal trustee’ to use the words of Keba M’baye.⁷⁷¹ The Working Group on the Right to Development sheds more light on the issue in these words:⁷⁷²

States and organizations had rights and obligations as far as the realisation of human rights was concerned and in relation to the right to development as a human right, although that did not mean that they possessed human rights as such.

⁷⁶⁸ Art 4(d) which reads: The new international economic order should be founded on full respect for the following principles: The right of every country to adopt the economic and social system that it deems the most appropriate for its own development and not to be subjected to discrimination of any kind as a result’.

⁷⁶⁹ J Swanson, ‘The emergency of a new right in the African Charter’ (1991) 12 *New York Law School Journal of International & Comparative Law* 318.

⁷⁷⁰ J Crawford *The rights of peoples* (1988) 159 - 167.

⁷⁷¹ K M’baye ‘Introduction’ (part four) ‘Human rights and the rights of peoples’ in M Bedjaoui (ed), *International law: Achievements and prospects* (1991) 1041 - 1049; see also Salomon (2007) 119.

⁷⁷² Report of the Working Group of Governmental Experts on the Right to Development (8th session, 24 January 1985) UN Doc E/CN.4/1985/11, para 20.

In sum, the state is the beneficiary of the right if it acts on behalf of its citizens.

3.6 Concluding remarks

The aim of this chapter was to examine the nature of the RTD. In so doing, it focuses on the content of the right, studies the controversies on the right, before looking at its implementation where duty-bearers and right-holders are identified.

From the discussion, it could be affirmed that the right is inalienable, is a multifaceted one made of civil and political rights, economic, social and cultural rights, right to participation and right to self-determination with a special emphasis on the interdependence, indivisibility and universality of all its elements. Apart from its composite feature, the right is also a claim for global justice, for fairness in sharing the world resources.

The right is very contentious in academic arenas where scholars battle on the concept of development law as well as the nature of the RTD *per se*. At the UN level, the debate has been turned into a political battlefield which is reflected in the voting patterns on UN resolutions on the RTD. The disagreement on the RTD is also illustrated through different attitudes adopted by international organisations in addressing the right. However, in spite of this disagreement, the right has been a subject of various undertakings at the national level and has a normative force, but remains non binding at international level where it is yet to be secured in a treaty or convention.

On the implementation of the RTD, the chapter shows that at the national level, the state is the duty bearer of the right whereas at international level, based on the cosmopolitanism philosophy, the international community is the duty bearer, even though this last aspect creates more controversy on the right as it is clear that right is not yet binding at a global level.

Lastly, based on the analysis of the UNDRTD, the chapter argues that the beneficiaries of the right are individuals as well as peoples. Nevertheless, the state is also perceived as a beneficiary of the right when it acts on behalf of its people.

After an analysis of the RTD at global level, the next chapter will focus on the right in the African human rights system.

CHAPTER 4 THE RIGHT TO DEVELOPMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM

- 4.1 Introduction
- 4.2 Substantive provisions on the RTD in the African human rights system
 - 4.2.1 The RTD in the ACHPR
 - 4.2.2 The RTD in the Protocol to the ACHPR on the Rights of Women in Africa
 - 4.2.3 The RTD in the African Charter on the Rights and Welfare of the Child
 - 4.2.4 The RTD in RECs: The 1993 SADC Treaty
- 4.3 The RTD in African national laws – Case studies
 - 4.3.1 Cameroon
 - 4.3.2 Uganda
 - 4.3.3 Malawi
 - 4.3.4 Ethiopia
 - 4.3.5 South Africa
- 4.4 The jurisprudence of the African Commission on the RTD
 - 4.4.1 *The Bakweri Land Claims Committee v Cameroon*
 - 4.4.2 *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*
 - 4.4.3 *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*
 - 4.4.4 *SERAC v Nigeria*
- 4.5 Concluding remarks

4.1 Introduction

The chapter examines the following question: What is the place of the RTD in the African human rights system?

As mentioned in chapter 2,⁷⁷³ of this work, ‘the African human rights system’ should be understood broadly. It comprises ‘the regional’ AU based system, the ‘subregional’ system

⁷⁷³ Section 2.2.

and even the national law with its case law. Provisions of this system will be looked at to the extent that they are useful in examining the RTD in the African law.

This chapter sets the stage for the analysis of the RTD within the NEPAD framework in the next chapter. In doing so, it looks at the RTD where NEPAD belongs, within the African human rights system. The chapter is divided in five parts including this introduction.

The second part sketches the substantives provisions of the RTD in the African human rights architecture; the third one focuses on national provisions of Cameroon, Uganda, Malawi, Ethiopia and South Africa while analysing the role of duty bearers; the fourth one looks at the African Commission jurisprudence on the RTD, and the fifth and final section provides concluding remarks.

4.2 Substantive provisions on the RTD in the African human rights system

This section focuses on the substantive provisions on the RTD in the ACHPR, the Protocol on the rights of Women, the African Children Charter and the 1993 SADC Treaty.

4.2.1 The RTD in the ACHPR

As already observed in the introduction, article 22 of the ACHPR reads:

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.

The first paragraph clearly underlines that the RTD is made of economic, social and cultural rights as well as freedoms (civil and political rights). In fact, here the multifaceted character of the right is highlighted. During one of the meetings of African Heads of State on the *travaux préparatoires* of the ACHPR, Senghor the former president of Senegal highlighted the need to include the RTD in the future African Convention because it entails all economic,

social and cultural rights, without neglecting civil and political rights.⁷⁷⁴ Furthermore, it could be argued that this view was incorporated in the ACHPR in these terms:⁷⁷⁵

Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

As far as the beneficiary is concerned, the ACHPR presents the RTD as a collective right, as ‘peoples’ rights’. However, the concept of peoples’ and the RTD is problematic, hence the need to give more attention to its significance. In clarifying the concept of people, the section will also assess the right to self-determination which is directly linked to the concept of people as well as to the RTD.

The concept of people grounded in the UN Charter⁷⁷⁶ and in the African philosophy claiming that a person is not perceived as an isolated human being, but as part of a community, as ‘an integral member of a group animated by a spirit of solidarity’,⁷⁷⁷ and as a result individual rights could be clarified and validated only by the rights of the community.⁷⁷⁸ Following this reasoning, peoples’ rights were enshrined in the African instrument from articles 19 to 24: Right of people to equality,⁷⁷⁹ to existence and self-determination,⁷⁸⁰ to dispose freely of

⁷⁷⁴ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, OAU DOC CAB/LEG/67/5.

⁷⁷⁵ The ACHPR, preamble, para 7.

⁷⁷⁶ The first sentence of the Preamble reads: ‘We the people of the United Nations...’

⁷⁷⁷ Okere ‘The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American System’ (1984) 6 *Human Rights Quarterly* 148 as quoted by R Kiwanuka ‘The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights (1988) 82 *The American Journal of International Law* 82.

⁷⁷⁸ Kiwanuka (1988) 82.

⁷⁷⁹ ACHPR art 19.

wealth and natural resources,⁷⁸¹ to economic, social and cultural development,⁷⁸² national and international security⁷⁸³ and to a general satisfactory environment.⁷⁸⁴

The striking feature here is that the ACHPR does not define the concept and it is argued that this was done deliberately in order to avoid disagreement.⁷⁸⁵ However, it could be argued that this voluntary omission creates more problems than it solves because as will be shown in the following lines, an undefined ‘peoples’ is misleading from various angles.

The UN Educational, Scientific and Cultural Organisation (UNESCO) Meeting of Experts on the study of the rights of peoples, held in Paris in 1989, defined peoples for purposes of peoples’ rights in international law, as a group of individual human beings who enjoy some or all of the following common characteristics: a) a common historical tradition, b) racial or ethnic identity; c) cultural homogeneity, d) linguistic unity, e) religion or ideology affinity; f) territorial connection; and g) a common economic life.⁷⁸⁶ A people should have a peculiar or ‘distinct character’.⁷⁸⁷ In this regard, Brownlie is of the view that

⁷⁸⁰ Art 20.

⁷⁸¹ Art 21.

⁷⁸² Art 22.

⁷⁸³ Art 23.

⁷⁸⁴ Art 24.

⁷⁸⁵ Report of the Draft African Charter presented by the Secretary-General at the 37th ordinary session of the OAU Council of Minister, Kenya, 15-21 June 1981, OAU Doc CM/1149 (XXXVII), Annex II: Rapporteur’s Report OAU Doc CAB/LEG/67/Draft.Rept (II) Rev.4 (Rapporteur’s Report), also Vieljoen (2007) 243.

⁷⁸⁶ UNESCO ‘New reflections on the concepts of peoples’ rights’ (1990) 11 (3-4) *Human Rights Law Journal* (pages 441, 446).

⁷⁸⁷ I Brownlie ‘The right of people in modern international law’ (1995) 9 *Bulletin of Association of Legal Philosophy* 108, 110.

[T]he concept of distinct character depends on a number of criteria which may appear in combination. Race or nationality is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate.⁷⁸⁸

However, in the ACHPR, there is no specific criterion to identify people or peoples. In fact, the doctrine is always trying to interpret the provisions related to ‘peoples’. Article 19 of the ACHPR reads: ‘All 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’.

Here ‘people’ is subject to various interpretations: It includes minorities within the state, or the entire population of a state,⁷⁸⁹ where no group prevails or discriminates against another.⁷⁹⁰ In this case, ‘people’ applies to all collective rights in the ACHPR.⁷⁹¹ It also implies the protection of minorities against both internal and external form of colonialism;⁷⁹² internally, against the state which could be understood as the right to internal self-determination from and indigenous peoples’ rights perspective.⁷⁹³ This also goes hand in hand with article 20 of the ACHPR which provides for the right of existence and the right to self-determination of all peoples.⁷⁹⁴ Indeed the concept of ‘people’ is vague, unclear and keeps changing, hence the

⁷⁸⁸ Brownlie (1993) 108-110. For more on the clarification of ‘peoples,’ see The Universal Declaration of the Rights of peoples, Algiers, 4 July 1976; also Cassese A. and Jouve E. (eds) *Pour un droit des peuples Essai sur la Declaration d’Alger* (1978).

⁷⁸⁹ P Kunig ‘The role of ‘peoples’ Rights in the African Charter of Human and Peoples’ Rights’ in Ginther K. & W Benedek (eds) *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 169.

⁷⁹⁰ Ougergouz *La Charte Africaine des Droits de l’Homme et des Peuples: Historique, portee juridique et contribution a la protection internationale des droits de l’homme en Afrique* (1993) 140.

⁷⁹¹ Ougergouz (1993) 140.

⁷⁹² R Kiwanuka (1988) 93.

⁷⁹³ UN General Assembly (GA) Res of 13 September 2007, art 3; also Viljoen (2007) 46.

⁷⁹⁴ More light will be shed on the concept of peoples’ rights in the ACHPR under the section allocated to the *endorois* case (‘The right to self-determination and natural resources’).

correctness of Ougergouz's argument in which he claims that the concept of 'people in the African Charter is a Chameleon-like concept'.⁷⁹⁵

This vagueness does not assist in claiming the RTD as the state, duty bearer can easily twist the concept into whatever can enable it to forgo its responsibilities. For instance, if 'people' is taken to mean the state itself, it is almost impossible for the state to claim a right against itself, but only against the international community as several African countries would like to do.

Nevertheless, saying the RTD is a peoples' right does not negate the fact that it is also an individual right. In this regard, M'baye argues that 'development is a right for all [individuals and people]'.⁷⁹⁶ In fact, he points out that associating the RTD with collective rights is a 'hasty conclusion' which he opposes.⁷⁹⁷ This view is supported by virally who argues that the RTD is a human and a right of people; an individual and collective right.⁷⁹⁸ In the same vein, Benedek argues that in the ACHPR he finds evidence of the individual RTD.⁷⁹⁹ In the same perspective, Ougergouz rightly argues that

[t]he right to development inevitably has an individual dimension, yet this stems rather from the purpose of the right rather than from the way it is exercised. Failing any proof of the contrary, the view enshrined in the Charter is firmly directed towards the ultimate goal of the full development of the human person. To deny this would be to fail to recognise that each type of rights, individual rights and

⁷⁹⁵ F Ougergouz *African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 204 & 211.

⁷⁹⁶ M'baye (1972) 515.

⁷⁹⁷ K M'baye 'Le droit au developpement en droit international' in Makarczk J (ed) *Essays in International law in honour of Judge Manfred Lachs* (1984) 173.

⁷⁹⁸ Ougergouz (2003) 299.

⁷⁹⁹ W Benedek 'peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in Kunig, P; Benedek, W & Mahalu CR (eds) *Regional protection of human rights by international law: The emerging African system – Documents and three introductory essays* (1985) 77-78.

rights of peoples, in its way strive towards the same goal: respect for human dignity in its two expressions – that of human beings and of human communities.⁸⁰⁰

The second paragraph of the article under study clearly identifies states as the duty bearers of the right. They shall act ‘individually or collectively, to ensure the exercise of the right to development’. While acting individually, the state takes action in the line of the Maastricht Guidelines studied earlier.⁸⁰¹ It must act to promote, respect and protect the RTD. This will be further addressed in the subsequent section dealing with the implementation of the right in African countries.

Though the duty of the state at national level is clear, acting ‘collectively’ to ensure the RTD implies acting through international co-operation. In this regard, the co-operation should take place amongst African states that are parties to the ACHPR. According to article 26 of the Vienna Convention on the Law of Treaties, the *pacta sunt servanda* must be respected by state parties to treaties; in other words, a treaty is binding only on its parties. Before the codification of this rule in 1969, it was emphasised by the Permanent Court of International Justice (PCIJ) in its 1928 consultative opinion through the *Dantzig* case.⁸⁰² The Court said that an international law agreement was binding only on parties to the agreement unless the parties had expressed their will or intention to do otherwise.

This rule of international law can constrain African state’s ability to provide the RTD because most of them are cash trapped and cannot assist each other financially and turn to the wealthy countries or IFIs that are not parties to the ACHPR. The wealthy countries and IFIs can only assist as they please, on the ground of charity, or humanitarian assistance discussed earlier. In fact, this concern will be further analysed when addressing the role of partnership in NEPAD’s attempts to realise the RTD.⁸⁰³

⁸⁰⁰ Ouguergouz (2003) 306.

⁸⁰¹ Section 3.4.1.1 discussing the state as the duty-bearer of the RTD, page 90.

⁸⁰² *Jurisdiction of the Court of Dantzig* case, consultative opinion 1928, PCIJ. Ser B, No 15.

⁸⁰³ Chapter 7 of this study.

4.2.2 The RTD in the Protocol to the ACHPR on the Rights of Women in Africa

In addressing one of the shortcomings of the ACHPR, which did not expressly cater for women's rights, the Protocol on the Rights of Women was adopted in Maputo, Mozambique on 11 July 2003, and entered into force on 25 November 2005. It protects women's rights in general. But interestingly, it addresses women's rights to sustainable development in its article 19, which calls upon states parties to mainstream gender in national development planning. Accordingly, women should be involved at all levels of development endeavours;⁸⁰⁴ women's right to land,⁸⁰⁵ to credit, and other resources should be promoted to enhance women's quality of life.⁸⁰⁶ In addition, women should be protected against the negative effects of globalization in order to ensure their right to sustainable development.⁸⁰⁷

Furthermore, article 10 (3) of the same instrument urges state parties that generally allocate more money to military expenditure to shift the focus and allocate more money for women's development. Indeed, the allocation of more resources to women's education, training and empowerment in general can only enhance women's RTD. In this context, the duty bearer of the right is the state and the beneficiaries are women. The Protocol on the Rights of Women specifically underlines what the duty bearer should do to ensure women's rights to sustainable development. In fact, the state should adopt gender responsive legislations to ensure women's right to sustainable development.

4.2.3 The RTD in the African Charter on the Rights and Welfare of the Child

Article 5 of the African Children's Charter provides for the right to 'survival and development' of the child. Accordingly, the state, the duty bearer, shall amongst others ensure

⁸⁰⁴ Art 19(b).

⁸⁰⁵ Art 19(c); also 2001 SADC Treaty, art 5(1) (j).

⁸⁰⁶ Art 19(d).

⁸⁰⁷ Art 19(f).

the ‘development’⁸⁰⁸ of the child who is the beneficiary of the right. In this context, it could be argued that the state shall take appropriate measures to ensure that the child’s right to food, healthcare, education among others are respected. The achievement of these rights to the benefit of the child will lead to his or her survival and development.

4.2.4 The RTD in RECs: The 1993 SADC Treaty

The Treaty of the Southern African Development Community (SADC) was adopted in 1992 and entered into force in 1993. Even though this particular instrument does not have a specific provision on the RTD, amongst others, some of its objectives are to realise development and achieve economic growth, alleviate poverty, improve the quality of life in SADC and support the socially disadvantaged.⁸⁰⁹ In addition, its 2001 amendment clearly highlights that ‘poverty eradication’ should be at the centre of all SADC actions and programmes. Following this logic, its 2003 Summit adopted a Charter of Fundamental Social Rights in SADC with the main objective of improving people’s standards of living. In the same vein, the SADC Protocol on Gender and Development was adopted in 2008. In substance, the content of this protocol is similar to article 19 of the Protocol on the rights of women discussed earlier, though there is no specific provision on women’s RTD. Nevertheless, it can be argued that the RTD is secured in various projects of regional integration because it is ‘a conglomerate consisting of numerous rights to basic necessities of life’⁸¹⁰ which informed the creation of regional economic communities.

In sum, this is an overview of the RTD concept in the AU human rights based system including the SADC sub-region. The next section will focus on the RTD in national law while studying *inter alia* the role of the state, primary duty bearer of the RTD.

4.3 The RTD in African national laws – Case studies

⁸⁰⁸ African Children’s Charter, art 5 (2).

⁸⁰⁹ Art 5 of the SADC Treaty. For more on ensuring social security or human welfare in SADC, see B Jordaan, E Kalula & E Strydom (eds) *Understanding Social Security Law* (2009) 45-53.

⁸¹⁰ Viljoen (2007) 496.

This section examines the duty bearer's obligations while focusing on the RTD at national levels. Whereas various African countries' constitutions provide for development,⁸¹¹ Cameroon, Ethiopia, Malawi and Uganda specifically provided for the RTD in their constitutions. These constitutions will be the focus of the study when examining the role of African states in the realisation of the RTD because they expressly provide for the right. Though the South African Constitution does not mention development, it is known as the most progressive constitution in Africa⁸¹² and provides an interesting case study with several cases law and will therefore be also looked at.

It is important to recall the second paragraph of article 22 of the ACHPR calling upon states to act individually and collectively to secure the RTD. As mentioned earlier, the state is the primary duty bearer of the right at national level. This section assesses to what extent African states listed above comply with the law of development of the African human rights system.

4.3.1 Cameroon

Paragraph 3 of the Preamble of the 1996 Cameroonian Constitution recognises the RTD in these terms:

[We are] resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.

⁸¹¹ Angola (art 200), Benin (art 9), Burkina Faso (art 14), Burundi (arts 52,56), Cape Verde (art 40), Central African Republic (art 2), Chad (art 19), Congo (art 7), Cote d'Ivoire (art 7), Democratic Republic of Congo (arts 16,58), Equatorial Guinea (art 13), Gabon (art 1), Ghana (art 37(2)(a) of the Derivative Principles of State Policy), Guinea (art 6), Liberia (art 7 of the Principles of National Policy), Madagascar (art 17), Niger (art 14), Senegal (art 7), Tanzania (art 9(1)(i) of the Fundamental Objectives and Directives of State Policy) and Togo (art 12); also C Heyns & W Kaguongo 'Constitutional Human Rights Law in Africa' (2006) 22 *South African Journal on Human Rights* 673.

⁸¹² J C Mubangizi *The protection of human rights in South Africa: A legal and practical Guide* (2004) 71.

According to this provision, Cameroon recognises itself as the duty bearer of the RTD and counts on its natural resources to deliver its people from the claws of poverty. It also highlights that all Cameroonians without discrimination will enjoy the right.

However, it also highlights the role of international co-operation, by declaring its readiness to work with other states with due respect to the principle of sovereignty in view of achieving the RTD. By the look of things, in providing for the RTD, Cameroon was inspired by the 1986 UNDRTD⁸¹³ and the ACHPR which highlights the role of the state and international community in providing the RTD without discrimination.

Though the RTD is included in the preambular paragraph, it is justiciable because article 65 of the Cameroonian Constitution underlines that ‘the Preamble shall be part and parcel of this Constitution’.⁸¹⁴ The government of Cameroon takes the RTD very seriously. This was highlighted by President Biya’s speech at the UN in 2001. He questioned ‘how can we speak of human rights without the right to development?’⁸¹⁵

Nevertheless, in its Periodic Reports on its implementation of the ACHPR’s provisions presented at the 31st Ordinary Session of the African Commission in 2002, Cameroon did not present measures undertaken to protect the RTD. In fact, the Report does not even mention the right in question. This gap shows that national governments or Heads of State and ministries of foreign affairs of numerous countries send their representatives to the Human Rights Council and the General Assembly to vote for the RTD resolutions and support the notion in speeches, whereas at national level nothing is done to for its implementation.

⁸¹³ See art 1(2), 2(3), 3 to list some of them.

⁸¹⁴ More analysis on the implementation of the RTD in Cameroon will be provided in chapter 6 of this research which focuses on the prospects of the RTD in Africa.

⁸¹⁵ ‘Biya emphasises on the right to development as the main human right’ *Afrol News* 8 September 2000, available at http://www.afrol.com/NEWS/cam007_biya_millennuim.htm (accessed 18 December 2008).

Interestingly, in its Concluding Observations on the Report,⁸¹⁶ except from observing that ‘poverty hinders the implementation of human rights in Cameroon’,⁸¹⁷ the African Commission did not address the issues or rather overlooked the lack of Report on article 22 of the ACHPR. There was no recommendation whatsoever on the question. Such reporting and monitoring mistakes do not enhance the prospects of realisation of the RTD in Africa and in Cameroon in particular.

4.3.2 Uganda

The 1995 Ugandan Constitution recognises the RTD. In the draft constitution, the RTD was a significant part of chapter 3. However, in the final constitution, the RTD finds its place in the midst of the National Objectives and Directive Principles of State Policy as objective number nine which reads: ‘The right to development’ and provides that ‘in order to facilitate rapid and equitable development, the State shall encourage private initiative and self-reliance’. In addition, objective number ten calls upon the state to undertake needed measures to involve the people in the formulation and implementation of development plans and programmes which affect them. In addition, the principles stress the role of the state in development.

Nevertheless, locating the RTD in the National Objectives and Directive Principles of State policy casts serious doubt on the justiciability of the provisions. Putting the RTD away from chapter 4 of the Constitution which deals with the Bill of Rights evidences that the drafters had no intention to ensure its justiciability.

However, the amendment of the 1995 Constitution through its article 8 (a) 1 turned the RTD into a justiciable right. It states that ‘Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of State policy’.⁸¹⁸ It can be argued that the RTD is now part of the Ugandan Bill of Rights as

⁸¹⁶ Presented at the 39th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Banjul, Gambia from 11 to 25 May 2005.

⁸¹⁷ Para 12 of the Concluding Observations.

⁸¹⁸ 1995 Constitution of Uganda as amended in February 2006.

provided by chapter 4 of the Constitution. Meanwhile, it is important to note that reporting under article 62 of the ACHPR⁸¹⁹ the Uganda Report does not mention what is done to operationalise article 22 of the African instrument dealing with the right under study.⁸²⁰

4.3.3 Malawi

Section 30 of chapter 4 of the 1994 Malawian Constitution reads:

1. All persons and people shall have a right to development and therefore to enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
2. The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
3. The state shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
4. The state has the responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

From this section, different features of the RTD can be drawn: Just like in the first article of the UNDRTD, the RTD is an individual and collective right to be enjoyed without discrimination in Malawi. The content of the right, enjoyment of ‘economic, social, cultural and political development’ is also similar to the content at regional as well international levels.

In Malawi, the RTD is justiciable and the state is clearly the primary entity responsible to deliver its people from poverty. In enjoying the RTD, not only should the vulnerable people

⁸¹⁹ Art 62 of the ACHPR ‘Each State Party shall undertake to submit every two years from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter’.

⁸²⁰ 39th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, May 2006.

not be forgotten, they should be given special attention. In fact, the RTD provision in the Malawian Constitution sounds like article 8(1) of the UNDRTD which highlights the most important role of the state in providing the RTD. It can be argued that Malawi incorporates international and regional instruments pertaining to the RTD into its municipal law

However, the November 2008 human development statistics in Malawi is far from being encouraging. Infant mortality rate is 90.55 deaths /1000 live births, life expectancy 43.45 years, 900 000 people living with HIV and AIDS, the risk to suffer and die from food and water borne diseases is very high, the literacy rate is only 62,7% and the population below poverty line is 53%.⁸²¹ Notwithstanding section 13(e) of the Malawi Constitution calling upon the state to promote the welfare of its citizens through policies and legislation, poverty is a reality in the country where ‘rural standards of living is a key indicator of the success of Government policies’.⁸²² This indicator is clearly in line with the Preamble of the UNDRTD which views development as⁸²³

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

Rural Malawians are however, forgotten.⁸²⁴ During their research on the ‘Right to Development, the Quality of Rural Life, Legislation and the Performance of State Duties’ in rural Malawi, Kamchedzera and Banda observed that rural dwellers were not in the agenda of the state. In fact, during the sum up and feedback session of the discussions, a village

⁸²¹ November 2008 CIA, The World Fact Book, Malawi available at <https://www.cia.gov/library/publications/the-world-fact-book/geos/mi.html> (accessed 15 November 2008).

⁸²² Art 13(e) of the Malawian Constitution.

⁸²³ UNDRTD, Preamble para 2.

⁸²⁴ G Kamchedzera and C U Banda ‘The Right to development, the quality of rural life, and the Performance of legislative duties during Malawi’s first five years of multiparty politics’. A paper based on research on the right to development, the quality of rural life, legislation and the performance of state duties; Research dissemination seminar number law/2001/2002/001, Faculty of Law, University of Malawi.

representative said:⁸²⁵

I would like to thank you on behalf of this village. I would like you to know that under the previous regime, we expected nothing and we received nothing in this village. With the new Government, we again expected nothing and we have received nothing. When we saw you enter our village, we expected nothing and we do not think you will give us anything once you return to where you have come from. Why then should I thank you? Because we think that by taking the effort to come here and discuss issues with us, you probably think that we too are people just like you.

Indeed, this statement confirms that rural folks are less than human beings in Malawi and have no rights including the RTD. As a result, even as the mean household size is the same for both urban and rural areas, at 4.3, the dependency ratio is 1.1 in rural areas compared to 0.8.⁸²⁶ The net primary school enrolment rate is 83.4 % in urban areas but 77% in rural areas.⁸²⁷ Even though mean distances to school are shorter in rural areas, 3.4 km compared to 3.7 km in urban areas, rural children take more time to get to school because of the lack of means of transport.⁸²⁸ In rural areas, children take 27.5 minutes to travel to school compared to 23 minutes in urban areas. About 5.9% of the rural folks spend less than Kwachas 50 per month.⁸²⁹ In the urban areas, poor people represent only 0.1%.⁸³⁰ Though this statistics were released by the Malawian National Statistical Office, back in 2000, the level of poverty in the country remains appalling as demonstrated by the November 2008 CIA World-Fact Book statistics.⁸³¹ Malawi should take its responsibility and comply with its national Constitution in

⁸²⁵ Kamchedzera & Banda (2001/2002) 13.

⁸²⁶ Kamchedzera & Banda (2001/2002) 16.

⁸²⁷ Kamchedzera & Banda (2001/2002) 16.

⁸²⁸ Kamchedzera & Banda (2001/2002) 17.

⁸²⁹ Kamchedzera & Banda (2001/2002) 17.

⁸³⁰ Kamchedzera & Banda (2001/2002) 17.

⁸³¹ See November 2009 CIA, The World Fact Book, Malawi available at <https://www.cia.gov/library/publications/the-world-fact-book/geos/mi.html> (accessed 15 November 2008).

general and the provision on the RTD in particular. It should take all necessary measures to address well-being in the entire country.

4.3.4 Ethiopia

In its chapter 3 on Fundamental Rights and Freedoms, the 1994 Ethiopian Constitution provides for the RTD in its article 43 which reads:

The Right to Development

1. The right of the peoples of Ethiopia collectively, or the nations, nationalities and peoples in Ethiopia, individually, to improve their standard of living and to sustainable development is guaranteed.
2. Citizens shall have the right to participate in national development, and in particular, to demand that their opinions be heard on matters of policies and of projects pertaining to the community of which they are members.
3. International agreements entered into or relations formed by the State shall be such as to guarantee the right to the sustainable development of Ethiopia.
4. The main objectives of development activities shall be the citizens' development and the fulfillment of their basic needs.

Similar to the Malawian Constitution, the Ethiopian one secures a justiciable RTD in its text. The Ethiopian text addresses all the elements of the RTD as included in the 1986 UNDRTD and the 1993 Vienna Declaration. The individual and collective aspect of the right are mentioned,⁸³² the right to participation is raised,⁸³³ the international community's duties through international agreements signed by Ethiopia are referred to,⁸³⁴ and finally the fact that the whole process of development conducted by the state should aim to ensure basic needs or human dignity is highlighted.⁸³⁵ The reality is that, just like Malawi, Ethiopia is one of the poorest countries on earth.

⁸³² 1994 Ethiopian Constitution, art 43(1).

⁸³³ 1994 Ethiopian Constitution, art 43(1), art 4(2).

⁸³⁴ 1994 Ethiopian Constitution, art 43(1), art 43(3).

⁸³⁵ 1994 Ethiopian Constitution, art 43(1), art 43(4).

Nonetheless, not only is the RTD enforceable in Ethiopia, the country's Report to African Commission clearly exposes measures taken to implement the right at a local level. For instance,

[u]nder article 89.5 [of the Ethiopian Constitution] the Government has the duty to hold, on behalf of the people, land and other natural resources and to deploy them for their common benefit and development; the Government shall at all times promote the participation of the people in the formulation of national development policies and programmes. It shall also have the duty to support the initiatives of the people in their development endeavors.⁸³⁶

Accordingly, realising the RTD in Ethiopia is all about enhancing the standards of living for all through the use of resources, the participation of people in development policies under the support of the state which is in the driving seat. In fact, in reporting to the African Commission on article 22, Ethiopia mostly highlighted constitutional provisions protecting the RTD, though these provisions are yet to materialise on the ground. Furthermore, the measures taken to implement the constitutional provisions are underlined in the Report. This situation and the widespread poverty in Ethiopia raise questions on what is done to address poverty and implement the constitutional provisions on the RTD. It is not enough to recognise the RTD in a constitution and go to bed. Action needs to be taken to actualise and render the constitution useful. States should comply with their obligations to take appropriate measures at local as well as global to better its people's life.⁸³⁷

4.3.5 South Africa

Though the South African 1996 Constitution does not mention the RTD as a human right, its chapter two or Bill of Rights guaranteeing socio-economic rights comprises the protection of the RTD as will be shown below.

⁸³⁶ Ethiopia combined Report (initial and four periodic reports) to the African Commission on Human and Peoples' Rights, para 423.

⁸³⁷ UNDRTD, art 8(1).

The legislature, the Human Rights Commission,⁸³⁸ the Commission for Gender Equality, the Public Protector,⁸³⁹ the Auditor-General⁸⁴⁰ and the courts ensure that the RTD is respected. Despite the fact that these institutions do not address the RTD *per se*, they protect socio-economic rights which are the correlative rights to the RTD. The South African Chief Justice Pius Langa stresses that at national level there cannot be development if socio economic rights are not realised.⁸⁴¹ The First Periodic Report of South Africa to the African Commission at its 38th Ordinary Session clarifies:⁸⁴²

Although the Constitution does not provide for the right to development, this right is implied since the Constitution provides social, economic and cultural rights, including political rights, which are features of the right to development defined in article 1 of the UN Declaration as comprehensive economic, social, cultural and political processes which aim at the constant improvement of the well-being of the entire population and of all individuals, in which human rights and fundamental freedoms can be realised. The above mentioned rights enshrined in the Constitution provide a framework for comprehensive economic, social, cultural and political processes aimed at constant improvement of the well-being of the entire population and all individuals, in which human rights and fundamental freedoms can be realised.

⁸³⁸ Sec 184(3) of the South African Constitution empowers the Human Rights Commission to demand from all organs of the State ‘information on the measures taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment’.

⁸³⁹ Established under Sec 182 of South African Constitution, the Public Protector has the power to ‘investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice’.

⁸⁴⁰ Sec 188(1) of the Constitution empowers the Auditor-General to: ‘audit and report on the accounts, financial statements and financial management of :

- a) all national and provincial state departments and administration;
- b) all municipalities; and
- c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General’.

⁸⁴¹ Justice Pius N Langa ‘Human rights, the rule of law, and the right to development’ speech presented at the Birchwood Conference Center in Johannesburg, 24 November 2006 (on file with author).

⁸⁴² First Periodic Report of South Africa to the African Commission, para 325.

In other words, elements of the RTD as defined by international and regional instruments are part and parcels of the Constitution. More importantly, aware that the achievement of the right is a continuing process,⁸⁴³ the government undertook various measures for its achievement: Legislation and Policy,⁸⁴⁴ Peoples Housing Process Policy,⁸⁴⁵ National Savings Programme,⁸⁴⁶ Policy on Joint Ventures,⁸⁴⁷ Housing Consumer Protection Measures Act, 1998 (Act of 1998),⁸⁴⁸ The Rental Housing Act of 1999,⁸⁴⁹ the Local Government: Municipal System Act of 2000⁸⁵⁰ and numerous case law discussed below show South African's commitment to the RTD. The South African Report to the African Commission clearly identifies measures taken to realise the RTD.

In response, the African Commission was only concerned by the lack of participation of states, institutions and of civil society in the preparation of the report.⁸⁵¹ In fact, it can be argued that the African Commission has no problem with South Africa's commitment to the RTD, except that there is a need to involve the civil society and other stakeholders on human rights in the preparation of the Report.⁸⁵²

⁸⁴³ First Periodic Report of South Africa to the African Commission, para 325.

⁸⁴⁴ First Periodic Report of South Africa to the African Commission, para 326.

⁸⁴⁵ First Periodic Report of South Africa to the African Commission, para 327.

⁸⁴⁶ First Periodic Report of South Africa to the African Commission, para 327.

⁸⁴⁷ First Periodic Report of South Africa to the African Commission, para 328.

⁸⁴⁸ First Periodic Report of South Africa to the African Commission, para 329.

⁸⁴⁹ First Periodic Report of South Africa to the African Commission, para 330.

⁸⁵⁰ First Periodic Report of South Africa to the African Commission, para 331.

⁸⁵¹ 38th Ordinary Session of the African Commission, Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa; para16.

⁸⁵² Recommendation of the African Commission, para 26.

Notwithstanding the positive Report to the African Commission, the protection of socio-economic rights and the RTD in South Africa are hampered by the fact that socio-economic rights are subjected to progressive realisation, or the requirement that the government must only act according to the availability of financial resources.⁸⁵³ This condition gives room for the state to justify its inability or unwillingness to achieve socio-economic rights and protect the RTD.

Nevertheless, as correctly observed by Marks and Andreassen ‘progressive realisation’ does not allow the state to neglect the protection of socio-economic rights.⁸⁵⁴ On the contrary, the notion of ‘progressive realisation must be seen in the light of the overall objective of the Covenant [on Economic Social and Cultural Rights], which is to establish clear obligations for state parties to move as expeditiously as possible to realise these rights’.⁸⁵⁵

Nonetheless, in ensuring the justiciability of socio-economic rights, the South African example should be followed by other countries in Africa. The country has been taken to court for not delivering houses⁸⁵⁶ and not protecting the right to health.⁸⁵⁷ In the case of *Government of Republic of South Africa and Others v Grootboom and Others*,⁸⁵⁸ where a poor community, living in huts had been evicted from a privately owned property after having

⁸⁵³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); 1997 12 BCLR 1696 (CC).) Also *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)* (No 2) 2002 5 SA 721 (CC).

⁸⁵⁴ S Marks and B Andreassen ‘Introduction’ in Marks & Andreassen (eds) *Development as a human right. Legal, political and economic dimensions* (2006) xvi.

⁸⁵⁵ Marks and Andreassen (2006) xvi; also Committee on ESCR, General Comment No 3 (1990) on the nature of state obligations under art 2 (1) of the ICESCR.

⁸⁵⁶ *Government of Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

⁸⁵⁷ *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)* (No 2) 2002 5 SA 721 (CC).

⁸⁵⁸ The *Grootboom* case 2000 11 BCLR 1169 (CC).

applied for low-cost housing to the government, the Constitutional Court of South Africa held that

[t]here can be no doubt that human dignity, freedom and equality; the foundational values of our society are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2 [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁸⁵⁹

Based on article 26 of the Constitution, the Constitutional Court made it compulsory to the government to deliver housing to the poor. The South African Government was obliged to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the said right. The *Grootboom* case shows the importance of socio-economic rights and the right of access to housing in particular in the realisation of the RTD in South Africa.

In another South African case, *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (*TAC case*),⁸⁶⁰ the Treatment Action Campaign challenged the South African Government's policy in terms of which an antiretroviral drug, Nevirapine, was made available only in certain research sites within the public health sector for the purposes of testing the efficacy of the programme to prevent mother-to-child transmission of HIV and AIDS. The Constitutional Court declared that section 27(1) and (2) of the South African Constitution required the government to devise and implement within its available resources a comprehensive and coordinated programme to realise progressively the right of pregnant women and their newborn children to have access to health services to combat mother-to-

⁸⁵⁹ The *Grootboom* case 2000 11 BCLR 1169 (CC), para 23.

⁸⁶⁰ The *TAC case*. For more on this case, see M Heywood 'preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the *Treatment Action Campaign case* against the Minister of Health' (2003) 19 *South African Journal of Human Rights* 278. See also E Baimu 'The government's obligation to provide anti-retroviral to HIV-positive pregnant women in an African human rights context: The South African Nevirapine case' (2003) 3 *African Human Rights Law Journal* 160. See also D M Chirwa 'The right to health in international law: Its implications for the obligation of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 541.

child transmission of the disease.⁸⁶¹ The Court ordered the South African Government to immediately remove the barriers that hinder the distribution of Nevirapine in public hospitals for the sake of protecting mother- to-child transmission of the disease. The distribution was not supposed to consider suitability of a medical site or other such factors. In this way, the Court played an important role in the promotion of development based on socio-economic rights in general and the right to health in particular.

The South African jurisprudence further shows that the RTD goes beyond socio-economic rights and civil and political rights and includes other branches of law such as environmental law that can ensure the protection of human well-being. In this regard, the South African Constitutional Court handed down a very important judgment on 7 June 2007. In the *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,⁸⁶² the Court highlighted the importance of protecting the environment, and linked its protection to the fulfillment of other human rights under the Constitution and to the protection of the right to life itself. In addition, the case provides more clarification on the RTD.

The question before the Court was to know whether the environmental authorities considered and evaluated the social and economic impact of the proposed filling station on existing ones and how an additional filling station would affect the environment.⁸⁶³ In answering this

⁸⁶¹ Section 27 of the South African Constitution provides as follows:

- 27. (1) Everyone has the right to have access to
 - a. health care services, including reproductive health care; sufficient food and water; and
 - b. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

⁸⁶² *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* Case No. CCT67/06. See also *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 2 SA 163 (SCA).

⁸⁶³ *Fuel Retailer* case, para 91.

question, the Constitutional Court provided more information on the content of the RTD. Even though the case does not address the RTD *per se*, it demonstrates the connection between the well-being of human beings (which is the main concern of the RTD) with the protection of the environment.⁸⁶⁴ Justice Ngcobo emphasises this link by quoting the report of the World Commission on Environment and Development, which reads:⁸⁶⁵

Environment stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water and forest degradation. Energy policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not about the protection of nature; they are both relevant for improving the lot of humankind.

The link between the RTD and environmental concerns is explained by the Rio Declaration through its principles 3 and 4. Principle 3 provides that ‘the Right to Development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’ while Principle 4 provides that environmental protection is fundamental to achieving sustainable development. Therefore, Boyle and Frestone correctly observe that the core element of the concept of sustainable development is the inclusion of both developmental and environmental protection,⁸⁶⁶ or what Justice Ngcobo calls ‘the principle of integration of environment protection and socio-economic development’.⁸⁶⁷

The discussion above focuses on the implementation of the RTD at the national level where the government is the primary duty bearer of the RTD. It is responsible for the creation of the

⁸⁶⁴ *Fuel Retailer case*, para 44.

⁸⁶⁵ *Fuel Retailer case*, para 44; also General Assembly 42nd Session: Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) at http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm (accessed 9 March 2008).

⁸⁶⁶ *Fuel Retailers case*, para 50.

⁸⁶⁷ *Fuel Retailers case*, para 50.

climate needed to operationalise the right in question. This can be done through the establishment of democratic institutions, respect for the rule of law, good governance and appropriate poverty alleviation policies.

Though as a result of bad governance, several African states do not take appropriate measures to ensure the RTD, where the latter is comprised in their law. The first step towards improving the situation is to domesticate the ACHPR as well as its Protocol on Women's rights. In other words, before looking outwards for assistance, African governments must first look inwards. They should create a stable legal framework, informed by supreme national constitutions and establish good governance before turning to development partners. In this perspective, Mbazira argues that Africa should begin to get rid of its problems by utilising the locally available resources and avoid relying on external solutions.⁸⁶⁸

In sum, the four African countries discussed above recognise or strive to insert the RTD in their national legal systems. This should be followed by other African countries (parties to the ACHPR) that have the obligation to domesticate article 22 of the ACHPR.

4.4 The jurisprudence of the African Commission on the RTD

This section will focus on four communications: the *Bakweri Land Claims Committee v Cameroon*⁸⁶⁹ (*Bakweri case*), the first ever inter-state complaint brought before the African Commission, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*.⁸⁷⁰ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*⁸⁷¹ (*Endorois case*) and *SERAC v Nigeria*⁸⁷² (*SERAC case*) where the African Commission failed to take a strong stand on the RTD.⁸⁷³

⁸⁶⁸ Mbazira (2004) 47.

⁸⁶⁹ *Bakweri Land Claims Committee v Cameroon*, Communication No 260/2002, AHRLR (2004) 43.

⁸⁷⁰ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

⁸⁷¹ Communication 276/2003.

⁸⁷² *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, the Gambia, and www.achpr.org.

4.4.1 *The Bakweri Land Claims Committee v Cameroon*⁸⁷⁴

In the *Bakweri* case, the complainants submitted a communication to the African Commission to claim their historic lands which were held by non-native people. They grounded their communication on the violation of their right to have their cause heard,⁸⁷⁵ their rights to property,⁸⁷⁶ wealth and natural resources⁸⁷⁷ as well as the violation of their RTD.⁸⁷⁸ Unfortunately, this case did not go beyond the admissibility phase because local remedies were not exhausted by the applicants.⁸⁷⁹ Hence, it did not bring any significant development on the RTD at the African Commission. However, the RTD was on the table; in other words, the RTD is well written in the African law.

4.4.2 *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*⁸⁸⁰

⁸⁷³ It is worth to note that apart from observing that the right to food (violated by the defendant) is implicit in several provisions of the ACHPR such as art 4 on right to life, art 16 on right to health article 22 on the RTD, the African Commission doesn't find a violation of the RTD per se in this case. (see *SERAC & Another v Nigeria* para 64).

⁸⁷⁴ *Bakweri Land Claims Committee case v Cameroon*, Communication No 260/2002, AHRLR (2004) 43.

⁸⁷⁵ Art 7(1)(a) of the ACHPR.

⁸⁷⁶ Art 14 of the ACHPR.

⁸⁷⁷ Art 21 of the ACHPR.

⁸⁷⁸ Art 22 of the ACHPR.

⁸⁷⁹ Art 50 of the ACHPR reads: 'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the commission that the procedure of achieving these remedies would be unduly prolonged'.

⁸⁸⁰ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

Unlike the *Bakweri* case, which did not see its completion, the *Democratic Republic of Congo (DRC)* case is a good development on the RTD. Here are the facts: On 9 March 1999, in the first interstate communication filed before the African Commission the DRC lodged a complaint against Burundi, Rwanda and Uganda; the DRC alleged that it was the victim of a military assault by Burundi, Rwanda and Uganda that had invaded its border provinces in the eastern part of the country and committing mass violations of human rights and international law. These violations comprise the mass killing of civilians and the invasion of a hydroelectric dam. The attack on the hydroelectric dam yielded the interruption of electricity supply to homes, schools and hospitals which resulted to the deaths of patients relying on life support systems.

The DRC also claimed that the respondent states were responsible for human rights violation such as rape, mass looting of civilian property and natural resources as well as the forced movement of populations from the region into ‘concentration camps’ in Rwanda in order to create a Tutsi land.

In term of law, the complainant argued that not only the respondents’ actions violated articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the ACHPR, they also encroach upon international law with special attention to the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 and its additional protocol 1, the UN Charter and the UN Declaration on Friendly Relations Between Nations.

Burundi refused to take part in the proceedings, Rwanda refused to take part in the proceedings beyond admissibility stage and though Uganda denied the allegations against it, the African Commission found for the applicant. In fact, bound by article 23 of the ACHPR, the African Commission had to uphold international law and had to draw inspiration from international law as provided by articles 61 and 62 of the ACHPR in making its decision. The respondents were found guilty of violation of the alleged provisions of international law and the ACHPR.

More importantly on the RTD, the African Commission found for the applicant on two grounds: first, it found the dumping and mass burial of victims of massacres and killings

orchestrated against the people of the Eastern Province of the DRC particularly appalling and made a pronouncement on the RTD in these words:⁸⁸¹

The Commission further finds these acts barbaric and in reckless violation of Congolese peoples' rights to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African tradition and values enunciated in the preamble to the African Charter.

Here, the African Commission's equates the killings and barbaric acts against Congolese people to a violation of their right to cultural development. Though indeed there is a violation of human rights and the right to life, the African Commission did not explain clearly how the killings and barbaric acts affect the right to cultural development.

Second, the African Commission sees a direct link between the right to wealth and national resources and the RTD. It also links the right to wealth and natural resources to the ability of states to fulfill their individual and collective obligations to achieve the RTD (article 22(2) of the ACHPR). In this regard, the African Commission argues that

[the] deprivation of the right of the people of the Democratic Republic of Congo, in this case, 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.

Put differently, in the *DRC* case unlike in the *SERAC* case, the realisation of the RTD is linked to the realisation of the right to wealth and natural resources. This approach which takes into account the interconnectedness of human right should be welcomed because, as demonstrated earlier, the RTD is a multifaceted human right and should be addressed as such.

⁸⁸¹ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*, para 87.

4.4.3 *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*⁸⁸²

At its 46th Ordinary Session, the African Commission⁸⁸³ delivered a historical decision through the *Endorois* case. This communication is important and unique, because, for the first time, the African Commission was able to deal in a substantive and groundbreaking way with the alleged violation of the RTD. Here are the facts:⁸⁸⁴

On 22 May 2003, the complaint was lodged by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions on behalf of the Endorois community. The complainants claimed the eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s, to set up a national game reserve and tourist facilities. The communication dealt with several alleged human rights violations of the Endorois community.

According to the complainants, the eviction was a violation of the Endorois peoples' human rights resulting from the displacement from their ancestral lands (upon which their sustainable way of life was based) without adequate compensation. In addition, the lost of their land yielded the interruption of their pastoral activity and the infringement of their rights to practice their religions and culture as well as their 'overall process of development'.⁸⁸⁵ Furthermore, the complainants alleged that the Endorois people were dispossessed from their land, their property without having a say and that all decisions affecting their land were taken without their effective participation and complained that this was a violation of their RTD.

⁸⁸² Communication 276/2003.

⁸⁸³ Held in Banjul, The Gambia from 11 – 25 November 2009.

⁸⁸⁴ Communication no 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

⁸⁸⁵ Communication no 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, para 1

The case reached the African Commission after Kenyan courts' failure to remedy the injustice. In terms of the ACHPR, these allegations encompass the violation of articles 8,⁸⁸⁶ 14,⁸⁸⁷ 17,⁸⁸⁸ 21⁸⁸⁹ and 22⁸⁹⁰ of the ACHPR by the Republic of Kenya.⁸⁹¹ Nevertheless, though other rights involved are not less important, the analysis of this decision will be centred on the claims pertaining to the RTD which is at the heart of the thesis.

In claiming their RTD, the complainants founded their arguments on three main grounds:

- The violation of their right to participation in decisions affecting their land and development and
- The violation of their right to self-determination and natural resources attached to their right to be a distinct 'people'.

a- The right to participation in decision affecting their land and development

The complainants claimed that they did not take part or participate in the development process and that the well-being of their community was neglected by the Kenyan government.⁸⁹² They argued that their consent was not required and clearly indicated that an appropriate consent 'requires at minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process with an effective opportunity to

⁸⁸⁶ Freedom of conscience and religion.

⁸⁸⁷ Right to property.

⁸⁸⁸ Right to culture.

⁸⁸⁹ Rights to free disposition of natural resources.

⁸⁹⁰ RTD.

⁸⁹¹ See Communication 276/2003, para 22.

⁸⁹² Communication 276/2003, para 125.

participate individually or collective’.⁸⁹³ In other words, the Endorois people stressed the violation of their right to participation in issues affecting their communities and even their life because they had no say when their land was taken away from them.

In reaction to these allegations, the Kenyan government disagreed and observed that the right to participation of all is ensured through a democratic process informed by free and fair election involving representatives.⁸⁹⁴ In this dispute, the African Commission was called upon to make a decision on the right to participation and its impact on the realisation of the RTD.

The right to participation or the right not to be excluded is secured in several human rights instruments. The ICCPR caters for the right to participation in these terms:⁸⁹⁵

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It could be argued that this provision caters for the right to participation of indigenous people under the concept of ethnic or linguistic minorities.

The right to participation is also located in the 1986 UNDRTD, which sees the human being at the centre of development and should therefore be the ‘participant and beneficiary’,⁸⁹⁶ or rather the alpha and omega, of development. Furthermore, not only should individuals and groups participate in development,⁸⁹⁷ their participation should ‘be active, free and meaningful’ and they should also benefit from the result of development.⁸⁹⁸

⁸⁹³ Communication 276/2003, para 133; also *Mary and Carrie Dann v USA* (2002), para 136.

⁸⁹⁴ Communication 276/2003 Para 270.

⁸⁹⁵ ICCPR, art 27.

⁸⁹⁶ UNDRTD, art 2(1).

⁸⁹⁷ UNDRTD, art 2(2).

⁸⁹⁸ UNDRTD, art 2(3).

Similar to the instruments mentioned above, the Rio Declaration,⁸⁹⁹ the 1990 African Charter for Popular Participation in Development and Transformation,⁹⁰⁰ the ACHPR⁹⁰¹ and the Declaration on the Rights of Indigenous People⁹⁰² also provide for the right to participation. From the reading of these instruments, the participation could be defined as:⁹⁰³

A process by which the government and civil society open dialogue, establish partnerships, share information and otherwise interact to design, implement and evaluate development policies, project and programs...that requires the involvement and commitment of all interested parties, including, among others, the poor and traditionally marginalized groups, especially racial and ethnic minorities.

According to this definition, all the stakeholders of development including ‘traditionally and marginalised groups especially racial and ethnic minorities’ shall be involved in the development process. The African Commission’s pronouncement on the right to participation was heard when in the *SERAC* case the commission noted that the Ogoni people were marginalised by the government while dealing with the Dutch oil company, Shell. (To be discussed shortly).

In the *Endorois* case, the African Commission found that the consultations undertaken with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission’s benchmark of

⁸⁹⁹ Adopted at the Rio Conference on Environment and Development in Rio de Janeiro, Brazil, 3-4 June 1992, para 21 and 22 clearly underline the right to participation of indigenous people in development.

⁹⁰⁰ Adopted at the International Conference on Popular Participation in Development and Transformation in Arusha, Tanzania ; UN doc. E/ECA/CM.16/11,1990. Addis Ababa, UN Economic Commission for Africa.

⁹⁰¹ Art 13.

⁹⁰² UN Res GA/10612 of 13 September 2007, art 11 and 12 for example.

⁹⁰³ This definition is the fruit of the 1996 Santa Cruz Summit on Sustainable Development. It was subsequently adopted by the Inter-American Council for Development in 2000; also K Mynnti ‘The right of indigenous peoples to participate in development projects’ in M Scheinen & M Suksi (eds) *Human Rights in Development Year Book 2002- Empowerment, participation, accountability and non-discrimination: Operationalising a human rights based approach to development* (2005) 235.

consultations in a form appropriate to the circumstance. The African Commission observed that ‘community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve’,⁹⁰⁴ hence its decision to urge the state to warrant the rights to effective participation of Endorois in development issues.

In calling upon the state to ensure an ‘active, free and meaningful participation in development’,⁹⁰⁵ by the beneficiaries of development, it could be argued that the African Commission underscored the point that even if the beneficiaries ignore their right to participate, they should be educated and informed timeously to ensure their inclusion in development projects.

This position of the African Commission is conducive to the realisation of human rights and the RTD in particular, because as noted through the Maastricht guidelines,⁹⁰⁶ the state has the obligation to promote, protect and fulfil human rights, and therefore should take all necessary measures to involve the beneficiaries of rights in the process of development. Thus, the correctness of the African Commission’s statement:

The State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.⁹⁰⁷

State’s compliance with this prescription will definitely be a good step towards ensuring the RTD.

b - The right to self-determination and natural resources and the right to be a distinct people

⁹⁰⁴ Para 281.

⁹⁰⁵ UNDRTD, art 2(3).

⁹⁰⁶ The Maastricht principles describe the duty of the state in terms of human rights realisation. Accordingly, the state has the duty to promote, respect and fulfilled human rights. Sees section 3.4.1.1 of this thesis.

⁹⁰⁷ Communication 276/2003, para 289.

In claiming their RTD, the complainants underlined that their eviction from their land negated their right to self-determination over their land and their natural resources. In other terms, their territorial and economic self-determination were violated;⁹⁰⁸ in this instance, the complainants combined the right to self-determination (art 20 of the ACHPR) and the right to natural resources (article 21 of the ACHPR) to claim their RTD. They also argued that encroachment upon these two rights abolished their choices and capabilities in terms of ‘liberty in their action’,⁹⁰⁹ and therefore hinders their RTD. They also contended that the eviction demolished their way of life, sources of income and as a result, hindered their ability to pay their taxes which led to the impounding of their cattle by the government.⁹¹⁰

In response to these allegations, Kenya argued that the complainants’ contention was untrue as a tax is charged in income and that if the Endorois had no income, there were not taxed at all.⁹¹¹ In resolving this question, the African Commission had to address the right to territorial and economic self-determination as an important element of the RTD.

As mentioned earlier, the right to self-determination is secured in the provision of the ICESCR and the ICCPR in their common article 1(1), in the ACHPR,⁹¹² in the Vienna Declaration,⁹¹³ the CERDS,⁹¹⁴ and the UNESCO Convention on the Protection and Promotion

⁹⁰⁸ Communication 276/2003, para 129.

⁹⁰⁹ Communication 276/2003, para 128.

⁹¹⁰ Communication 276/2003, para 126.

⁹¹¹ Communication 276/2003, para 273.

⁹¹² Art 20.

⁹¹³ Vienna Declaration, part 1, para 2; also art 4 of the NIEO Declaration, 26 (k) and 14 (e) of Copenhagen Declaration.

⁹¹⁴ Art 2 ‘Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities’.

of the Diversity of Cultural Expressions⁹¹⁵ as well as the UN Declaration on the Rights of Indigenous Peoples.⁹¹⁶ These instruments provide for national self-determination in the realisation of development with an authoritative language. In general, they give instructions to states by using ‘shall’ in various instances; the state ‘shall’ take steps to...⁹¹⁷ For most of these instruments, self-determination is a group right or ‘peoples’ right’. It seems that in the international arena, self-determination refers to sovereign entities like states.

However, back in 1999, in its Concluding Observation on Canada, the Human Rights Committee recognised that numerous ‘peoples’ may exist within a state.⁹¹⁸ It stated that

[t]he right to self-determination requires, *inter alia* that all people must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee recommends that decisive and urgent action be taken towards the full implementation of the recommendations on land and resource allocation. [Recommendations made by the Royal Commission on aboriginal Peoples in view to protect indigenous peoples’ rights in Canada].⁹¹⁹

Similarly, the Committee on Human Rights used common article 1 on self-determination to protect indigenous peoples’ rights within the confine of countries like Mexico,⁹²⁰ Norway,⁹²¹ Australia,⁹²² amongst others.

⁹¹⁵ Art 2 (2).

⁹¹⁶ Art 3.

⁹¹⁷ Art 5 UNDRTD for example, also CERDS, art 1 (3) The States Parties to the present Covenant, ..., shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁹¹⁸ Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8.

⁹¹⁹ Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8.

⁹²⁰ Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999).

⁹²¹ Concluding Observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999).

⁹²² Concluding Observations on Australia, UN Doc. CCPR/CO/69/AUS (2000).

However, emphasising the need to use an interconnectedness approach to human rights interpretation, Scheinin observes that the interdependence-based interpretation of the ICCPR's provisions reveals that article 1 and article 27⁹²³ are linked. Following this approach, article 27 on minority rights reveals that self-determination is also an individual human right.⁹²⁴ In *Makuika et al v New Zealand*,⁹²⁵ which dealt with national fisheries settlement in New Zealand and the share of the indigenous peoples known as Maori, the Human Rights Committee realised that minorities rights included in article 27 incorporate various elements of self-determination as provided for by article 1 of the Covenant.

Beside the Human Rights Committee's Concluding Observations which view peoples' rights to self-determination within the boundaries of a state as a reality, the only international instrument which provides clearly for self-determination of 'people' in a midst of a state is the 2007 UN Declaration on the Rights of Indigenous Peoples. It reads in articles 3, 6 and 23 respectively:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural development

'Every indigenous individual has the right to a nationality' and finally:

Indigenous Peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programme through their own institutions.

⁹²³ Art 27 of the ICCPR reads: 'In those States in which ethnic, religious or linguistic minorities exist, person belonging to such minorities shall not be denied the right, in community with the other members of their groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

⁹²⁴ M Scheinin 'Advocating the right to development through complaint procedures under human rights treaties' in Andreassen & Marks (2006) 276.

⁹²⁵ Communication No 547/1993 *Makuika et al v New Zealand* (27 October 2000). See 2000 Report of the Human Rights Committee, vol. II, UN Doc. A/56/40 (vol. II), 11-29.

These articles not only shed more light on the legal source of the RTD, they also showcase that the right to self-determination can be enjoyed by groups within the confine of a state. The last quote above actually emphasises the right to participation and administration of social programmes aiming at the realisation of socio-economic rights. Again, the composite aspect of the RTD appears. The right to participation or civil and political rights associated with economic, social and cultural rights result in a right called RTD. More importantly, the right to self-determination of an indigenous individual does not deprive him or her of his or her nationality. His or her right to self-determination is actually to be exercised within his or her country of origin.

The right to self-determination of people under colonial rule is at the centre of the Copenhagen Declaration.⁹²⁶ In the same vein, article 20 of the ACHPR reads:

- (1) All people shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- (2) Colonised or oppressed peoples shall have the right to free themselves from the bond of domination by resorting to any means recognized by the international community.
- (3) All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

According to this provision, all people shall enjoy the right to self-determination. People here might include sovereign states or groups within a state. In any case, the article is self explanatory; colonised peoples are also entitled to self-determination. This underscores the colonial domination of Africa and the need for freedom from colonial power. From a decolonisation perspective, self-determination is the national sense of self-esteem without which all societies cannot be developed because they will have no say in their

⁹²⁶ Art 26(k) reads: ‘...Reaffirm the right of self-determination of all peoples, in particular of peoples under colonial or other forms of alien domination or foreign occupation, and the importance of the effective realization of this right, as enunciated, *inter alia*, in the Vienna Declaration’.

relationships.⁹²⁷ It is based on the assertion that all people have an equal right to liberty, to free themselves from any foreign intrusion, to choose their own regime and fight for their freedom, and to benefit from other people's help in their fight if it is necessary.⁹²⁸

More importantly, article 20(2) underlines the right to self-determination of 'oppressed people'. This provision also empowers peoples or groups inside a sovereign state to claim their rights to secede if they are oppressed. This is very much in line with the UN Declaration on the Right of Indigenous Peoples. In this perspective, the African Commission protected the right to self-determination and to natural resources of the Ogoni people through *SERAC V Nigeria*⁹²⁹ discussed elsewhere in this thesis.

Unfortunately, the practice of the right to self-determination does not always comply with the law. Nmehielle argues that, 'African States have individually and under the auspices of the OAU [now AU], taken the position that self-determination does not apply outside the colonial context, because such post-colonial application of the concept will undermine African unity'.⁹³⁰ This policy was also observed during the Biafra struggle when the late Julius Nyerere, former President of Tanzania opposed Biafra's attempt to secede from Nigeria on the ground that it was an attempt to destroy African unity.⁹³¹ Similarly, emperor Selassie of Ethiopia acting as head of the Consultative Committee on the Nigeria-Biafra crisis was of the opinion that national unity of individual African states was a key factor in uniting the continent and therefore the territorial integrity of OAU member states was not negotiable.⁹³²

⁹²⁷ F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights in Africa* (2004) 387; C Heyns 'The African regional human rights system: The African Charter' 108 (2004) *Pennsylvania State Law Review* 691-692.

⁹²⁸ Viljoen (2004) 387.

⁹²⁹ *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, the Gambia, and www.achpr.org.

⁹³⁰ V O Nmehielle *The African human rights system, Its law, practice, and institutions*. (2001)143.

⁹³¹ Nmehielle (2001) 143.

⁹³² Nmehielle (2001) 143.

The refusal to apply the provision on self-determination to groups within Africa was also applied by the ICJ in the case between *Burkina Faso and Mali*.⁹³³ The ICJ declared as follows:

The maintenance of territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by the peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.

In the same vein, in the *Katangese* case⁹³⁴ where the Katangese Peoples Congress requested that the African Commission recognise the peoples' right of the 'Katangese people' to independence, thus allowing them to split from the state of Zaire, the African Commission refused to recognise them as a 'people' and held that it had an obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those state parties to the African Charter.⁹³⁵ The African Commission also held that:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by article 13(1) of the African Charter, the African Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.⁹³⁶

Through the same communication, the African Commission clarifies that self-determination may be exercised through

⁹³³ *Burkina Faso v Republic Mali*, ICJ (22 December 1986) ICJ Reports 554, 566-567.

⁹³⁴ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). For more on this case, and self-determination, also see M Hansungule 'Substantive complaint handling manual for the Ethiopian Human Rights Commission', paper prepared for the Ethiopian Human Rights Commission (on file with author)

⁹³⁵ The *Katangese* case, para 5.

⁹³⁶ The *Katangese* case, para 6.

[i]ndependence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.⁹³⁷

Surprisingly, applicants for self-determination did not claim their RTD which is connected to self-determination. They could have based their claim on article 22 of the ACHPR as well.

Another instance where the African Commission was called upon to clarify the right to self-determination was the *Gambian Coup* case.⁹³⁸ In this case, a *coup d'état* was planned by a military force, which later came into power by force; the African Commission held that the military *coup d'état* was a grave violation of the right of the Gambian people to freely choose their government as entrenched in article 20(1) of the African Charter.⁹³⁹ It was the violation of the right to vote of Gambians which amounts to the violation of their right to self-determination.

As noted above, the rationale behind the refusal of right to self-determination at national level has to do with African unity which was fundamental for the decolonisation of the continent.

However, such policy seems to be very detrimental for the protection of indigenous peoples' rights in general and their RTD in particular. In Namibia as in many parts of the world, indigenous peoples are discriminated against; they have no rights to land, access to justice, culture, education, and healthcare.⁹⁴⁰ In fact, they are oppressed and should be given a right to claim their self-determination not in theory, but in practice because their RTD is at stake. The successful protection of their RTD calls for the implementation of a right to self-

⁹³⁷ The *Katangese* case, para 4.

⁹³⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

⁹³⁹ The *Jawara* case, para 73.

⁹⁴⁰ SA Djoyou Kamga 'Promotion of indigenous and tribal peoples' rights through the implementation of the principles of ILO Convention No.169 and the African Charter on Human and Peoples' Rights: Namibia desk review 5. ILO Project prepared under the auspices of the Centre for Human Rights, University of Pretoria.

determination involving external as well as internal self-determination.⁹⁴¹ In other words, externally, a group should be free to set up its own political institutions, to have its own economic resources, and to be in charge of its culture;⁹⁴² internally, a group should not have its freedoms taken by other groups, states or by an oppressor.⁹⁴³

In the present case (*Endorois*), the African Commission underlined freedom of choice as a core element of the RTD as highlighted by Sengupta the Independent Expert on the RTD.⁹⁴⁴ Accordingly, people should be given the choice to develop their potentials and this cannot be done without territorial and economic self-determination. Development should be understood in terms of freedom where people are free to choose their way of life. In this context, ‘freedom is the primary end and the principal means of development’.⁹⁴⁵ Therefore, without freedom, development and the RTD becomes a pipe dream, hence the correctness of the African Commission’s decision in ruling that the eviction of the Endorois people hinders their right to self-determination and reduced their freedom of action to empower themselves. It could be argued that the African Commission’s decision was a good move towards the ‘legal empowerment of the poor’.⁹⁴⁶ In other words, this decision set a precedent that will inspire and allow the poor to claim their human rights.

In reaching its decision, the African Commission was not only guided by the Report produced by the UN Working Group on Indigenous Populations requiring that ‘indigenous peoples are

⁹⁴¹ L B Sohn ‘The new international law: Protection of the rights of individuals rather than states’ (1982) 32 *American University Law Review* 1, 50.

⁹⁴² Sohn (1982) 50.

⁹⁴³ Sohn (1982) 50.

⁹⁴⁴ A Sengupta ‘The right to development as a human right’ Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at http://www.hsph.harvard.edu/xfbcenter/working_papers.htm 2000 (accessed 30 June 2008).

⁹⁴⁵ A, Sen *Development as freedom* (1999) 35, also H J Steiner *et al International human rights in context law, politics, morals – Text and materials* (2007) 1434.

⁹⁴⁶ D Banik ‘Introduction’ in D Banik (ed) *Rights and legal empowerment in eradicating poverty* (2008) 1.

not coerced, pressured or intimidated in their choices of development’,⁹⁴⁷ but also by the decision of the court in the *Yakye Axa community* case⁹⁴⁸ where it was argued that the

[d]isplacement of the members of the community from [their] lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering’.

In other words, the mere fact that the Endorois people were removed from their land and deprived of their self-determination hindered their ability to realise their RTD. It is observed that the concept of ‘peoples’ and self-determination are linked. Unlike in its previous decision where the African Commission were silent on the issue, it elaborated extensively and clearly defined ‘peoples’.⁹⁴⁹ Relying on the Report of the Working Group on Indigenous Peoples,⁹⁵⁰ the Commission highlighted the identification criteria of indigenous people to be:

- ‘a) the occupation and use of a specific territory;
- b) the voluntary perpetuation of cultural distinctiveness;
- c) self-identification as a distinct collectivity, as well as recognition by other groups;
- and
- d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination’⁹⁵¹

The Commission went on to identify the Endorois as specific group in these words:

The alleged violation of the African Charter by the respondent state are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands,

⁹⁴⁷ Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

⁹⁴⁸ *Indigenous Community Yakye Axa v Paraguay* 17 June 2005, Inter American Court of Human Rights.

⁹⁴⁹ Para 156 -157 of the decision.

⁹⁵⁰ Report of the Working Group, ‘ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (Published by IWGIA, 2005), see Chapter 4.

⁹⁵¹ Endorois case, par, 150.

cultural patterns, social institution and religious systems. The African Commission therefore accepts that self-identification for the Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.⁹⁵²

Through this case, unlike in the previous ones, the African Commission explained the notion of ‘peoples’ and its new approach was vital in finding the violation of the RTD by Kenya. In addition, the Commission did not submit the realisation of the right of to the availability of resources as it was the case in the *SERAC* case in addressing socio-economic rights. It applied the principle of immediate realisation secured in the ACHPR.

c – The impacts of the Endoris decision

Amongst others, the African Commission urged the Government of Kenya to recognise the RTD of the Endorois people, pay them ‘adequate compensation for all the loss suffered, pay [them] royalties from existing economic activities and ensure that they benefit from employment possibilities within the Reserve’ and involve them in the implementation of this ruling.

This decision is a very good move towards the protection of indigenous peoples’ rights in general, and in ‘making the law work for everyone’;⁹⁵³ it is also a defining moment towards the implementation of the RTD. Human Rights Watch observes: ‘[I]t is the first time that any international tribunal has found a violation of the RTD’.⁹⁵⁴

Through this decision, unlike in the *SERAC* case to be discussed shortly, the African Commission seized the opportunity to clarify the substance of the RTD. It clearly stated the ‘constitutive and instrumental’⁹⁵⁵ features (including the concept of ‘peoples’) of the right. In other words, it is a

⁹⁵² Para 157 of the decision.

⁹⁵³ A Sengupta ‘The political economy of legal empowerment of the poor’ in D Banik (eds) *Rights and legal empowerment in eradicating poverty* 2008 (31).

⁹⁵⁴ Human Rights Watch ‘Kenya: Landmark Ruling on Indigenous Land Rights

African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development’ at

http://www.witness.org/index.php?option=com_content&task=view&id=1015&Itemid=168 and

<http://www.hrw.org/africa/kenya> (accessed 10 March 2010).

⁹⁵⁵ Communication 276/2003, para 277.

process or a tool through which all human rights are realised in order to reach the end product which is the RTD.

The *Endorois* decision is very interesting in clarifying the substance of the RTD. In *William Courson v Zimbabwe*,⁹⁵⁶ the complainant submitted a communication against Zimbabwe concerning the legal status of homosexuals since homosexuality was outlawed by the Zimbabwean legislation. Among others, the complainant claimed that the criminalisation of homosexuality in Zimbabwe was a violation of the right to economic, social and cultural development with due regard to their identity as a people and their equal enjoyment of the common heritage of mankind as provided by article 22 of the ACHPR. Nevertheless, the human rights discourse could not benefit from this case because the petition was withdrawn.⁹⁵⁷

However, the complainant could have benefited from a claim based on the right not to be discriminated against,⁹⁵⁸ (if they suffered discrimination on the ground of their sexual orientations) and not on the RTD which is a multifaceted human right. Nevertheless, Ankuma notes that the *Courson* case is recorded as a communication where the RTD was an issue in the African human rights system.⁹⁵⁹

Another positive benefit of the *Endorois* decision is that the African Commission clearly underlines the holistic character of the RTD which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices.⁹⁶⁰ The African Commission's ruling is important as it calls upon state parties to the ACHPR to

⁹⁵⁶ Communication 136/94 *William A Courson v Zimbabwe*; for more on this communication, see Ankuma (1996) 166.

⁹⁵⁷ Communication 136/94 *William A Courson v Zimbabwe*, para 3.

⁹⁵⁸ ACHPR, art 2.

⁹⁵⁹ E A Ankuma (1996) 'The African Commission on Human and Peoples Rights: Practice and Procedures' 166.

⁹⁶⁰ Communication 276/2003, para 277.

respect human rights in general; in fact, this decision ‘spells the beginning of a brighter future’⁹⁶¹ for the realisation of the RTD, even though the implementation of this decision remains to be seen.

4.4.4 *SERAC v Nigeria*⁹⁶²

This case illustrates the failure of the African Commission to fully address the issues pertaining to the RTD, but to the right to wealth and natural resources,⁹⁶³ amongst others. Nevertheless, this case is interesting in this discussion as it shows how though empowered by article 60⁹⁶⁴ of the ACHPR, the African Commission failed to interpret the law and to define the scope and content of the RTD.

As a matter of fact, two non-governmental organisations (NGOs) brought suit before the African Commission against Nigeria for claims based on the violation of the right not to be discriminated against (article 2 of the Charter), the right to life (article 4), property (article 14), health (article 16), a family, wealth and natural resources (article 21) and to satisfactory environment (article 24). Among others, the Ogoni people did not participate in the conclusion of the contracts (depriving them of their land and natural resources) between the Nigerian government and Shell Company, they were not given a share of the profits from the exploitation of their land, and were displaced from their ancestral land without compensation

⁹⁶¹ Human Rights Watch ‘Kenya: Landmark Ruling on Indigenous Land Rights African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development’ at http://www.witness.org/index.php?option=com_content&task=view&id=1015&Itemid=168 and <http://www.hrw.org/africa/kenya> (accessed 10 March 2010).

⁹⁶² *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, The Gambia, and www.achpr.org.

⁹⁶³ Art 21 of the ACHPR.

⁹⁶⁴ Art 60 reads: ‘The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

and as a result they claimed their right to wealth and natural resources. The NGOs challenged the agreements the Nigerian government had entered into for the exploration and mining of oil in Ogoni land without considering the interests of the Ogoni people. The interests that were ignored included participation of the local community during the conclusion of the contracts, the local people not being given a share of the profits from the exploitation of their land, and their displacement from their ancestral land without compensation in order to clear the way for mining activity. It was also claimed that the oil production was responsible for the environmental degradation and bad health stemming from the contamination of the environment in the Ogoni community. The exploitation disposed toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The resulting contamination of water, soil and air had serious health impacts, including skin infections, gastro-intestinal and respiratory ailments, and increased risk of cancers, neurological and reproductive problems.

In this case, the African Commission failed to clarify the content of the RTD. Though it was of the view that the RTD was violated, it did not pronounce such violation in its final decision. In fact, it referred to the violation of the RTD while emphasising the violation of ‘the right to food implicit’ in several violated provisions.⁹⁶⁵ The Commission affirmed that:

The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.⁹⁶⁶

The African Commission missed the opportunity to provide a dynamic reading of the law to clarify the scope and protect the RTD. All provisions of the ACHPR in which the right to food is implicit could have been read together to do so. Furthermore, the African Commission argued in paragraph 56 of its decision that article 21 of the ACHPR was intended to provide for ‘cooperative economic development’ on the continent. In other words, under article 21 of the ACHPR, the African Commission clearly endorsed the ‘participatory development

⁹⁶⁵ Para 64 of the decision.

⁹⁶⁶ Para 64 of the decision.

imperative’⁹⁶⁷ which could have been read under article 22 as well. Though the case does not address the RTD directly, in reaching its decision, the African Commission was inclined to protect the rights to health,⁹⁶⁸ to environment,⁹⁶⁹ of all people to freely dispose of their wealth and natural resources in their own interest.⁹⁷⁰ In addition, the African Commission found the violation of the right to food which is implicit in the RTD violated,⁹⁷¹ but not acknowledged by the Commission in its final decision. A better reading of the ACHPR could have been useful in protecting the RTD especially if one is to consider Okafor’s view that in addressing the RTD, ‘one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter’.⁹⁷² Nonetheless, the African Commission clearly avoided making a pronouncement on the RTD, which was violated and was the base for the violation of the right to food. The reading of the right to food into the content of the RTD (that was violated) should have assisted the Commission in taking a strong stand on the RTD. This is disquieting because in the same case, the African Commission found the violation of the right to shelter (which is not provided for in the Charter) through the combination of the protection of the right to health, property and family.⁹⁷³ The same approach could have been used to find the violation of the RTD and not the right to food, given that the RTD is provided for.

In terms of legal regime, the Commission submits socio economic rights (elements of the RTD) to progressive realisation based on the availability of resources, whereas the ACHPR subscribes for immediate realisation. It could however, be argued that the African Commission is empowered⁹⁷⁴ to use international law including the General Comments of the

⁹⁶⁷ O C Okafor ““Righting” the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples’ Rights’ in S Marks (ed) *Implementing the right to development – The role of international law* (2008) 55.

⁹⁶⁸ Art 16 of the ACHPR.

⁹⁶⁹ Art 24 of the ACHPR.

⁹⁷⁰ Art 21 of the ACHPR.

⁹⁷¹ SERAC Case, para 64.

⁹⁷² O C Okafor (2008) 55.

⁹⁷³ SERAC case, para 60.

⁹⁷⁴ Art 61 of the ACHPR.

Committee on Economic Social and Cultural Rights in reaching its decision. Nevertheless, this approach worked because Nigeria is a party to the ICESCR. Olowu questioned: ‘would there have been credible and justifiable basis for the Commission to apply the same approach were it to involve a state that is not party to ICESCR [International covenant on Economic Social and Cultural Rights]?’⁹⁷⁵ Such an approach would not have worked for countries like Botswana, Mozambique, or Comoros that are not party to the ICESCR. Hence, the Commission has to reconsider its approach in order to set a common standard on economic social and cultural rights on the continent.⁹⁷⁶

The other problem with this decision is the silence of the African Commission on the question of ‘peoples’ in article 21 of the ACHPR.⁹⁷⁷ The RTD is a group or peoples’ rights, but no clarification of the concept is given. In fact, on this issue, the African Commission seems to follow the trend set in its precedent where it avoided pronouncing on the right of people to self-determination.⁹⁷⁸ This led Olowu to argue that the African Commission ‘chose to play the ostrich game’ on the issues of ‘peoples’.⁹⁷⁹ In avoiding the concepts of ‘peoples’, the African Commission confused the Niger Delta with ‘Ogoniland’ and failed to investigate whether the ‘Ogoni communities’ could qualify as a specific group to be identified as ‘peoples’⁹⁸⁰ who could be right holders of the RTD. Fortunately, as highlighted earlier, this had been corrected through the *Endorois* decision.

4.5 Concluding remarks

The aim of this chapter was to assess to what extent the RTD is a reality in the African human rights system. It was found that the RTD is enshrined in the African human rights system including national laws.

⁹⁷⁵ D Olowu *An integrative rights-based approach to human development in Africa* (2009) 154.

⁹⁷⁶ D Olowu (2009) 154.

⁹⁷⁷ D Olowu (2009) 155.

⁹⁷⁸ See the *Katangese Peoples’ Congress v Zaire* (2000), AHLR 72 (ACHPR 1995).

⁹⁷⁹ Olowu (2009) 155.

⁹⁸⁰ D Olowu (2009) 155.

The chapter also found that the African Commission was approached with claims pertaining to the RTD in the *Bakweri Land Claims* case, failed to make a clear pronouncement on the right in the *SERAC* case, but could express itself on it through the first ever inter-state communication where the Democratic Republic of the Congo complained against Burundi, Rwanda and Uganda, and more importantly in the *Endorois* case.

Overall, the chapter shows that the RTD is not an alien concept to the African human rights architecture. Having established the existence of the RTD in the African legal framework, the next three chapters of this work will examine to what extent NEPAD/APRM can enhance the achievement of the right on the African continent.

CHAPTER 5 NEPAD AND THE RIGHT TO DEVELOPMENT

- 5.1 Introduction
- 5.2 NEPAD and the holistic realisation of human rights
- 5.3 NEPAD legal status and the RTD
- 5.4 NEPAD and the right to participation
 - 5.4.1 The birth of NEPAD - OMEGA/MAP: An impossible compromise
 - 5.4.2 NEPAD and civil society participation
- 5.5 NEPAD financial constraints and the RTD
- 5.6 Concluding remarks

5.1 Introduction

The vital question in this chapter is: To what extent can NEPAD/APRM enhance the realisation of the RTD? Or, to what extent does NEPAD embrace a human rights approach to development?

Having established that the RTD is a human right in Africa through the previous chapter, this chapter investigates to what extent the right can become a reality through NEPAD/APRM. To achieve its goals, from a human rights perspective, the chapter will assess to what extent NEPAD upheld or are informed by elements of the RTD. In other words, can NEPAD be the roadmap to the realisation of the RTD in Africa?

To answer this question, the chapter will firstly examine to what extent the NEPAD Programme are human rights-based; secondly it will look at the NEPAD legal status and analyse its impact on the achievement of the RTD; thirdly it will proceed to look at the right to participation (vital for the realisation of the RTD) in NEPAD and have a look at NEPAD prospectively, fourthly it will focus on the role of financial constraints on NEPAD human rights mandate and finally, it will provide some concluding remarks.

5.2 NEPAD and the holistic realisation of human rights

At the outset of this section, it is important to keep in mind that the holistic realisation of human rights is the substance of the RTD. The NEPAD Declaration on Democracy, Political, Economic and Corporate Governance⁹⁸¹ clearly observes that NEPAD was established to

[e]radicate poverty and to place our countries, individually and collectively, on a path of sustainable growth and development and at the same time, to participate actively in the world economy and body politic on equal footing. We reaffirm this as our most pressing duty.⁹⁸²

According to article 31 of the 1969 Vienna Convention on the Law of Treaties, (general rule of interpretation) ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁹⁸³ In other words, it is important to consider the context and the purpose of the agreement. From this stand point, though NEPAD is not a treaty, this study will borrow from the rule mentioned above; put differently, the study will consider NEPAD in the light of its context and purpose. In fact, NEPAD was born in a context of abject poverty in Africa and its purpose is to fight poverty. Its aim is to ensure a better life or human dignity. In its paragraph 5, the document emphasises that the abolition of poverty and the nurturing of socio-economic development should be addressed urgently. According to these provisions, NEPAD’s aim is to achieve the RTD in Africa. This interpretation is linked to NEPAD context and purpose. In reality, to meet its objectives, people’s rights to participation must be protected; the realisation of socio-economic rights, environmental concerns as well as freedoms should be in the agenda. Sengupta argues that a development programme associated with the RTD should strive ‘to remove capability poverty in addition to income poverty through the expansion of

⁹⁸¹ Assembly of Heads of State and Government, 38th Ordinary Session of the OAU, 8 July 2002, Durban South Africa, NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I. For more insights on this instrument, see K R Hope ‘Practitioner perspective – towards good governance and sustainable development: the African Peer Review Mechanism’ (2005) 2 (18) *Governance: An International Journal of Policy, Administration, and Institutions* 288.

⁹⁸² Assembly of Heads of State and Government, 38th Ordinary Session of the OAU, Preamble, para 2 & 5.

⁹⁸³ Art 31(1).

education and training, health and nutrition’⁹⁸⁴ such as found in the NEPAD Programme. Indeed, the NEPAD strategy is to increase human capability (freedoms) through education programmes such as e-school projects (right to education) provide better health care (right to health) and nutrition (right to food) through programmes such as NEPAD Comprehensive Africa Agriculture Development Programme (CAADP). It caters for income poverty reduction through a broad creation of employment (right to employment) through its infrastructural and other projects, as well as its policy to increase the gross national product. In fact, it is ‘a holistic, comprehensive and integrated strategic framework for the socio-economic development of Africa’.⁹⁸⁵ Mangu argues that the advent of the AU and NEPAD provides the needed structure for respect of human rights in the African continent;⁹⁸⁶ and has actually transformed ‘the human rights landscape in Africa’.⁹⁸⁷

The other criterion of a RTD development programme met by the African institution is its ability to highlight the obligations of all the different agents, from the state authorities, governments, the multinational companies, the multilateral agencies and the international community.⁹⁸⁸ In fact, the ‘P’ in NEPAD, calls for a partnership between African leaders and their people and between Africa and the international community at large in order to realise the RTD.

⁹⁸⁴ A Sengupta ‘Implementing the right to development’ 8, available at <http://www.hsph.harvard.edu/fxbcenter/Implementing%20the%20RTD.pdf> (accessed 22 May 2008).

⁹⁸⁵ African Development Bank Group “building today, a better tomorrow” at http://www.afdb.org/portal/page?_pageid=473,970224&_dad=portal&_schema=PORTAL (accessed 21 October 2006).

⁹⁸⁶ Mangu (2005) 408.

⁹⁸⁷ Mangu (2005) 408.

⁹⁸⁸ The NEPAD strategy clearly highlights the role and obligations of all the stakeholders, eg: in matters of economic and corporate governance are the responsibility of an African Task Force of Ministries of Finance and Central Bank to review governance practice and make recommendations. For more, see the NEPAD document (2001) 22 – 50 where sectorial priorities objectives and action to realise the priorities are defined.

Nevertheless, as will be shown later in this study, the ‘P’ is nowhere to be found in NEPAD activity.

In terms of article 3(h) of the AU treaty,⁹⁸⁹ the AU has the obligation to promote and protect human rights (including the RTD) as provided for by the ACHPR. NEPAD, the development hand of the AU is also relevant in achieving human rights and the RTD in particular in Africa. It addresses human rights when acknowledging their fundamental place in any development endeavour⁹⁹⁰ and claiming that the aim of the democracy and political governance initiative is to foster respect for human rights.⁹⁹¹

However, it can be argued that mentioning human rights is not enough. NEPAD does nothing for the RTD. Following this logic, Mathews observes that the RTD ‘had been neatly excised from the key sections in the NEPAD Declaration of Democracy, Political, Economic and Corporate Governance’ and maintains that this excision is due to the fact that the language of the RTD does not gel well with NEPAD’s main donors.⁹⁹²

Nonetheless, these arguments could be refuted because in stressing their ‘new political will’,⁹⁹³ African leaders noted that the context of

[t]he new phase of globalisation coincided with ... the emergence of new concepts of security and self-interest, which encompass the right to development and the eradication of poverty. Democracy and state

⁹⁸⁹ Art 3(h) of the AU Constitutive Act states that:

‘The objectives of the Union shall be to...

(h) Promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.’

⁹⁹⁰ NEPAD 2001, para 43, 49, 71 & 79.

⁹⁹¹ NEPAD 2001, para 80.

⁹⁹² S Mathews ‘The right to development, global partnership and peer partner review’; Submission to the Task Force on the Right to Development, January 26- 27 2007.

⁹⁹³ NEPAD 2001, part III.

legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements.⁹⁹⁴

In other words, African leaders came out strongly to ensure human rights in general and the RTD in particular. To achieve their goal, they identified democracy, state legitimacy, accountable government, culture of human rights and popular participation as key prerequisites.

Furthermore, from Sen's perspective, realising the RTD not only implies a holistic course of action for the protection of all human rights,⁹⁹⁵ but also implies economic growth made of growth of resources, such as GDP and advancement in technology and institutions⁹⁹⁶ as highlighted by the NEPAD programme. In this respect, Rukato argues that⁹⁹⁷

[o]ne of the objectives of the NEPAD Programme is the protection of democracy and human rights. The Democracy and Political Initiative of NEPAD is aimed at contributing to the enhancement of political and administrative frameworks in line with the internationally accepted standards and principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.

However, it could be wrong to rely only on NEPAD's goal of eradicating poverty to claim that the institution is about achieving the RTD. Though NEPAD refers to human rights here and there, it does not use a human right perspective in addressing its development targets. In this respect, Manby correctly observed that NEPAD should have defined 'the objectives of development in terms of legally enforceable entitlements',⁹⁹⁸ which would have empowered

⁹⁹⁴ NEPAD 2001, para 43.

⁹⁹⁵ A Sen *Development as freedoms* (1999).

⁹⁹⁶ Sengupta 'Implementing the right to development' 17, available at <http://www.hsph.harvard.edu/fxbcenter/Implementing%20the%20RTD.pdf> (accessed 22 May 2008).

⁹⁹⁷ Rukato (2010) 51.

⁹⁹⁸ Manby (2004) 1002.

human rights advocates to claim people's right not to be poor;⁹⁹⁹ since it is necessary to set up appropriate mechanisms to claim the RTD. From an RTD approach, it is important to redesign a NEPAD where socio-economic rights are not addressed as mere access to services, but as human rights, as entitlement or claimable rights.¹⁰⁰⁰

Nevertheless, viewing the RTD only in terms of legally enforceable entitlement or justiciable human rights may be misleading. In fact, this stresses the questions of the existence, justiciability and feasibility of the right. In other words, the RTD is not justiciable and feasible because NEPAD did not provide a legal mechanism to claim individual and peoples' rights.

This thesis contends that although the rule of law is necessary to enforce human rights, it is not the only mean. Social and political agitations can give birth to appropriate legislations and raise awareness on the issues in order to change the conditions. Supposing that there is no law or legislation involved, this study posits that social and political pressure, naming, awareness raising and disgracing are other ways to compel violators of human rights to stop their evil deeds and protect human dignity.

As mentioned earlier, the power of popular insurrection was seen in Ukraine in 2006 and in 2008 in Thailand, in Tunisia and Egypt in 2011 where the population peacefully change their governments without any legal process. Therefore, if the NEPAD lacks the capacity to establish a legal system to protect the RTD, it does not affect the nature of the right which is inherent to all human beings.

The NEPAD Declaration on Democracy, Political, Economic and Corporate Governance¹⁰⁰¹ is unambiguous. In this document, African leaders clearly committed themselves to ensuring peace and security, putting an end to unconstitutional change of government, promoting

⁹⁹⁹ Manby (2004) 1002.

¹⁰⁰⁰ E Baimu (2002) 310.

¹⁰⁰¹ Assembly of Heads of State and Government, 38th Ordinary Session of the OAU, 8 July 2002, Durban South Africa; AHG/235 (XXXVIII) Annex I.

human rights, respecting the rule of law and good governance.¹⁰⁰² In details, amongst others, African leaders pledge to comply with the ACHPR,¹⁰⁰³ the 1990 African Charter for Popular Participation in Development¹⁰⁰⁴ (right to participation), the African Charter on the Rights and Welfare of the Child¹⁰⁰⁵ that provides for the RTD of the child,¹⁰⁰⁶ the Protocol on the establishment of the African Court on Human and Peoples' Rights,¹⁰⁰⁷ the 1999 (Grand Bay Mauritius) Declaration and Plan of Action for the Promotion and Protection of Human Rights,¹⁰⁰⁸ the Framework for an OAU Response to Unconstitutional Changes Government¹⁰⁰⁹ and the AU Constitutive Act.¹⁰¹⁰

It could even be argued that from the moment NEPAD pledged to support the ACHPR including the African Commission as well as the African Court of Human Peoples' Rights, there was no need to create parallel legal systems to protect the RTD which would have resulted in several overlaps and wastage of human and financial resources.

There is a need to establish and strengthen the link between the African Commission, the African Court on Human and Peoples' Rights and the APRM. Though the latter is voluntarily acceded to, it had been established to compel African leaders to respect their commitments.

¹⁰⁰² AHG/235 (XXXVIII) Annex I, para 3 and AU Constitutive Act: Preamble, para 10; art 3 (h) & (g); 4 (m), (c), (L) (N) & (p).

¹⁰⁰³ AHG/235 (XXXVIII) Annex I, para 3 (b).

¹⁰⁰⁴ AHG/235 (XXXVIII) Annex I, para 3 (c).

¹⁰⁰⁵ AHG/235 (XXXVIII) Annex I, para 3 (c).

¹⁰⁰⁶ Art 5.

¹⁰⁰⁷ AHG/235 (XXXVIII) Annex I, para 3 (h).

¹⁰⁰⁸ AHG/235 (XXXVIII) Annex I, para 3 (i).

¹⁰⁰⁹ AHG/235 (XXXVIII) Annex I, para 3 (j); also OAU 2000 Summit in Lomé, Togo.

¹⁰¹⁰ AHG/235 (XXXVIII) Annex I, para 3 (l)

Against this view, Donnelly rejects the RTD because of its non justiciability¹⁰¹¹ and the same criticism applies to human rights in NEPAD.¹⁰¹² Nonetheless, this thesis argues that human rights are grounded in human dignity and not in a court of law.

Why hide behind the non justiciability of the rights through NEPAD to claim its inability to enhance the RTD? As Johnson correctly puts it, how justiciable are the ESCR?¹⁰¹³ Is there any international court to sue states that do not comply with the provision of the ICESCR or the ICCPR? For instance, according to the ICESCR, education should be free. However, various African countries are still charging school fees, even though the matter can be addressed through the UN Committee on ESCR. Indeed, if the value of human rights is found only in their justiciability, then there is a real ‘need for a world court of human rights’ to use the words of Manfred Nowak the former UN Special Rapporteur on torture.¹⁰¹⁴

At national level, the provisions pertaining to socio-economic rights are very often located in general principles of states’ policy and are therefore not justiciable. This does not make socio-economic rights less human rights. Consequently, the non justiciability of the RTD through NEPAD should not wipe out NEPAD’s capacity to improve the enjoyment of the right, though as mentioned earlier NEPAD will gain in linking the African Commission and the African Court on Human and Peoples’ Rights with its APRM process.

Now, shifting the attention to the APRM, it can be argued that NEPAD is mostly about a holistic realisation of human rights. APRM puts weight on reviewing policies and programmes of rule of law, corruption, poverty alleviation, literacy, health, corporate governance laws which are all secure in the RTD concept. In fact, out of nine APRM objectives under the commitment of democracy and political governance, five focus directly

¹⁰¹¹ Donnelly (1985) 485.

¹⁰¹² Manby (2004) 1002.

¹⁰¹³ In discussion with Johnson at the UN High Commission for Human Rights in Pretoria office, 4 May 2009.

¹⁰¹⁴ M Nowak ‘The need for a world court of human rights’ (2007) 7 *Human Rights Law Review* 251.

on human rights realisation. They are the promotion of constitutional democracy, including periodic political competition and opportunity for choice, the rule of law and the inclusion of a Bill of Rights in a supreme constitution;¹⁰¹⁵ the promotion and protection of economic, social, cultural, civil and political rights enshrined in the African and international human rights instruments;¹⁰¹⁶ the promotion and protection of the rights of women,¹⁰¹⁷ of children and young persons,¹⁰¹⁸ and of vulnerable groups including displaced persons and refugees which is the ninth objective. From this stand point, among other things, the APRM always calls upon participating states to promote human rights at national level¹⁰¹⁹ and ratify international human rights instruments and comply with their monitoring mechanisms at regional and global levels. This led Mangu to argue that ‘in order to achieve NEPAD’s objectives which all revolve around the protection and promotion of human and peoples’ rights in Africa’,¹⁰²⁰ African leaders established the APRM. In fact, if development, good governance and human rights had been achieved in Africa, the launching of NEPAD would not have been necessary.¹⁰²¹

On the contrary, Akokpari argues that the lack of linkages between NEPAD and the earlier African development plans (Lagos Plan of Action, the African Alternative to Structural Adjustment is problematic) hinders NEPAD’s ability to protect human rights.¹⁰²² This thesis disagrees on the ground that the advent of the AU definitely brought more emphasis on

¹⁰¹⁵ Objective 2.

¹⁰¹⁶ Objective 3.

¹⁰¹⁷ Objective 7.

¹⁰¹⁸ Objective 8.

¹⁰¹⁹ Country Review Report, Benin, 58.

¹⁰²⁰ Mangu (2005) 391.

¹⁰²¹ Mangu (2007) 397.

¹⁰²² Akokpari (2004) 6.

protecting human rights in Africa, and the programme which preceded NEPAD were all under the OAU when African human record was not of good quality.

However, an analysis of some of the APRM objectives discloses that NEPAD is not serious about protecting human rights. For instance, objective 7 on women's rights protection which is also recorded in the NEPAD 2001 paragraph 49(7) and 67(2) in terms of

[p]romoting the role of women in social and economic development by reinforcing their capacity in the domain of education and training; by developing revenue-generating activities through facilitating accesses to credit; and by assuring their participation in the political and economic life of African countries

and to 'promote the role of women in all activities'. This seems to be simple statements on paper. Apart from developing gender tools and materials, handbooks and background documents on gender for NEPAD personnel and establishing a Gender Task Force with the mandate to assist in gender mainstreaming,¹⁰²³ NEPAD does not draw from any existing instrument protecting women's rights such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁰²⁴ or the Convention on the Political Rights of Women,¹⁰²⁵ or the Convention on consent to marriage¹⁰²⁶ or others.

In the same vein, the protection of women's rights in the NEPAD framework is too vague because it does not address women's daily problems such as domestic violence, rapes and others, and as correctly observed by Manby 'the protection of women's rights by NEPAD is not matched with a pledge to provide effective remedies to address their plight'.¹⁰²⁷ The same criticism applies for the protection of child rights where neither the 1989 Convention on the

¹⁰²³ Rukato (2010) 102.

¹⁰²⁴ Adopted in 1979 and entered in to force in 1971.

¹⁰²⁵ 193 UNTS 135, adopted 20 December 1952, entered into force 7 July 1954.

¹⁰²⁶ ILO Convention no 100, 165 UNTS 303, adopted 29 June 1951, entered into force 11 August 1954.

¹⁰²⁷ Manby (2004) 1005.

Right of the Child (CRC) nor the African Children Charter is drawn to ensure child rights. In the same perspective, whereas objective number nine of the APRM refers to the plight of refugees and displaced persons, there are no practical legal mechanisms to cope with the issue. Even the 1969 OAU Convention Governing Specifics Aspects of Refugees Problems in Africa is not used as a source of inspiration to tackle the question.¹⁰²⁸ As a result, Africa has been struggling with refugees' problems for years.¹⁰²⁹

In order to improve its human rights mandate, NEPAD shall draw from existing human rights instruments and not keep its office as an economic entity only. Using a human rights approach to its activities with lawyers' input can only enhance its chances to achieve the RTD.

Nevertheless, the economic governance and management commitment promotes macro economic policies that support sustainable development,¹⁰³⁰ sound public finance management,¹⁰³¹ anticorruption and money laundering mechanisms and policies.¹⁰³² In general, all APRM commitments are aimed at the betterment of human lives.

However, the APRM is voluntarily acceded to, has no sanctions and relies merely on peer pressure. Only unclear 'appropriate measures'¹⁰³³ can be taken against states that refuse to comply with the recommendations of the mechanism. These measures are vague and

¹⁰²⁸ Manby (2004) 1005.

¹⁰²⁹ According to the UN in 2002, more than half of the world's 25 millions displaced persons were in Africa (Norwegian Refugee Council Global IDP Project, Internally Displaced People: A Global survey, 2002); also in 2004, the UN High Commissioner for Refugees observed that 30% of the total refugee community was in Africa (UNHCR, 2003 Global Refugees Trends (15 June 2004); 2008 Global Refugees Trends indicates 2.1 million refugees in Africa.

¹⁰³⁰ Objective 1.

¹⁰³¹ Objective 3.

¹⁰³² Objective 4.

¹⁰³³ APRM Base document, para 24.

imprecise. As Rukato questioned, what happens after the review?¹⁰³⁴ There is no follow up mechanism; every one goes home and the report is not brought back in the NEPAD process.¹⁰³⁵ In the same perspective, the whole review process is undermined when the so-called ‘appropriate measures’ to be taken against disobedient states are to be addressed. A NEPAD official observed:¹⁰³⁶

A weakness with the current review process is that it does not prescribe sanctions or penalties and as such it runs the risk of being ineffective. Unless there are penalties or sanctions, the review will become a sham and attempts at achieving sustainable development through the adoption of best practices will fail.

Interestingly, African countries join international agreements and accept to report to the UN treaty bodies, and accept to be monitored without conditions. They comply with self-assessment requirements from these treaty bodies without problems. However, when it comes to Africa, the mechanism is voluntary, which shows that African countries apply a double standard with the rule of law. They have no problem ratifying binding instruments at international level, but in their own continent, the design a weak process with a voluntary accession which gives no real incentive to comply with the rule of law.

Furthermore, the APRM governance standards do not really make a difference. Under these governance instruments, the APRM lists numerous standards, codes and declarations that should be used to measure good governance on the continent. These standards include African instruments, binding (the AU Constitutive Act, the ACHPR and others) and non binding (several resolutions and declarations of the OAU and AU); it also contains a variety of non binding instruments originating from the ILO, IMF and commonwealth for example. In addition, all the UN conventions, declarations, resolutions and conference reports are included.

¹⁰³⁴ H Rukato presentation of *Future of Africa prospects - for democracy and development under NEPAD* (before its publication) at the University of Pretoria, 4 June 2009.

¹⁰³⁵ Rukato (2009) and (2010) 98.

¹⁰³⁶ Z Kebonang & C M Fombad (2006) ‘The African Peer Review Mechanism: Challenges and prospects’ in *AU, NEPAD and the APRM: Democratisation Efforts Explored* 51.

Putting together almost all existing instruments under the label of ‘APRM Governance Standards’¹⁰³⁷ cannot compel countries to uphold good governance principles and cannot be an appropriate instrument to measure compliance with good governance. In fact, they comply with those that are binding on them, hence the need to separate binding from non-binding instruments. In fact, mixing these two sets of instruments weakens the role of binding ones in attempting to ensure good governance.

Moreover, it does not help to have a shopping list of instruments that ends up providing a way out for human rights violators who can always find a way to comply with few reports of international conferences.

Prospectively the AU should reduce the APRM Governance standards, and tailor them within the confines of the four APRM thematic areas. Special attention should be given to binding instruments. This will ease the measurement of compliance with the APRM which relies on peer pressure only.

Nonetheless, the peer pressure is not ineffective. In fact, the mechanism is known as ‘peer review’, this justifies the fact that leaders are in the front seat where they can talk to their peers following the African traditional society’s practice according to which leaders used to consult members of their age groups to solve a problem.¹⁰³⁸ Nevertheless, this argument does not negate the fact that the credibility and efficiency of the process could have been strengthened by real sanctions against ‘stubborn’ states.

In spite of the soft nature of APRM instruments, to ensure that APRM’s purpose is achieved, participating states adopt appropriate laws, policies and standards as well as building the necessary human and institutional capacity. They have also committed themselves to adopt

¹⁰³⁷ See SAIIA ‘APRM governance standards’ (2008)

¹⁰³⁸ M Hansugule ‘Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation’ 4, paper prepared for the Office of the Special Adviser on Africa (on file with author).

specific objectives, standards, criteria and indicators for assessing and monitoring progress in key areas regularly in accordance with the APRM Base Document and the Declaration on Democracy, Political, Economic and Corporate Governance. This involves a responsibility to submit to periodic reviews and be guided by agreed parameters.

Whatever APRM shortcomings are, it is important to keep in mind that the APRM is unique in the sense that nowhere in the world do states come together to criticise each other to learn and record best practices. Even if its implementation has challenges, it should be promoted and encouraged with a view of enhancing the prospects of the RTD in the continent.

5.3 NEPAD's legal status and the RTD

The section assesses NEPAD legal's status and its impact on the realisation of the RTD. It stresses the need to clarify NEPAD legal personality if the institution is to make a difference in achieving the RTD.

After its adoption in Lusaka, Zambia at the 37th Session of the Assembly of the Heads of State and Government of the OAU in July 2001, NEPAD became the economic programme of the AU. Its adoption by the AU was followed by its international recognition as Africa's official development plan through the resolutions of the United Nations General Assembly.¹⁰³⁹ These regional and international recognitions do not transform NEPAD into a binding instrument. NEPAD is not a treaty or a convention with binding obligations. As a result, countries make political commitments that they comply with as they please. More importantly, NEPAD has no legal status and until recently could not be taken to court and is still represented in its transactions by the Development Bank of Southern Africa.

This is not the best approach to use in working towards the implementation of human rights and more importantly in the implementation of the RTD. Moreover, all African countries members of the AU are automatically member of NEPAD unlike being participant to the APRM where a country willing to participate should sign the MOU which is unfortunately another 'soft' or non binding instrument as will be shown below.

¹⁰³⁹ UN General Assembly Declaration A/RES/57/2 & Resolution on NEPAD, A/RES/57/7.

To strengthen the continental plan, accession to NEPAD and even the AU should not be automatic for all African countries. Accession should be subject to respect for human rights. In this regard, Africa should emulate the European practice in which no European state has joined the European Union without first being a member of the Council of Europe, whose accession is conditioned among other things by the obligation of the candidate to 'have achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.¹⁰⁴⁰ From this standpoint, the AU treaty should also have a provision for the expulsion of the AU member states that do not respect human rights and other AU rules after accessing the Union.

However, given that this solution is not practical as Africa cannot start readmitting members, one of the best approaches would be as mentioned earlier to strengthen NEPAD/APRM by linking it to the African Commission and the African Court on Human and Peoples' Rights. A good integration of NEPAD/APRM in the African human rights system will enhance its ability to realise human rights, even though the system itself is far from being perfect.

Currently, non compliance with the NEPAD agreement has no legal effect, hence the correctness of the argument that 'NEPAD strategy moves away from the traditional hard law binds of treaties encapsulated in regional economic communities and other economic initiatives, towards a soft law mechanism'.¹⁰⁴¹ Such an approach does not enhance the realisation of human rights on the continent. For example, the implementation of the right to education through the NEPAD's e- school project¹⁰⁴² is hampered by the fact that NEPAD is not a treaty. The implementation of the project in question implies inserting cables under the

¹⁰⁴⁰ European Commission enlargement–Accession criteria available at http://ec.europa.eu/enlargement/enlargement/_process/accesion_process/criteria/index_xternal_en.htm (accessed 26 September 2008).

¹⁰⁴¹ R Ngamau 'The role of NEPAD in African economic regulation and integration' (2004) 10 *Summer Law & Business Review of the Americas* 520.

¹⁰⁴² The NEPAD e-school Project was set up in 2003 at the Africa Economic Summit in Durban, South Africa 2003. It aims is to involve young Africans (from primary and secondary school) to the global information society and knowledge economy through the internet for example.

ground in African countries. In some countries, such cables are not allowed because monuments and precious places might be destroyed. In this regard, Shetty of Advance Micro Devices in charge of setting up e-schools on the continent complained that implementers of the project do not find enough space to establish computer labs.¹⁰⁴³ Similarly, Van Jaarsveld of Oracle also in charge of setting up e-schools, echoes his frustration in these terms: 'it is also a big challenge convincing some governments of the viability of this project'.¹⁰⁴⁴ If countries sign a binding instrument to access the NEPAD, they cannot refuse to accept cables or other projects in their countries.

However, the project had already been implemented in 120 schools in 16 African countries which are: Algeria, Burkina Faso, Cameroon, Egypt, Gabon, Ghana, Kenya, Lesotho, Mali, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa and Uganda.¹⁰⁴⁵ Nevertheless, a better legal framework will accelerate the realisation of such projects and enhance the achievement of the rights to education and others.

The integration of NEPAD in the AU is also linked to the legal status of the plan. Article 9 of the Declaration on the New Common Initiative (MAP and OMEGA Plan) underlines the adoption of the Strategic Policy Framework of the New African Initiative as well as its Programme of Action by African leaders.¹⁰⁴⁶ Accordingly, the NEPAD Heads of State and Government Implementing Committee (HSGIC) at its 8th session held in Maputo, Mozambique on 9 July 2003 recommended the adoption of its decision calling for the integration of NEPAD in the AU. This call was answered at the AU 2nd ordinary session held in July 2003 in Maputo where the AU Summit called for NEPAD to be fully integrated into

¹⁰⁴³ NEPAD's e-learning project faces major obstacles at <http://www.cipaco.org/spip.php?article1353> 1 (accessed 16 April 2008).

¹⁰⁴⁴ NEPAD's e-learning project faces major obstacles at <http://www.cipaco.org/spip.php?article1353> 1 (accessed 16 April 2008).

¹⁰⁴⁵ NEPAD Progress Report prepared by the AU/NEPAD Secretariat for the 4th meeting of the African Partnership Forum, 5 Abuja, Nigeria, 9-10 April 2005.

¹⁰⁴⁶ Declaration on the New Common Initiative (MAP and OMEGA). AHG/XXXVII).

the structures and processes of the Union by July 2006.¹⁰⁴⁷ At its 7th ordinary session held in Banjul, the Gambia from 1 to 2 July 2006, the AU Assembly extended the deadline for the integration to January 2007.¹⁰⁴⁸

At the 18th NEPAD HSGIC in Algiers Brainstorming Summit on 21 March 2007,¹⁰⁴⁹ it was decided among other things to transform the NEPAD into the NEPAD Planning and Coordinating Authority and to determine its structure and profile. This decision was adopted by the 10th AU Assembly in Addis Ababa in January/February 2008¹⁰⁵⁰ which committed itself to proceed with the integration of NEPAD without delay. This led to the creation of the NEPAD Coordinating Unit (the Unit). The Unit was inaugurated at the AU Commission (AUC) in Addis Ababa on 10 June 2008 by its Chairperson, Jean Ping.¹⁰⁵¹ Among its functions, the Unit worked for and obtained the conclusion of the AU Commission/South African host agreement for South Africa to host the NEPAD Secretariat.¹⁰⁵² This was done in compliance with the decision of NEPAD HSGIC at its 8th session held in Maputo on 9 July 2003 which decided to mandate the Chairperson of the AU to

¹⁰⁴⁷ Assembly of the African Union 2nd Ordinary Session, 10-12 July 2003, Assembly /AU/Decl.8 (II) available at www.africa-union.org (accessed 7 February 2008).

¹⁰⁴⁸ ‘7th Ordinary Session of the AU Assembly held in Banjul’ *AUC NEWS*, 11 July 2006, 4 available at www.africa-union.org (accessed 7 February 2008).

¹⁰⁴⁹ HSGIC Meeting and Brainstorming on NEPAD, 21 March 2007, Algiers, Algeria. This summit recommended 13 points on which the integration process should rely. Among others, the transformation of the NEPAD Secretariat into a NEPAD Planning and Coordinating Authority and the creation of the Coordination Unit was recommended.

¹⁰⁵⁰ Assembly/AU/10(X).

¹⁰⁵¹ 19th Summit of the NEPAD Heads of State & Government Implementation Committee (HSGIC) 29 June 2008, Sharm-El- Sheikh, Egypt; HSGIC/19/ANN-AGN/3 ‘Expanded annotated agenda’.

¹⁰⁵² ‘7th Ordinary Session of the AU Assembly held in Banjul’ *AUC NEWS*, 11 July 2006, 4 available at www.africa-union.org (accessed 7 February 2008).

[e]nter into a temporary host agreement with the Government of the Republic of South Africa with a view to providing the NEPAD Secretariat with a legal status of an AU office operating outside the African Union Headquarters for a transitional period of three years as from July 2003, or until such time the relevant structure of the African Union are fully operational, which ever comes first.¹⁰⁵³

Though the host agreement was signed and the NEPAD Secretariat operates (now legally) from Midrand, South Africa, it is noteworthy that NEPAD is still represented in its transaction by the Development Bank of Southern Africa.

Prior to the latest integration move, the relationship between the AU and NEPAD seems to be rather competitive with the NEPAD's HSIC more inclined to market the 'NEPAD brand' in front of donors. In this regard, in July 2003, the former Nigerian President, Obasandjo acting as the Chairperson of the HSIC left the AU summit to meet with President Bush who decided to visit four African countries right in the middle of the summit. In the same perspective, Rukato correctly observes that former President Hosni Mubarak of Egypt did not always attend NEPAD Summits, when they were not held in his country.¹⁰⁵⁴

There is an urgent need to finalise the harmonisation of the role of various AU bodies with the NEPAD. In compliance with article 3(f) of the AU treaty, a protocol relating to the establishment of the Peace and Security Council (PSC Protocol) of the AU was adopted.¹⁰⁵⁵ The Peace and Security Council objective is to promote peace, security and stability in Africa in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development.¹⁰⁵⁶ These objectives are similar to what NEPAD aims to achieve.

¹⁰⁵³ The Draft Communiqué issued at the end of the 8th Summit of HSGIC of NEPAD in Maputo, Mozambique, 09 July 2003 (on file with author).

¹⁰⁵⁴ Rukato's presentation (2009).

¹⁰⁵⁵ The PSC Protocol was adopted in Durban, South Africa, 9 July 2002 and entered into force on 26 December 2003.

¹⁰⁵⁶ PSC Protocol, art 3 (a).

Most importantly, the PSC Protocol of the AU, just like the APRM¹⁰⁵⁷ has its ‘Panel of the Wise’ (POW) made of five highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development in Africa and are selected by the Chairperson of the AUC after consultation with the member states concerned.¹⁰⁵⁸ The POW is the equivalent of the APRM’s Panel of Eminent persons.

Nonetheless, though the new NEPAD structure is yet to be approved by the AU, there is hope because the recent inauguration of the unit represents

[t]he effective take – off of the integration process and the continuing close collaboration between the AU Commission and the NEPAD Secretariat in advancing the overall objectives of integration and contributing to better management of Africa’s development process.¹⁰⁵⁹

In fact, the integration of NEPAD in the AU has known positive progress and it would not be wrong to argue that NEPAD is now integrated in the AU. In this respect, the NEPAD Secretariat has been transformed into the NEPAD Planning and Coordinating Agency (NEPAD Agency);¹⁰⁶⁰ the 21st NEPAD Heads of State and Government Implementation Committee Meeting,¹⁰⁶¹ worked on ‘the adoption by the NEPAD Secretariat of AU policies and procedures in finance, administration, human resource (HR) management, auditing, legal, protocol and procurement’.¹⁰⁶² In the same vein, to address overlaps and repetition of tasks

¹⁰⁵⁷ See APRM 2008 Annual Report, 2.

¹⁰⁵⁸ PSC Protocol, art 11 (2).

¹⁰⁵⁹ *Nepad Dialogue* 1, issue 239 - 21 August, 2008.

¹⁰⁶⁰ T Pampalone ‘The new NEPAD’ *Mail & Guardian*, 19 March 2010 ; also *NEPAD Dialogue* April 2010, Issue 265 available at <http://www.nepad.org/newsletter/NEPAD%20Dialogue,%20issue%20265/index.html> (accessed 29 May 2010).

¹⁰⁶¹ Held in Sirte, Libya, on June 30, 2009.

¹⁰⁶² J Ping ‘Opening remarks at the 22nd NEPAD Head of State and Government Implementation Committee’ 4 Addis Ababa, Ethiopia, 30 January 2010, available at www.africa-union.org.

between NEPAD and the AU, the continental body worked to harmonise the work plan of the AUC and the NEPAD Secretariat, to clarify the role of each body and to advance joint collaboration.¹⁰⁶³ In this perspective, new developments occurred with the creation of the NEPAD Agency that comes with a new structure, operating model and financing:¹⁰⁶⁴

The major features of the AU/NEPAD governance structure comprise the African Union Assembly of Heads of State and Government, the NEPAD Heads of State and Government Orientation Committee and a Steering Committee.

In terms of operation model, the NEPAD Agency has adopted a strategic direction based on six thematic areas:

- agriculture and food security
- climate change and natural resource management
- regional integration and infrastructure
- human development
- economic and corporate governance
- crosscutting issues of gender, capacity development and information communications technology

In terms of financing, the Agency is financed through the statutory budgets of the AU, voluntary contributions from AU member states and from development partners and the private sector.¹⁰⁶⁵

As far as the APRM is concerned, several changes are taking place. For instance, the Base document, the continental Questionnaire, the method of undertaking country self-assessment and peer review are currently revised. However, except the draft revised continental

¹⁰⁶³ Ping 'Opening remarks at the 22nd NEPAD Head of State and Government Implementation Committee' 4 Addis Ababa, Ethiopia, 30 January 2010, available at www.africa-union.org.

¹⁰⁶⁴ See www.nepad.org (accessed 26 December 2010).

¹⁰⁶⁵ See www.nepad.org (accessed 26 December 2010).

Questionnaire,¹⁰⁶⁶ these documents are not yet in the public domain as they are still to be finalised and those that are finalised are not yet validated by stakeholders and approved by the APR panel.¹⁰⁶⁷ This shows that the APRM does not ensure people's right to participation. We would have expected the APRM Secretariat to put all draft documents on their website, to publicise them and request views and opinions before finalising the documents. Such an approach will bring a sense of legitimacy and ownership of the process on the continent.

It is however, hoped that the integration of NEPAD/APRM in the AU will successfully address the following problems: Established under article 5(h) of the AU Constitutive Act, the Economic Social and cultural Council (ECOSOCC) is an advisory body of the AU.¹⁰⁶⁸ Amongst its duties, it must ensure good governance, the rule of law, democracy and human rights with special attention to gender equality.¹⁰⁶⁹ In addition, the ECOSOCC should ensure the participation of the African society in African business. This brief description of the ECOSOCC's activities is far from being different from the APRM's agenda. In the same perspective, like the APRM, the Pan-African Parliament is also called upon to promote good governance on the continent.¹⁰⁷⁰ This lack of harmonisation of the AU bodies with NEPAD leads to a repetition of tasks, creates confusion and unnecessary expenses. As mentioned earlier, identifying these overlaps and delineating specific duties as done through the integration process will go a long way in making the continental body efficient.

To achieve the harmonisation, the Unit is a bridge between the AUC and the NEPAD Secretariat. Furthermore, several working visits have been undertaken recently by AUC

¹⁰⁶⁶ 2011 Draft Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism available at www.nepad.org/aprm (accessed 10 March 2011).

¹⁰⁶⁷ On 5 January 2010, the researcher went to the APRM Secretariat in Midrand, South Africa where he received the information during a meeting with an official. This was also confirmed by Prof Hansungule who is a consultant at APRM.

¹⁰⁶⁸ AU Constitutive Act, art 22.

¹⁰⁶⁹ ECOSOCC Statutes, art 2 (5) & 7 (5).

¹⁰⁷⁰ See art 3 of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted by the 5th Extra-Ordinary OAU Assembly session in Sirte, Libya on 2 March 2001.

personnel in finance, procurement, administration and human resource, legal, protocol, internal audit and management information systems to evaluate the NEPAD Secretariat's needs as they relate to their incorporation into AU procedures.¹⁰⁷¹ It could therefore be argued that the long awaited NEPAD/AU integration is a reality now.

However, to what extent is this integration welcomed? Looking at it from Mutua's perspective who saw the complementary mandate of the African Court of Human and Peoples' Rights and the African Commission as a good thing for the realisation of justice on the continent,¹⁰⁷² it could be argued that spreading the responsibility of ensuring good governance and respect for human rights to various AU bodies is conducive to the establishment and promotion of good governance. In fact, it could be argued that for NEPAD to be successful, it is important to expand its independence from the AU because it runs the risk of being swallowed by the AU's heavy bureaucracy. In addition, it will be easy to monitor its progress and achievements. Donors, civil society organisations and all stakeholders will be able to keep track on what is going on by looking at the APRM and other reports. In the same vein, it could also be argued that the AU is too political to be linked directly to NEPAD; foreign institutions and governments play an important role in NEPAD and the AU does not have room for alien bodies. NEPAD could grow into a monster for the AU. By the look of its reports, NEPAD had already achieved a lot. Why change something which had operated well, even without defining its goals as entitlement?

From a legal standpoint, is amending article 5¹⁰⁷³ of the AU treaty to include NEPAD an option? Yes, it is an option as article 5(2) of the AU treaty empowers the AU 'Assembly to

¹⁰⁷¹ J Ping 'Opening remarks at the 22nd NEPAD Head of State and Government Implementation Committee' 4 Addis Ababa, Ethiopia, 30 January 2010 available at www.africa-union.org.

¹⁰⁷² M Mutua 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 343.

¹⁰⁷³ Art 5 of the AU Constitutive Act reads:

‘Organs of the Union:

1. The organs of the Union shall be:

- (a) The Assembly of the Union;
- (b) The Executive Council;
- (c) The Pan-African Parliament;
- (d) The Court of Justice;

establish other organs'. Nevertheless, perhaps NEPAD should not be included in the AU because it needs some leverage of independence to be efficient in ensuring the realisation of the RTD.

However, 'the standing alone policy' of NEPAD was not conducive to realisation of the RTD. Conscious of the importance of the full integration of NEPAD in the AU, the Pan-African Parliament, concerned with the inadequate coordination and possible overlapping between the activities and mandates of the AU organs and NEPAD, recommended as follows:

The AU should urgently implement the AU Summit Decision of 2003, taken in Maputo (Maputo Decision), in relation to the integration of NEPAD into AU processes; and strengthen the NEPAD Secretariat to ensure that, it is fully capacitated to play its role within the provisions of the Maputo Decision.¹⁰⁷⁴

Yes, it was difficult, but it has happened now. In fact, it was a process which developed from 2001 at the 37th OAU Summit in Zambia, the 2003 AU summit which highlighted the need for a full integration, the 18th HSGIC (in Algiers) and the 10th AU Summit of January/February 2008 which saw the real 'historic moment',¹⁰⁷⁵ when the integration process took off through the establishment of the Unit. So far, there have been several things to show. For example, the AUC and the NEPAD Secretariat embarked on their First Work Programme Harmonisation Session on 3 November 2009, with the participation of Commissioners, NEPAD Chief Executive Officer, Directors and sectoral Heads;¹⁰⁷⁶ in addition, the 2010

-
- (e) The Commission;
 - (f) The Permanent Representatives Committee;
 - (g) The Specialized Technical Committees;
 - (h) The Economic, Social and Cultural Council;
 - (i) The Financial Institutions;
2. Other organs that the Assembly may decide to establish'.

¹⁰⁷⁴ Pan-African Parliament, Recommendation No PAP-REC. 003/2006, para 1 as adopted on 12 May 2006.

¹⁰⁷⁵ The Chairman of the AU Commission qualified the inauguration of the Unit as 'historic moment'; *NEPAD Dialogue* 2, Issue 229, 2008.

¹⁰⁷⁶ Ping 'Opening remarks at the 22nd NEPAD Head of State and Government Implementation Committee' 5 Addis Ababa, Ethiopia, 30 January 2010 available at www.africa-union.org.

budget of the NEPAD was presented to the AUC and was incorporated in the overall budget of the AU.¹⁰⁷⁷ These realisations are expected to enhance NEPAD capacity to realise human rights and the RTD in particular.

However, though the integration is now a reality, many challenges remain to be addressed. For instance, there is a strong need to ensure ‘the institutionalisation of a coordinated approach and regularised feedback between the various departments, divisions and sections of the AUC and the NEPAD Secretariat in their operational and programmatic functions’.¹⁰⁷⁸ In addition, ensuring the capacity of the Unit as to fulfill its mandate and the availability of necessary funds to the integration process are other serious challenges.¹⁰⁷⁹

On the APRM’s side, a look at the APRM legal status reveals that the APRM Base Document,¹⁰⁸⁰ the Memorandum of Understanding¹⁰⁸¹ (MOU) and other decisions of the HSGIC are from a soft law register and cannot be binding on state parties that need a legal push to comply with their human rights mandate. In fact, the MOU is weaker than the APRM base document. According to the APRM Base Document,

[t]he mandate of the APRM is to ensure that the policies and practices of participating states conform to the agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance. The APRM is the mutually agreed instrument for self-monitoring by the participating member governments.¹⁰⁸²

¹⁰⁷⁷ Ping (2010) 5.

¹⁰⁷⁸ Ping (2010) 6.

¹⁰⁷⁹ Ping (2010) 6.

¹⁰⁸⁰ The Base document was approved at the July 2002 OAU Durban summit in the ‘Durban Declaration on Democracy, Political Economic and Corporate Governance’; See NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, 1.

¹⁰⁸¹ The MOU was adopted at the 6th HSGIC meeting held on March 2003 in Abuja, Nigeria.

¹⁰⁸² APRM Base Document para 2.

Meanwhile, the MOU says the following about the mandate:

The mandate of the APRM is to encourage participating state in ensuring that the policies and practice of participating states conforms to the agreed political, economic and corporate governance values, codes and standards, and achieve mutually agreed objectives in socio-economic development contained in the Declaration on Democracy, Political, Economic and Corporate Governance.¹⁰⁸³

The APRM Base document asks participating states to ‘ensure’ that principles and policies are respected, whereas the MOU asks them only to ‘encourage’ participating state to respect APRM policies. Furthermore, the weakness of the MOU is highlighted by the fact that there is no sanction if a participating state does not abide by the rules, while the APRM Base document guarantees the respect of rules by threatening stubborn participating states with ‘appropriate measures’.¹⁰⁸⁴ In fact, the weakness of the APRM legal framework led Hansungule to argue that

[n]otwithstanding the clear and express desire from the Base Document, the APRM cannot per se force a participating country to comply with its commitments or promises under any of the instruments using law. For instance, failure by a participating State to move from Support Mission to self-assessment stage has no legal consequences. APRM cannot insist on compliance or threaten legal measures upon a deviant state. Yet, APRM documentation uses legal terminologies like ‘acceding to the Memorandum of Understanding’, etc. In fact not being a treaty this constitutes inappropriate use of language.¹⁰⁸⁵

However, the APRM MOU reads: ‘All procedures to be adopted under the APRM shall be consistent with the decisions and procedures of the African Union.’¹⁰⁸⁶ In other words, the APRM’s ‘hardness’ is borrowed from its association with the AU. The other use of hard law or treaty language appears in the APRM instrument when the MOU underlines ‘Member states of the African Union wishing to accede to the [APRM] shall sign the MOU’.¹⁰⁸⁷ The

¹⁰⁸³ MOU para 6.

¹⁰⁸⁴ APRM Base Document, para 24.

¹⁰⁸⁵ Hansungule (2008) 8.

¹⁰⁸⁶ MOU para 27.

¹⁰⁸⁷ MOU para 30; also NEPAD/APRM/panel13/Guidelines/11-2003/Doc-8.

verb ‘accede’ should be highlighted here, because it is generally used when referring to treaties or binding instruments.

Nevertheless, the use of hard law language in a soft instrument does not change it into a hard one. However, the finalisation of the integration of NEPAD in the AU will boost the legality of the APRM. In this regard, the 2008 AU Summit in Egypt ‘decides that the APRM structures, namely the APRM Forum, the APRM Panel and the APRM Secretariat shall be part of the processes and structure of the African Union’.¹⁰⁸⁸ It also called upon the AU Commission to negotiate and conclude a host agreement, with the Government of South Africa, for the APRM with a view to facilitating the discharge of its mandate’.¹⁰⁸⁹ These linkages between the AU and the APRM will definitely strengthen the legal force and legal *persona* of the APRM. This will go a long way in keeping African leaders on their toes in implementing the RTD as well as other human rights.

In sum, the recent integration of the AU has clarified clarify and strengthened the legal status of NEPAD. This is it a good move to enhance the prospects for the RTD in Africa.

5.4 NEPAD and the right to participation

The previous chapters¹⁰⁹⁰ identified the right to participation as one of the cornerstones of the RTD. In this regard, African states recognise that¹⁰⁹¹

[n]ations cannot be built without the popular support and full participation of the people, nor can the economic crisis be resolved and the human and economic conditions improved without the full and effective contribution, creativity and popular enthusiasm of the vast majority of the people. After all, it is to the people that the very benefits of development should and must accrue.

¹⁰⁸⁸ Assembly/AU/Dec.198 (XI) ‘Decision of the African Peer Review Mechanism’ para 6.

¹⁰⁸⁹ Assembly/AU/Dec.198 (XI) ‘Decision of the African Peer Review Mechanism’ para 7.

¹⁰⁹⁰ Chapter 3 & 4.

¹⁰⁹¹ The African Charter for Popular Participation in Development and Transformation, part 1, para 3.

In other words, there is no development without popular participation. This section examines the extent to which the right to participation is implemented in the NEPAD programme. To achieve its aim, the section will look at the birth certificate of NEPAD to assess to what extent African folks participated to the establishment of the plan before examining to what extent its operationalisation is participatory.

5.4.1 The birth of NEPAD - OMEGA/MAP: An impossible compromise

As mentioned in chapter two,¹⁰⁹² the MAP was designed by former President of South Africa Mbeki. His mandate originated from the 1999 OAU Extraordinary Summit in Sirte, Libya where he and Bouteflika of Algeria were mandated to deal with African creditors to obtain the total cancellation of Africa's external debts. In the same vein, the South Summit of the Non Aligned Movement and the G77 which was held in Havana, Cuba in April 2000, mandated Presidents Mbeki and Obasanjo (former President of Nigeria) to discuss debt cancellation of developing countries with the G8, the World Bank and the IMF.¹⁰⁹³ The same mandate was reiterated to Mbeki, Obasanjo and Bouteflika at the 2000 OAU Summit in Togo.

The OMEGA Plan was Senegalese President Abdoulaye Wade's plan to free Africa from poverty. It was Wade's personal initiative and he clearly said: 'I didn't wait to be called on by Africa to study this [plan].'¹⁰⁹⁴ Answering the question whether there was no risk of duplication between OMEGA and MAP, he clarifies further:¹⁰⁹⁵

¹⁰⁹² Section 2.4.

¹⁰⁹³ Report of the Chair on the activities of the Non Aligned Movement, Ministerial meeting, Millennium Assembly, New York, September 2000; also Statement delivered by Ambassador Aluko-Olokun, Member of NEPAD Steering Committee and former personal representative of Obasanjo on NEPAD, on behalf of the NEPAD Steering Committee and Secretariat at the opening ceremony of the meeting of experts on debt sustainability held in Dakar, Senegal, 17 November 2003.

¹⁰⁹⁴ Interview published by All Africa Global Media (all Africa.com) 8 February 2001, with Senegal's President Abdoulaye Wade available at <http://www.intlnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

¹⁰⁹⁵ Interview published by All Africa Global Media (all Africa.com) 8 February 2001, with Senegal's President Abdoulaye Wade available at <http://www.intlnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

The difference is that they, Mr Mbeki, Mr Obasanjo and Mr Bouteflika have been mandated by Africa (by the organization of African Unity and the G15) to make contacts and talk with the G7/8 group of countries about debt problems. And they've talked about a plan for Africa. But they were the advocates of PLANS for Africa. We gave them the mandate. But as an individual and an economist, I have proposed ONE plan for Africa.

As will be discussed below, Wade's rhetoric on 'PLANS and ONE plan for Africa' hides enormous discrepancies and controversies on OMEGA and MAP. However, these days, it is common knowledge that the two plans were merged and gave birth to the NAI which also gave birth to NEPAD. Nonetheless, is the merger of two very different ideologies possible? The question is to investigate whether the background of NEPAD is not a roadblock to its ability to realise the RTD. The answer to this question will reveal to what extent NEPAD can contribute to the eradication of poverty known as the RTD in the human rights discourse.

The OMEGA Plan focuses on economic development with a target of realising 7% growth. Its priorities are investing in education, health care, infrastructure and agriculture. OMEGA is specific with proposed solutions to its realisation. For example, it proposes the establishment of five private universities sponsored by renowned tertiary institutions from the West to enhance education in Africa.

Contrary to the MAP, it does not address governance and democracy. MAP has a more holistic approach with special emphasis on:

- peace building, good governance, democracy
- investment in people
- diversification of Africa's production and export
- investment in ICT and other infrastructure
- development of financing mechanisms

In fact, MAP had respect for human rights and the rule of law in mind, hence its emphasis on good governance and human rights.

The other striking differences between MAP and Omega lie in the funding process. While MAP advocates for aid and private capital flow and debt reduction,¹⁰⁹⁶ OMEGA believes that

¹⁰⁹⁶ MAP para V (86), (87) & (96).

the traditional structure of aid and lending should be changed.¹⁰⁹⁷ This means, according to OMEGA the cost of investment should be evaluated in US dollar and submitted to donors¹⁰⁹⁸ and will be complemented by domestic input. Consequently, OMEGA advocates the establishment of a single international authority in charge of the execution of the plan and management of resources.¹⁰⁹⁹ In addition, it says a Board of Directors made of debtors and creditors representatives should be part of the management structure.¹¹⁰⁰ Wade believes that Africa should be given long-term concessional loans to be paid back after 50 years.¹¹⁰¹ It is submitted here that OMEGA does not have any intention to integrate the plan in the AU, because creditors have no seat in the AU. This is basically a sort of ‘Marshal Plan’. Though Wade argues the contrary,¹¹⁰² it is submitted that his plan to gather funds to build the continent has some similarities with the Marshal Plan to rebuild Europe; the only difference being that Europe was devastated by a war and Africa is devastated by poverty. OMEGA focuses on economic growth and believes that the growth is going to ‘trickle down’ to the poor. Wade wants to keep the plan at subregional and regional level, though his plan has a section on national needs assessment, but which should be determined from a subregional stand point.¹¹⁰³ In fact, he stated in various interviews in 2001: ‘The originality of the

¹⁰⁹⁷ OMEGA Plan, chap 1, para 87.

¹⁰⁹⁸ OMEGA Plan, chap 2, para 6.

¹⁰⁹⁹ OMEGA Plan, chap 5, para 2.

¹¹⁰⁰ OMEGA Plan, chap 5, para 3.

¹¹⁰¹ A Wade ‘Omega Plan for Africa: An African strategy for globalisation’ 12 (4) *The African Economist* 36; also E Harsch ‘Africa preparing its own recovery plans – Leaders aim for new drive to combat continent’s poverty, global marginalisation’ in *Africa Recovery* at <http://www.un.org/ecosocdev/geninfo/afrec/vol15no1/151gov1.htm> (accessed 26 July 2008).

¹¹⁰² L Villalon ‘An interview with President Abdoulaye Wade of Senegal’ on 29 April 2001, at http://kasc.ku.edu/~kasc/resources/newsletters/2001_spring/8/index.shtml (accessed 5 July 2008).

¹¹⁰³ OMEGA Plan, chap 2, para 2.1.

OMEGA plan is to think in regional and continental terms’;¹¹⁰⁴ ‘it is the continental vision and not individuals countries’.¹¹⁰⁵

In contrast, MAP stands for an African leadership of the plan, made of African Heads of State and Government with binding decisions on participating countries,¹¹⁰⁶ thus giving some space for the integration of the plan in the AU and the incorporation of the plan in national development policies. This seems to be an area of impossible compromise between OMEGA and MAP. This impossible compromise weakens NEPAD which symbolises the Wade/Mbeki ideological conflict. This also fuels concerns on NEPAD’s legitimacy especially when Mbeki states: ‘participation [in NEPAD] will be opened to all African countries prepared and ready to commit to the underlying principles guiding the initiative... Countries that are not ready will be welcome to join later’.¹¹⁰⁷ The former Nigerian President’s (Obasanjo) statement that NEPAD will be ‘a plan by Africa for the People of Africa’¹¹⁰⁸ ignores the fact that there was no referendum to consult Africans.¹¹⁰⁹

Again, in contrast to OMEGA, MAP suggests the establishment of a ‘binding commitment by the developed countries and multilateral institutions to an agreed set of obligations with accompanying milestones and timeframes’.¹¹¹⁰

¹¹⁰⁴ Villalon (2001).

¹¹⁰⁵ Interview published by All Africa Global Media (all Africa.com) on February 8 2001, with Senegal’s President Abdoulaye Wade available at <http://www.intltnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

¹¹⁰⁶ MAP para V (104) & (104.1).

¹¹⁰⁷ Briefing by President Thabo Mbeki at the World Economic Forum Meeting: Millennium Africa Renaissance Programme – Implementation Issues, 28 January 2001.

¹¹⁰⁸ E Harsch ‘Africa preparing its own recovery plans – Leaders aim for new drive to combat continent’s poverty, global marginalisation’ in *Africa Recovery* at <http://www.un.org/ecosocdev/geninfo/afrec/vol15no1/151gov1.htm> (accessed 26 July 2008).

¹¹⁰⁹ More discussion on the legitimacy of NEPAD is provided in chapter 3 of this thesis.

¹¹¹⁰ MAP para V (102.2).

The OMEGA was a precise economic plan underpinned by education, health care, infrastructure and agriculture and was to be achieved in 15 years which became the NEPAD time frame. Again, this is in contrast with MAP which stands for a broader development approach. It can be argued that the realisation of the RTD should not be submitted to a time frame, it should be integrated in the way of life, be institutionalised or else it will not be sustainable. Nevertheless, a timeframe is fundamental in giving directions and providing a comprehensive vision for the realisation of a project.

Notwithstanding their differences, both programmes catered for Africa's development with special emphasises on the African ownership of development projects (through African leaders), though there was no referendum to mandate African leaders. The advent of the NAI symbolised the compromise which is now known as NEPAD.

Nonetheless, was this compromise possible? It seems that though the two plans had fundamental differences, there were merged to respond to demands of African Ministers who wanted to avoid the diffusion of energies and resources through two separate initiatives.¹¹¹¹ It is also argued that the fusion of the two plans was based on 'the need to avoid confusing Africa's partners, diffusing the focus, eroding capacity, splitting resources and undermining the credibility of the plans'.¹¹¹² Thus, it could also be argued that the fusion of the two plans was not informed by their synergies.

From a different perspective, it could be argued that MAP and OMEGA were never merged. In Davos, Switzerland where Mbeki, Obasanjo and Wade were on the same platform to unveil

¹¹¹¹ This request was made in Algiers on 8 – 10 May 2001 when African Finance, Development and Planning Ministers met to discuss the two plans.

¹¹¹² E Baimu 'Human rights mechanisms and structures under NEPAD and the African Union: emerging trends towards proliferation and duplication' 2; Occasional paper No 15, Centre for Human Rights, University of Pretoria, August 2002 available at http://www.chr.up.ac.za/centre_publications/occ_papers/occ15.html (accessed 20 July 2007).

a plan for Africa, Wade was not aware that his peers had a plan in their pocket. He thought they came to listen to his plan, hence his comment:¹¹¹³

To be honest, I didn't know that they (Mbeki and Obasanjo) were going to talk about a plan for Africa. It was right there in Davos that I found out about it. But I spoke and they both said, indeed, what President Wade has said fits perfectly with our plan for Africa.

Against this view, it can be argued that the fusion of the two plans followed the Davos meeting. Nevertheless, such an argument does not stand, because of the continuous rifts between NEPAD's architects with Wade arguing that NEPAD had achieved nothing while his peers disagree,¹¹¹⁴ Wade trying to keep the policy at subregional and regional level whereas the other founders stand for the integration of NEPAD at national level. This ideological battle was further illustrated by the very remarkable absence of Mbeki, Obasanjo (the chair of the Meeting), Bouteflika (Algeria) and Moubarack (Egypt the other NEPAD's founder) at the 2002 NEPAD meeting in Dakar, Senegal. All of them claimed to have other commitments.¹¹¹⁵

However, from 2002 to 2008, much water ran under the bridge, hence Mbeki and other influential NEPAD leaders were present at the April 2008 NEPAD meeting in Senegal. Unfortunately, the Summit was not a success, and the headline was: 'African leaders fail to make a breakthrough on NEPAD'.¹¹¹⁶

¹¹¹³ Interview published by All Africa Global Media (all Africa.com) on February 8 2001, with Senegal's President Abdoulaye Wade available at <http://www.intltnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

¹¹¹⁴ 'Is NEPAD nothing but a talk shop?' *African business* available at http://findarticles.com/p/articles/mi_qa5327/is_20051/ai_n21365124 (accessed 25 July 2008).

¹¹¹⁵ O Quist-Arcton 'Mbeki, Obasanjo, Bouteflika, Absent from NEPAD Meeting in Senegal' *All Africa.com* available at <http://allafrica.com/stories/printable/200204150989.html> (accessed 25 July 2008).

¹¹¹⁶ D Flynn 'African leaders fail to make a breakthrough on NEPAD' *Reuters*, available at <http://www.reuters.com/articlesPrint?articleid=USL15142193> (accessed 25 July 2008).

The noise and disagreement on the nature of the African development plan shows that African peoples had no say or were not consulted prior to its establishment. The confusion is incredible and affects the poverty eradication mechanisms at national level.¹¹¹⁷ Wade once said if the NEPAD plan does not incorporate his views, he was going to stand by them.¹¹¹⁸ It is not about Mbeki or Wade or anybody's views, but about the welfare of African people. African leaders must get their act together, clear up the confusion and allow the RTD to become a reality on the continent. They should eliminate the impression that NEPAD objective is to create an 'enriched elite'¹¹¹⁹ and not to empower African people. Nonetheless, African leaders broadly agree that the third challenge of NEPAD is¹¹²⁰

[s]peeding up the integration of NEPAD plans into national development programmes in agriculture, health, education and skills development, water and sanitation, science and technology and SMME development. Unless this happens, African countries will not be in a position to achieve the Millennium Development Goals or their sustainable development.

However, the controversy is far from being over. President Wade unveiled the initiative by Senegal on the revitalisation of NEPAD, at the 15 April 2008 HSGIC Meeting in Dakar. In his speech, Wade ignored the conclusions of the 21 March 2007 Algiers Brain Storming Meeting adopted at the 10th AU Summit in January 2008, in Addis Ababa which said that implementation should be through:

- a) Countries
- b) Regional Economic Communities (REC's)
- c) Development institution
- d) Bilateral and multilateral organisation.

¹¹¹⁷ The national policies makers wondered whether national development policies should be informed by the NEPAD framework or not.

¹¹¹⁸ Interview published by All Africa Global Media (all Africa.com) on February 8 2001, with Senegal's President Abdoulaye Wade available at <http://www.intltnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

¹¹¹⁹ Manby (2004) 1002.

¹¹²⁰ 'Facing the Challenge' *NEPAD Dialogue* 7 issue No 17, 7.

Wade said NEPAD should function at intra-regional level, inter-regional and continental levels, but did not mention country level and other institutions, ignoring the view of other leaders.¹¹²¹

Notwithstanding the Algiers HSGIC Meeting and the 10th AU Summit conclusion underlining that NEPAD is part of the AU, hence the need for a rapid integration through the work of the NEPAD Secretary and the AU Commission, Wade's initiative for the revitalisation plan did not involve the AU. According to Wade's revitalisation plan, the new NEPAD management configuration will change. The HSGIC will be replaced by 'the Committee of Heads of State for the Design, Supervision, and Coordination of NEPAD'.¹¹²² To describe this Committee *verbatim*, it

[w]ould function as an apex Steering Committee or Boards of Directors. The Presidency/Chairmanship, who would from indications in the Senegalese document, be assumed by President Wade, would be assisted by 4 Vice Chairs and 6 Heads of state regionally selected who would oversee the sectors. Also proposed was an interim arrangement which would have the ten sectors [of the NEPAD project] been overseen in respective clusters by the leaders of the following countries, Nigeria, Senegal, South Africa, Algeria, Uganda and Ethiopia. The chair will be assisted by a light Secretariat, while the Vice Chairs will also, each, have supporting technical/administrative Office. The Steering Committee will, on its part, transform into a Sherpa Committee of Assistant to the Presidents.¹¹²³

Where is the AU in this revitalisation plan? Perhaps Wade has personal ambitions. Why should he be the president of the NEPAD management structure without elections where African people can exercise their right to participation? The striking thing here is that, there is no reference to AU, no reference to taking the plan to country level and it seems NEPAD

¹¹²¹ HSGIC/19/NEPAD-REW/5, 19th Summit of the NEPAD Heads of States & Government 29 June 2008, Sharm-El-Sheikh, Egypt; Report of the NEPAD Review Summit, 2. Dakar, Senegal, 15 April 2008.

¹¹²² HSGIC/19/NEPAD-REW/5, 19th Summit of the NEPAD Heads of States & Government 29 June 2008, Sharm-El-Sheikh, Egypt; Report of the NEPAD Review Summit, 2. Dakar, Senegal, 15 April 2008.

¹¹²³ HSGIC/19/NEPAD-REW/5, 19th Summit of the NEPAD Heads of States & Government 29 June 2008, Sharm-El-Sheikh, Egypt; Report of the NEPAD Review Summit, 2. Dakar, Senegal, 15 April 2008.

should belong to a club (Nigeria, Senegal, South Africa, Algeria, Uganda and Ethiopia) in charge of its implementation. Wade simply ignored the 2007 Algiers and 2008 Addis Ababa conclusions stating that ‘NEPAD is a Program of AU which constitutes a philosophical framework, a vision and mission for Africa [and that] NEPAD is therefore, not an implementing institution’.¹¹²⁴ More importantly, in response to Wade’s proposal to revitalise the NEPAD, the Dakar 2008 HSGIC Summit stated:¹¹²⁵

The Heads of State came up with the Algiers Decisions, to ensure coherence between the work of the NEPAD Secretariat, and that of the AU Commission. These decisions are already being implemented, for example, the recruitment of the NEPAD CEO is on course [before the appointment of the current CEO Dr Ibrahim Assane Mayaki]. It would therefore not be helpful to the ongoing integration process and momentum to come up with a new initiative that tends to create parallel process and structure.

Though the Summit also promised to submit Wade’s proposals on NEPAD institutional arrangements, to the AU/NEPAD Coordinating Committee for its consideration,¹¹²⁶ it was almost impossible to stop the running machine which reached the ‘historic moment’¹¹²⁷ with the inauguration of the Unit almost two months later (on 10 June 2008). Though the Unit is already at work and NEPAD integrated in the AU, it could be argued that the ideological rifts which hindered NEPAD’s progress are yet to be forgotten. As mentioned earlier, Wade once said, if the NEPAD plan does not incorporate his views, he was going to stand by them.¹¹²⁸

¹¹²⁴ Conclusions & Recommendations of the HSGIC Meeting and Brainstorming on NEPAD, para 4; Algiers 21 March 2007; adopted by the 10th AU Summit in Addis Ababa (January 2008).

¹¹²⁵ HSGIC/19/NEPAD-REW/5, 19th Summit of the NEPAD Heads of States & Government 29 June 2008, Sharm-El-Sheikh, Egypt; Report of the NEPAD Review Summit, 3. Dakar, Senegal, 15 April 2008.

¹¹²⁶ HSGIC/19/NEPAD-REW/5, 19th Summit of the NEPAD Heads of States & Government 29 June 2008, Sharm-El-Sheikh, Egypt; Report of the NEPAD review summit, 4. Dakar, Senegal, 15 April 2008.

¹¹²⁷ At the inauguration of the UNIT in charge of finalising NEPAD’s integration the AU, Jean Ping the Chairman described the event as ‘a historic moment’.

¹¹²⁸ Interview published by All Africa Global Media (all Africa.com) on February 8 2001, with Senegal’s President Abdoulaye Wade available at <http://www.intltnet.org/news/2001/02/13/2507-1.html> (accessed 21 July 2008).

What is next? How does he stand by his views in front of the AU? Hopefully, he will simply stand with his peers at the AU in support of the plan.

Perhaps Wade should reconsider his views because he was not mandated to establish an African plan. In any case, African leaders should always look for an appropriate compromise and constantly keep in mind that Africans' welfare is paramount. The departure of Mbeki or any other NEPAD founder or African leader should not affect the sustainability of the plan.

Interestingly, it is clear that in the early days of NEPAD, African people were not involved in the process; their rights to participation were not a matter of concern, and hence the lack of human rights based approach to the continental development agenda. Appiagyei-Atua correctly argues that 'African leaders have failed to articulate an effective concept of right that positively linked human rights to development in relation to [African people] culture and history'.¹¹²⁹

In summary, the differences between the two plans are so pronounced that fusing them was going to be counter-productive on the implementation field. In spite of few successes, it is important to note that until NEPAD architects share the same ideology and speak the same language, the victory against poverty might remain a dream. In fact, the description of the birth of NEPAD above clearly shows that prior to the advent of NEPAD, African folks were not informed, they were not consulted and they did not participate in the establishment of the African plan aimed to address their concerns including their RTD. Having exposed the lack of participation of Africans in the early days of NEPAD, the next section will assess the involvement of the people after the establishment stage.

5.4.2 NEPAD/APRM and civil society participation

The previous section shows that neither MAP nor OMEGA involved the civil society in its establishment. The right to participation in the establishment of NEPAD could have been ensured by the organisation of a referendum on its establishment. Unfortunately, the people of Africa were left out. Sharing this view, a commentator argues that while the NEPAD document calls for the participation of the people in development, the process through which

¹¹²⁹ K Appiagyei-Atua (2006) 548.

the document itself was drawn excluded the people.¹¹³⁰ However, it is instructive to note that the organisation of a referendum was going to be almost impossible or unachievable because of the distinctive features of each African country as well as the financial and other logistical implications of a continental referendum.

Nevertheless, discussing the NEPAD at Parliamentary level in each African country, in various African villages as well as in the African Parliament was going to be a good step towards involving Africans in the whole process. This view derives from the fact that parliaments are representative of the people, especially in democratic states. NEPAD's architects are convinced that African leaders derive their mandate from their people and can act on their behalf. This is evidenced by paragraph 47 of the NEPAD document which reads:

We believe that while African leaders derive their mandates from their people, it is their role to articulate these plans [as contained in the NEPAD] and lead the processes of implementation on behalf of their peoples.

This argument is too general because all African states are not democratic, or rather all African leaders are not democratically elected. Therefore, claiming that the NEPAD 'is based on the agenda set by the African peoples through their own initiatives and their own volition, to shape their own destiny' as paragraph 48 of the NEPAD document states is very controversial. This is evidenced by the rejection of NEPAD by the African Civil Society Declaration on NEPAD in these terms: 'We do not accept NEPAD!! Africa is not for Sale.'¹¹³¹

NEPAD's architects preach people's participation through Paragraph 56 of the NEPAD when it reads:

¹¹³⁰ Baimu (2002) 308.

¹¹³¹ The African Civil Society Declaration on NEPAD 'we do not accept NEPAD!! Africa is not for sale!!' The African Civil Society Declaration is available at http://www.ifg.org/wssd/acsnepad_decl.htm (accessed 13 January 2005).

We are, therefore, asking the African peoples to take up the challenge of mobility in support of the implementation of this initiative by setting up, at all levels, structures for organization, mobilization and action.

This paragraph seems to be unrealistic. The state is the main duty bearer of human rights. Therefore, it should set up structures and initiatives to ensure that people take part in national and regional affairs and not call upon the populace to ‘set up structures for organisation and action’. Some scholars believe that the founders of NEPAD did not have Africa’s interest at heart.¹¹³² They argue that Wade and Mbeki came with new development paradigms because the previous ones came from Africa experts and not Heads of state.¹¹³³ In an interview, Wade points out that this time around, the plan was drafted by the decision makers,¹¹³⁴ hence the criticism according to which NEPAD has a top-down approach policy. The African Civil Society Declaration on NEPAD states that the NEPAD is

[a] top-down programme driven by African elites and drawn up with corporate forces and institutional instruments of globalisation, rather than being based on African experiences, knowledge and demands. A legitimate African programme has to start from the people and be owned by the people.¹¹³⁵

From this standpoint, the African Civil Society Declaration on NEPAD makes a good point. NEPAD has to start from the people and be owned by the people. During his field trip for this

¹¹³² M Kankwenda, ‘Forty years of development illusions: revisiting development policies and practices in Africa’; B omonide ‘Mobilisation for the implementation of alternative development paradigms in 21st Century Africa’; S.O Tomori and O.W. Tomori ‘Revisiting the African alternative framework to structural adjustment programmes for socio-economic recovery and transformation (AAF-SAP) in contemporary Nigeria’; O. Ajakaiye ‘The centrality of planning to alternative development paradigms in Africa’ ; H A. Sunmonu ‘ Implementation of Africa’s development paradigms: solutions to Africa’s socio-economic problems’; E. Onubogu ‘Modernisation, globalisation and Africa’s political economy: the Case of Nigeria’, all in Omonide *et al* (2004).

¹¹³³ Onimode *et al* (2004) 237.

¹¹³⁴ A Wade ‘Africa, an outcast or a partner?’ (2002) 6 *African Geopolitics* 49.

¹¹³⁵ African Civil Society Declaration on NEPAD, preamble, para 3.
http://www.ifg.org/wssd/acsnepad_decl.htm (accessed 13 January 2005).

study, the author encountered abject lack of co-operation and was even chased away from various NEPAD founders' countries embassies in Pretoria and Ottawa. This sad situation yielded some reflections: Who wrote the NEPAD programme? Do the officials at the embassies know about NEPAD? If so, why were they so reluctant to discuss with the researcher?¹¹³⁶ If the receptionist or clerk or secretary were not willing to provide assistance to researchers, how did they get their jobs? Who appointed them and why? Are they accountable? What about people's right to information which goes hand in hand with the right to participation? All these questions raise serious development concerns and highlight the disconnection between the leadership and the people. If the RTD is to be realised through NEPAD, future researchers should not encounter such roadblocks.

Under former President Mbeki, in some circles NEPAD was not perceived as a human rights machine, but as a tool for South Africa's imperialism in Africa.¹¹³⁷ This view was sustained during the 2008 Alternatives Day by Scroeder of Khanya College in South Africa.¹¹³⁸ According to Scroeder, the South African Government practiced neo-liberal policies at home and uses NEPAD to expand such policies on the continent.¹¹³⁹ In other words, he views NEPAD as a South African tool to dominate the continent.

Echoing Landsberg's view,¹¹⁴⁰ this writer stood against such arguments and maintained that the thesis of NEPAD being instrument of South Africa and other founding countries *diktat* fails because the plan was well received throughout the continent. Africa's regional and

¹¹³⁶ The author and his friend Donald Rukare (also a Phd candidate) encountered the difficulties at various embassies in Pretoria from 10 to 15 May 2009.

¹¹³⁷ R Naidoo 'The New Partnership for African Development (NEPAD): Where to from here?' in NALEDI (2000) 3.

¹¹³⁸ Khanya College is a South African organisation standing against neo-liberalism.

¹¹³⁹ I Scroeder 'Immigration to build solidarity' Axis 3, 2008 Alternatives Days at St Alphonse de Rodriguez, Montreal, Canada, 23 August 2008.

¹¹⁴⁰ C Landsberg 'NEPAD: What is it? What is missing? Paper written for NALEDI in *building alternatives to neo-liberal globalisation: The Challenges facing NEPAD*' (2004) 9

subregional bodies embrace and support the programme. In addition, because NEPAD recognised the need for partnership between African states, this author echoed Landsberg who maintains that NEPAD does not belong to South Africa or any other country, but to Africa.¹¹⁴¹ Echoing the view of Hope, this writer also argued that Africa's leaders find themselves in a 'damned if they do, damned if they don't' position.¹¹⁴² They were damned for not demonstrating leadership to solve Africa's development problems and then, having done that by launching the NEPAD, they were damned for not consulting others to demonstrate their leadership.

This thesis does not find NEPAD irrelevant, but it is of the view that NEPAD should do more for the realisation of the RTD by implementing a rights based approach to development. It should be acknowledged that NEPAD brought back the question of Africa's development on the table.

However, to clarify the question of NEPAD being an instrument of few countries dominance on the continent, an African Opinion Leader Survey on NEPAD and AU was realised in 2002¹¹⁴³ in seven African countries (South Africa, Nigeria, Senegal, Algeria, Kenya, Uganda and Zimbabwe); South Africa, Nigeria, Senegal and Algeria were chosen because they were amongst NEPAD founders while the Kenya, Uganda and Zimbabwe were chosen randomly.

Respondents were asked to indicate the extent to which they agreed with the statement that 'NEPAD does not embody the economic aspirations of all Africans'. Most respondents in South Africa, Nigeria and Kenya believe that NEPAD embodies the economic aspirations of all Africans while in Algeria, Zimbabwe, Uganda and Senegal, the majority of elites believe

¹¹⁴¹ Landsberg (2004) 9.

¹¹⁴² K R Hope 'Practitioner perspective –towards good governance and sustainable development: the African Peer Review Mechanism' (2005) 18(2) *Governance: An International Journal of Policy, Administration, and Institutions* 288.

¹¹⁴³ 'The African Opinion Leader Survey on NEPAD and AU (2002); Preliminary Report presented by the Centre for International and Comparative Politics in co-operation with Konrad-Adenauer-Stiftung.

the contrary, in so doing expressing reservation in the ability of the NEPAD guidelines to tackle the economic needs of the African population in general.¹¹⁴⁴

Questioning the elitist or top-down approach character of NEPAD, the African Opinion Leader Survey on NEPAD and AU mentioned above¹¹⁴⁵ asked respondents to indicate on a scale of 1 (strongly agree) to 5 (strongly disagree) the extent to which they agreed with the statement that “only the ruling elite is actively engaged in promoting NEPAD”. The majority of respondents in all countries except Zimbabwe believe that NEPAD is largely an elite-driven process. Uganda with 2.20 displayed the strongest level of agreement, followed by Nigeria with 2.20, Senegal with 2.44, South Africa with 2.57, Kenya with 2.60 and Zimbabwe displayed the highest level of confidence in NEPAD’s inclusiveness. From this standpoint, the civil society is excluded and does not participate. Such perceptions of NEPAD need serious improvement in order to provide room for human rights realisation.

Nevertheless, in order to democratise NEPAD and bring it to the man on the street, Nigeria, Senegal, Algeria and South Africa have launched a number of outreach programs, though the latter have only conveyed the general outlines of the plan and have not vigorously engaged civil society participation.¹¹⁴⁶ In fact, the statistics remain shocking because only 14% of the elite interviewees were aware of NEPAD’s existence, while 80% of respondents have no knowledge of NEPAD at all in the selected countries.¹¹⁴⁷ It is important to note that in this context, the elite interviewees were persons who hold authoritative positions in powerful public and private organisations and influential movements and who are therefore able to affect strategic decisions regularly. The ignorance of NEPAD by the elite or the ‘powerful’ demonstrates that the man on the street or the peasant has no say on the whole process. Due to

¹¹⁴⁴ The African Opinion Leader Survey on NEPAD and AU (2002).

¹¹⁴⁵ The African Opinion Leader Survey on NEPAD and AU (2002).

¹¹⁴⁶ The African Opinion Leader Survey on NEPAD and AU (2002).

¹¹⁴⁷ The African Opinion Leader Survey on NEPAD and AU (2002).

the lack of participation of African populace, it is argued that the NEPAD is externally-driven¹¹⁴⁸ and therefore meaningless for Africans.

However, the 2002 Survey referred to above reveals the contrary. The respondents were asked to identify from a list what they considered as five most desirable benefits of NEPAD and classified them per priority. The list was made of: African unification; the eradication of poverty; stronger democratic governance; improved infrastructure, the restoration of Africa's dignity; political stability; improved health care; increased foreign direct investment (FDI); improved social welfare; better education for all; jobs for all; food for all; and reawakening of African cultural traditions.

¹¹⁴⁸ J Akokpari 'Policing and preventing human rights abuses in Africa: the OAU, the AU & the NEPAD Peer Review' (2004) 32 *International Journal of Legal Information* 466.

The following table summarises the perceived benefits of NEPAD by Africans

Table: Perceived benefits of NEPAD

Rank	South Africa	Nigeria	Senegal	Algeria	Kenya	Uganda	Zimbabwe
1	Eradication of poverty (38.2%)	Eradication of poverty (25.5%)	African unification (26.3%)	Eradication of poverty (27.5%)	Eradication of poverty (30.0%)	Eradication of poverty (34%)	Stronger democratic governance (24.3%)
2	Stronger democratic governance (15.9%)	African unification (20.8%)	Improved infrastructure (19.4%)	Political stability (18.3%)	African unification (15.0%)	African unification (15.5%)	Eradication of poverty (22.1%)
3	African unification (10.8%)	Political stability (13.1%)	Eradication of poverty (14.2%)	Stronger democratic governance (12.7%)	Political stability (9.2%)	Stronger democratic governance (12.5%)	African unification (14.3%)
4	Increased FDI (6.4%)	Stronger democratic governance (10%)	Stronger democratic governance (12.7%)	African unification (10.0%)	Stronger democratic governance (8.3%)	Political stability (8.2%)	Increased FDI (11.4%)
5	Jobs for all (3.9%)	Restoration of African dignity (7.7%)	Increased FDI (7.5%)	Improved infrastructure (5.8%)	Improved infrastructure (5.8%)	Improved infrastructure (7.2%)	Political stability (10.0%)

Source: The African Opinion Leader Survey on NEPAD and AU-2002, Centre for International and Comparative Politics in co-operation with Konrad-Adenauer-Stiftung.

An analysis of the table above shows that Africa needs NEPAD to eradicate poverty, to be unified and implement stronger democratic governance. It can therefore be argued that Africans believe that NEPAD plays a vital role in the achievement of their RTD. The majority of elite respondents in Algeria (27.5%), Kenya (30%), Uganda (34%) South Africa (38.2%) and Nigeria (28.5%) considered the eradication of poverty as the desirable profit of NEPAD. In this regard, NEPAD appears to be a vital instrument to realise the RTD in Africa, because if poverty is beaten, Africa will be developed and its people will be on the right track towards the achievement of their RTD. More importantly, the mere fact that Africans believe in NEPAD is a good step in legitimising the plan, because accepting and owning the plan will increase its chances of success.

However, the legitimacy of the plan is hindered by Wade messages. He strongly criticised NEPAD claiming that accomplishments are ‘slow to materialise’ due to wastage of ‘time and money’ and also due to lack of appropriate administration.¹¹⁴⁹ In addition, he complained about the ‘English takeover’¹¹⁵⁰ of the plan by English speaking countries. Most importantly, he claimed that the ‘true conception of the project’¹¹⁵¹ is not worth wasting time for. To make himself clear, he said at a press conference in October 2007 in Dakar:¹¹⁵²

NEPAD has failed. Unfortunately we have not understood the true concept of NEPAD. My brother Meles, [Ethiopian Prime Minister] who heads the project does not understand the whole idea, so are his other collaborators. Instead we have beaten about the bush and wasted too much time.

In spite of former President Mbeki and other founders’ disagreement with Wade’s statements, the latter further raise questions on the legitimacy of NEPAD and underlines that the right to participation of Africans is not respected in the whole NEPAD processes. In fact, African leaders should take the advice of Professor Adebayo seriously. He said that Africa needs a¹¹⁵³

[n]ew African transformation ethic based on a human-centered development paradigm which puts the people at the centre of the development process, on the driving seat as it were and is predilected, above all, on the rational proposition that development has to be engineered and sustained by the people themselves through their full and active participation. In other words, the new African transformation ethics rest on the firm belief that development should not be undertaken on behalf of a people; rather, that it should be the organic outcome of a society’s value system, its perception, its concerns and its endeavours.

¹¹⁴⁹ Statement of A Wade at the occasion of the Johannesburg HSIC Summit in 2004 as quoted by O Deme ‘between hope and scepticism: Civil society and the African Peer Review Mechanism’ *Insights* (2005) 7 available at http://idl-bnc.idrc.ca/dspace/bitstream/10625/27418/1/121268_e.pdf (accessed 8 January 2011).

¹¹⁵⁰ Statement of A Wade at the occasion of the Johannesburg HSIC Summit in 2004 as quoted by Deme (2005) 7.

¹¹⁵¹ Statement of A Wade at the occasion of the Johannesburg HSIC Summit in 2004 as quoted by Deme (2005) .8

¹¹⁵² A Wade ‘NEPAD has failed’ *Daily Observer* 4 October 2007 at <http://observer.gm/africa/senegal/dakar/news/topic/president/rss> (accessed 15 April 2008).

¹¹⁵³ A Adedeji *Preparing Africa for the Twenty-first Century: Agenda for the 1990s ECA* (1991) 49.

In other words, plans such as NEPAD should belong to the people and not individuals. In the same line of thought, this research claims that development goals should have a human rights flavour emanation from the communities. Nevertheless, the insertion of NEPAD in the AU goes a long way in ensuring its legitimacy, credibility and sustainability.

The good news is that, as observed in the table above, Africans view NEPAD as a framework to address their concerns. Thus, the NEPAD has become a common feature in the lives of Africans and it has been generally accepted as an institution that is arguably responsive to African problems, though it should be stressed that the euphoria which followed NEPAD adoption nine years ago is not longer visible. What about participation in the APRM?

The right to participation through the APRM process

In assessing the right to participation of African people in the APRM process, the upcoming sub-sections focus *inter alia* on the APRM forum, the Panel of Eminent Persons and the APRM national institutions such as the national focal points and the national government council because these institutions provide frameworks through which participation can be assessed. In addition, the Programme of Action (POA) and APRM Questionnaire will also be looked at to the extent they enhance participation and the APRM in general.

The right to participation through the APRM Forum

Made of participating Heads of state and government, the APRM Forum is the highest decision making body of the APRM. It supervises 'the APRM organisation and processes, for mutual learning and capacity building, and for exercising the constructive peer dialogue and persuasion required to make the APRM effective, credible, and acceptable'.¹¹⁵⁴ To what extent is the APRM Forum participatory? Are African Heads of state and government experts on democracy, political, economic, and corporate governance issues that underpin the mechanism?

¹¹⁵⁴ NEPAD/HGSIC-3-2003//APRM Guideline/O&P, 1-2 & 9.

The quality of a seating Head of state should not be enough to qualify people to the membership of the APRM Forum. Many African leaders are not always democratically elected or experts in issues that matter to the review. Therefore, not only should the APRM Forum be assisted with experts, it should provide for civil society participation and be more inclusive. Keeping the review at the Heads of state and governments' desks, far away from the reviewed country and away from the civil society casts serious doubts not only on the value of the APRM Forum, but on the value of APRM all together. A SADC leader slammed the APRM Forum by underlining the complicity between African leaders. He said:¹¹⁵⁵

African leaders are renowned for their group solidarity. They will stick to their own even in the face of human rights violations, economic mismanagement, corruption and poor leadership. One only has to look at how they embraced the 2002 Zimbabwe elections results as legitimate when clearly they were not. Unless you have the World Bank/IMF, the European Union and the United States as part of the African Peer Review Mechanism, none of the African leaders can exert any meaningful pressure on the other because they do not have the moral, political or economic leverage to do so. Unless you carry a stick, African leaders will not listen to you.

It is unrealistic to expect the EU, US and the IFIs to be part of the process as they are not African, though the comment is more linked to the lack of accountability of African leaders. This state of affairs corroborates the ineffectiveness of the APRM by emphasising that African leaders stand together to protect each other's 'dirty habits', hence the comment that they 'do not criticise each other for the same reason that people in glass houses avoid throwing stones'.¹¹⁵⁶ This view is sustained by Omonide *et al* when they argue that Africans are very jealous of their sovereignty and the heads of state have the tendency to come together like trade union leaders.¹¹⁵⁷ Manby of Afrimap reported the comments of a journalist who as a

¹¹⁵⁵ Kebonang & Fombad (2006) 51.

¹¹⁵⁶ P Mistry (chairman of the Oxford International Group) 'Why sub-Saharan Africa is not developing' at <http://zoopoe6.v.severlocity.net/hj3/sections/africa/African%20Development.pdf> 6 (accessed 20 Jan 2007).

¹¹⁵⁷ Omonide *et al* (2004) 246.

member of Kenya's National NEPAD Secretariat attended the APRM Forum meeting during the review of Kenya report. The journalist said:¹¹⁵⁸

I counted the number of leaders who spoke after President Kibaki [of Kenya] had responded to Dr Machel [who led the Kenya review process]. They were from Ghana, Ethiopia, South Africa, Rwanda, and Nigeria. Not one posed a question to Mr Kibaki.

They all praised the report and commended Kenya for being candid, thorough and open. They pledged to support Kenya in seeking solutions to its constitution review and diversity problems.

When it was all over, presidents Obasandjo and Mbeki and Prime Minister Meles Zenawi of Ethiopia expressed relief and promised to go on with the process, after realizing that it was not life-and-death situation.

It is about time that the forum opens its doors to the media, churches and other members of civil society to ensure full participation to the process. Notwithstanding its logistic cost, the review should not be done away from the people, but should be broadcasted on national radios and televisions where people can call in and have a say. Again, applying regional and international of human rights monitoring should be the rule.

Nevertheless, the proceedings described above do not provide enough reasons to throw the whole process in the dustbin, hence the correctness of the view that 'the lack of proper consultation with some interested parties does not necessarily render the content of the outcome document as irrelevant'.¹¹⁵⁹ Efforts should be made to better the mechanism from a human rights perspectives.

In this respect, as correctly recommended by Hansungule, there is a need to establish at continental level a 'Conference of stakeholders which will include National Focal Points, the APRM Panel, the APRM Secretariat, National Government Councils partners and other

¹¹⁵⁸ B Manby 'Was the APRM process in Kenya a waste of time? Lessons that should be learnt for the future, in *Open Society institute Africa Governance Monitoring & Advocacy Project, AfriMap*, 3 available at <http://www.afriMap.org> (accessed 11 July 2008); also J Okungu, 'Kenya passed 'ordeal' with flying colours' *The Nation*, 14 July 2006.

¹¹⁵⁹ Hope (2005) 18.

members of the civil society under the chairmanship of the APRM Forum.¹¹⁶⁰ This will provide a platform outside the ‘Peer Review Submit’ to address hindrances to the operationalisation of the process. Finally, the APRM should be reviewed in compliance with the APRM Base Document¹¹⁶¹ that provides for the review once every five years.

The APRM Panel of eminent persons and the right to participation

The APRM Based Document explicitly requires that the operations of the APRM be ran and managed by a Panel of between 5 and 7 eminent persons¹¹⁶² (the APR Panel). The members of the APR Panel must have African professional experience relevant to the work of APRM¹¹⁶³ and must be well known for their ethical stature and demonstrated commitment to the ideals of pan-Africanism.¹¹⁶⁴ Candidates for selection will be chosen by participating countries and appointed by the APR Forum for 4 years and will retire by rotation.¹¹⁶⁵ In addition, the Heads of state and government will make sure that the Panel has proficiency in the areas of political governance, macro-economic management, public financial management and corporate governance. The composition of the APR Panel will also reveal wide regional equilibrium, gender equity and cultural diversity.

The Panel of Eminent Persons mandated for the country review mission is to be revisited. Members of this institution should include qualified peoples who are given the job not only because of their integrity, (as it is currently the case) but also because of their competence and expertise in matter of governance and human rights. Currently, the Panel of Eminent Persons looks like a ‘club of supporters’ or friends of African leaders. It is important to remove this

¹¹⁶⁰ Hansungule (2010) 18.

¹¹⁶¹ Paragraph 28.

¹¹⁶² APRM Base Document, para 6.

¹¹⁶³ APRM Base Document, para 6.

¹¹⁶⁴ APRM Base Document, para 6.

¹¹⁶⁵ APRM Base Document, para 8.

perception by advertising the position and selecting the best candidates objectively. This will go a long way in upgrading the process and will open the door not only for popular participation but also for a better human rights monitoring.

Furthermore, to ensure the integrity of the APRM Panel, there is a need to operationalise paragraph 10 of the APRM Base Document that provides for adoption of a ‘charter for the panel’. This action will help in defining and clarifying the borders between the APRM Panel and the APRM secretariat.¹¹⁶⁶ In fact, the Base Document should clearly prescribe the mandate of both institutions even if they have to collaborate. To strengthen this separation of power, a Code of Conduct (comprising enforceable disciplinary sanctions) for APRM panels should be adopted to ensure that the panel respects its Charter and the separation of powers.¹¹⁶⁷

Similarly there is a need to comply with the Base Document¹¹⁶⁸ which limits the mandate of the members of the Panel to 4 years. Hansungule correctly observes that ‘the term was not followed during the term of the first panel’.¹¹⁶⁹ These measures will enhance the right to participation in the APRM which will be improved.

The APRM national focal point and the right to participation

The National Focal Point is the station connecting the APRM process from the continental to national level, thus the work of the focal point should be ‘inclusive, integrated and coordinated with existing policy decision and medium-term planning processes’.¹¹⁷⁰ The Country Guidelines¹¹⁷¹ recommend that the Focal Point be established at a high level of

¹¹⁶⁶ M Hansungule ‘Legal opinion on the draft operating procedure of the APRM’ (2010) 10 (unpublished paper, on file with author).

¹¹⁶⁷ Hansungule (2010) 14.

¹¹⁶⁸ Para 8

¹¹⁶⁹ Hansungule (2010)10.

¹¹⁷⁰ 2006 APRM Annual Report, 1.

¹¹⁷¹ NEPAD/HGSIC-3-2003//APRM Guideline/O&P.

government who reports directly to the Head of state and with access to all national stakeholders.¹¹⁷² It should be inclusive and independent.

However, as noticed in various countries reviewed,¹¹⁷³ currently the National Focal Point is entrusted to the executive power, who appoints the personnel of the structure. Questions about the integrity and independence of the institution might affect the process at national level. This was observed in a critical assessment of the APRM in Rwanda when the NGO known as *League des Droits de la Personne dans la regions des Grands Lacs* (LDGL) revealed that the location of the National Focal Point at the Presidency of the Republic affected the objectivity of the process,¹¹⁷⁴ hence the recommendation of the Executive Secretary of the United Nations Economic Commission for Africa (UNECA) stating that the structures of the APRM ‘would work better and its credibility guaranteed if it were independent and not attached to political pressure of government’.¹¹⁷⁵ Indeed, confining the National Focal Point to a ministry is not recommended because the government can change and the person responsible of the Focal Point who is the first resource on APRM might just disappear from the scene. Furthermore, in many African countries the government and the opposition do not see ‘eye to eye’ and how can the National Focal Point be representative of all stakeholders if its existence depends on the executive will? The National Focal Point should be reviewed and its independence enhanced. This will ensure the participation of all stakeholders and improve the prospect for the RTD.

The National Commission and the right to participation

¹¹⁷² Communiqué of the 1st Summit of Heads of State and Government in the APRM (APR Forum), Kigali, Rwanda, 13 February 2004.

¹¹⁷³ Ghana, Rwanda, South Africa and Kenya to list some of them.

¹¹⁷⁴ LDGL ‘Critical review of the African Peer Review Mechanism process in Rwanda’⁷ at [http://www.afrimap.org/english/images/report/APRM Rwanda ENG.pdf](http://www.afrimap.org/english/images/report/APRM%20Rwanda%20ENG.pdf) (accessed 25 August 2008).

¹¹⁷⁵ A Janneh, Executive Secretary, UNECA, ‘Independence of APRM needed for good governance in Africa’, Abuja, Nigeria, 29 October 2006 available at <http://www.africanmonitor.org/node/62> (accessed 10 July 2008).

Like the National Focal Point, the National Commission also known as National Governing Council was established by the First Summit of Participating Heads of State and Government in the APRM in Kigali, Rwanda on 13 February 2004. The National Commission should be made of citizens who command the respect of the general public, be autonomous from the government and inclusive of all stakeholders. It caters for policy direction to the implementation of the APRM.¹¹⁷⁶

However, similar to the National Focal Point, its main challenge is to be independent from the executive power. In South Africa, for instance, the process was characterised by the abundance of Governments' Cabinet Ministers sitting in the Governing Council which ended up giving some space to civil society members only after being pressurised to do so.¹¹⁷⁷ This situation actually triggered discontent in the South African Parliament that tried to establish its own parallel APRM structure before reaching an agreement with the executive power.¹¹⁷⁸ In fact, in South Africa, it was noted that NGOs and community-based organisations were not satisfied with the control of the process, though they had ten of the 15 seats on the panel overseeing the process. The main concern was about the power of the government in writing the final report.¹¹⁷⁹

Nevertheless, South Africa produced many good practices including the establishment of the Provincial Governing Councils, the invitation of research institutions as partners and

¹¹⁷⁶ A Janneh, Executive Secretary, UNECA, 'Independence of APRM needed for good governance in Africa', 1-2, Abuja Nigeria, 29 October 2006 available at <http://www.africanmonitor.org/node/62> (accessed 10 July 2008).

¹¹⁷⁷ Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation' 16, paper prepared for the Office of the Special Adviser on Africa (on file with author).

¹¹⁷⁸ Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation' 17, paper prepared for the Office of the Special Adviser on Africa (on file with author).

¹¹⁷⁹ Kebonang & Fombad (2006) 49.

shortening of the Questionnaire¹¹⁸⁰ and its translation in various languages which were novel on the table¹¹⁸¹ and allowed people from the street to be informed and aired their view on the process.

Government interference was also observed in Rwanda where one of the arguments for the absence of civil society members in the process was that ‘most of them perished during genocide’.¹¹⁸² The lack of technical capacity and the difficulties in accessing information also stood on the way of a better mechanism in Rwanda,¹¹⁸³ though there were also positive comments on the participatory nature of the process.¹¹⁸⁴

Nevertheless, it is instructive to note that many workshops involving few civil society members lasted 3 hours or a day at most, thus they did not have enough experience and time to make a real impact on the process.¹¹⁸⁵ This was not a meaningful participation. In this respect, ‘it was noted for example that the Rwanda APR Technical Team had already

¹¹⁸⁰ The questionnaire is the document that outlines the methodological guidelines for the review process. It assists the country to be reviewed to conduct its self-assessment which is the base to formulate its preliminary Programme of Action (POA).

¹¹⁸¹ Hansungule ‘Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation’ 27-28, paper prepared for the Office of the Special Adviser on Africa (on file with author).

¹¹⁸² Hansungule ‘Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation’ 18, paper prepared for the Office of the Special Adviser on Africa (on file with author).

¹¹⁸³ LDGL ‘Critical review of the African Peer Review Mechanism process in Rwanda’ iv at <http://www.afrimap.org/english/images/report/APRM Rwanda ENG.pdf> (accessed 25 August 2008).

¹¹⁸⁴ LDGL ‘Critical review of the African Peer Review Mechanism process in Rwanda’ iv at <http://www.afrimap.org/english/images/report/APRM Rwanda ENG.pdf> (accessed 25 August 2008) 10.

¹¹⁸⁵ LDGL ‘Critical review of the African Peer Review Mechanism process in Rwanda’ iv at <http://www.afrimap.org/english/images/report/APRM Rwanda ENG.pdf> (accessed 25 August 2008) 11.

answered the APR Questionnaire incorporating predominantly opinions and figures, without the crucial input of other stakeholders capable of guaranteeing overall national ownership'.¹¹⁸⁶

However, the process yielded positive results such as the establishment of the Unity and Reconciliation Commission and the *Gacaca* courts¹¹⁸⁷ aiming to accelerate national reconciliation after the genocide.¹¹⁸⁸ It also enhanced the dialogue between the states and non state actors. In addition, democratic institutions such as the adoption of a new Constitution (through a referendum) characterised by the setting up of an independent judiciary, a Human Rights Commission as well as an Ombudsman was established¹¹⁸⁹ and this was a step in the right direction in ensuring people's participation as well as a better implementation of the RTD in Rwanda.

In Ghana, the concern was the same as in South Africa. Though the peer review was opened and dominated by civil society bodies, the final report was mostly written by the government. Moreover, despite the protest from civil society organisations, the government appointed civil society representatives without consultation or participation of the two major confederations of non-governmental organisation.¹¹⁹⁰ Furthermore, many members of the civil society had no understanding of the process and those who had some knowledge of the process received the

¹¹⁸⁶ Draft report of the APRM technical support mission, 'Report of the APRM Panel on the country review of the Republic of Rwanda'.

¹¹⁸⁷ The *Gacaca* court is traditional system of justice established in Rwanda in the wake of the 1994 genocide. In this court, hearings are held outdoors with the participation of the community at large. Such court became necessary when the regular Rwandan Courts were overwhelmed by the volume of case after the genocide.

¹¹⁸⁸ Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation' 24, paper prepared for the Office of the Special Adviser on Africa (on file with author)

¹¹⁸⁹ Hansungule 'Overview paper on the role of the APRM in strengthening governance in Africa: opportunities & constraints in implementation' 23-24, paper prepared for the Office of the Special Adviser on Africa (on file with author).

¹¹⁹⁰ R Herbert 'The survival of NEPAD and the African Peer Review Mechanism: a critical analysis' (2004) 11 *South African Journal of International Affairs* 18.

discussion documents only at meetings and could not make a significant input,¹¹⁹¹ hence the comments that ‘there was no mechanism for those involved to satisfy themselves that their comments on what became the final draft of the country self-assessment report and programme of action – to all intents and purposes the heart of the country’s peer review process – had been taken in to account’¹¹⁹² and that the ‘Governing Council, which quite rightly is the central organiser, is felt not to have left enough space for others to make meaningful input’.¹¹⁹³ All these shortcomings are due to the lack of a proper legal mechanism characterised by transparency, respect for rule law. There is a need to have a human rights-informed review process.

Another area of concern was the Questionnaire which had only ‘modest resemblance’ to the expert recommendations because all the requests pertaining to political rights, balance of power, corruption, freedom of associations, the power of parliament to compel testimony and financial accountability from the executive and the right to opposition to access media were removed from the agenda and replaced with things that were not addressed by the experts.¹¹⁹⁴

Nevertheless, amongst other things, the process had the merit to mobilise various stakeholders including chiefs, to consolidate and enhance democratic values.¹¹⁹⁵

It also emerged that during the country support mission in Kenya many stakeholders had no clue of the process or their role in it,¹¹⁹⁶ and did not have enough resources to prepare thoughtful scrutiny of governance.¹¹⁹⁷

¹¹⁹¹ Kebonang & Fombad (2006) 51.

¹¹⁹² A Bing-Pappoe ‘Ghana and the APRM: A critical assessment’ 8, June 2007 available at http://www.afriMAP.org/english/images/report/AfriMAP_APRM_Ghana_EN.pdf (accessed 8 August 2008).

¹¹⁹³ A Bing-Pappoe (2007).

¹¹⁹⁴ Herbert (2004) 16.

¹¹⁹⁵ A Bing-Pappoe (2007).

¹¹⁹⁶ The APRM Support Mission to Kenya, 26-27 July 2004, Communiqué <http://www.nepad.org/2005/files/aprm.php> (accessed 12 December 2006).

However, as pointed out by the Kenyan Governing Council, the APRM was not useless in Kenya. On the contrary, it produced many good things including an adequate environment for political dialogue with religious groups, NGOs and media ready to debate. In this regards, it was argued that ‘the process yielded in some respects, the most comprehensive documentation to date of the political, social, cultural and economic situation in Kenya. The APRM process has helped give ordinary Kenyans some voice to their concerns’.¹¹⁹⁸ It also led to the adoption and ratification of various codes of corporate governance and socio-economic development,¹¹⁹⁹ though the process was tarnished by the inappropriate dismissal of three council members by the Minister in charge of NEPAD Kenya.¹²⁰⁰ This action illustrated the negative views on the transparency of the process as well as the independence of the National Governing Council which did very little to ensure a meaningful popular participation.

In general, though NEPAD is now recognised as the voice of African development, a lot more efforts need to be undertaken to ensure the participation of African people in its processes. In moving towards the right path, it is important to open the APR Forum to the civil society including churches, NGOs, media and political parties from the opposition in the reviewed country; the national focal point and the national governing council should be independent and aimed at ensuring a broader participation of the public. It is noteworthy that shortcomings described earlier do not call for the dissolution of the APRM which is actually the best flower in NEPAD’s garden or the ‘jewel in NEPAD’s crown’,¹²⁰¹ but rather a call for its correction and improvement in order to enhance the prospects of the RTD under NEPAD.

¹¹⁹⁷ Herbert (2004) 18.

¹¹⁹⁸ S O Akoth ‘The APRM process in Kenya – A pathway to a new state?’ March 2007, 2 available at http://www.afriamap.org/english/images/report/APRM_kenya_EN.pdf (accessed 10 August 2008).

¹¹⁹⁹ 2006 APRM Kenya Report; also Hansungule, 25.

¹²⁰⁰ S O Akoth (2007) 2.

¹²⁰¹ African Peer Review Mechanism, Country Review Report of the Republic of Kenya 29 (2006), *available at* <http://www.nepad.org/2005/files/aprm/APRMKenyaareport.pdf> (accessed on 13 January 2008).

The Programme of Action and the right to participation

The Programme of Action (POA) is the fruit of the country self- assessment which allows the country to look at itself in a mirror in order to ascertain progress and identify gaps. The guidelines on how to address important issues related to the APRM four thematic areas are recorded in the country POA. To use Hansungule's words, it is

[t]he key input delivered by the country into the peer review, and it, therefore, serves to present and clarify the country's priorities; the activities undertaken to prepare and participate in the APRM; the nature of the national consultations; as well as to explicitly explain the responsibilities of various stakeholders in government, civil society and the private sector in implementing the Programme.¹²⁰²

Accordingly, it should be participatory and transparent as all stakeholders will have an important role to play in its implementation.

One of the difficulties with the POA is that countries are still struggling to find a way to align such a programme with their initial development plans; some are yet to understand if there is a need to a different plan to accommodate the POA.¹²⁰³ It was reported¹²⁰⁴ that, Rwanda's POA was basically feeling up the gaps in the existing national programmes. This may not be the solution as it is not sure the previous national plan was in line with APRM thematic areas. As a result people's right to participation in the adoption of the POA becomes questionable.

There is a need to improve the design and implementation of the POA; to domesticate it or infuse it in national development Programme with special attention to people's input. In fact, the POA should content precises stages and deadlines on how the country plans to comply with African Peer Review standards and codes.

¹²⁰² Hansungule, 38.

¹²⁰³ Hansungule, 40.

¹²⁰⁴ Hansungule 40.

The other problem linked to the POA is that the process is not always representative of the country review report. This casts a doubt on how representative if the POA. Prospectively, the APRM shall ensure greater transparency and more importantly make sure that there is synergy between the Country Review Report and the POA. This will go a long way in ensuring the implementation of the POA which is often neglected after the whole process.¹²⁰⁵

The APRM Questionnaire and the right to participation

The Questionnaire was compiled to have a consistent review mechanism throughout the continent. It is set in four thematic areas: democracy and political governance, economic governance and management, corporate governance, and socio-economic development. The Questionnaire should be commended as it offers the grounds on which to assess the country's compliance with good governance. However, there is a need to strengthen it by addressing its weaknesses (that reduce people's participation) which include its length, the lack of harmony in the use of similar concepts, the complexity of the language used; the multifaceted aspect of some thematic areas, the repetitiveness of some questions, the broadness of the questions and the lack of a specific focus on NEPAD

The length

The Questionnaire is too long (88 pages) and cumbersome making the whole process difficult to follow. This shortcoming is replicated in 2011 Draft Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism¹²⁰⁶ which is actually 90 pages. Such an approach reduces the practicality of consultations and discussions as these will need a broader scope, more time, and a much extended scope to get all the stakeholders to participate effectively.

¹²⁰⁵ Rukato (2010) 98.

¹²⁰⁶ 2011 Draft Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism available at www.nepad.org/aprm (accessed 10 March 2011).

There is a need to shorten the Questionnaire by replacing the four thematic areas with simple and more convenient clusters of governance related subjects. This will enhance the practicality of research related to the Questionnaire.¹²⁰⁷

The complexity of the language used

To enhance participation, there is a need to render the Questionnaire accessible to ordinary folks as well as experts. The current Questionnaire contains several technical and complex languages. For example: Objective 1, Question 4 of the economic governance thematic area asks ‘What has your country done to increase domestic resource mobilisation including public and private savings, capital formation and reduce capital flight?’ The first indicator calls upon the respondents to highlight measures taken to ‘deepen financial intermediation’. Unless one is a good expert in economy, he would not have a clue of ‘deepen financial intermediation’. The Questionnaire should be comprehensible to all,¹²⁰⁸ hence the need to have an explanatory paragraph for complex questions.

The Draft Revised Country Self-Assessment Questionnaire should be commanded for simplifying the language used in the economic section. Removing the concept of financial intermediation was long overdue and this was done in the Draft Revised Country Self-Assessment Questionnaire and should be confirmed in the final document.

In improving the indicators on the question ‘what sectoral economic policies has your country developed and implemented to promote economic growth and sustainable development?’¹²⁰⁹, the respondents could also be asked to describe policies targeting the balance of interests between environmental and economic sustainability.

¹²⁰⁷ R Herbert and S Gruzd *The African Peer Review Mechanism Lessons from the Pioneers* (2008) 40.

¹²⁰⁸ Ross and Gruz p 143.

¹²⁰⁹ Question 3 objective 1 of the current questionnaire.

The question itself had been improved in 2011 Draft Revised Country Self-Assessment Questionnaire which adds time limitation (5-10 years) for policy evaluation and effectiveness.¹²¹⁰

Lack of harmony in the use of similar concepts

For instance, the socio-economic section of the Questionnaire uses the notions of ‘socio-economic development’, ‘social development and poverty eradication’¹²¹¹ in the same sentence. This is confusing and cannot assist in providing an appropriate response to the question.¹²¹²

However, the Draft Revised Country Self-Assessment Questionnaire attempts to harmonise the concept and used the notion of ‘broad based sustainable socio economic development’¹²¹³ which is clearer and should be incorporated in the future Questionnaire to enhance the right to participation.

The multifaceted aspect of some thematic areas

The other reason to amend the Questionnaire is the multifaceted character of some thematic areas. For example, the economic governance section focuses on trade, monetary and macro-economic policy-making, fiscal management and oversight processes, anti-corruption efforts, and anti-money laundering systems. This is too broad for one thematic area because several members of civil society have no clue of these issues and even a research institution in charge of this thematic area may lack appropriate expertise for all these issues.¹²¹⁴

In the draft Revised Country Self-Assessment questionnaire, the same broadness appears in the document and should be corrected.

¹²¹⁰ 2011 The Draft Revised Country Self-Assessment Questionnaire, chapter 4 ‘economic and governance and management’, question 2, p 28

¹²¹¹ Objective 2 of the section allocated to socio - economic development.

¹²¹² Herbert and S Gruzd (2008) 43.

¹²¹³ Draft Revised Country Self-Assessment Questionnaire, chap 6, p 69; also objective 1, p 75.

¹²¹⁴ Herbert and Gruzd (2008) 39.

The repetitiveness of some questions

The Questionnaire endeavors to merge cross-cutting material into each of the thematic focus. Though this seems to highlight the preeminence of the issues raised, it makes the reports repetitive and boring as the same questions appears under the four focus areas. This was highlighted by the Sixth Africa Governance Forum in these terms:

The Questionnaire appears to be repetitive especially on cross-cutting issues, thus making the Country Self-Assessment Review tedious and difficult to follow and digest. This has implications for the Country Review Team (CRT) Report as well as the final Panel Report.¹²¹⁵

The handling of corruption by the Questionnaire is well illustrative of this repetitiveness. Whereas corruption in political and business spheres are similar and are investigated and prosecuted by the same body (the judiciary), the Questionnaire differentiates corruption in the political and business sector.¹²¹⁶ To avoid such repetitive Questionnaire, one approach could be to have a table encompassing all cross-cutting issues.¹²¹⁷

In the Draft Revised Country Self-Assessment Questionnaire, objective 6 dealing with the promotion and protection of the rights of women in the democracy and good political governance¹²¹⁸ is sound and correct. However several aspects of women's rights reappear in chapter 6 dealing with broad-based sustainable socio-economic development, in its objective 4.

Since the four thematic areas are very complementary, it could be necessary to assemble related issues. For example on a theme 'human rights', questions related to women's rights,

¹²¹⁵ United Nations Development Programme (UNDP), 'Implementing the African Peer Review Mechanism: Challenges and Opportunities, Report of the Sixth Africa Governance Forum (AGF-VI)', Kigali, Rwanda, 9–11 May 2006, report produced 20 June 2006, p.24.

¹²¹⁶ Herbert and Gruzd (2008) 39.

¹²¹⁷ Herbert and Gruzd (2008) 39.

¹²¹⁸ Chap 3

children rights, indigenous people rights and disability rights could be addressed. This will facilitate the work of specialised working group on specific questions.¹²¹⁹

This approach could assist in addressing vulnerable groups' rights which are not adequately addressed in the Questionnaire. For instance, precise indicators on the right of people with disability are needed. Here, affirmative action, how inclusive are policies on access to civil and political and socio economic rights, accessibility of information through Braille, sign language interpreter and other tools as required by specific disabilities. This shortcoming is also characteristic of the Draft Revised Country Self-Assessment Questionnaire for the African Peer Review Mechanism.

Review some indicators that are not reflexive of the reality in countries. For example, Democracy theme Objective 3, Question 1 which focuses on measures that have been put in place in view of protecting economic socio cultural and civil and political rights, there is a need to include the presence of a justiciable bill of rights in the Constitution with clear remedies for human rights violation. In the same vein, on question three focusing on 'what sectoral or macroeconomic policies has your country developed and implemented to promote economic growth and sustainable development?' one possible additional indicator could have been 'give measures targeting the balance of interests between environmental and economic development'. These two suggestions could be considered during the adoption on final Questionnaire.

Similarly, under the same objective 3, Question 2, addressing access to justice, indicators include the description of measures taken to provide (training, monitoring, evaluation, adjustment)'. This indicator may not reflect the reality as training provided may not lead to access to justice.¹²²⁰ In fact, this controversial provision had been removed from the Draft Revised Country Self-Assessment Questionnaire and shall not be included in the future Questionnaire.

¹²¹⁹ Herbert and S Gruzd (2008) 40.

¹²²⁰ Herbert and Gruzd (2008) 42.

Under the same question, another possible indicator could be to provide evidence that all accused persons are trialed in a language of their choice.

The broadness of the questions in the Questionnaire is problematic

Currently some questions have too many notions and this does not make it easily researchable. Under objective 4 of the section focusing on democracy, the first question reads: ‘What are the constitutional and legislative provisions establishing the separation and balance of powers among the Executive, the Legislature and the Judiciary branches of government?’ Such a question can be divided into two with the first one focusing on the separation of power between the executive and the legislative and the second one on the balance of power between executive and the judiciary. The concept of ‘balance of power’ can be removed from the question as it is already included in the concept of ‘separation of powers’. This approach had been adopted by the Draft Revised Country Self-Assessment Questionnaire.¹²²¹

The criticism attached to the broadness of the question is also applicable to the broadness of some indicators. For example, the first question ‘What are the main categories of commercial enterprise and what is their role in the economy?’ under the corporate governance section, has too many indicators to be researchable. It requires a great knowledge of almost all the economy of the country and this is not conducive to an efficient participation in terms of time and expertise. Some of these indicators could be the focus of the Country Review Team and research institute.¹²²² This approach is also adopted by the Draft Revised Country Self-Assessment Questionnaire, though it could be argued that the length of indicators is linked to the need to explain the content of indicators.

The lack of focus on NEPAD

The Questionnaire does not investigate to what extent NEPAD reaches the grassroots in the countries. In other words, how NEPAD programme is implemented at the country level. This

¹²²¹ Chap 3, objective 2, question 1.

¹²²² Ross and Gruzd (2008) 45.

has been however corrected in the Draft Revised Country Self-Assessment Questionnaire ¹²²³ and should be adopted in the final Questionnaire.

As mentioned earlier, the Questionnaire is useful in involving people in the process. However, some revisions are needed and countries should be encouraged to contextualise the Questionnaire to their realities.

Having assessed, the right to participation in NEPAD/APRM, the next session will examine how financial constraints can impact the achievement of the RTD.

5.5 NEPAD, financial constraints and the RTD

The aim of this section is to assess the impact of financial constraints on NEPAD's ability to realise the RTD in Africa. Realising the RTD entails several actions in an interrelated manner which leads to the betterment of human condition. Marks states the following:

It is not enough to consider that the allocation of resources for affordable housing is a contribution to the right to shelter; the planner must ask what the plan will do for the residents' enjoyment of the right to health, food, education, information, work and effective remedies, to mention only the most obvious ones. ¹²²⁴

In other words, realising the RTD implies an effective process comprising appropriate planning to yield positive outcomes or enjoyment of human rights. For this to happen, 'one must take account of the interconnectedness and seamlessness of the rights', ¹²²⁵ elements of the RTD. Therefore, achieving the RTD in Africa needs more than just political will; it needs more than the mere 'determination of Africans to extricate themselves and the continent from the malaise of underdevelopment and exclusion in a globalising world'. ¹²²⁶ In other words, the

¹²²³ Chap 6, objective 1, question 3.

¹²²⁴ S Marks 'The human rights approach to development: seven approaches in Sengupta, Negi & Basu (eds) *Reflections on the right to development* (2005) 27.

¹²²⁵ Okafor (2008) 55.

¹²²⁶ NEPAD 2001, para 1.

RTD requires political will, appropriate planning and a lot of money. NEPAD itself is the living testimony of the political will of African leaders; the planning, even if it needs improvement, is there through the NEPAD document as well as the Declaration of Democracy, Political, Economic and Corporate Governance.

Nonetheless, the implementation of NEPAD's programme and the achievement of 7% annual growth requires an estimated USD \$64 billion every year.¹²²⁷ Is this money available? This is the one million dollar question.

In order to have the necessary funds, NEPAD believes in the effective utilisation of Africa's resources, rationalising government spending, encouraging domestic savings and harmonising the taxation system with a view to encourage investors to support its agenda¹²²⁸ and facilitates it self-reliance. Furthermore, NEPAD's architects advise African countries to diversify and increase the quality of their export base products and unite in order to counter any competition on the international market,¹²²⁹ to increase their manufacturing capacity¹²³⁰ which will definitely yield financial results. In furthering its objective at regional level, the NEPAD Business Group was created to raise money and give room for businesses' participation in financing NEPAD.¹²³¹ The (ADB) had been a pillar in financing NEPAD. From 2002 to 2005, 'the ADB has financed sixteen projects, worth about US\$ 692.1 million and raised around US\$ 1.6 billion.'¹²³²

¹²²⁷ NEPAD 2001, para 144.

¹²²⁸ NEPAD, para 145.

¹²²⁹ NEPAD, para 168.

¹²³⁰ NEPAD, para 155 & 170.

¹²³¹ F G Mucavele 'NEPAD Progress Report-towards development' 4, para 7; 8 February 2006 (on file with author).

¹²³² Mucavele (2006) 6, para 12.

Unfortunately, the money raised through the methods described above is not enough; hence the NEPAD programme relies mostly on external funding.¹²³³ This is evidenced by the fact that the World Bank provided Institutional Development Fund grants to support NEPAD Secretariat's activities such as a grant in 2004 worth US \$348, 000 to finance Public Expenditure Tracking in Agriculture, provided a grant in 2003 worth US \$500,000 to finance the 'strengthening implementation of NEPAD agenda in West Africa'.¹²³⁴ The World Bank also assists NEPAD with loans. Example, from 2001 to 2005 the World Bank approved 11 regional projects (three in the financial sector, one for trade facilitation, three on HIV and AIDS, three in the power sector) for an amount totalling US \$ 555 million in International Development Assistance credits.¹²³⁵ Apart from the World Bank, NEPAD is financed by other donors including the European Union (EU), the IMF and United State Agency for International Development (USAID) the United Nations Industrial Development Organisation, the UNDP¹²³⁶ and many others.

The future of NEPAD looks uncertain because its existence seems to depend on external funding. Analysing the financing of NEPAD, the former NEPAD CEO, Nkuhlu, argues that 'the greatest threat is the increasing dependence on funding by development partners and UN agencies. Financial support by African countries has declined in the last two years'¹²³⁷ and this can only lower the prospect of the RTD under the African institution.

¹²³³ E Harsch 'NEPAD stimulates debate on development, democracy and global ties' (2003) 16 (4) *Africa Recovery* 7.

¹²³⁴ L K-van Niekerk and Houdart 'NEPAD' 4 at <http://www.un.org/afica/osaa/nepad.html> (accessed 16 September 2007).

¹²³⁵ L K-van Niekerk and Houdart 'NEPAD' 4 at <http://www.un.org/afica/osaa/nepad.html> (accessed 16 September 2007).

¹²³⁶ 2006 UN Report 'The contribution of the private sector to the implementation of the NEPAD' 6.

¹²³⁷ W L Nkuhlu 'The Partnership for Africa's Development (NEPAD): beyond the establishment stage' 15, paper presented at the University of Pretoria, South Africa on 8 November 2007 (on file with author).

However, in its briefing to the UN on 17 October 2007, Mucavele former NEPAD CEO who took over from Nkuhlu and has been replaced at the 20th HSGIC Summit on 3 January 2009 by Dr Ibrahim Assane Mayaki, observed that the African continent had invested 67 billion dollars in priority of NEPAD, more than half of which came from contribution from African governments.¹²³⁸ He nevertheless pointed out that this was not enough to meet NEPAD's target.

The Cape Town based newspaper; *The Cape Argus*, portrayed a tearful former President Mbeki calling upon the G8 to 'follow through on their promises of support for Africa's socio-economic rescue plan, NEPAD'.¹²³⁹ In the same light, Dr Jean Ping, Chairperson of the AU Commission, recently expressed his frustration linked to donors' refusal to respect their pledge towards NEPAD and called upon them to respect their pledges.¹²⁴⁰ Indeed, depending on aid to realise a plan is a risky business because the sustainability of the plan is not guaranteed. Therefore, to be able to realise the African dream of post colonial era which is freedom from poverty, self-reliance, self-sustainment and holistic human development, NEPAD should start looking inwards for funding.

From the APRM perspective, paragraph 12 of the Guidelines for countries to prepare for and to participate in the APRM clearly reads:¹²⁴¹

National ownership and leadership by the participating country are essential factor underpinning the effectiveness of such a process. This includes leadership in ensuring consistency with existing national efforts, like the Poverty Reduction Strategy Papers (PRSP) processes, other national poverty reduction strategies, Medium Term expenditure Framework (MTEF), National Human Rights Action Plans, Millennium Development Goal (MDG) strategies, ongoing institutional reforms, and other relevant governance and socio-economic development strategies, programmes and projects. It also includes

¹²³⁸ F Mucavele 'Briefing on the progress in the implementation of NEPAD', 4 on 17 October 2007, Conference Room-6, United Nations.

¹²³⁹ 'Mbeki urges G8 to follow up on NEPAD promises' *The Cape Argus*, 2 June 2008, edition 1, 12.

¹²⁴⁰ Address by Dr Jean Ping, Chairperson of the AU Commission at the opening of the 13th Ordinary Session of the AU Executive Council, 6; 27 June 2008, Sharm El Sheikh, Egypt.

¹²⁴¹ NEPAD/APRM/panel13/Guidelines/11-2003/Doc-8.

efforts by the participating country to address capacity constraints in an integrated manner within all of these activities, as well as facilitating and coordinating the alignment of international support behind the National Programme of Action that participating countries are expected to develop and implement.

In other words, to be part of the APRM process, a country must own and lead the process, be ready to establish a synergy between its development programmes and the NEPAD's, and implement them through its Programme of Action (POA).¹²⁴² This undertaking needs financial resources. To ensure a smooth Peer Review, it has been agreed that states participating in the APRM should bear the cost of the review,¹²⁴³ and contribute \$100 000 annually for the running of the secretariat which has no budget on its own. Nevertheless, can APRM participant countries pay the bills? The reality is that African countries are bogged down by a heavy debt load and are even unable to pay their membership dues to the AU and its predecessor OAU. This sad situation led Libya in 1999 and Nigeria in 2005 to pay others countries contribution in running the AU as well as the APRM Secretariat.¹²⁴⁴

Though Rwanda contributed US \$100 000, the bulk of the money needed to review Rwanda came from donors with a contribution of US \$500 000 from the UNDP, US \$540 000 from the British Department for International Development (DFID), US \$60 000 and US\$21 000 from UNIFEM.¹²⁴⁵ This strong reliance on external founding seems to threaten the sustainability of the process and cast serious doubt on NEPAD ability to achieve the enjoyment of the RTD.

Nevertheless, it is important to keep in mind that as from 31 December 2006, the APRM was primary funded by participating African countries. The total input from these countries was

¹²⁴² The POA is the national plan of action that builds on existing policies, programmes and projects and the recommendation of review.

¹²⁴³ APRM Base Document, para 27.

¹²⁴⁴ N Udombana 'a harmony or a cacophony? The music of integration in the African treaty and the New Partnership for Africa's Development' (2002) 13 *Indiana International and Comparative Law Review* 233.

¹²⁴⁵ LDGL 'Critical review of the African Peer Review Mechanism process in Rwanda' 7, at [http://www.afrimap.org/english/images/report/APRM Rwanda ENG.pdf](http://www.afrimap.org/english/images/report/APRM%20Rwanda%20ENG.pdf) (accessed 25 August 2008).

US \$48, 8 millions, representing 62 % of the total contribution since the establishment of the APRM.¹²⁴⁶ Bilateral and multilateral donors are credited with the remaining 38%.¹²⁴⁷ Nonetheless, it could be argued that 38% of external funding remains high, because without such a contribution, the institution will not function effectively and efficiently.

African leaders should take serious actions in reversing the trend. One way of doing so is to stop wasteful spending on presidential jets,¹²⁴⁸ presidents' holidays' cost,¹²⁴⁹ and reducing ministers' luxury vehicles costs.¹²⁵⁰ This will assist them in saving some money to be allocated to AU, NEPAD and APRM activities.¹²⁵¹

¹²⁴⁶ Mucavele briefing on the progress in the implementation of NEPAD' (2007) 5.

¹²⁴⁷ Mucavele (2007) 5.

¹²⁴⁸ M Nalugo 'President Yoweri Museveni has summoned MPs on the Presidential Affairs committee to brief them about his urgent need for a brand new Gulf Stream 5 (G5) presidential jet' *The Monitor* (Kampala), 7 December 2007

http://www.friendsforpeaceinafrica.org/index.php?option=com_content&task=view&id=186&Itemid=110 (accessed 25 December 2009).

¹²⁴⁹ On 28 August 2009, it was reported that for his last Holiday at La Baule France, President's Biya (of Cameroon) and his friends used 43 bedrooms for a total amount of 42 000 Euros per day. Biya's holiday was more expensive than Sarkozy's, Obama's and former President Bush's put together; see 43 chambres et 42 000 par jour pour les vacances de Paul Biya (mis à jour) at <http://fr.news.yahoo.com/69/20090828/twl-43-chambres-et-42-000-par-jour-pour-b11dcdf.html?printer=1> (accessed 29 August 2009).

¹²⁵⁰ In South Africa, *News 24.com* reported that the water and environmental affairs department had bought a R900 000 BMW for Deputy Minister Rejoice Mabudafhasi. In the same report, it was observed that the police department had splurged out R235 000 on luxury hotel accommodations for Minister Nathi Mthethwa. Economic Development Member of the Executive Council Mike Mabuyakhulu had used his own car for government business, and claimed a total of R383 618.07 for four months travel expenses. A BMW 7 Series was bought for Minister in the Presidency Trevor Manuel at a cost of R1.2m and included R100 000 in "unnecessary accessories". Another reply to a parliamentary question revealed that Deputy Police Minister Fikile Mbalula had spent R1.6m on two new ministerial vehicles, including R83 879 on extras.

¹²⁵¹ 'Wasteful spending hits 318 m' *news24.com* at http://www.news24.com/Content/SiteElements/HomePage/NewsYouShouldKNOW/1163/b37154c8433a4073adf344a519bec1a0/16-10-2009-02-46/Wasteful_spending_hits_R318m (accessed 25 December 2009).

Overall, the lack of funding constitutes a serious hindrance to NEPAD's capacity to realise the RTD in Africa. Financial constraints amongst other factors, plays an important role on the current lack of euphoria on NEPAD activities. Such lack of euphoria and enthusiasm on the continental plan cannot enhance the prospects for the RTD in Africa. African leaders should strive to bring back the euphoria that accompanied the plan in its early days. This will definitely help in raising more money within Africa and abroad in order to enhance the chances of the RTD on the continent.

5.6 Concluding remarks

The aim of this chapter was to assess to what extent the NEPAD is informed by human rights; to what extent it mainstreams human rights in development in order to achieve the RTD.

The chapter shows that NEPAD addresses basic needs through the fight against poverty, through the provision of services. Based on the purpose and objectives of NEPAD, the chapter argues that the continental programme is informed by human rights. However, in terms of NEPAD framework, nothing is done to oblige the duty bearers to comply with their commitments or to empower the poor to claim these rights framed in terms of services. This state of affairs is noticeable through the soft nature of NEPAD or its lack of accountability, though it is also observed that the non-justiciability of a right does not negate its value.

After observing that NEPAD aims to realise human rights and the RTD, the chapter shows that the lack of participation of African people in the early days and during the implementation of NEPAD does not enhance the possibility of the realisation of the RTD, since the beneficiaries of the plan have no say. In addition, the soft nature of the plan did not improve the prospects for the RTD, though the ongoing integration of NEPAD in the AU is expected to remedy several problems including its lack of legitimacy.

The chapter also calls on the AU to reduce the size of the APRM governance standards and avoid mixing binding and non binding instruments to avoid weakening the binding ones. It

also calls for the reform of various NEPAD/APRM institutions and calls for a POA which reflects the country self-assessment and the country review report. In addition, it calls for the implementation of the APRM Based Document that provides for the review of the APRM every five years. It also prescribes reforms related to the APR Forum, Panel and National Focal Points and also proposes the adoption ‘the Charter of the Panel, the Code of conduct of the Panel as well as the establishment of an APRM ‘Conference of stakeholders’ to strengthen the process.

In addition, referring to the Questionnaire, the chapter emphasises the need to reduce the length, to harmonise the use of similar concepts, simplify the language used; to address the multifaceted aspect of some thematic areas, and avoid the repetitiveness of some questionnaires, and the lack of a specific focus on NEPAD.

The chapter also demonstrates that the NEPAD’s lack of financial resources as well as wasteful spending by African leaders hinder its ability to realise the RTD.

Overall, though NEPAD aims at realising the RTD, this will not happen if African leaders do not ensure popular participation in and ownership of the plan as well as reduce wasteful spending to forward some money in NEPAD activities to ensure the organisation’s self-reliance.

CHAPTER 6 INTEGRATION OF NEPAD INTO NATIONAL DEVELOPMENT POLICIES: THE CASE OF CAMEROON AND SOUTH AFRICA

- 6.1 Introduction
- 6.2 NEPAD's policies on the integration of vulnerable groups and participation
 - 6.2.1 NEPAD's policies on vulnerable groups
 - 6.2.2 NEPAD's policies on participation
- 6.3 The Cameroonian subprogramme to integrate the vulnerable groups into the economy
- 6.4 NEPAD and the Cameroonian subprogramme to integrate vulnerable groups into the economy
- 6.5 The right to participation in Cameroon
 - 6.5.1 Participation through election processes
 - 6.5.2 Participation through decentralisation
- 6.6 NEPAD and the right to participation in Cameroon
 - 6.6.1 NEPAD and the right to participation through elections in Cameroon
 - 6.6.2 NEPAD and the right to participation through decentralisation in Cameroon
- 6.7 Integration of vulnerable groups through the New Growth Path (NGP) in South Africa
- 6.8 NEPAD and the integration of vulnerable groups in South Africa
- 6.9 The right to participation in South Africa
 - 6.9.1 The right to participation through electoral processes
 - 6.9.2 The right to participation through decentralisation in South Africa
- 6.10 NEPAD and the right to participation in South Africa
 - 6.10.1 NEPAD and the right to participation through election in South Africa
 - 6.10.2 NEPAD and the right to participation through decentralisation in South Africa
- 6.11 Concluding remarks

6.1 Introduction

The main question in this chapter is the following: To what extent is the NEPAD plan integrated into national frameworks for the realisation of the RTD? In this chapter, NEPAD will be looked at from a functionalist perspective. In other words, we will try to understand NEPAD in terms of its functioning and the impact thereof in ‘the larger social system’.¹²⁵²

In providing a response to the question, the chapter analyses the implementation of the rights of vulnerable groups to be protected and the right to participation in Cameroon and South Africa before assessing to what extent governments’ action towards the realisation of these rights are informed by NEPAD. Cameroon is chosen because as mentioned earlier, it provides for the RTD in its Constitution. In addition, the author is very familiar with the concerned country and has a good personal knowledge of the legal system. South Africa is chosen because it is a NEPAD funding country, the author’s familiarity with its legal system, because of the very good reputation of its Constitution and because it is the place where the thesis is written from.

Before clarifying the structure of the chapter, it is important to substantiate why the rights of vulnerable groups and to participation are chosen within the framework of the RTD. Realising the RTD entails a ‘public action’¹²⁵³ in terms of human rights implementation. However, though all human rights are essential, it may be practicably difficult to fulfil all of them at the same time. It is consequently justifiable to start with the realisation a few ‘basic rights’¹²⁵⁴ without which the RTD will not be realised. The concept of vulnerable groups includes the elderly, people with disability and women who are generally marginalised, hence the need to render them visible through the protection of their rights.

The chapter also focuses on the right to participation because it is one the pre-eminent rights to be respected if the RTD is to be realised, though it is important to note that, participation in

¹²⁵² Landsberg (2008)218.

¹²⁵³ Sen (2004) 343.

¹²⁵⁴ Shue (1980).

a context of lack of resources is not enough for the realisation of the RTD. Hence the next chapter will focus on how NEPAD raises resources (through partnership).

In assessing to what extent NEPAD is integrated in national frameworks for the realisation of the rights listed above, the chapter will be divided in eleven sections including this introduction.

The second section will set out NEPAD's policies in terms of the protection of vulnerable groups and participation. This will assist in examining whether the countries chosen for the study (Cameroon and South Africa) comply or integrate NEPAD in their national frameworks.

The third and fourth sections will examine the protection of vulnerable groups in Cameroon (through the Cameroonian subprogramme to integrate the vulnerable groups in the economy) and how such a protection integrates NEPAD respectively..

The fifth and sixth sections will analyse the right to participation and assess how this right complies with the NEPAD's standards respectively.

Following the same trend, but with a special attention to South Africa, sections seven and eight will focus on the protection of vulnerable groups through the New Growth Path (NGP) and examine the place of NEPAD respectively and sections nine and 10 will follow the same model, but with special attention to the right to participation. Finally, section 11 will provide concluding remarks.

6.2 NEPAD's policies on integration of vulnerable groups and participation

6.2.1 NEPAD's policies on vulnerable groups

From a MDGs' perspective,¹²⁵⁵ NEPAD undertakes 'to reduce the proportion of people living in extreme poverty by half between 1990 and 2015'.¹²⁵⁶ In this process, vulnerable groups

¹²⁵⁵ MDG No 1.

such as women and the poor should be empowered. In this vein, African states should take measures to support existing poverty reduction plans ‘at the multilateral level, such as the Comprehensive Development Framework of the World Bank and the Poverty Reduction Strategy approach linked to the debt relief initiative for Highly Indebted Poor Countries (HIPC’s)’.¹²⁵⁷ With a special attention to women, African governments should create a commission on gender to tackle particular problems encountered by poor women.¹²⁵⁸ Stressing the difference between other citizens and vulnerable citizens, not only should African leaders underline the importance of protecting ‘each individual citizen’, they should also emphasise the specific need to protect ‘the vulnerable and disadvantaged groups’.¹²⁵⁹

Overall, NEPAD’s policies on vulnerable groups aim to ensure a better standard of living for all without discrimination. In this respect the rights of the poor and the vulnerable should be tackled seriously.

6.2.2 NEPAD’s policies on participation

The NEPAD document emphasises the right to participation in the context of the RTD in its paragraph 43. In addition, the right to participation is enshrined in the NEPAD document under the heading of ‘Democracy and Political Governance Initiative’.¹²⁶⁰ Under this heading, African states agree to comply with the international principles of democracy which entails a political multipartism, workers’ unions, and periodical free and fair elections through which people can freely elect their representative.¹²⁶¹ The right to participation to comply with in

¹²⁵⁶ NEPAD 2001, para 68.

¹²⁵⁷ NEPAD 2001, para 115.

¹²⁵⁸ NEPAD 2001, para 116.

¹²⁵⁹ NEPAD Declaration on Democracy, Political Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, para 10

¹²⁶⁰ NEPAD 2001, para (ii).

¹²⁶¹ NEPAD 2001, para 79.

terms of NEPAD's commitment also entails strengthening the political and administrative framework of participating countries, in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.¹²⁶² More importantly, African states have the obligation to create a commission to foster implementation 'of participatory and decentralised processes for the provision of infrastructural and social services'.¹²⁶³ The prescriptions on the right to participation are reinforced by the NEPAD Declaration on Democracy, Political Economic and Corporate Governance¹²⁶⁴ which among others emphasises the need to insist on the¹²⁶⁵

[e]quality of all citizens before the law and the liberty of the individual; individual and collective freedoms, including the right to form and join political parties and trade unions, in conformity with the constitution; equality of opportunity for all; the inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office; and adherence to the separation of powers, including the protection of the independence of the judiciary and of effective parliaments.

Independently or prior to the advent of NEPAD, African countries decided to enshrine the principles of democracy in their national constitutions, encourage political representation, which enable all citizens to contribute in the political process through a free and fair election, support and, where needed, set up a suitable electoral commission and monitoring institutions in their individual countries and supply 'the necessary resources and capacity to conduct elections which are free, fair and credible'.¹²⁶⁶

¹²⁶² NEPAD 2001, para 80.

¹²⁶³ NEPAD 2001, para 116.

¹²⁶⁴ AHG/235 (XXXVIII) Annex I

¹²⁶⁵ AHG/235 (XXXVIII) Annex I, para 7.

¹²⁶⁶ AHG/235 (XXXVIII) Annex I, para 13.

6.3 The Cameroonian subprogramme to integrate the vulnerable groups into the economy

Protecting the vulnerable groups is fundamental in realising the RTD. The vulnerable groups are generally forgotten and end up being marginalised by developmental initiatives, hence the need to incorporate and empower them through a legal protection of their rights. The international standards of human rights provide an adequate standard of living for all. In this regard, the UDHR provides for the right to social security¹²⁶⁷ and to a better standard of living¹²⁶⁸ which are also included in the ICESCR.¹²⁶⁹ In a similar vein, the CRC,¹²⁷⁰ CEDAW¹²⁷¹ and CERD¹²⁷² provide for the right to a better life under the concept of social security.

At regional level, though the ACHPR does not directly provide for the right to social security, this right could be read under the right of physical and mental health,¹²⁷³ under the obligation of the state to protect the family¹²⁷⁴ as well as the right of ‘aged and disabled for special measures of protection in keeping with their physical and mental needs’.¹²⁷⁵ In a similar vein,

¹²⁶⁷ Art 22.

¹²⁶⁸ Art 26

¹²⁶⁹ Art 9 and art 11.

¹²⁷⁰ Art 23, and art 6.

¹²⁷¹ Art 11, 13 and 14.

¹²⁷² Art 2(1)(c) and 5(e).

¹²⁷³ Art 16.

¹²⁷⁴ Art 18(1).

¹²⁷⁵ Art 18(4). For more on the inclusion of social security right in art 16, 18(1) and 18(4) of the ACHPR, see L Jansen Van Rensburg and L Lamarche ‘the right o social security and assistance’ in D Brand and C Heyns (eds) *Socioe economic Rights in South Africa* (2005) 231.

the African Children's Charter caters for the children's social security through its provisions on the rights to survival, protection and development of the child,¹²⁷⁶ education,¹²⁷⁷ health and health services¹²⁷⁸ and the right to be protected against all types of economic exploitation.¹²⁷⁹

Following the international and regional standards of better life for all, Cameroon provides for social protection in these terms: 'All persons shall have equal rights and obligation. The State shall provide all citizens with the conditions necessary for their development'.¹²⁸⁰ Though this provision does not directly refer to the protection of vulnerable groups through the concept of social security, it could be argued that it offers a complete social protection which integrates developmental plans and programmes intended to guarantee 'at least a minimum standard of living for all'.¹²⁸¹

Against this background, and in the context of the Cameroonian PRSP emphasising 'the integration of vulnerable groups into the economy',¹²⁸² the government designed a poverty reduction subprogramme which was part of the 2003-2007 cooperative cycle between Cameroon and the UNDP. The subprogramme is basically a 'Support for Micro Schemes'. Its main objective is to address rural poverty by offering financial and technical assistance or support to the grassroots development initiatives which are pertinent in achieving the RTD.

Among other things, the subprogramme supports community-based income generating micro-projects based on the sustainable use of natural resources, reinforces the technical and

¹²⁷⁶ Art 5.

¹²⁷⁷ Art 11.

¹²⁷⁸ Art 14

¹²⁷⁹ Art 15.

¹²⁸⁰ Paragraph 6 of the Preamble of the Constitution.

¹²⁸¹ Jansen Van Rensburg and Lamarche (2005) 210.

¹²⁸² The 6th priority is strengthening human resources, the social sector and facilitating the integration of vulnerable groups into the economy.

organisational capacity of women and contributes to the fight against HIV and AIDS. Beneficiaries of the subprogramme should be rural populations organised in groups such as village development committees or cooperatives for example. The subprogramme intervenes in agriculture and live- stock production such as integrated fish farming, bee keeping, forestry and agro-forestry. In addition, the subprogramme caters for storage, processing and marketing of agriculture products as well as production and marketing of off-farm products. Interestingly, support structures are set up to assist rural populations who lack capacity to formulate and implement their projects. Most importantly, a support structure is not allowed to directly apply either on its own behalf or on behalf of a community, but receives 10 % of the total grant if the project is eligible. The project should be finalised within 3 to 6 months and exceptionally within 12 months. The applicant for the grant should contribute at least 20% of the total amount applied for.

Finally, if the project budget is higher than the grant expected from the subprogramme, the applicant should approach other donors and provide a proof that the additional support is available before receiving the grant from the subprogramme. At face value, this subprogramme looks like the solution for rural Cameroonians and one can argue that Cameroon complies with article 22(2) of the ACHPR stating that ‘States shall have the duty, individually or collectively, to ensure the exercise of the right to development’.

From a different angle, the shortage in education in rural communities affects the feasibility of the poverty reduction subprogramme and constrains the prospects for the RTD. Even though there is a support structure to assist peasants, a strong basic education is needed to be able to produce a draft to be perfected by the support structure. Growing up in an environment of ‘schools without teachers’ does not help to equip the rural poor with the minimum knowledge required to address the marketing of agricultural products or discuss forestry and agro-forestry issues before taking them to support structures that end up grabbing 10% of the budget needed for the realisation of the project. Not only should the state support structures from a different budget, it should not ask rural groups to finance up to 20% of the entire project because generally, members of these groups are very poor.

However, it can be argued that the 20% to be deposited by the applicant is not a bad thing because it shows how serious the entrepreneur is; it testifies to the level of responsibility of

the applicant and above all, the idea is to teach ‘people how to fish but not to give them fish’. In fact, this practice is in line with article 27(1) of the ACHPR which reads: ‘Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international communities’. In other words, through his or her 20% contribution, the applicant recognises his or her duties and takes his responsibilities towards his or her family, society, community, the state and even the international community, keeping in mind that the UNDP was involved in financing the subprogramme. In addition, individual contributions in development initiatives echo article 2(2) of the 1986 UNDRTD according to which

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

Put differently, the 20% contribution should not be viewed as a financial burden, but as the contributor’s chance to exercise his right to participation, his chance to play a role in realising his RTD, that of his community as well as of the whole country. In fact, this should be viewed as the exercise of the natural right to participation of a citizen in the development of the land.

The duration of the project which is normally three to six months and in exceptional cases one year is not realistic. Three to six months is a bit short to realise a sustainable project unless rural groups are encouraged to think very small, and if this is the case, there is a need to revise such a mindset.

Finally, referring an applicant to other donors when his project is more ambitious does not ease things. Applying and acquiring funds from many donors is never easy and the mere thought for an uneducated person to be running around for funds is enough to kill his or her ambitions. The government should review cases requiring more money on a case by case basis and find a way to support such applicants where necessary. This will boost the image of Cameroon, since the country will be complying with article 8(1) of the 1986 UNDRTD according to which

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

All in all, initiatives like the poverty reduction subprogramme should be encouraged and sustained. However, the quality of their fruits will depend on how well their garden of education is watered. In other words, it is important to provide quality education in communities that will be called upon to design or administer microfinance and other projects. This approach, at national level will transform the society and transform the RTD into reality. More importantly, Cameroon should follow the example of South Africa¹²⁸³ in providing for the right to social security in its constitution even if the realisation of this right should happen progressively upon the availability of resources.

After an assessment of the protection of vulnerable groups through the Cameroon subprogramme, the next section will assess the place of NEPAD in this subprogramme.

6.4 NEPAD and the Cameroonian subprogramme to integrate the vulnerable groups in the economy

Following NEPAD's objectives, the subprogramme intends reducing the proportion of poor people; it addresses the difficulties of vulnerable groups such as women and rural people; furthermore, the Cameroonian government cooperates with the UNDP in the implementation of the subprogramme. In addition, the latter is directly connected to the Poverty Reduction Strategy approach linked to the debt relief initiative for Highly Indebted Poor Countries (HIPC) as recommended by NEPAD.¹²⁸⁴

¹²⁸³ To be discussed below.

¹²⁸⁴ NEPAD 2001, para 115.

The subprogramme however, does not refer to NEPAD framework or policies. In the same vein, Cameroon's PRSP report addresses infrastructural human development, health, trade, agriculture and various other issues without pointing out what was done in connection with NEPAD. Nevertheless, it could be argued that what matters is the implementation of NEPAD and not referring to it. However, beyond referring to NEPAD or not the truth is that very little on NEPAD benefits the needy people. In this regard, Rukato the former NEPAD CEO observes 'very little on NEPAD activities reaches the grassroots; NEPAD is about workshops, conferences and other events, but without any real benefit for rural folks'.¹²⁸⁵ She even said 'thanks to NEPAD, I travelled the world, but poverty keeps growing in Africa'.¹²⁸⁶

However, Cameroon should not be the only guilty party for not incorporating NEPAD into its national development plan because though Cameroon did not have a strategy to domesticate NEPAD, the institution itself did nothing to solve the problem. In this regard, Rukato explains:¹²⁸⁷

Sectoral ministers and official experts participated in NEPAD meetings at regional/continental level and made decisions. However, these decisions were not followed up by implementation strategies for domesticating them at national level. This resulted in a wide disjuncture between the national level strategy and those at the regional/continental level. In many cases there was no reporting or accountability by member states on actions taken to implement decisions made at the regional/continental level.

In other words, the continental institution failed to provide guidance on how to domesticate its plan. However, to reduce the impact of this mistake, in 2007, the NEPAD secretariat undertook several actions aiming to educate national governments on how to domesticate NEPAD. Among others, NEPAD helped countries to identify with its plan and methods through the establishment of a shared national goals and national development strategy that highlights NEPAD's priorities, ideals and standards through discussions and debates with

¹²⁸⁵ Rukato's presentation (2009).

¹²⁸⁶ Rukato's presentation (2009).

¹²⁸⁷ Rukato (2010) 98.

stakeholders in order to stimulate national ownership; and educating national governments on avenues for financial support for national priorities.¹²⁸⁸

Overall, given the circumstances described above, it could be argued that the Cameroonian subprogramme for the integration of vulnerable groups in the economy captures NEPAD priority in terms of seeking solutions for the empowerment of the poor. Any improvement in such initiative would enhance the prospects for the RTD on the continent.

6.5 The right to participation in Cameroon

In chapters 2, 3 and 4, it was argued that the right to participation was the cornerstone of the RTD. Indeed, the right participation, like the right to education and the right of vulnerable groups to be protected is an empowering human right. It gives the opportunity to people to be involved in all matters affecting their lives.

How does Cameroon, which provides for the RTD in its Constitution, ensure the right to participation of its people? More importantly, are national initiatives on the right to participation informed by NEPAD?

As already highlighted, the international standards of the right to participation are secured in the Universal Declaration,¹²⁸⁹ the ICCPR,¹²⁹⁰ and the ICESCR.¹²⁹¹ At the regional level, the ACHPR¹²⁹² and the 1990 African Charter for Popular Participation in Development and

¹²⁸⁸ Rukato (2010) 98 - 99.

¹²⁸⁹ Art 21.

¹²⁹⁰ Art 1 & 25.

¹²⁹¹ Art 1; the General Comment no 25 of the Committee on ESCR.

¹²⁹² Art 13.

Transformation¹²⁹³ underscore the right to participation in Africa.¹²⁹⁴ In Cameroon, the right to participation is addressed through national elections and political decentralisation.

6.5.1 Participation through elections processes

Informed by the UN Committee on Human Rights General Comments No 25 ‘the right to participate in public affairs, voting right and the right to equal access to public service’, the government of Cameroon enshrined the right to participation in the 1996 Constitution in these terms:¹²⁹⁵

Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

In the same perspective, article 13 of the same instrument reads as follows:

¹²⁹³ The African Charter for Popular Participation in Development and Transformation; UN doc. A/45/427 of 22 August 1990; art 3 & 4 for example.

¹²⁹⁴ Art 3 reads: ‘The Conference was organized out of concern for the serious deterioration of the human and economic conditions in Africa in the decade of the 1980s, the recognition of the lack of progress in achieving popular participation and the full appreciation of the role popular participation plays in the process of recovery and development’. According to article 4, the objectives of the African Charter for Popular Participation for Development and Transformation were to:

- a) Recognise the role of people’s participation in Africa’s recovery and development efforts
- b) Sensitise national governments and the international community to the dimensions, dynamics, processes and potential of a development approach rooted popular initiatives and self –reliant efforts
- c) Recommend actions to be taken by governments, the United Nations system as well as the public and private donors agencies in building environments for authentic popular participation in the development process and encourage people and their organizations to undertake self-reliant development initiatives.’

The African Charter for Popular Participation for Development and Transformation will be further discussed in chapter 5 of this study.

¹²⁹⁵ Art 27(1).

- (1) Every citizen shall have the right to participate freely in the government of his country either directly or through freely chosen representatives in accordance with the provisions of the law.

Accordingly, participation could be exercised directly or indirectly through chosen representatives. It could be argued that direct representation can be exercised through referendum as provided for by article 2 of the Constitution which vests the sovereignty of the country to the people. However, as correctly observed by Fombad, ‘the decision whether or not a referendum is to be resorted to depends entirely on the discretion of the President of the Republic as provided for by article 64 (3) of the Constitution’.¹²⁹⁶

As for the indirect participation through chosen representatives, the latter should derive their mandate ‘from people through election by direct or indirect universal suffrage’.¹²⁹⁷ More importantly, the vote shall be equal, and secret,¹²⁹⁸ and political parties and groups that shall be bound to respect the principles of democracy, national sovereignty and unity have the obligation to assist the electorate in making a meaningful decision.¹²⁹⁹

In order to foster popular participation and democracy, in 1990 the government enacted ‘liberty laws’ recognizing multipartyism officially.¹³⁰⁰ The liberty law included:

- Law No. 90/046 to revoke the Ordinance No 62-OF-18 of 12 March 1962 that has been used to keep all dissenters to the regime at bay.
- Law No. 90-52 on Freedom of Mass Communication that provided for the protection of freedom of expression.

¹²⁹⁶ Fombad (2003) 34.

¹²⁹⁷ Art 2(2) of the Constitution.

¹²⁹⁸ Art 2(3) of the Constitution.

¹²⁹⁹ Art 3 of the Constitution.

¹³⁰⁰ For more on this, see Fombad (2003) 73.

- Law No. 90-53 concerning the freedom of association which empowered Cameroonians to exercise their right to participation in the affairs of their country.
- Law No. 90-56 that provides for the formation and registration of political parties.

These laws saw the proliferation of political parties and by 2009, Cameroon had more than two hundred political parties. Nevertheless, perhaps the explosion of political parties is motivated by the national policy of granting funds to political parties for financing their activities,¹³⁰¹ though the funds should not be used for personal benefit.¹³⁰² It could therefore be argued that the enactment of laws and the ensuing explosion of political parties are not enough to ensure appropriate participation. What matters most is the desire, the political will to ensure alternation of power in the country. In fact, notwithstanding the enactment of the so called ‘liberty laws’, the following should be noted:¹³⁰³

Besides the fact that the ruling CPDM party and its candidates have with monotonous regularity been declared winners in [numerous] elections, it is significant that all national and international election monitoring bodies that observed these elections have always reported widespread fraud, electoral rigging and other irregularities that had rendered these elections neither free no fair.

Put differently, the adoption of laws to enhance the right to popular participation will not reach its objective if the appropriate implementation of such laws does not follow.

In an attempt to enhance the credibility of elections and therefore improve the right to participation, a National Elections Observatory (NEO)¹³⁰⁴ was established through Law No.

¹³⁰¹ See the Law No. 2000-15 of 19 December 2000 relating to the Public Funding of Political Parties and Election Campaigns which sets down the conditions for granting public funding to political parties generally and public funding of election campaign.

¹³⁰² Law No. 2000-15 of 19 December 2000 relating to the Public Funding of Political Parties and Election Campaigns, section 12(2).

¹³⁰³ Fombad (2003) 74.

¹³⁰⁴ For more on the NEO, see generally A D Olinga ‘L’ONEL réflexions sur la Loi Camerounaise du 19 Décembre 2000 portant Création d’un Observatoire National des Elections (2002); A D Olinga ‘Politique et droit electoral au Cameroun : Analyse juridique de la politique electorale ‘ *Polis* 6

2000-16 of 19 December 2000. Nonetheless, the NEO that was supposed to be an independent institution mandated to monitor and control elections and referendums¹³⁰⁵ in ‘order to ensure regular, impartial, objective, transparent and fair elections, and to guarantee voters and candidate the free exercise of their rights [to participation]’,¹³⁰⁶ had its members appointed only by the President of the Republic.¹³⁰⁷ The latter could appoint only his personal friends who will be on mission to ensure his or his party’s victory, hence the public outcry which led to the replacement of the NEO by the establishment of Election Cameroon (ELECAM) by Law No. 2006/011 of 29 December 2006 which is mandated to organise and oversee elections in the country.

However, ELECAM, just like the NEO, is criticised for being the instrument of the ruling party.¹³⁰⁸ In fact, in violation of the Law No. 2006/011 alluded to above, several of ELECAM’s electoral council members are also influential members of the ruling party in Cameroon where members of the other political parties and civil society are forgotten.¹³⁰⁹ Condemning election management in Cameroon, the EU declared:¹³¹⁰

(2002) D N Tshiyoyo ‘CAMEROON: EMB case Study’ available at <http://aceproject.org/ero-en/regions/africa/CM/case-study-cameroon.doc/view> (accessed 13 June 2010).

¹³⁰⁵ Sec 1 of Law No 2000-16 of 19 December 2000; Also C M Fombad ‘Cameroon’s “National Elections Observatory” and the prospects of constitutional change of government’ in F Colombus (eds) *Politics and economics of Africa* (2002) 71-92.

¹³⁰⁶ Sec 2 of Law No 2000-16 of 19 December 2000.

¹³⁰⁷ Sec 3 of Law No 2000-16 of 19 December 2000.

¹³⁰⁸ J P Nguemegne ‘Cameroun : ELECAM ou « ELECTION CAMEROON » une institution electorale vouée a l’echec’ (2010) available at <HTTP://WWW.CAMER.BE/INDEX1.PHP?ART=9569&RUB=6:1> (accessed 20 June 2010).

¹³⁰⁹ Nguemegne (2010); also *Décret N° 2008/463 du 30 décembre 2008 portant nomination des membres du Conseil électoral d’ «Elections Cameroun »* (ELECAM).

¹³¹⁰ ‘EU Condemns Election Management Transfer in Cameroon’ *Newstime Africa* (2009) available at <http://www.newstimeafrica.com/archives/6216> (accessed 25 June 2010)

We were very disappointed this year when the authorities appointed the 12 board members of ELECAM and 11 of them were members of the central committee and political bureau of the ruling party. In other words, this simply meant transferring (sic) the task of elections organisation from MINAT [Ministry of Territorial Administration] admin to one of the parties in contest, actually making it a player and referee at the same time. This was a missed opportunity to advance the democratisation process. This is regrettable. It's a pity. It is already a false start for the 2011 presidential poll which is just by the corner. That election has already lost its credibility (sic).

Indeed, the appropriation of ELECAM by the ruling party negates the independence of the institution and casts serious doubts on any election managed by such institution. The government of Cameroon should remedy this situation by appointing independent individuals as members of ELECAM.

The other constraint to the efficiency of ELECAM seems to be its lack of human and financial resources. In terms of human resources, it could be argued that the institution is young and its members lack experience in dealing with electoral mechanisms.¹³¹¹ In terms of financial shortage, the 2009-2010 budget does not allocate any money to ELECAM and this is a sign of an ill-prepared institution.¹³¹² It is argued that ELECAM is simply rejected by Cameroonians who do not see it fit to ensure their right to participation as they were not consulted for its establishment.¹³¹³

As alluded to earlier, there is a need to have a political will to ensure popular participation and this does not start by a constitutional revision to ensure the entrenchment of the President of the Republic as it was recently the case in Cameroon. This happened in violation of the

¹³¹¹ Nguemegne (2010).

¹³¹² Nguemegne (2010).

¹³¹³ D Mandeng (2010) 'Cameroun : ELECAM, Un Organe Chargé de Redonner sa Confiance au Corps Electoral Boycotte' available at www.Podcastjournal.net (accessed 20 June 2010).

constitution, which forbids any amendment that is contrary to ‘democratic principles which govern the republic’.¹³¹⁴

Though in its PRSP 2006 progress report, Cameroon claimed that the establishment of ELECAM was a positive achievement in strengthening democracy,¹³¹⁵ it could be argued that the mere fact that several stakeholders such as political parties from the opposition as well as civil society were not involved is problematic.

6.5.2 Participation through decentralisation

In an attempt to ensure the right to participation, Cameroon has institutionalised political decentralisation. The success of this system is conditioned by the people’s right to choose their local leaders and the institution of a mechanism to ensure the transfer of decision-making from central authorities to the local ones and from the latter to the communities.¹³¹⁶ In other words, appropriate political decentralisation entails a vertical decentralisation with the power flowing from the central authority to local representatives, and a horizontal representation with the power flowing from the local representatives to the grass roots that decide on their priority and are empowered to hold their representatives at local and national level fully accountable.¹³¹⁷

In addressing political decentralisation, the Cameroonian Constitution provides in its article 1(2) ‘The Republic of Cameroon shall be a decentralized unitary State. It shall be one and indivisible, secular, democratic and dedicated to social services’. In the same vein, article 55 of the same instrument provides for national decentralisation as follows:

¹³¹⁴ Art 64 of the Constitution.

¹³¹⁵ PRSP 2006 Cameroon Progress Report ‘Strategic area No. 7: Improvement of the institutional framework and governance’ para xxxvi.

¹³¹⁶ J-M Kauzya ‘Political decentralisation in Africa: Experience of Uganda, Rwanda, and South Africa’ (2007) 4 Discussion paper available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan028411.pdf> (accessed 15 July 2010).

¹³¹⁷ Kauzya (2007) 5.

- 1) Regional and local authorities of the Republic shall comprise Regions and Councils.
Any other such authorities shall be created by law.
- 2) Regional and local authorities shall be public law corporate bodies. They shall be freely administered by councils elected under conditions laid down by law. The duty of the councils of regional and local authorities shall be to promote the economic, social, health, educational, cultural and sports development of the said authorities.
- 3) The State shall exercise supervisory powers over regional and local authorities, under conditions laid down by law.
- 4) The State shall ensure the harmonious development of all the regional and local authorities on the basis of national solidarity, regional potentials and inter-regional balance
- 5) The organization, functioning and financial regulations of regional and local authorities shall be defined by law.
- 6) The rules and regulations governing councils shall be defined by law.'

Though according to article 55(2) which states that local authorities or councils shall in principle be headed by elected officials (Mayors and Municipal Councilors for example), the decentralisation laws give too much power to the executive. According to decentralisation laws¹³¹⁸ passed on 22 July 2004 by the Parliament through a decree, the President of the Republic can amend the geographical boundaries of local authorities, rename or decide on the temporary regrouping of local authorities.¹³¹⁹ The President's power to change the geographical boundaries of local authorities, rename or regroup them without consultation of the local people casts a doubt on the real aim of decentralisation. It is like allowing the President to regroup five different villages with different languages and cultures under the

¹³¹⁸ Law No. 2004/017 on the orientation of decentralisation; No 2004/018 laying down rules applicable to councils, Law No. 2004/019 laying down rules applicable to regions.

¹³¹⁹ Law No. 2004/017 of July 22, 2004 on the orientation of decentralisation, chapters 1-3. Council numbers 360 as 2007, art 6.

same administration without consulting their peoples. Moreover, the regional council may be suspended by the President of the Republic:

Where such organ carries out activities contrary to the Constitution
undermine the security of the state or public law and order;
endangers the state territorial integrity.¹³²⁰

It is contended that the President has a super power over regional councils and this cannot enhance the right to participation of people on the ground. In the same vein, in the Cameroonian decentralisation laws, there is no constitutional provision sharing power between the central power and the local authorities that have only the amount of power given to them by the central authority¹³²¹ in exercising its ‘supervisory powers’.

According to the 2004 laws, however, local authorities have a legal personality and an administrative autonomy. More importantly, their administration is conducted by individuals elected through a direct universal suffrage. Nevertheless, the strong hand of the executive power reaches and controls the elected body of the local authority through articles 46 to 57 of Law No. 2004/017 which allows the governor or a senior divisional officer to oversee the elected local authority.

However, by Decree No 2002/216 of 24 August 2002, the Cameroon government created the Ministry of Territorial Administration and Decentralisation (MINATD). This institution seeks ways to harmonise the decentralisation process in the country, hence the argument that it is ‘taking into account imperatives of preserving national unity and social cohesion in a country characterized by social and cultural diversity’.¹³²² Under the auspices of MINATD, local governments’ staffs are trained at the Local Government Training Centre (CEFAM) based in Buea in South West Cameroon. In addition, it administers the Special Inter-communal Equipment and Support Fund (FEICOM), which collects and reallocates the additional

¹³²⁰ Art 59(1) of the constitution.

¹³²¹ Art 55(3) of the constitution.

¹³²² C Cheka ‘The state of the process of decentralisation in Cameroon’ (2007) No 2, XXXII *Africa Development* 186.

council surtax and supplies financial grants and loans to councils. Nonetheless, as Fombad, correctly observes:¹³²³

The criteria for benefiting from state grants have never been clearly defined and councils run by opposition parties have often alleged that they usually receive little or no subsidies from these state grants.

Notwithstanding some good initiatives of MINATD, the right to participation of many Cameroonians is hindered by Law No.2004/018 of July 22 2004 which established ‘city councils’ with special status. According to article 115(1) of the law in question, the government can appoint a delegate to head a city council with ‘special status’. In other words, after elections are over with officials and municipal councilors chosen by direct universal suffrage, a Presidential Decree can choose their boss. Though the government policy is informed by article 58 of the constitution which empowers the President of the Republic to appoint such delegates and aims to protect minorities in the country, it violates the right to participation of the people who vote the municipal councilors and other mayors, hence the correctness of the argument that article 115(1) of the law ‘contradicts the principle of the free administration of local authorities by locally elected officials’.¹³²⁴ Yaounde, Douala, Bafoussam and Garoua that are the most important towns in the country are ‘city councils’ with special status and are therefore headed by non-elected ‘Government Delegates’. Again, where is the ‘real people’s will in the process? The so called ‘decentralisation’ seems to be in reality a ‘*deconcentration*’ of power whereby the real power belongs to the executive.¹³²⁵ This is evidenced by the fact that in 2005, the Minister of Finance ordered all local councils to close their financial account and transfer money into the national treasury for the implementation of a ‘single till’ policy.¹³²⁶ As a result, the financial status of councils becomes uncertain and depends on the availability of funds in the national treasury or on the

¹³²³ Fombad (2003) 159.

¹³²⁴ Cheka (2007) 191.

¹³²⁵ J Manor *The political economy of democratic decentralisation* (1999) 5.

¹³²⁶ Cameroon, Decision No 05-232/MINEFI/CAB of 16 May 2005.

good will of the authority responsible for resource allocation. This practice undermines the ability of elected local councils or local community to administer their locality freely.

There is therefore a need to harmonise the decentralisation process with a special attention on peculiarities of each region, especially if the true aim of decentralisation is to enhance popular participation. Surrounded by various cultures, one of the challenges of the government is to strike a balance by respecting all tendencies in the decentralisation process. The first step is to review the notion of ‘city council with special status’ and encourage bottom-up participation through the creation and support of peasant organisations, self-help associations, human rights movements and trade unions. It is about empowering people on the street by allowing them to be fully involved in the affairs of the land.

Overall, the right to participation is operationalised through direct participation (referendum) or indirect participation (elections processes) and through decentralisation. On the direct representation through referendum, the President of the Republic is the only one who can initiate a referendum. On the indirect participation through elected representatives, unfortunately, it is difficult to have free and fair elections in the country where members of ELECAM in charge of the whole electoral process are influential members of the ruling party.

The right to participation through decentralisation is hindered by the superpower of the central authority or the President who can suspend regional council, and has the power to appoint a delegate to head a city council with ‘special status’, which should normally be headed by an elected official. Now, what is the role of NEPAD in shaping the right to participation Cameroon?

6.6 NEPAD and the right to participation in Cameroon

This section looks at the extent to which the right to participation in Cameroon is compatible to participation as understood by NEPAD. In other words, has the NEPAD plan addressing the right to participation become part of Cameroonian’s governance plan? How does Cameroon integrate NEPAD in its governance and democracy strategies?

6.6.1 NEPAD and the right to participation through elections in Cameroon

In term of participation through elections, though the Cameroonian government complies with NEPAD's request to set up multipartism and organise periodic elections to allow the people to choose their representatives, unfortunately the organisation and monitoring of the elections cannot yield fair results. As described earlier, the dependence of ELECAM on the ruling party hinders the freedom and fairness of elections. Indeed, NEPAD's provision urging African states to establish a suitable electoral Commission is simply ignored in Cameroon. There is therefore a need to have a real national independent electoral commission in Cameroon if the 'inalienable right of the individual to participate by means of free, credible and democratic political processes in periodically electing their leaders for a fixed term of office'¹³²⁷ is to be respected.

Though the Cameroonian PRSP's strategy area 7 aims to 'Improving governance, the efficiency of administrative services, and the institutional framework' or aims at 'Promoting governance and curbing corruption, reinforcing transparency and accountability, improving the delivery of basic social services, strengthening the rule of law and the legal and judicial security of investments',¹³²⁸ if there is no independent monitoring institution, the whole policy on the question of participation remains doubtful. Until this happens, it could be argued that Cameroon does not integrate NEPAD in its national framework on the right to participation through elections.

Nevertheless, Cameroon's willingness to integrate NEPAD in its national development plans including elections processes is highlighted by its accession to the APRM. Cameroon signed the MOU for its accession to the APRM back in 2003 and on 5 June 2008, it received a delegation led by Graca Machel, the representative of the APRM Panel of Eminent Persons in charge of reviewing Cameroon. The aim of the meeting was to discuss the establishment of the National Governing Council as well as the identification of the ministry that will be the

¹³²⁷ NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I, para 7, 8, 11 and 13.

¹³²⁸ Cameroon PRSP, strategy 7.

National Focal Point.¹³²⁹ After the meeting, Graca Machel seemed optimistic and told the media that Cameroon is ready to undergo the APRM process.¹³³⁰

However, Cameroon's readiness for the process will be clarified by the extent to which the process will be transparent, especially for a country ruled by the same man for 29 years. In any case, the mere fact that Cameroon will undergo the APRM process is a good step in looking for ways to integrate NEPAD in its national development policies.

Nonetheless, will the review of Cameroon really make a difference? In general, after the review, everyone closes shop and goes home, in other words, there is no follow up of the review process. The result is not brought back in the NEPAD process; what happened after the review is nobody's business.¹³³¹

NEPAD should therefore develop a mechanism to follow up and keep track on what happens in the country after the review, and to ensure that the country implements its Programme of Action in general and addresses issues related to free and fair election in Particular.

After an assessment of the role of NEPAD in implementing the right to participation in Cameroon through election processes, the following section will focus on the role of NEPAD in implementing the right to participation through decentralisation.

6.6.2 NEPAD and the right to participation through decentralisation in Cameroon

NEPAD calls upon African states to strengthen their political and administrative frameworks in line with the principles of democracy, transparency, accountability, integrity, respect for human rights and promotion of the rule of law.¹³³²

¹³²⁹ E Kendemeh 'Cameroon: governance-Cameroon's performance under review' *Cameroon Tribune*, 5 June 2008 available at <http://allafrica.com/stories/200806050922.html> (accessed 27 June 2008).

¹³³⁰ Kendemeh (2008)

¹³³¹ Rukato (2009 presentation).

¹³³² NEPAD 2001, para 80.

It could be argued that this prescription is not captured in the Cameroonian decentralisation plans which are characterised by a heavy control of the central authority. The fact that there is no constitutional provision sharing power between the central power and the local authorities undermines the principles at the heart of NEPAD.

Whereas NEPAD urges African states to establish a commission to foster implementation ‘of participatory and decentralised processes for the provision of infrastructural and social services’,¹³³³ the Cameroonian decentralisation framework empowers the President to appoint non elected delegates at the head of city councils with ‘special status’. This practice negates the right to participation through decentralisation as provided for by NEPAD.

After an assessment of the integration of NEPAD in Cameroonian policies on the protection of vulnerable groups and the right to participation, the following sections will provide similar analysis with special attention to South Africa.

6.7 Integration of vulnerable groups through the New Growth Path in South Africa

In an attempt to comply with international law requirements that everyone including the vulnerable persons have the right to a better standard of living, the Constitution provides for the right to health care, food, water and social security in these terms:

- (1) Everyone has the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

¹³³³ NEPAD 2001, para 116.

Though these ‘well-being rights’ should be realised progressively within the confines of resources available, they are not less justiciable within the South African context. The *TAC*¹³³⁴ and *Grootboom*¹³³⁵ cases discussed earlier are illustrations of the protection social security rights. Furthermore, in the 2006 case of *Centre for Child Law and Others v The MEC for Education and Others*,¹³³⁶ the Witwatersrand High Court rendered a judgment protecting the right of children to adequate social services when removed from their families.

However, far from discussing social security rights in general in South Africa, and following the trend set in examining the protection of vulnerable groups in Cameroon through a national programme, this section will look at the protection of vulnerable groups in South Africa through the NEP which was created on the ashes of previous development policies know as the Reconstruction and Development Programme, AsgiSA (renewed government’s commitment to addressing joblessness and poverty and identified infrastructure needs), and The Growth, Employment and Redistribution (GEAR) which characterised Mbeki’s administration.

The NGP was approved by the Zuma’s cabinet in October 2010. It seeks to protect the vulnerable through a “comprehensive response to the structural crises of poverty, unemployment and inequality... based on solidarity across society”.¹³³⁷ To realise this objective, the government will focus on ‘Job drivers’ which entails:

1. Substantial public investment in infrastructure both to create employment directly, in construction, operation and maintenance as well as the production of inputs, and indirectly by improving efficiency across the economy.
2. Targeting more labour-absorbing activities across the main economic sectors – the agricultural and mining value chains, manufacturing and services.
3. Taking advantage of new opportunities in the knowledge and green economies.

¹³³⁴ The *TAC* case.

¹³³⁵ The *Grootboom* case.

¹³³⁶ *Centre for Child Law and Others v The MEC for Education and Others*, case No 19559/06 (T).

¹³³⁷ ‘Patel Outlines Implications of New Growth Path for Provinces’ available <http://www.sabinetlaw.co.za/provincial-local-and-traditional-government/articles/patel-outlines-implications-new-growth-path-pro> (accessed 1 March 2010).

4. Leveraging social capital in the social economy and the public services.
5. Fostering rural development and regional integration.¹³³⁸

To achieve its objectives, the government made several policies' commitments including in rural development, competition policy, stepping up education and skills development, Enterprise development, developmental trade policy, promoting small business and entrepreneurship; eliminating unnecessary red-tape and reviewed Broad-based Black Economic Empowerment (BBBEE) to empower the most vulnerable people. In addition commitments to regional growth through policies for African development and social partnership are also made.

The implementation of NGP will be in two phases: the first one happens in two steps; the first step currently happening (2010/2011) lays the framework including monitoring mechanisms and implementation forums; and the second step 2012/13 characterised by the review of progress and adjustment of policies as required.

The second phase characterised by the consolidation of the NGP also happens in two steps: The first step, by 2014 the reflection of changes in the structure of production and ownership should be perceptible in national statistics, and the state should be perceptibly more capable and responsive to economic needs. The second step, 2015-2020 should be the continuation of NGP in consideration of successes and needed adjustments, with efficient monitoring and evaluation against clear targets.¹³³⁹

In general, this policy provides guidance to provinces and municipalities on how to successfully implement the programme without accumulation of backlogs and unnecessary delays and they also highlight conditions of employment under the project. It is hoped that this policy will yield 10 million jobs in the next 10 years.

However, the sceptics such as the Congress of South Africa Trade Union (Cosatu) reject NGP on the ground that it is

¹³³⁸ The New growth path: the framework' 9-10 available at <http://www.info.gov.za/view/DownloadFileAction?id=135748> (accessed 28 February 2011).

¹³³⁹ The New growth path: the framework' 32-33 available at <http://www.info.gov.za/view/DownloadFileAction?id=135748> (accessed 28 February 2011).

[t]oo interventionist, too statist, too market friendly, no different from Gear, too prescriptive, that the state is too weak to make it work, that calls for wage moderation for workers are unfair, that the government should not set private sector wages and that BEE has gone too far to start again.¹³⁴⁰

Sharing this view, Harris argues that '[e]conomically, the document is something of a curate's egg: part good and part bad, but as a result, entirely spoiled',¹³⁴¹ though he also acknowledges that it is useful to review the BEE, the competition policy, and small business regulation and financing.¹³⁴² Among proponents of NGP, experts such as Stiglitz, the Nobel Laureate in economics are of the view the policy is conducive to the eradication of poverty.¹³⁴³

In its 'strategy to address the current crisis of poverty and skills shortage'¹³⁴⁴ and job creation the NGP should be commended for attempting to depart from the 'welfare system to workfare system'.¹³⁴⁵ This policy is expected to tackle poverty, 'empower people to access economic

¹³⁴⁰ K Davie 'New growth path more like a jungle' *Mail and Guardian* online

<http://www.mg.co.za/article/2010-12-06-new-growth-path-more-like-a-jungle> (accessed 28 February 2011).

¹³⁴¹ T Harris 'The document is something of a curate's egg'

<http://www.moneyweb.co.za/mw/view/mw/en/page292681?oid=518529&sn=2009+Detail#> (accessed 28 February 2011).

¹³⁴² T Harris 'The document is something of a curate's egg'

<http://www.moneyweb.co.za/mw/view/mw/en/page292681?oid=518529&sn=2009+Detail#> (accessed 28 February 2011).

¹³⁴³ Stiglitz backs government's new growth path (excerpt): Professor Joseph Stiglitz - Nobel Laureate, economics

<http://www.moneyweb.co.za/mw/view/mw/en/page295799?oid=525024&sn=2009+Detail#> (accessed 28 February 2011).

¹³⁴⁴ S Liebenberg 'Making a difference: human rights and development – reflecting on the South African experience' in Andreassen & Marks (eds) *Development as a human right. Legal, political and economic dimensions* (2006) 190.

¹³⁴⁵ D Plaatjies & K Nicolaou-Manias 'Government Employment Creation Programme: Budgeting for job creation in social welfare services – Exploring EPWP opportunities (2005) 7 available at http://www.hsrc.ac.za/research/output/outputDocuments/4254_Plaatjies_Budgetingforjobcreation.pdf (accessed 15 July 2010).

opportunities, while creating a comprehensive social safety net to protect the most vulnerable in our society’.¹³⁴⁶ Notwithstanding the controversy on the evolving policy, this thesis contends that the NGP is an attempt to start a new dialogue about improving vulnerable people’s lives and only time will tell if it was worth the trial.

In terms of comparison with the Cameroonian subprogramme for the integration of vulnerable groups in the economy, it is important to note that though the NGP is broader and located in a more developed country, both plans are multifaceted schemes ‘directed at the very roots of poverty and unemployment’¹³⁴⁷ and should therefore be recommended for the realisation of the RTD.

6.8 NEPAD and the integration of vulnerable groups in South Africa

Similar to the Cameroonian subprogramme to integrate vulnerable groups in the economy, the NGP is informed by NEPAD’s objective of reducing the proportion of poor people and addressing the difficulties of vulnerable groups such as women and rural people. In so doing the programme follows NEPAD’s goal of realising the MDGs of eradicating poverty by 2015.

In addition, though the NGP five years reports says nothing on NEPAD, it is clear that the

[o]bjectives [of the NGP] were closely aligned with those defined in the African Union Plan of Action for the Promotion of Employment and Alleviation of Poverty, adopted at the Third Extraordinary Session on Employment and Poverty Alleviation in September 2004. In terms of the plan, each member of the Union committed to reverse the current trends of pervasive and persistent poverty, unemployment

¹³⁴⁶ Budget Vote speech by the Minister of Social Development, Dr Zola Skweyiya to the National Assembly, Cape Town, 30 May 2008.

¹³⁴⁷ W D Thwala ‘Challenges Facing Labour-Intensive Public Works Programmes and Projects in South Africa’ *The International Journal of Construction Management* (2007) 4-5 available at <http://repository.lib.polyu.edu.hk/jspui/bitstream/10397/466/6/THWALA%201-9.pdf> (accessed 15 July 2010).

and under-employment on the African continent, and to improve the general standard of living at individual, community and national level.¹³⁴⁸

The objectives of the AU highlighted in the quote above are well those of NEPAD which is the economic hand of the AU, hence the argument that the NGP is an integration of the NEPAD framework in the South African development policy. President's Zuma's recent commitment to give more attention to NEPAD¹³⁴⁹ illustrates how South Africa integrates the continental plan in its national policies.

The integration of NEPAD into South African policies was also underlined by the 2009 report on the measures taken by the government to deal with the challenges pointed out in the Country Self Assessment and Country Review Reports. In the report, the Public Service and Administration Minister, Masenyani Richard Baloyi¹³⁵⁰

[r]esponded to the 23 issues raised in country review report that includes the issues of poverty and inequality; capacity constraints and poor service delivery; land reform; violence against women and children; HIV and AIDS pandemic; corruption; crime; racism and xenophobia and management of diversity'.

He also emphasised that¹³⁵¹

[a]s an on-going debate on issues emanating from the Country Review Report, the NGC [National Governing Council] took a decision to further engage on some of the cross-cutting issues that we believe require more so as to give a clear meaning to those issues, such as xenophobia, corruption, racism, the role of media as well as the role of civil society in a democratic dispensation. This will enable the country robust debate, arrive at a consensus and take action on these cross cutting issues.

¹³⁴⁸ Quinton Michael Doidge Minister of Public Works (Expanded Public Works Programme Programme 5 years report, 2004/ 05-2008/09).

¹³⁴⁹ 'Zuma, Bouteflika renew commitments to NEPAD' available at http://www.nepad.org/News/lang/en/sector_id/6/news/114 (accessed 30 May 2010).

¹³⁵⁰ Media Statement 'South Africa sets standard of accountability on the APRM' 4 February 2009, available at <http://et-ee.facebook.com/topic.php?uid=42742847059&topic=7088> (accessed 1 July 2010).

¹³⁵¹ Media Statement 'South Africa sets standard of accountability on the APRM' 4 February 2009, available at <http://et-ee.facebook.com/topic.php?uid=42742847059&topic=7088> (accessed 1 July 2010).

In view of the measures taken to integrate the vulnerable groups in the economy, it could be argued that in Cameroon and in South Africa, NEPAD is integrated in the national frameworks ensuring a better standard of living for vulnerable groups.

6.9 The right to participation in South Africa

This section will discuss the right to participation in South Africa before focusing on the role of NEPAD in its implementation. The first part divided in two subsections will discuss the right to participation through electoral processes and political decentralisation and the final part will investigate the role of NEPAD in implementing the right to participation in the country.

6.9.1 The right to participation through electoral processes

After cleaning the ashes of apartheid characterised by the exclusion of black people from effective political and other forms of participation, the South African government has, since 1994, committed itself to ensure the right to participation of all. The first step towards ensuring the right to participation is visible through the very first chapter of the 1996 which reads as follows:

- 1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - (b) Non-racialism and non-sexism.
 - (c) Supremacy of the constitution and the rule of law.
 - (d) Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

The underlining concepts of 'democratic state', 'achievement of equality', 'non-racism and non sexism' clearly show that the government at the early stage of the transformation of the country intended to fix the wrongs of the past. Most importantly, this intention is highlighted by paragraph 1(d) that stresses the importance of 'Universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government,

(and the need) to ensure accountability, responsiveness and openness'. Put differently, free and fair elections seem to be the road map to ensure the right to participation in the country.

Beside the right to use 'indigenous' languages,¹³⁵² which entails participating in national affairs using indigenous languages, the constitution through the Bill of Rights¹³⁵³ clearly underlines the right to participation through its provision on political rights which reads as follows:¹³⁵⁴

- (1) Every citizen is free to make political choices, which includes the right-
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right-
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.

Again, this is the illustration of the fundamental place of the right to vote in South Africa. Apart from including the right to vote in the Bill of Rights, the South African government enacted several policies to ensure popular participation through free and fair elections. These policies include the Electoral Act 73 of 1998, dealing with the Municipal Electoral Act 27 of 2000, the Electoral Laws Amendment Act 34 of 2003 and the Electoral Laws Second Amendment Act 40 of 2003 all dealing with the regulation of elections of the National Assembly, the provincial legislatures and municipal councils; and to address related matters.

¹³⁵² The 1996 Constitution, Sec 6(2).

¹³⁵³ The 1996 Constitution, chap 2.

¹³⁵⁴ The 1996 Constitution, Sec 19.

Among others, these laws address issues such as registration of voters and voters' roll,¹³⁵⁵ proclamation and preparation for the election,¹³⁵⁶ the election *per se*,¹³⁵⁷ elections agents.¹³⁵⁸ Still to ensure a meaningful participation in the country, the government adopted the Electoral Commission Act¹³⁵⁹ which establishes the Electoral Commission,¹³⁶⁰ its powers, duties, functions and composition.¹³⁶¹ Furthermore, it provides for the accountability of the commission and its staff,¹³⁶² the conditions of registration and cancellation of political parties¹³⁶³ and more importantly the establishment of an electoral court¹³⁶⁴ to handle electoral disputes.

Interestingly, the 'Electoral Commission is independent and subject only to the Constitution and the law',¹³⁶⁵ and of its five members, one shall be a judge appointed by the President of the Republic.¹³⁶⁶ Nevertheless, this is not a condition ensuring the victory of the president because not only should his colleagues not have a high party-political profile,¹³⁶⁷ they should

¹³⁵⁵ Electoral Act No 73 of 1998, chap 2.

¹³⁵⁶ Electoral Act No 73 of 1998, chap 3.

¹³⁵⁷ Electoral Act No 73 of 1998, chap 4.

¹³⁵⁸ Electoral Act No 73 of 1998, chap 5.

¹³⁵⁹ Act No 51 of 1996.

¹³⁶⁰ Act No 51 of 1996, chap 2; also Sec 190 of the Constitution.

¹³⁶¹ The 1996 Constitution, Sec 191.

¹³⁶² Act No 51 of 1996, chap 3.

¹³⁶³ Act No 51 of 1996, chap 4.

¹³⁶⁴ Act No 51 of 1996, chap 5.

¹³⁶⁵ Act No 51 of 1996, Sec 3(1).

¹³⁶⁶ Act No 51 of 1996, Sec 6(1).

¹³⁶⁷ Sec 6(2)(b).

also be recommended by the National Assembly by a resolution adopted by a majority of the members of that Assembly.¹³⁶⁸ More importantly, the five members of the Electoral Commission should be appointed by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly, from a list of recommended candidates submitted to the committee¹³⁶⁹ by a panel made of:¹³⁷⁰

- (a) the President of the Constitutional Court, as chairperson;
 - (b) a representative of the Human Rights Commission established by section 115(1) of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993);
 - (c) a representative of the Commission on Gender Equality (now called Commission for Gender Equality) established by section 119 (1) of the said Constitution; and
 - (d) the Public Protector established by section 110 (1) of the said Constitution.
- (4) The panel shall submit a list of no fewer than eight recommended candidates to the committee of the National Assembly referred to in subsection (2)(d).
- (5) The panel shall act in accordance with the principles of transparency and openness and make its recommendations with due regard to a person's suitability, qualifications and experience.

The involvement of numerous independent authorities in the constitution of the Electoral Commission should be applauded as it ensures its independence and legitimacy.

Overall, not only does the South African fundamental law¹³⁷¹ provides extensively to ensure the right to participation, it also establishes several other national institutions¹³⁷² to give the

¹³⁶⁸ Sec 6(2) (c).

¹³⁶⁹ Sec 6(2) (d).

¹³⁷⁰ Sec 3.

¹³⁷¹ The 1996 constitution, Sec 17, 18, 23, 30, 105, 118, 128, 151, 157, 211, and 214.

¹³⁷² See chapter 9 on state institution supporting constitutional democracy; art 181(1)

opportunity to claim human rights including the right to participate in case of violation. All these measures are strengthened by the Electoral Code of Conduct¹³⁷³ which aims to establish an environment appropriate for free and fair elections.

Notwithstanding the apparent solidity of the legal framework catering for the right to participation in South Africa, this right was undermined by the practice of ‘floor crossing’ institutionalised through the Constitution of the Republic of South Africa Fourth Amendment Bill of 2002 which was passed into law in February 2003. Floor crossing allowed elected representatives to change their political affiliation without losing their seats at the national, provincial and local levels. Such a practice distorts people’s will and constitutes a serious loophole in the enjoyment of the right to participation. In an attempt to clarify the situation, Faull explains:¹³⁷⁴

The South African system of representative democracy is premised on proportional representation. In national and provincial elections the total number of valid votes cast, constitutes 100% of the vote. Subsequent to elections, the votes accruing to each party are tallied proportionately, and seats are assigned accordingly in line with a formula for representation. When an individual MP crosses the floor it distorts the balance of representation as determined by citizens through the ballot box.

Put differently, floor crossing ignores public opinion and as correctly observed by Faull referring to the 2004 elections at the National Assembly, ‘a 2% shift toward a party through floor-crossing does not necessarily reflect a concurrent shift in voter intention towards that party’.¹³⁷⁵

-
- (a) The Public Protector.
 - (b) The South African Human Rights Commission.
 - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - (d) The Commission for Gender Equality.
 - (e) The Auditor-General.
 - (f) The Electoral Commission.

¹³⁷³ The Electoral Act of 1998, Schedule 2.

¹³⁷⁴ J Faull ‘Floor crossing is bad news for democracy’ IDASA, 12 September 2005, available at <http://www.idasa.org.za/> (accessed 15 June 2010).

¹³⁷⁵ Faull (2005).

Another reason to abolish floor crossing is that, it poses a serious challenge for the fundamentals of participatory democracy as prescribed by the founding provision of the South African Constitution in the sense that elected delegates change the party without consulting the grassroots and without an avenue to be held accountable.¹³⁷⁶ As a result, it could be argued that floor crossing invalidates and weakens the constitutional provision guaranteeing ‘the equality of all votes and voters, and the right to representation’.¹³⁷⁷

Furthermore, the practice of floor crossing had to be abandoned because it transformed the elections into a circus which ends up keeping people away from the ballot box as they choose to stay home instead of going out to cast votes that are neglected when the floor crossing takes place. In this respect, Faull notes:¹³⁷⁸

In 2004, turnout of voters in Kwa Zulu Natal and the Western Cape, the two provinces most effected by the 2003 national and provincial defection period, registered the lowest levels of voter turnout for polls across the country, 73.51% and 73.05% respectively.

In the *United Democratic Movement v President of South Africa*,¹³⁷⁹ the court observed the danger of floor crossing of in these terms:¹³⁸⁰

There is a close link between the voter and party in proportional representation systems than may be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based electoral systems, and that for this reason the argument against defection may be stronger than would be the case in constituency-based elections. But even in constituency based election, there is a close link between party membership and election to

¹³⁷⁶ Faull (2005).

¹³⁷⁷ Faull (2005).

¹³⁷⁸ Faull (2005).

¹³⁷⁹ *United Democratic Movement v President of South Africa* 2003(1) SA 495 (CC), 2002 (11) BCLR (CC).

¹³⁸⁰ *United Democratic Movement* case, para 34; also G Fick ‘Elections’ in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2004) 29-13.

a legislature. Floor crossing in the absence of a meaningful link between the voter and the political party he or she votes for under a closed list PR [proportional representation], system has the potential to make a relatively unresponsive system even less responsive.

In the same vein, a commentator observed that ‘floor-crossing was a travesty of democracy’.¹³⁸¹ The shortcomings of floor crossing led to the abolition of the practice in South Africa. This was done in 2008 when the National Council of Provinces unanimously passed three bills¹³⁸² ‘that scrapped floor-crossing at all levels of government’.¹³⁸³

The South African electoral system, however, continues to suffer from many pitfalls. For instance, the shortage of financial resources which are unequally distributed across the country creates a situation where well-funded voting stations face less challenges than their counterparts that have more money.¹³⁸⁴

In addition, it is compulsory to have a bar-code identification document to register and vote. Nevertheless, the Department of Home Affairs mandated to issue the document is not always up to the task as its work is constrained by numerous backlogs which become a hindrance to the right to participate.¹³⁸⁵ Nevertheless, it is important to note that the identification document and the registration process are mechanisms aiming to ensure free and fair

¹³⁸¹ ‘Floor-crossing scrapped’ <http://www.news24.com/SouthAfrica/Politics/Floor-crossing-scrapped-20081119> (accessed 20 June 2010).

¹³⁸² The Constitution 14th and 15th Amendment Bills and the General Laws Amendment Bills which were gazetted on 9 January 2009.

¹³⁸³ ‘Floor-crossing scrapped’ <http://www.news24.com/SouthAfrica/Politics/Floor-crossing-scrapped-20081119> (accessed 20 June 2010).

¹³⁸⁴ D Pottie and J S Saul ‘Normalization? The South African election’ 14 *Southern Africa Report* (1999) available in *Africa files* available at <http://www.africafiles.org/article.asp?ID=5169&ThisURL=./sar.asp&URLName=SAR> (accessed 20 June 2010).

¹³⁸⁵ Pottie and Saul (1999).

elections.¹³⁸⁶ These mechanisms ensure that only people entitled to vote cast their ballots and do so only once.¹³⁸⁷ Fick¹³⁸⁸ correctly argues that in the *New National Party* case,¹³⁸⁹

[t]he court was satisfied that a bar-coded identity document constituted a rational means of realizing the legitimate government purpose of enabling the effective exercise of the right to vote.

The other hindrance to the right to participation however is that though the Constitution¹³⁹⁰ and the Public Funding of Represented Political Parties Act of 1997 compel the state to fund ‘political parties participating in national and provincial legislatures on an equitable and proportional basis’, smaller parties are bogged down by the registration fees of R 5 000 for elections and R 150 000 for participation in elections. These fees are imposed on political parties by the Independent Electoral Commission.¹³⁹¹

Still on the funding of political parties, the latter are allowed to seek private funding to conduct their electoral campaign. Nevertheless, such funding is yet to be regulated. This lacuna hinders people’s ability to monitor how parties are funded; information is kept away from those who need it in order to participate meaningfully.¹³⁹²

¹³⁸⁶ *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC).

¹³⁸⁷ Fick (2004) 29-3.

¹³⁸⁸ Fick (2004) 29-3.

¹³⁸⁹ *New National Party of South Africa v Government of South Africa* 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC), para 16.

¹³⁹⁰ Sec 236.

¹³⁹¹ APRM Country Report South Africa (September 2007) 86, para 137.

¹³⁹² APRM Country Report South Africa (September 2007) 86, para 138.

The South African electoral system is also bogged down by the system of proportional representation in which elected representatives are drawn from a party's list of candidates. This system does not advance the right to participation as members of Parliament (MPs) are elected through a tiny list by party dignitaries to whom they are faithful or accountable and not to the grassroots.¹³⁹³ Even the establishment of constituency offices did not silence some critics of the system.

Proportional representation, however, seems to be the solution for a country like South Africa that has to involve all its citizens in its affairs after the apartheid regime. In fact, proportional representation provides room for the participation of all including the smallest parties that have a say in the affairs of the land;¹³⁹⁴ it empowers vulnerable groups such as women and children,¹³⁹⁵ hence the correctness of the view that proportional representation¹³⁹⁶

[h]as achieved the objectives for which it was designed, including fair distribution of votes cast, fair representation of parties in the National Assembly, reconciliation and harmony, containment of conflict, and enhancement of women's participation in the democratic process.

In fact, the right to participation of all, including prisoners is guaranteed. The voting rights of prisoners were protected by the Constitutional Court in *August v Electoral Commission*.¹³⁹⁷ According to the court, notwithstanding the provision of the Electoral Act, which empowers the chief electoral officer 'not to register a person as a voter if that person is serving a sentence of imprisonment without the option of a fine',¹³⁹⁸ prisoners had the right to register

¹³⁹³ APRM Country Report South Africa (September 2007) 85, para 133.

¹³⁹⁴ APRM Country Report South Africa (September 2007) 85, para 131.

¹³⁹⁵ APRM Country Report South Africa (September 2007) 85, para 131.

¹³⁹⁶ APRM Country Report South Africa (September 2007) 84, para 132.

¹³⁹⁷ *August v Electoral Commission* 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC).

¹³⁹⁸ Electoral Act 73 of 1998 S 8(2) (f).

and vote, they ‘could not be disenfranchised’ to use the words of Fick.¹³⁹⁹ In motivating its decision the court referred to *Haig v Canada*¹⁴⁰⁰ to highlight the vital place of the right to vote in a democracy.¹⁴⁰¹ Quoting the *Haig* case, the court declared:¹⁴⁰²

All form forms of democratic government are found on the right to vote. Without that right democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is the proud badge of freedom. While the Charter guarantees certain electoral rights, the right to vote is generally granted and defined by statutes. That statutory right is so fundamental that a broad liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The court was of the view that there was no reasonable justification under section 36 of the Constitution to limit the prisoners’ right to vote.¹⁴⁰³ The *August* decision was upheld by the constitutional court in *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders*¹⁴⁰⁴ where it was decided that provisions that withdraw the right to vote from convicted prisoners who had no option of a fine violated the Constitution and were therefore unlawful.

Overall, unlike Cameroon, South Africa provides for a right to free and fair elections characterised by a genuine independent electoral commission.

6.9.2 The right to participation through decentralisation in South Africa

¹³⁹⁹ Fick (2004) 29-3.

¹⁴⁰⁰ *Haig v Canada* 105 DLR (4th) 577, 613 (SCC).

¹⁴⁰¹ For more on the democracy in South Africa, see T Roux ‘Democracy’ S Woolman *et al* (eds) Constitutional Law of South Africa (2004) 10-i.

¹⁴⁰² The *August* case, para 18.

¹⁴⁰³ The *August* case, par 16; also Fick (2004) 29-4.

¹⁴⁰⁴ *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* 2004 (5) BCLR 445 (CC).

The first measure in terms of decentralisation was the adoption of the Local Government Transition Act of 1993 which was the result of consultations between the Local forums and the National Local Government Negotiating Forum. This was translated in chapter 7 of the Constitution dealing with to local government.¹⁴⁰⁵ Amongst others, local governments are expected:¹⁴⁰⁶

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

In other words, the local government is a tool through which people should realise the political, economic, cultural empowerment which are the cornerstones of the RTD. The constitutional provisions on local government were strengthened by the Local Government Municipal Structure Act of 1998,¹⁴⁰⁷ which among others provides for the regulation of the internal systems, structures and office-bearers of municipalities; for adequate electoral systems; and problems in connection therewith. Similarly, the Local Government Municipal Demarcation Act of 1998 provided for the reorganisation of all municipalities within the country. This is also reinforced by the Local Government Municipal System Act of 2000¹⁴⁰⁸ which calls upon municipalities to work in order to improve the socio economic status of local communities and deliver services to all while ensuring a strong collaboration with all its structures to ensure popular participation.¹⁴⁰⁹

¹⁴⁰⁵ Sec 151-164 of the Constitution.

¹⁴⁰⁶ Sec 152.

¹⁴⁰⁷ Act No 117 of 1998, Government Gazette, 18 December 1998.

¹⁴⁰⁸ Act No 32 of 2000, Government Gazette 20 November 2000.

¹⁴⁰⁹ Introductory paragraph of the Act.

Unlike in Cameroon the Constitution provides for ‘functional areas of concurrent national and provincial legislative competence’¹⁴¹⁰ which include education, housing health and indigenous law and customary law. In addition, the South African fundamental law delineates exclusive areas for municipalities.¹⁴¹¹ For example the central authority is excluded from legislations related to beaches, cemeteries and dog licences. Such laws limit the power of the central authority. As a result, unlike in Cameroon the President cannot unilaterally change the nature of a particular province or municipality. This cannot happen in South Africa without a constitutional amendment to be considered by the Constitutional court. This practice deters against the super power phenomenon of the president as studied in the case of Cameroon.

The Constitution also provides for the equitable shares and allocations of revenue in the following terms:¹⁴¹²

- (1) An Act of Parliament must provide for-
 - (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
 - (b) the determination of each province's equitable share of the provincial share of that revenue; and
 - (c) any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations may be made.

This provision was reinforced by the Intergovernmental Fiscal Relations Act 97 of 1997, enacted ‘[t]o promote co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters; to prescribe a process for the determination of an equitable sharing and allocation of revenue raised nationally; and to provide for matters in connection therewith’.¹⁴¹³ This provision is also strengthened by the

¹⁴¹⁰ Constitution, Schedule 4, part A.

¹⁴¹¹ Constitution, Schedule 4, part A.

¹⁴¹² Sec 214.

¹⁴¹³ Act No 97 of 1997, Government Gazette, 17 December 1997.

Division of Revenue Act No 12 of 2009¹⁴¹⁴ that shields municipalities against the manipulation of the central authority.

Unlike in Cameroon where the central authority solely controls the amount and the criteria to allocate the money to municipalities, the South African financial framework ensures that municipalities are all treated equally. The question of equitable share of revenue had been at the centre of a lawsuit. The Uthukela district council lodged an application in the Pietermaritzburg High Court against the national government claiming its equitable ‘Institutional capacity grant’.¹⁴¹⁵ Though the National Treasury claimed that the district did not qualify for the grant, the national government lost the case and decided to appeal. However, the matter was amicably settled and the district qualified for the grant.¹⁴¹⁶ This outcome is interesting as it tackles governance and transparency issues. Wittenberg correctly notes that laws on equitable shares and allocations of revenue are ‘enormous step forward in breaking patronage networks’.¹⁴¹⁷

The decentralisation also catered for the right of individual to participate through the legislative process at provincial level. Through its judgment of 17 August 2006 in *Doctors for Life International v The Speaker of the National Assembly and Others*,¹⁴¹⁸ the constitutional court emphasised the right of individual to participate in law making.

As a matter of fact, the applicant Doctors for Life International (DFL) lodged a complaint directly to the Constitutional Court, challenging the constitutionality of four Bills: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. It

¹⁴¹⁴ Act No 12 of 2009, Government Gazette, 3 April 2009.

¹⁴¹⁵ Pietermaritzburg High Court (NW 7 February 2002b).

¹⁴¹⁶ M Wittenberg ‘Decentralisation in South Africa’ (2003) 46 (paper on file with author).

¹⁴¹⁷ M Wittenberg ‘Decentralisation in South Africa’ (2003) 46 (on file with author).

¹⁴¹⁸ *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05

is important to note that at the time of launching the complaint, DFL was under the mistakenly belief that all the health legislation was still in bill form. But, in reality, all of the legislation except the Sterilisation Amendment Act had been promulgated when these proceedings were launched on 25 February 2005.¹⁴¹⁹

Nevertheless, DFL's complaint was based on the process followed by the National Council of Provinces (NCOP) that did not give the complainant the possibility to participate in the elaboration of the Bills; indeed, the NCOP failed to invite written submissions and conduct public hearings on these Bills as required by its duty to facilitate public involvement in its legislative processes and those of its committees.¹⁴²⁰

Though the constitutional challenge was primarily directed at the Speaker of the National Assembly and the Chairperson of the NCOP, the Speakers of the nine provincial legislatures and the Minister of Health were subsequently joined as further respondents in the matter.

The respondents stood against the charges and argued that they did comply with their respective duties to facilitate public involvement in the passing of the Bills. In addition, they claimed that the obligation to facilitate public involvement only requires that the public be given an opportunity to make either written or oral submissions sometime during the process of making laws.¹⁴²¹

The issues before the court were the following:

- Whether the Constitutional Court is the only competent court to hear such a matter;
- Whether the court is competent to grant a declaratory relief in respect of the proceedings of Parliament;
- The nature and scope of the constitutional obligation of a legislative organ of state to facilitate public involvement in the law-making process; and

¹⁴¹⁹ *Doctors for Life*, para 10.

¹⁴²⁰ *Doctors for Life* case, para 7.

¹⁴²¹ *Doctors for Life* case, para 1 and 4.

- Whether on the facts of the case the NCOP complied with that obligation when passing the health legislation under challenge, and, if it did not, the consequences of its failure.

On the first point, the exclusive jurisdiction was not contested by respondents and this was established on the ground that the issue under discussion questioned whether Parliament had failed to fulfill a constitutional obligation and this is a constitutional matter to be addressed by the Constitutional court.¹⁴²²

On the second point, it was held that the court is competent to issue a declaratory relief only after a Bill has been signed into law and before it is brought into operation;¹⁴²³ in such a situation, the court can grant relief and declare the enacted law invalid. In the case under discussion, the court found that the Traditional Health Practitioners Act, the Choice on Termination of Pregnancy Amendment Act, and the Dental Technicians Amendment Act which had already been signed into law could be under consideration by the court.

On the third point, questioning whether the NCOP and the provincial legislatures facilitate public involvement in their respective legislative processes as required by the Constitution, the court observes that though the Parliament and the provincial legislatures have a broad discretion to determine how best to fulfill their constitutional obligation to facilitate public involvement in a given case, measures taken to ensure public participation should be reasonable.¹⁴²⁴

Answering the question whether the NCOP has complied with its obligation to facilitate public involvement in relation to the Traditional Health Practitioners Act, and the Choice on Termination of Pregnancy Amendment Act, Justice Ngcobo, found that these two Bills generated public interest and the NCOP promised to hold public hearing on the issues at

¹⁴²² *Doctors for Life* case, para 30.

¹⁴²³ *Doctors for Life* case, para 66.

¹⁴²⁴ *Doctors for Life* case, para 127 and 128.

provincial levels.¹⁴²⁵ He also found that most of the provinces as well as the NCOP did not hold public hearings on Traditional Health Practitioners Act¹⁴²⁶ and the Choice on Termination of Pregnancy Amendment Act,¹⁴²⁷ hence the conclusion that the NCOP did not comply with its obligation to facilitate public involvement in relation to these two Acts as contemplated by section 72 (1) (a) of the Constitution.

As far as the Dental Technicians Amendment Act was concerned, the lack of public interest on the Bill, led the court to conclude that the NCOP did not act unreasonably in not holding public hearings on this statute, hence the dismissal of the claim relating to the Dental Technicians Amendment Act.

The *Doctors for life* case is the operationalisation of the right to participation and should be emulated by other African countries.

However, decentralisation does not solve all problems related to the right to participation. The concerns raised by the shadow Report to the South Africa's first periodic state report to the African Commission¹⁴²⁸ included the '[i]naccessibility of and lack of civil society involvement in preparation of periodic report'.¹⁴²⁹ According to the shadow report, the South

¹⁴²⁵ *Doctors for Life* case, para 158.

¹⁴²⁶ *Doctors for Life* case para 170, 171, 173 and 181.

¹⁴²⁷ *Doctors for Life* case para 183, 186.

¹⁴²⁸ Shadow Report to the South Africa's first periodic state report to the African Commission presented at the 38th Session of the Commission, 21 November – 5 December 2005, Banjul, The Gambia. The report was prepared by the Centre for Human Rights, University of Pretoria; Socio-economic rights project, Community Law Centre, University of the Western Cape, the Human Rights Institute of South Africa, Lawyers for Human Rights, Central and Gauteng Mental Health Society, Gauteng Children's Rights Committee, Community Law and Rural Development Centre. The shadow Report is available on the Centre for Human Rights, University of Pretoria website http://www.chr.up.ac.za/hr_docs/countries/docs/Shadow%20report.doc (accessed 25 June 2010).

¹⁴²⁹ Shadow Report to the South Africa's first periodic state report to the African Commission presented at the 38th Session of the Commission, 21 November – 5 December 2005, para 2.

African government prepared the reports secretly and informed the civil society only a few weeks before the tabling of the report at the African Commission. This maneuver did not allow the civil society to have a say in the elaboration of the report.¹⁴³⁰

The secrecy around the elaboration of the report was also criticised by the African Commission which also raised its concerns ‘at the lack of involvement of civil society participation in the preparation of the report’¹⁴³¹ and called upon the South African government to share the reports ‘with all sectors of the society to give them an opportunity to contribute in its preparation or to react thereto’.¹⁴³²

Notwithstanding the problems discussed above, South Africa offers several good practices in terms of implementing the right to participation. Initiatives towards ensuring a meaningful public participation include:

- The establishment of ward committees composed of a maximum of ten elected individuals, representing diverse interest in the ward and chaired by a ward councilor. These elected individuals are mandated to guarantee full participation of the grassroots in all government’s activities.¹⁴³³
- The *Imbizo* and the ‘Citizen forum’ which is a public participation scheme allowing citizens and their leaders at national, provincial and local levels to discuss various topics through which the grassroots can air their views and address issues related to their communities;¹⁴³⁴

¹⁴³⁰ Shadow Report to the South Africa’s first periodic state report to the African Commission presented at the 38th Session of the Commission, 21 November – 5 December 2005, para 2.

¹⁴³¹ Thirty Eighth Ordinary Session of the African Commission, Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, para 17.

¹⁴³² Thirty Eighth Ordinary Session of the African Commission, Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa, para 17.

¹⁴³³ APRM Country Report South Africa (September 2007) 88 para 149.

¹⁴³⁴ APRM Country Report South Africa (September 2007) 89 para 149.

- The Presidential *Imbizo* through which the President of the Republic goes to the communities to monitor what is happening on the ground and to listen to the people;
- The *Batho Pele* scheme which compels service delivery institutions and staff to ‘set and adhere to standards and practices when engaging with the public and conduct their work in a professional and transparent manner’;¹⁴³⁵ and
- finally the recent establishment of a hotline through which people can directly contact the President’s office to air their views and concerns; though the efficiency of this line is yet to be shown since it was established.

Overall, though the implementation of the right to participation has few challenges such as the expensive fees imposed on political parties by the Electoral Commission, the lack of transparency on the private funding of political parties and the secrecy around the preparation of the South Africa’s first periodic state report to the African Commission, the country enacted several policies such as the establishment of ward committees, the *Imbizo* and the ‘Citizen forum’ the Presidential *Imbizo*, and the *Batho Pele* schemes to ensure public participation in the affairs of the land. Furthermore the judiciary is tireless at work in ensuring the right to participation of all including prisoners as discussed through the *Doctors for Life* case, the *August* case and *Minister of Home Affairs v National Institute of Crime Prevention and the Re-Integration of Offenders* case. Indeed, South Africa is an example of good practice in terms of ensuring the right to participation. Nevertheless, to what extent is the South Africa’s implementation of the right to participation informed by NEPAD? This question will be the focus of the next section.

6.10 NEPAD and the right to participation in South Africa

¹⁴³⁵ APRM Country Report South Africa (September 2007) 101 and 106, para 216.

This section assesses whether NEPAD is integrated in the national framework for participation through elections on the one hand and participation through decentralisation on the other hand.

6.10.1 NEPAD and the right to participation through elections in South Africa

In term of participation through elections, similar to Cameroon, South Africa complies with NEPAD's request to set up multipartism and organise periodic elections to allow the people to choose their representatives. Nevertheless, the difference appears in the institution in charge of organising and monitoring the elections where contrary to the case of Cameroon, South Africa has a genuine Independent Electoral Commission in line with the NEPAD's provision urging African states to establish a suitable electoral Commission.

Furthermore, it could be argued that the completion of the South African peer review in 2006 is another indication of South Africa's willingness to integrate participatory democracy as prescribed by NEPAD in its national framework. In this respect, this thesis contends that the abolition of the floor crossing shows that the country complies with the African Peer Review Panel's (APR Panel) recommendation which emphasised the need to 'address adverse effect of floor crossing on the long-term development, vitality, vibrancy and sustainability of multiparty constitutional democracy in a post-apartheid South Africa'.¹⁴³⁶

6.10.2 NEPAD and the right to participation through decentralisation in South Africa

Whereas Cameroon disregards NEPAD's request to reinforce national political and administrative frameworks in line with the principles of democracy in terms of decentralisation, South Africa complies. In doing so, the central authority has a limited power of control over municipalities; the Constitution establishes 'functional areas of concurrent national and provincial legislative competence'¹⁴³⁷ and exclusive areas for municipalities.¹⁴³⁸

¹⁴³⁶ APRM Country Report South Africa (September 2007) 90, para 152.

¹⁴³⁷ Constitution, Schedule 4, part A.

¹⁴³⁸ Constitution, Schedule 4, part A.

The control over the central authority is also ensured by the equitable division of revenue raised nationally between the national, provincial and local governments.

On another positive note, people have ownership of affairs affecting their community and the courts do not hesitate to take actions in ensuring the right to participation of all. In a similar vein, schemes such as *imbizo*, presidential *imbizo* and *Batho Pele* show how people can have ownership of power in the context of decentralisation. Based on the examples discussed above, it is contended that South Africa integrates NEPAD's policies on participation through decentralisation in its national framework.

6.11 Concluding remarks

The aim of the chapter was to explore the extent to which NEPAD is integrated into national development policies pertaining to the protection of vulnerable groups and the right to participation in Cameroon and South Africa.

As far as the protection of vulnerable groups is concerned, both countries strive to eradicate poverty as requested by NEPAD. The Cameroonian subprogramme to integrate vulnerable groups in the economy and the NGP in South Africa are empowering mechanisms targeting the vulnerable groups. These programmes in both countries fully incorporate NEPAD into national development frameworks.

In terms of the right to participation, the chapter shows that though Cameroon provides for the right to participation through direct and indirect participation (referendum and elections respectively) as well as regional decentralisation, the efficiency of these mechanisms is hindered by the absolute power of the President who is the only person who can initiate a referendum. In addition, the lack of an independent electoral monitoring institution is another hindrance to the free and fair elections in Cameroon.

As far as the right to participation through regional decentralisation is concerned, the implementation of this right is hampered by the extensive power of the central authority on the regional council, the lack of constitutional provisions sharing command between the

central power and the local authorities who have only the amount of power given to them by the central authority as well as the capacity of the President to appoint delegates to head a city council with ‘special status’, which should normally be headed by an elected official. Notwithstanding the Cameroonian move towards being peer reviewed, it is contended that the country disregards NEPAD’s standards on the right to participation.

South Africa, on the other hand has an Independent Electoral Commission, a decentralisation with equitable sharing of resources between local governments, a constitutional sharing of power between the central authority and the local government, national programmes to allocate power to the grass roots and more importantly a strong judiciary which does not hesitate to enforce the right to participation, hence the contention that NEPAD framework on the right is fully integrated in the South African agenda on implementing the right to participation.

Overall there is some hope for the RTD through the protection of vulnerable groups in both countries where NEPAD is well integrated, though on the right to participation, Cameroon should integrate NEPAD’s standards as South Africa does. It is However important to note that participation without resources will not be enough to realise the right under study, hence the next chapter investigates whether partnership as understood by NEPAD can bring in resources and what factors are determinant in accessing them.

CHAPTER 7 NEPAD, THE NEW GLOBAL PARTNERSHIP FOR DEVELOPMENT AND THE RTD

- 7.1 Introduction
- 7.2 Brief overview of the concept of partnership
- 7.3 NEPAD and the new global partnership
 - 7.3.1 Partnership between NEPAD and the G8
 - 7.3.2 NEPAD in the WTO
 - 7.3.2.1 The TRIPS Agreement and the RTD
 - 7.3.2.2 Agreement on Agriculture and the RTD
 - 7.3.3 NEPAD, the ACP Agreement and the RTD
 - 7.3.4 NEPAD, the EPAs Agreement and the RTD
- 7.4 Concluding remarks

7.1 Introduction

The vital question in this chapter is the following: Is NEPAD capable of setting up the new global partnership needed for the realisation of the RTD?

Early in this study, it was observed that the RTD is made of a bundle of rights, that the state is the primary duty bearer and that the international community has a vital role to play through international co-operation to ensure the enjoyment of the right. Subsequently, it was demonstrated that NEPAD, through the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance,¹⁴³⁹ is all about realising the bundle of rights elements

¹⁴³⁹ Assembly of Heads of State and Government, 38th Ordinary Session of the OAU, 8 July 2002, Durban South Africa, NEPAD Declaration on Democracy, Political, Economic and Corporate Governance AHG/235 (XXXVIII) Annex I. For more insights on this instrument, see K R Hope 'Practitioner perspective –towards good governance and sustainable development: the African Peer Review Mechanism' (2005) 18 (2) *Governance: An International Journal of Policy, Administration, and Institutions* 288.

of the RTD, though the plan was hindered by the lack of popular participation and lack of resources among others; it was also shown that the continental plan addresses the role of the state through the APRM as well as through its mainstreaming into national development policies. To complete the coverage of the RTD elements through NEPAD, this chapter will focus on the place of international co-operation or partnership in the NEPAD programme.

Article 22(2) of the ACHPR calls upon African states to act ‘individually and collectively’ for the realisation of the RTD in Africa; collectively, this entails measures through international co-operation amongst African states, where the *pacta sunt servanda* principle applies.

However, on the international plane, the UN Charter,¹⁴⁴⁰ the UNDRTD¹⁴⁴¹ as well as the Vienna Declaration¹⁴⁴² calls upon states to come together through international partnership in view of realising a better life for all or realising the RTD. Nonetheless, as mentioned earlier, the collective responsibility for the realisation of the RTD is very controversial.

Nevertheless, aware that decisions taken in New York or Geneva affects people’s lives in Yaounde (Cameroon) or Arusha (Tanzania), NEPAD, amongst its strategies to end Africa’s developmental ill and realise the RTD, intends setting up a new global partnership with the international community including multilateral agencies.¹⁴⁴³

The aim of this chapter is to examine to what extent such a partnership is possible or feasible. To achieve its goal, the chapter will be divided in four parts including this introduction. The second one revisits the concept of partnership; the third one focuses on NEPAD capacity to get a new partnership from the international community. In this section, the examination of the feasibility of a new global partnership will be done through a brief analysis of the partnership between NEPAD and the G8, its role in the World Trade Organisation (WTO)

¹⁴⁴⁰ Art 55 & 56.

¹⁴⁴¹ Art 6(1) & art 7.

¹⁴⁴² Para 10(4), 12 & 13.

¹⁴⁴³ NEPAD 2001, part VI, 51.

with a special attention to the TRIPS and AoA Agreements, the ACP Agreement and the EPAs. The last part of the chapter will summarise the chapter in providing concluding remarks.

7.2 Brief overview of the concept of partnership

Originally the term partnership derives from the 1968 World Bank report, 'Partners in Development', which was produced under the guidance of the ex-Canadian Prime Minister Lester Person.¹⁴⁴⁴ The report emphasised discontent with existing aid relations at the time and demonstrated its preference for the concepts of donor and recipient in future development co-operation.¹⁴⁴⁵ It is also believed that the concept of partnership came from the radical solidarity movement of the 1960s and 1970s based in Latin America.¹⁴⁴⁶ This movement advocated that 'international solidarity lay at the heart of development ideology.'¹⁴⁴⁷ Partnership is informed by the principle of equality between states and mutual commitments, shared responsibility and equitable sharing of benefits.

In their work on the RTD, Chowdbury and De Waart emphasised that partnership is based on the 'principle of equality'¹⁴⁴⁸ between states. They states that

[t]he principle of equality (substantive and participatory) intends to bring about a just balance between the diverging and converging interests, particularly between the developed and developing countries...since all states are legally equal, they have the right to participate fully and effectively in the

¹⁴⁴⁴ H Stokke 'Conditional partners? Human rights and political dialogue in the EU-ACP relations' 1, paper presented at the Annual Conference of the Association of Human Rights Institutes, Vienna, 8-10 September 2006 (working group III).

¹⁴⁴⁵ Stokke (2006) 1.

¹⁴⁴⁶ Stokke (2006) 1.

¹⁴⁴⁷ Stokke (2006) 1.

¹⁴⁴⁸ S R Chowdbury & P J I M De Waart 'Significance of the right to development in international law: An introductory view' in S R Chowdbury, E.M.G. Denters and P J I M De Waart (eds) (1992) *The right to development in international law* 19.

international decision-making process for the solution of the economic, financial and monetary problems as a matter of participatory equality.¹⁴⁴⁹

This approach was implemented by the UNDP that replaced the terms ‘donor’ and ‘recipient’ with the terms ‘principal contributor’ and ‘project country’ respectively in its language.¹⁴⁵⁰ In this context, the creation of an international level playing field should be the rule whereby developing countries are seen as partners with developed ones and not as mere recipients and caretakers of decisions made by others.¹⁴⁵¹

Mutual commitments, shared responsibilities and equitable sharing of benefit are the corollaries of the principle of equality. Such a principle implies that developing countries’ obligations are matched by reciprocal obligations to be carried out by the international community. From this perspective, at international level, an ‘ultimate rule’ or foundation of the global social contract can be established for the realisation of the RTD. In the same light, Sengupta aptly suggests the ‘development compact’ or ‘global social contract’¹⁴⁵² whereby developing countries forgo certain prerogative to acquire more development co-operation. The ‘development compact’ actualises the social contract at the global level.

The need to establish a true partnership to ensure a better life for all is secured in international development policies such as the MDGs, discussed earlier,¹⁴⁵³ the Group of 8 richest countries (G8),¹⁴⁵⁴ and the Least Developed Countries (LDCs)¹⁴⁵⁵ initiatives. Following this

¹⁴⁴⁹ S R Chowdbury & P J I M De Waart (1992) 19.

¹⁴⁵⁰ Maggio & Lynch (1997).

¹⁴⁵¹ Maggio & Lynch (1997).

¹⁴⁵² A Sengupta, 4th Report to the Open-Ended Working Group on the Right to Development, E/CN.4/2002/WG.18/2, para 4.

¹⁴⁵³ See MDG No 8 which calls for the creation of a global partnership for development.

¹⁴⁵⁴ The G8 Official Notice, Genoa 2001: ‘We will also enhance co-operation and solidarity with developing countries, based on mutual responsibility for combating poverty and promoting sustainable development’.

perspective, NEPAD sees the establishment of a ‘new global partnership’ as a strategy to eradicate poverty and stop the marginalisation of the continent to ensure the RTD. Now, to what extent is such a partnership achievable?

7.3 NEPAD and the new global partnership

Aware that Africa is the ‘cradle of humanity’,¹⁴⁵⁶ and has various resources,¹⁴⁵⁷ NEPAD commits itself to establish sound macroeconomic policies, social development, accountable government, capacity building, create a favourable climate for investment and savings, and peaceful relations between African countries. In return, NEPAD expects external partners to create trustworthy assistance opportunities for developing countries on the global market, capacity building and technology transfer and ‘to meet the target level of Official Development Assistance flows equivalent to 0.7% of each developed country’s GNP’.¹⁴⁵⁸ In addition, developed countries have the responsibility to admit African goods into their markets, but more importantly to ‘negotiate more equitable terms of trade for African countries within the [World Trade Organisation] (WTO) multilateral framework’.¹⁴⁵⁹ How possible is such a partnership? Is this partnership not a simple dream? This question will be answered in four parts: the first one will focus on the partnership between NEPAD and the G8, the second one on the role of NEPAD in the WTO, the third part will quickly look at the ACP Agreement and how it unfolded into the EPAs in which the role of NEPAD will be looked at in the last part of the section.

7.3.1 Partnership between NEPAD and the G8

¹⁴⁵⁵ DCs Programme of Action, 2001: Partnership based on mutual commitment by LDCs and their development partners. Spirit of solidarity and shared responsibility; common but differentiated responsibilities of developing and developed countries.

¹⁴⁵⁶ NEPAD 2001, para 177.

¹⁴⁵⁷ NEPAD 2001, para 172, 176 & 179.

¹⁴⁵⁸ NEPAD 2001, para 185.

¹⁴⁵⁹ NEPAD 2001, para 185.

In its early days, NEPAD presented its new partnership proposal to the G8 seeking a partnership covering the G8 and Africa as a whole through NEPAD. However, the G8 response to NEPAD at its Kananasaki summit in 2002 proved that a true partnership is not for now. In a 12 pages document called *G8 African Plan*, the G8 agreed to build partnership with individual countries in Africa, not collectively as G8 and not with Africa as a whole, but on a bilateral selected basis. This will open doors to interference in countries' sovereignty, because G8 countries will assess African countries according to their own criteria. This is a consecration of 'the rule of the strongest'. The will of the donors will always prevail in the process rather than the one of the receivers. The standards of the donors will be imposed on Africa and they will withhold aid any time they conclude that their standards are not met and can even impose sanctions depending on their will. This leads to the conclusion that there is no strategy in the NEPAD agenda to respond to this 'power game'.¹⁴⁶⁰ In fact, among others the G8 response limited itself to focus on education, health, governance and others, but ignored the development of infrastructure which is one of NEPAD priorities. Though the debt question was also neglected by the G8, it was finally successfully resolved in 2006 when the G8 played an important role in the debt cancellation of African countries.¹⁴⁶¹

However, as correctly observed by Rukato,¹⁴⁶² the G8 response was too general and lacked precision and selected countries to be rewarded; most importantly, the G8 response showed that the G8 action is not informed 'by collective responsibility, but rather by collective interest'.¹⁴⁶³ In other words, nothing is done by the G8 from a human rights perspective, the G8 has no obligation or no duty to realise human rights within the context of its partnership with NEPAD which is part of the AU human rights based system. The G8 action is primarily based on its interest. This can only put NEPAD on the weakest side of the balance and as a

¹⁴⁶⁰ I Taylor 'The New Partnership for Africa's Development and the global political economy: towards the African century or another false start' 2, <http://www.codesria.org/Links/conferences/Nepad/taylor.pdf> (accessed 15 June 2008).

¹⁴⁶¹ Rukato (2010) 201.

¹⁴⁶² Rukato (2010) 201.

¹⁴⁶³ Rukato (2010) 203.

result such a partnership does not enhance the prospects of the realisation of the RTD through NEPAD. In fact, as discussed in the institutionalism theory, wealthy countries use institutional power to set the rules of the game. As correctly argued by Barnett and Duvall, they use ‘neoliberal institutional approaches that focus on the behavioral constraints’ to weaken third world institutions such as NEPAD that ends up be unable to eradicate poverty.

Taking the discussion to the APRM, the ‘power game’ problem affects the ownership and legitimacy of the APRM. Whereas the Guidelines for countries to prepare for and to participate in the APRM stresses that ‘national ownership and leadership by the participating country are essential’ for a real Peer review,¹⁴⁶⁴ African leaders highlight the African ownership of the APRM. In this respect, just a day before his country peer review, President Kibaki of Kenya observed:¹⁴⁶⁵

The African Peer Review Mechanism is our own process as Africans to enable us to govern our nations better, turn Africa into a working continent, and prepare the way for our children and grandchildren to live in an Africa that is politically and economically stable.

Similarly, at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007, APRM representatives claimed that APRM was ‘Africa’s innovative thinking on governance’.¹⁴⁶⁶ They clearly emphasised that the Mechanism is a ‘unique African instrument, it is African in origin, African inspired and African owned’.¹⁴⁶⁷ The same claim was made two years earlier by the APRM Eminent Person, the Cameroonian Jeuma in her speech to a panel discussion on Multi-Stakeholders Perspectives on the Implementation of NEPAD organised by the Office of the Special Adviser on Africa to the UN Secretary

¹⁴⁶⁴ NEPAD/APRM/panel13/Guidelines/11-2003/Doc-8, para 12.

¹⁴⁶⁵ Press Statement for H.E. President Mwai Kibaki on the Occasion of the APR Heads of State Forum, July 2006, available at www.nepadkenya.org/key_issues.htm (accessed 20 January 2007).

¹⁴⁶⁶ APRM’s Presentation at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007.

¹⁴⁶⁷ APRM’s Presentation at the Eighth Gathering of the African Partnership Forum in Berlin, Germany from 22 to 23 May 2007.

General¹⁴⁶⁸ and more recently by President Boutefflika who views the APRM as the proof of Africa's understanding that 'good governance provided a plus value to its development and had never been a constraint imposed from the outside'.¹⁴⁶⁹ These statements clearly emphasises that Africa exercises full sovereignty over the APRM.

From a different angle, it can also be argued that Africa does not own the mechanism. In line with this view, it can be said that the incentive to comply with APRM is that it shapes the way donors and developed countries respond to countries on the continent. After the February 2003 meeting of G7 Finance Ministers and Central Bank Governors, a press release stated:¹⁴⁷⁰

Consistent with the G8 Africa Action Plan, we are ready to provide substantial support to African countries that implement [the] New Partnership for Africa's Development (NEPAD) principles and are committed to improving governance and demonstrate solid policy performance.

In other words, donors use the APRM to interfere in Africa's sovereignty. In this perspective, the same Finance Ministers and Central Bank governors emphasised their support for the NEPAD/APRM through a 2003 Working Paper in theses words:¹⁴⁷¹

With respect to Africa, we renew our support to the NEPAD process and look forward to progress in the implementation of the African Peer Review Mechanism, including its governance aspect. We will ask the IFIs [International Financial Institutions] to look for opportunities to coordinate their monitoring and surveillance mechanism with NEPAD's own work.

¹⁴⁶⁸ Report of the Panel Discussion on multi-stakeholders' perspectives on the implementation of New Partnership for Africa's Development (NEPAD): four years after, 13 October 2005, United Nations Headquarters, New York.

¹⁴⁶⁹ 'Algerian President urges AU to integrate NEPAD' *BuaNews* 1 July 2008, available at <http://allafrica.com> (accessed 25 November 2008).

¹⁴⁷⁰ Government of Canada 2003a, 2 Statement of G-7 Finance Ministers and Central Bank Governors, Paris February 2003 at <http://www.g8.gc.ca/menu-en.asp> (accessed 22 June 2006).

¹⁴⁷¹ Government of Canada 2003b, 5 – G7 Finance Working Paper: Aid effectiveness available at http://www.g8.gc.ca/working_paper_aid_effectiveness-en.asp (accessed 22 June 2006).

These quotes clearly call needy African countries to participate in the APRM if they expect any assistance from donors. Therefore, acceding to the process might just be giving up a state's sovereignty to get help from the international community. In this perspective, it could be argued that the parties are not equals and it is difficult to see how a real partnership can take place between them. In fact, NEPAD and Africa does not set the term of partnership, but obey the rule of partnership set by donors. This led to argue that the economic dependence of Africa on the West will not lead to a proper promotion of human rights.¹⁴⁷²

Nevertheless, from a different line of thought, it can be argued that the APRM does not open doors to international interferences, especially when one notices that donors are never in the room during peer review processes. Thus, participation in the APRM has nothing to do with pleasing donors, but to enhance good governance and successfully fight poverty in Africa. Former President Mbeki underlined the need to achieve good governance¹⁴⁷³

[n]ot because we seek to improve our relations with the rest of the world as a first objective, critically important as this is, but to end political and economic mismanagement on our continent, and the consequential violent conflicts, instability, denial of democracy and human rights, deepening poverty and global marginalisation.

However, given NEPAD's financial constraints highlighted earlier, it is very difficult for NEPAD to operate without assistance from the international community. It is equally difficult for donors to give their money without opening an eye on how it is used. Consequently, NEPAD is the weakest link in the relation and will not be able to trade with donors as equal partners. If this is to happen, NEPAD should start by being more self-reliant in terms of financing its activities. This will in return enhance its capacities of achieving the RTD through partnership.

7.3.2 NEPAD in the WTO

¹⁴⁷² Appiagyei-Atua (2006) 524.

¹⁴⁷³ T Mbeki 'Letter to the right honourable Jean Chretien, Prime Minister of Canada' 8 November 2002 (on file with author).

Established during the Uruguay Round Agreements (URAs) of its precursor the General Agreement on Tariffs and Trade (GATT), the WTO is the ‘only truly global international organisation dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by world trading nations and ratified in their parliaments’.¹⁴⁷⁴ It has a membership of 152 countries as of 16 May 2008.¹⁴⁷⁵ The WTO intends to facilitate and liberalise international trade and work for the economic development of the planet. It seems to be the appropriate platform for NEPAD to realise its priority of setting up a new global partnership for Africa’s development because it is the real place to address unfair trade rules and other impediments to Africa’s development. In fact, the GATT in its Preamble emphasise the need to use trade to better human condition by providing employment and enough resources for all,¹⁴⁷⁶ especially in the developing world where countries are given preferential treatment and are not bound by the principle of reciprocity in trade.¹⁴⁷⁷

¹⁴⁷⁴ ‘What is the WTO?’ at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 16 June 2008).

¹⁴⁷⁵ ‘What is the WTO?’ at http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed 16 June 2008).

¹⁴⁷⁶ GATT Basic Instruments and selected documents, vol 1.

¹⁴⁷⁷ Art. XXIV:8 of the GATT reads: ‘The developing contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed contracting parties. In the same vein, art 18 of CERDS reads: ‘Developed countries should extend, improve and enlarge the system of generalised non-reciprocal and non-discriminatory tariff preferences to the developing countries consistent with the relevant agreed conclusions and relevant decisions as adopted on this subject, in the framework of the competent international organisations. Developed countries should also give serious consideration to the adoption of other differential measures, in areas where this is feasible and appropriate and in ways which will provide special and more favourable treatment, in order to meet the trade and development needs of the developing countries. In the conduct of international economic relations, the developed countries should endeavour to avoid measures having a negative effect on the development of the national economies of the developing countries, as promoted by generalised tariff preferences and other generally agreed differential measures in their favour’. For more on trade and development, see J Bhagwati ‘Introduction’ in Bhagwati, J and Hudec R (eds) (1996) *Fair Trade and Harmonisation*.

At the centre of these provisions, it is the duty of states to contribute to the development of international trade of goods, particularly by means of arrangements and by the conclusion of long-term multilateral commodity agreements, which improve life in every part of the world. All states share the obligation to promote the regular flow and access of all commercial goods traded at stable and fair prices, thus playing a part in the equitable development of the world economy.

However, few years after the creation of the WTO in 1995, it soon became obvious to governments throughout developing countries as they attempt to implement these agreements, that their interests were not considered during the negotiations leading to the adoption of the agreements in question. In fact, using compulsory power, they were clearly in opposition to the concerns and requests of the developing countries, but emphasised the interests and priorities of developed countries. Unfair trade rules such as agriculture subsidies by rich countries, complex and strict rules for food imports, and other protectionist policies imposed on developing countries are legitimised. The most powerful industrialised countries freely hamper the implementation of those URA terms that are contrary to their interests. For example, the US is good in avoiding the implementation of its URA commitments to eradicate its tariff and quote constraints on textile and clothing exports from developing countries.

Nevertheless, it cannot be argued that the URA and even the WTO are worthless for Africa. They create a framework where world poverty can be addressed. In August 2003, a consensus was reached on Trade Agreements on Intellectual Property Rights and public health, empowering poor countries to import medicines for public health reasons under compulsory licenses. However, this was just empty noise because by the end of the WTO Ministerial Conference held in Hong Kong in 2005, many issues were still unaddressed and even today, the question remains unanswered, hence the continuous bad health condition in developing countries and in Africa in particular. Nevertheless, the good news was the agreement on the elimination of agricultural subsidies by 2013.

However, international trade is characterised by self-interest and countries are definitely not there to assist each other on the ground of equality of states. On the contrary, they behave like in a jungle where the strongest beasts eat the weakest. Sharing this view, Keet argues that the WTO is a very complicated negotiation ground where

[r]uthless hard bargaining is driven by powerful corporate and national vested interests, not the polite diplomatic positioning or posturing of Heads of State. And, with the WTO Secretariat clearly biased towards the interests and demands of the most powerful member states, and the expansion of the liberalised global trade regime, the WTO is not a neutral open forum or assembly of nations where world leaders gather to debate and ‘influence’ each other’s positions.¹⁴⁷⁸

Apart from being cruel, WTO rules are extremely complex, hence the call for ‘technical assistance and support to enhance the institutional capacity of African states to use the WTO and to engage in multilateral trade negotiations.’¹⁴⁷⁹ This call had been answered by the WTO which ‘supports NEPAD’s main objectives in the field of trade, particularly through its technical assistance activities for African countries’.¹⁴⁸⁰ In 2004, out of 501 Trade-Related Technical Assistance, 178 or 36% benefited African countries.¹⁴⁸¹ In addition, African countries are included in 12 weeks Geneva-based training courses for government officials; the regional three-month trade policy courses, the Doha Development Agenda Advanced Training courses.¹⁴⁸² The integrated framework for trade-related technical assistance is another initiative established to assist poor countries to harmonise their poverty reduction strategy with the rules of international trade. There are also various programmes under the

¹⁴⁷⁸ D Keet ‘Proposals on the role of trade within the New Partnership for Africa’s Development (NEPAD) – challenges and questions’ Presentation at workshop of African trade union organised by the National Labour and Economy Development Institute (NALEDI), 22-23 May 2003, in Johannesburg, South Africa. Available at http://www.transcend.org/t_database/pdfarticles/584.pdf (accessed 20 May 2007).

¹⁴⁷⁹ NEPAD 2001, para 167.

¹⁴⁸⁰ WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008).

¹⁴⁸¹ WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008).

¹⁴⁸² WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008), 1-2.

Joint Integrated Technical Assistance Programme as well as the Trade Policy Review Mechanism,¹⁴⁸³ all aiming to enhance poor countries' ability to have a say on the international plane.

However, these training programmes do not yield results because of the uneven bargaining power at the negotiation table. In this regard, it is argued that African representatives are vulnerable to pressures and are influenced by their Northern aid and trade partners, who usually approach them openly and in secret far from the negotiations table to oppose and challenge African views.¹⁴⁸⁴

Most importantly, training provided might be useless because the fundamental question is to know whether 'technical' assistance from the North is adequate to solve problems in the South; are the contexts and environments similar? The other question on 'technical' assistance is that it is certainly not disinterested, and its content will replicate the views of the pro-WTO institutions and agencies providing the technical assistance or 'capacity building'.¹⁴⁸⁵

Nonetheless, it can also be argued that the WTO is international and that its rules are applied universally. There are no specific rules for Africa; claiming that technical assistance from the North cannot solve problems in the South is not true. The problem is not about the nature of technical assistance, but the nature of the rules of international trade. Do they cater for Africa's interests? It does not help to have training programmes based on 'wrong' or inequitable rules. What are needed here are equitable rules or fair trade mechanisms before talking of 'technical assistance'.

¹⁴⁸³ WTO support to NEPAD, Period of Report: 2004-2005, 1 available at <http://www.un.org/africa/osaa/2005%20UN%20System%20support%20for%20NEPAD/WTO.pdf> (accessed 15 June 2008), 1- 3.

¹⁴⁸⁴ Keet (2003) Available at http://www.transcend.org/t_database/pdfarticles/584.pdf (accessed 20 May 2007).

¹⁴⁸⁵ Keet (2003).

Nevertheless, the Aid-For-Trade (AFT) initiative was launched at the WTO 6th Ministerial Conference in Hong Kong in 2005. Its objective was to help developing countries including African ones to use trade as a tool for development.¹⁴⁸⁶ To operationalise the AFT, the ADB in collaboration with the WTO, UNECA and the Tanzanian government co-organised an Aid-For-Trade Conference in Dar-Es-Salaam, Tanzania from 1 to 2 October 2007. Economic Ministers from African governments' donors, NGOs, government organisations, Regional RECs, private sector, the media and other stakeholders were present at the forum looking for ways to enhance Africa's role in the world trade. A subsequent AFT meeting was held from 19 to 21 November in Geneva and an AFT Advisory Group gathered on 21 January 2008 at the WTO to assess and discuss the initiative further.¹⁴⁸⁷

As mentioned earlier, the problem is not the lack of forum for discussing trade or enhancing Africa's capacity to trade, but the unfairness of international trade rules. The ADB calls for 'a shift from awareness to implementation' of AFT.¹⁴⁸⁸ This thesis shares this view, but also calls for the establishment of fair trade rules before moving to their implementation phase.

Reiterating the demand for global justice through international co-operation, the first UNCTAD (1964), General Principle No 8 specifically called for preferential concessions to developing countries through this statement:¹⁴⁸⁹

Developed countries should grant concession to all developing countries and extend to developing countries all concessions they grant to one another and should not, in granting these or other concessions, require any concessions from developing countries.

¹⁴⁸⁶ K Bedourama (Secretary General of ADB) 'Information paper on the New Partnership For Africa's Development (NEPAD): 2008 Annual Report'; ADB/BD/IF/2008/47, para 2.36 (on file with author).

¹⁴⁸⁷ Bedourama (2008), para 236.

¹⁴⁸⁸ Bedourama (2008), para 236.

¹⁴⁸⁹ Proceedings of the UN Conference on Trade and Development, first session vol1, Final Act and Reports (1964).

Put differently, developed countries should facilitate the development of poor countries; they should give them the same opportunities they grant to one another without expecting anything in return. In this respect, UNCTAD II in 1968 clarified the objectives of the preferential treatment and non reciprocal concessions to be allocated to the developing countries. They were: firstly to increase export earnings to developing countries; secondly to promote industrialisation, and thirdly to speed up the rate of development.¹⁴⁹⁰ From this stand point, after the 1979 Tokyo Round, the legal basis for trade co-operation among developing countries was the enabling clause. Accordingly, the contracting parties were allowed to:¹⁴⁹¹

Accord differential treatment and more favourable treatment to developing countries without according such treatment to other contracting parties, and such preferential treatment covers regional or global arrangements among the developing countries for the mutual reductions or elimination of tariffs and other barriers.

Accordingly, not only should co-operation ensure an equitable international economic order, it should take into account the needs and interests of all countries with special attention on developing ones.

However, Africa is faced with compulsory power imposed through the terms and hindrances imposed on regional trade arrangements (RTAs) as established by the WTO. These hindrances make sure that RTAs do not 'raise barriers that discriminate against third parties in the world economy. Countries in regional economic communities, such as those in Africa, are asked to lower their individual and collective tariff provisions, and remove other external 'barriers', in order to 'integrate the globalised world 'for their own good'.¹⁴⁹² In other words, the kind of preferential trade terms and common external terms as well as common external tariffs that categories of countries might exploit for their mutual benefit and ease heavy

¹⁴⁹⁰ Proceedings of the UN Conference on Trade and Development, 2nd session, Final Act and Reports (1968), Resolution 21 (II).

¹⁴⁹¹ Tokyo Round, Decision of 28 November 1979.

¹⁴⁹² Keet (2003).

pressures from external ‘third parties’ are severely limited by the WTO’s article 24.¹⁴⁹³ In this regard, the Belize Minister of Foreign Affairs and Foreign Trade, Eamon Courtenay correctly observed in his statement at the failed Doha round in 2006:

There is something inherently wrong with a system, which promises development and delivers lower prices for exports. We say there is something fundamentally unfair in a system, which promises a development agenda and delivers suspended negotiations and less market to small, vulnerable economies... Of the 6 billion people on planet earth, 1 billion has more than 80 per cent of world income and 5 billion has less than 20 per cent of the income. Our common charge is to right the imbalance’.¹⁴⁹⁴

There is a need to amend this contentious article if the spirit of the 1979 Tokyo Round, offering ‘special and differential terms’ for developing countries is to be respected. So far, NEPAD is yet to address this question. In fact, the current developments at the WTO do not comply with the CERDS according to which

[a]ll States share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.¹⁴⁹⁵

The assumption that the ‘marginalisation’ of Africa from the processes of globalisation has been the reason of its underdevelopment and that Africa’s potential has been unproductive because of its limited integration into the global economy is one of the characteristic of the NEPAD’s document. Nonetheless, NEPAD does not convincingly provide the remedies to give a rightful place to Africa in the WTO for example. As long as such remedies are not found, prospects for the RTD in Africa remain very low.

¹⁴⁹³ Art 24 of the WTO requests amongst others, that regional agreement covers ‘substantially all trade’ and does not take into consideration individual trade arrangements. In short it assumes that all countries are equal and that rules should be applied without exception or rather universally.

¹⁴⁹⁴ M Gorelick ‘The sixty-first General Assembly: Transcending rifts on development and beyond’ UN Chronicle, online edition, 2006 at http://www.un.org/pub/chronicle2006/issue_4/o406cont.htm (accessed 5 January 2009).

¹⁴⁹⁵ Art 6.

To show the effect of the power game on the international plane and illustrate the points made above, it is important to have a quick look the TRIPS as well as the AoA agreements.

7.3.2.1 The TRIPs agreement and the RTD

The main objective of this section is to demonstrate that NEPAD is the weakest link when it comes to use the TRIPs agreement to improve the standard of living on the continent. The section is divided in two parts. The first one presents a brief overview of the TRIPS and the second one discusses its effects on the realisation of the RTD while showing how NEPAD is unable to remedy the challenges.

Brief overview of the TRIPS Agreement

Prior to the TRIPS Agreement, intellectual property was characterised by a lack of a standardised protection mechanism, hence the reaction of the WTO that established a multilateral framework to address issues relevant to the protection of intellectual property through the Agreement which came into effect on 1 January 1995.¹⁴⁹⁶ According to the WTO, ‘Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time’.¹⁴⁹⁷ The TRIPS Agreement caters for intellectual properties such as copyrights and related rights, trademarks, industrial design, geographical indications, patents layout design of integrated circuit and undisclosed information. The TRIPS Agreement is the vehicle through which the international community agreed to set up standards, cater for dispute resolution and address various issues related to intellectual property. It is the platform through which NEPAD Should act for the improvement of lives in Africa.

¹⁴⁹⁶ Summary of the TRIPS Agreement at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (accessed 29 December 2010).

¹⁴⁹⁷ WTO ‘What are Intellectual Property Rights?’ at http://www.wto.org/english/tratop_e/TRIPS_e/intel1_e.htm (accessed on 29 December, 2008).

The TRIPS Agreement sets out the minimum standards of protection in each intellectual property to be respected by parties to the WTO. The minimum standards include the identification of the main elements of protection, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. According to the Agreement, member states should be free to adopt measures¹⁴⁹⁸ to protect public health and nutrition, to promote socio-economic and technological development and to protect against the abuse of intellectual property rights.¹⁴⁹⁹ However, due to their low level of development, developing countries are given more time to implement the Agreement whereas developed ones had until 1996 to implement the agreement.¹⁵⁰⁰

The Agreement also provides that in case of disputes between WTO members in relation to respect for the minimum standards, the WTO dispute settlement procedures will come into play.¹⁵⁰¹ In the occurrence of a dispute, a panel of trade experts is appointed to take care of the matter and produce a report. The panel's decision is not final; it may be subjected to appeal to the WTO Appellate Body. If a party to a dispute fails to abide by a decision, the other party can impose trade sanctions on the member if the Dispute Settlement Body is of the view that it is the appropriate way to handle the issue.¹⁵⁰²

The TRIPS Agreement can also be reviewed through the biennial Ministerial Conferences. This forum is 'the highest decision-making body of WTO and it can make decisions on all matters under any of the WTO Agreements, including the TRIPS Agreement'.¹⁵⁰³ In all, the

¹⁴⁹⁸ TRIPS Agreement art 1(1).

¹⁴⁹⁹ TRIPS Agreement, art 8.

¹⁵⁰⁰ As above, art 66 (1).

¹⁵⁰¹ For more on the dispute settlement, see art 64 of the TRIPS Agreement.

¹⁵⁰² Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-second session 'Economic, Social and Cultural Rights – The impacts of the Agreement on Trade-Related Aspects of Intellectual Properties Rights on human rights' Report of the High Commissioner, UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 7.

¹⁵⁰³ UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 8.

TRIPS Agreement aim is to regulate and harmonise the protection of intellectual property on the international plane. Though article 7 of the Agreement recommends that

[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations,

The question remains: to what extent does the TRIPS Agreement take human rights into consideration? Or rather, to what extent is the compensation of the innovator balanced with human welfare? Can NEPAD influence the agreements for the good of Africans?

The TRIPS Agreement, the right to health and the right to development

As argued earlier, like other organs of the international community, the WTO has the duty to provide for a social and international order that is conducive to the realisation of human rights and the RTD. It is also important to note that most member states of the WTO are also parties to the ICESCR. Article 12 of the ICESCR obliges states to respect, protect and fulfil the right of everyone to the highest attainable standard of physical and mental health. However, articles 27 of the Universal Declaration and 15 of the ICESCR are the main provisions addressing both the protection of the right of an innovator and the protection of human rights.

Article 27 of the Universal Declaration reads:

- (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In the same vein, article 15 of the ICESCR provides:

1. The States parties to the present Covenant recognise the right to everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

According to articles 27 and 15 of the Universal Declaration on Human Rights and the ICESCR respectively, members of the international community and states parties to the covenant have the obligation to guarantee the cultural rights of everyone. In addition, states parties must ensure that everyone without discrimination enjoys the benefits of scientific progress and its applications. In other words, whenever there is a new book, a new technology or a new drug, states parties to the Covenant are obliged to take the innovation to their people. Nonetheless, articles 27 (2) of the Universal Declaration and 15 (1) (c) of the ICESCR clearly recognise the right of an author to protect and enjoy the moral and material benefits of his creation. Put differently, states parties to the Covenant must ensure that every innovator benefits from his work. Therefore, there is a strong need to find the appropriate balance between the protection of the right of a creator and the protection of human rights, hence the comment that the

ICESCR could be said to bind States to design IP [intellectual property] systems that strikes a balance between promoting general public interests in accessing new knowledge as easily as possible and in protecting the interests of authors and inventors in such knowledge.¹⁵⁰⁴

Now, does the TRIPS Agreement strike the appropriate balance between protecting both interests? Without intellectual protection, there will be less innovation and less progress. Researchers must be given incentives to do their job which contributes to the realisation of human dignity. Unprotected creativity will be copied and sold cheaply by dishonest people and this will not encourage the most needed innovation for the betterment of human well-being. Thus, the setting up of copyright, patents, trademarks and other mechanisms mentioned earlier to protect authors is clearly justified. Nevertheless, what is the need to create things that are not accessible to the needy people? Is it correct to live in permanent crisis while remedies are packed and sealed in boxes?

It might be unfair to claim that drugs are sealed in boxes because the manufacturer's rights are not always protected. The patents granted to inventors are sometimes temporary.¹⁵⁰⁵

¹⁵⁰⁴ UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 10.

¹⁵⁰⁵ UN doc E/CN.4/Sub.2/2001/13 27 June 2001, para 11.

Accordingly, throughout the period of protection which is 20 years,¹⁵⁰⁶ the creator or patent holder can exclude competitors from manufacturing, using and selling the drug or book or any innovation, but after the expiry of the protection timeframe, everyone can access the medicine. Nevertheless, what if by the expiry date of the protection of the rights of the innovator, all the needy people are dead? Knowing that human rights are inalienable, the right to health, development and life of people should not be surrendered to a patent holder.

The 2000 World Health Organisation (WHO) Report describing the health crisis notes that only 11% of health spending globally happens in the third world which account for 90% of the world disease. In the same vein, it is worth repeating that in the 1, 393 new drugs permitted between 1975 and 1999, only 13 were for tropical diseases¹⁵⁰⁷ found in places like Africa and that out of these 13 new drugs, five were byproducts of veterinary research and two commissioned by the military.¹⁵⁰⁸ This is sad because will people not survive in places like Africa. Aren't African human beings? There is a strong need to gear international policies to ensure access of medicine by deprived people.

However, it could be argued that the international community has been working towards the eradication of diseases in the developing world. In 1970, there was a Special Programme for research and Training in tropical diseases initiated by the WHO and co-sponsored by the United Nations Children Fund (UNICEF), the UNDP and the World Bank.¹⁵⁰⁹ In addition, there is a Special Programme for Research and Training in Tropical Diseases which relied on

¹⁵⁰⁶ Pogge (2007) 37.

¹⁵⁰⁷ Pooge (2007)37.

¹⁵⁰⁸ Pogge (2007) 37.

¹⁵⁰⁹ 12th Session of the Working Group on the Right to Development, 5th Session of the High Level Task Force on the implementation of right to development agenda item 4 of the provisional agenda 'Implementation of the work plan for the period of 2008-2010 endorsed by the human rights council in resolution 9/3 – Assessment of global partnerships in the areas of access to essential medicines, debt relief and transfer of technology, as well as dialogue with MERCOSUR – The Global Funds to Fight Aids, Tuberculosis and Malaria, the Special Programme for Research and Training in Tropical Disease and the right to development'; UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, Para 5.

stewardship, empowerment and explores uncared for diseases. In order to promoting access to medicine in poor areas, the Special Programme caters for research and development and building and enhancing capacity in partnership with the pharmaceutical companies in manufacturing medicine needed in the developing world.¹⁵¹⁰

Nevertheless, the 2000 and current health situation in the third world shows that such programmes did not work. Similarly, the Resolution WHA 27.52 calling for the ‘intensification of research on tropical parasitic diseases’ adopted in May 1974 by the World Health Assembly¹⁵¹¹ could not stop the 2000 health crisis.

The Global Fund to Fight AIDS, Malaria and Tuberculosis¹⁵¹² was amongst other initiatives¹⁵¹³ set up to ensure better health in the developing world. Though this initiative has broadened its capacity, it is yet to reach issues that matter to poor communities such as access to medicine.¹⁵¹⁴

In such circumstances, nothing can be done at national level or by NEPAD to realise the right to health and the RTD. No matter how good national or regional policies are good on the question, nothing or very little can be achieved because the answer lies at the international level where NEPAD is voiceless. The protection of authors should not override human dignity which includes the right to food, health and development. In fact, as explained by the General Comment No 14 on the right to health, the achievement of the right to health should consider

¹⁵¹⁰ Report of the high-level task force on the implementation of the right to development on its fifth session UN doc A/HRC/12/WG.2/TF/2, para 33.

¹⁵¹¹ UN doc A/HRC/12/WG.2/TF/2, also UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, para 9.

¹⁵¹² A/HRC/12/WG.2/TF/CRP.4/Rev.1 above, part 3.

¹⁵¹³ Global Forum for Health Research, *Medecin Sans Frontieres*, Bill & Melinda Gates Foundation Initiatives on research for neglected diseases and medicines for malaria venture to list few of them.

¹⁵¹⁴ Report of the high-level task force on the implementation of the right to development on its fifth session A/HRC/12/WG.2/TF/2, para 44; also UN doc A/HRC/12/WG.2/TF/CRP.4/Rev.1, part 3 (A).

‘the existing gross inequality in the health status of people, particularly between developed and developing countries’.¹⁵¹⁵

In an attempt to reverse the 2000 health crisis, the ‘Global Alliance for Vaccine and Immunisation’ created the same year saved around 2.9 millions lives and encouraged more research on illness affecting the poor,¹⁵¹⁶ but a very small proportion of development spending is committed to illnesses accounting for 90% of the world’s health problem.¹⁵¹⁷

Addressing the WTO institutional challenges in 2004, the WTO Consultative Board underlined article 7 of TRIPS Agreement emphasising the need to protect both the creator and human welfare as well as the WTO’s view according to which ‘the case for trade is made very definitely in terms of enhancing human welfare, [and that] trade is a means to an end, not an end in itself.’¹⁵¹⁸

Notwithstanding such statements, it can be argued that health crisis and poverty are exacerbated by the TRIPS Agreement. For example HIV/AIDS is destroying the third world; but the expensive anti-retroviral agents (ARVs) needed to cope with the disease are patented and beyond the reach of the poor African who lives on less than 2 dollars a day. The TRIPS Agreement does not allow third world scientists to manufacture generic ARVs to improve health and human rights in their regions, though item 17 of the Doha Declaration notes that the TRIPS Agreement must be interpreted in a manner supportive of public health and therefore should give room for more accessible ARVs generically. On the contrary, in their interest pharmaceutical companies and some developed countries will rather spread the rumor that

¹⁵¹⁵ Committee on ESCR General Comment No 14 ‘The right to highest attainable standards of health’ 11/08/2000, E/C.12/2000/4, para 38.

¹⁵¹⁶ GAVI’s new vaccine strategy prioritises deadly diseases at http://www.gavialliance.org/media_centre/index.php (accessed on 10 July 2008).

¹⁵¹⁷ Global Forum for Health Research Report 2002.

¹⁵¹⁸ WTO Consultative Board Report ‘*The future of the WTO: Addressing institutional challenges in the new millennium*’ (2004) 10.

generic medicines are less effective.¹⁵¹⁹ Nevertheless, as pointed out by MacDonald, there have been reports testifying that ‘there was no significant difference in efficacy between generic and commercial anti-retroviral drugs’.¹⁵²⁰ In fact, rich countries determine a poorer nation’s right to health. In this regard, on 26 June 2003, Fiona Fleck from the *British Medical Journal* reported the removal of two generic AIDS medicines from its approval drugs by the WHO almost a year earlier, before revealing 3 months later (September 2003) in the same magazine that the WTO had re-approved the same medicine after a long battle with the USA delegation.¹⁵²¹

This is totally unacceptable. Health is a fundamental human right, and a right whose realisation is crucial for the achievement of other human rights and freedoms, including the RTD. Trade should cease to be a business only and be humanised as a matter of urgency. In fact, the economic effects of HIV/AIDS are amongst the biggest constraints to the realisation of the RTD in Africa. It is been reported that households taking care of a family member with AIDS experience striking decline of earnings.¹⁵²² The education system is destroyed by HIV/AIDS which reduces the number of healthy teachers and students;¹⁵²³ second, health treatment reduces the family education budgets;¹⁵²⁴ third, HIV/AIDS increases the number of orphans who may lack parental support to attend school.¹⁵²⁵ The agricultural sector is also affected. In this regard, sickness of farmers and farm workers affect their capacity to produce

¹⁵¹⁹ T H MacDonald *Health, Trade and Human Rights* (2006) 13.

¹⁵²⁰ MacDonald (2006) 13.

¹⁵²¹ MacDonald (2006)13.

¹⁵²² Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/13 para 45; also UNAIDS, report on the global HIV epidemic, Geneva, June 2000 (UNAIDS/OD.13E), 26 ff.

¹⁵²³ E/CN.4/Sub.2/2001/13, para 45.

¹⁵²⁴ A E/CN.4/Sub.2/2001/13, para 45.

¹⁵²⁵ E/CN.4/Sub.2/2001/13, para 45.

and threaten food security.¹⁵²⁶ The business sector is not spared because sick employees cannot report to work and this causes lower productivity, and higher overtime costs for workers obliged to work longer hours to replace sick colleagues.¹⁵²⁷ If international HIV/AIDS policy is not adjusted to assist national or regional efforts, the right to health and the RTD will not be achieved.

Nevertheless, there have been positive reports¹⁵²⁸ from the WHO Commission on Intellectual Property Rights, Innovation and Public Health, claiming that intellectual property rights provided significant motivation for the development of new drugs and medical technologies.¹⁵²⁹ However, the reports also observed that intellectual property rights are not an effective incentive in small and poor communities.¹⁵³⁰ In other words, they did not make a difference where medicines are much needed. Therefore, there is a need to think of an efficient way to facilitate access to medicine to the poor.

In looking for a better solution, in May 2006, the WHA set up the Working Group to develop a Global Strategy and Plan of Action for ‘needs-driven’, vital health research and development relevant to sicknesses that unreasonably impinge on poor countries, to encourage creation, build capacity, enhance access and mobilise resources.¹⁵³¹

Though the Global Strategy and Plan of Action contents, many RTD criteria such as broad-based participation, in the development of the Strategy and the establishment of monitoring,

¹⁵²⁶ E/CN.4/Sub.2/2001/13 para 45.

¹⁵²⁷ E/CN.4/Sub.2/2001/13 para 45.

¹⁵²⁸ The WHO Commission on Intellectual Property Rights, Innovation and Public Health, 2006 Report.

¹⁵²⁹ 12th Session of Working Group on the Right to Development, Report of the high-level task force (5th Session) on the implementation of the right to development A/HRC/12/WG.2/TF/2, para 26.

¹⁵³⁰ A/HRC/12/WG.2/TF/2, para 26.

¹⁵³¹ A/HRC/12/WG.2/TF/2, para 26.

assessment and reporting systems,¹⁵³² the Plan did not address Trade-Related Aspects of TRIPS plus rules, and the lack of involvement of non governmental organisations amongst other things.¹⁵³³ To address such shortcomings, The Working Group on the RTD recommended the addition of an explicit language to highlight the right to health in the Global Strategy and Plan of Action, recommended the assessment of access to essential medicines in the fulfilment of the right to health in national constitutions and international development policies, the total involvement of poor countries in appraising the improvement on the objectives of the plan.¹⁵³⁴

To alleviate the problems linked to TRIPs Agreement, the World Intellectual Property Organization (WIPO) was established in 2007. It aims to tackle the development dimensions of intellectual property and access to global technology for development.¹⁵³⁵ Though the institution is still young and it may be early to look at its achievement, the High-level task force on the implementation of the RTD is of the view that from an RTD approach, the transfer of technology should go beyond information and communication technology and incorporate intellectual property amongst other things.¹⁵³⁶

Article 5 of the ICESCR, clearly underlines that nothing in the Covenant can justify any act aimed at the destruction of any of its rights or freedoms or to limit a right beyond what is provided for in the Covenant. However, this obligation seems to have been misunderstood or misinterpreted by the authors of the TRIPS Agreement. In regard of the HIV/AIDS crisis, they seem to alienate the right to health and the RTD in protecting authors' rights, which is also a wrong application of articles 27 of the Universal Declaration and 15 of the ICESCR. In the same perspective, the TRIPS Agreement violates the General Comment no 14 on the right

¹⁵³² A/HRC/12/WG.2/TF/2, para 26.

¹⁵³³ A/HRC/12/WG.2/TF/2, para 27.

¹⁵³⁴ A/HRC/12/WG.2/TF/2, para 26.

¹⁵³⁵ MDG 8 (F).

¹⁵³⁶ 12th Session of the Working Group on the Right to Development, A/HRC/12/WG.2/TF/2, para 81.

to the highest attainable standard of health¹⁵³⁷ which calls upon states to take into account HIV/AIDS in respecting, protecting and fulfilling the right to health as provided by article 12 of the ICESCR.¹⁵³⁸

In contrast to this view, article 8 of the TRIPS Agreement underlines that WTO members may ‘adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development’. Nonetheless, according to the same article, such measures should be consistent with the TRIPS Agreement which struggles to find a right balance between ensuring human welfare and protecting the creator’s rights.¹⁵³⁹ But, it should be acknowledged that

[m]embers may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.¹⁵⁴⁰

In the same vein, the consideration or protection of human welfare is provided for through the provision according to which parties to the TRIPS Agreement may remove ‘diagnostic, therapeutic and surgical methods for the treatment of humans or animals’.¹⁵⁴¹

¹⁵³⁷ Committee on ESCR General Comment No 14, para 10.

¹⁵³⁸ Art 12 of the ICESCR reads:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

¹⁵³⁹ The Agreement identifies the need to balance human rights with creators’ rights (art 15) but does not direct on how to achieve such a balance.

¹⁵⁴⁰ Art 27 (2) of the TRIPS Agreement.

¹⁵⁴¹ Art 27 (3) (a) of the TRIPS Agreement.

A good look at the Agreement reveals that human rights are protected incidentally. The core purpose of the agreement is not to promote human rights which are known to be inalienable, hence the correctness of the comment that

[t]he various links of the subject matter of human rights – the promotion of public health, nutrition, environmental and development – [that are all fundamental for the realization of the RTD] are generally expressed in terms of exceptions to the rule rather than the guiding principles themselves and are made subject to the provisions of the Agreement.¹⁵⁴²

It is imperative to change such an approach and show some respect for human beings in the third world. Considering the difficulties related to accessing HIV/AIDS drugs in the developing world, it can be argued that the protection of the right to health and the RTD by the TRIPS Agreement remains inadequate.

Notwithstanding the economist perspective of Bhagwati claiming that human rights cannot be part of the WTO's agenda,¹⁵⁴³ it is fundamental to emphasise Sen's perspective that 'rights make human beings better economic actors'.¹⁵⁴⁴ The WTO is part of the international community and as such, not only has the obligation not to harm the poor, but to ensure that all its actions improve human well-being. In this vein, it is important to comply with the Marrakesh Agreement establishing the WTO which reads as follows:

[r]elations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development.¹⁵⁴⁵

¹⁵⁴² Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2001/13, para 22.

¹⁵⁴³ J Bhagwati 'Introduction' in J Bhagwati and R Hudec (eds) *Fair Trade and Harmonisation* (1996) 1.

¹⁵⁴⁴ UNDP 2000 Report.

¹⁵⁴⁵ Paragraph 1 of the Preamble.

This provision clearly establishes human rights obligations of the WTO that should view human well being as paramount. The paramount character of human well-being in ‘trade business’ was emphasised by the Committee on ESCR at its 21st session held in Geneva from 15 November to 3 December 1999.¹⁵⁴⁶ This was in fact the legalisation of the WHO’s ‘Health for all 2000 (HFA 2000)’ Campaign. This campaign championed by Dr Halfdan Mahler was announced at the 1997 meeting of the World Health Assembly at Alma Ata in the Crimea in Ukraine.¹⁵⁴⁷ Amongst other things, the HFA 2000 emphasised the access to healthcare on the basis of needs. Thus in principle, Africans should have been given free access to medicine on the basis of their needs.

However, under the powerless NEPAD, the current TRIPS Agreement hinders the realisation of the right to health. While forwarding *Health, Trade and Human Rights* Mogobe Ramose observes that ‘the nature and practice of trade under the regimes of the International Monetary Fund, the World Bank, and the World Trade Organization are a crime against the law of the preservation of the good health of the people, in particular the poor’.¹⁵⁴⁸ In the same vein, the 1999 UNDP, Human Development Report notes that the TRIPS Agreement impacts negatively on public health, food security, biodiversity, agriculture and indigenous knowledge, and this happens under NEPAD that may seem powerless.

Though the WTO is of the view that ‘to date the TRIPS Agreement is the most comprehensive multilateral agreement on intellectual property’,¹⁵⁴⁹ the Sub-Commission on the Promotion and Protection of Human Rights thinks otherwise and observes:

Actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to, inter alia, impediments to the transfer of technology to developing countries, the consequences for the enjoyment of the right to food, of plant

¹⁵⁴⁶ Statement of Committee on ESCR to the third Ministerial Conference of the WTO, E/C.12/1999/9.

¹⁵⁴⁷ MacDonald (2006) 3.

¹⁵⁴⁸ M Ramose ‘Forward’ in MacDonald (2006).

¹⁵⁴⁹ WTO ‘Overview: the TRIPS Agreement’ http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (accessed 29 December 2010).

variety rights and the patenting of genetically modified organisms, ‘bio-piracy’ and the reduction of communities’ (especially indigenous communities’) control over their own genetic and natural resources and cultural values, and restriction on access to patented pharmaceuticals and the implications for enjoyment of the right to health.¹⁵⁵⁰

In addition, the Sub-Commission states that

[s]ince the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law on the other.¹⁵⁵¹

The two quotes above explain clearly how the TRIPS Agreement limits the prospects of the RTD, hence the call on the WTO in general and the Council on TRIPS during its ongoing review of the TRIPS Agreement in particular, to take fully into account the existing state obligations under international human rights instruments.¹⁵⁵²

From a different standpoint, every national government should be responsible for the welfare of its citizens, not the international community. Thus, the WTO has no human rights obligation. This view sustained by Professor Charnovitz¹⁵⁵³ ignores that in this time of globalization, decisions taken in New York affect people’s life beyond the USA borders. As much as it is true that development and poverty eradication is the primary responsibility of the ‘nation - state’, it is also true that the international community has a vital role to play because decisions taken at international level impact the ability or capacity of a state or a continent to provide for its citizens. Positive or fair international trade rules will enhance national governments capacity to ensure the welfare of their people.

No matter what Cameroon or South Africa and NEPAD can do at national level to cope with poverty, they cannot succeed if globalisation is viewed through the eyes of Henry Kissinger,

¹⁵⁵⁰ Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000.

¹⁵⁵¹ Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000.

¹⁵⁵² Resolution on Intellectual Property Rights and Human Rights, E/CN.4/ Sub.2/2000/7, 17 August 2000, para 8.

¹⁵⁵³ S A Aaranson and J M Zimmerman (2008) 39.

former American Secretary of state (1973-1977) under Presidents Nixon and Ford. He said in a public lecture in Dublin, Ireland, on 12 October 1999:

The process of development begins by widening the gap between the rich and the poor in each country... The basic challenge is that what is called globalization is really none other than the name given to the dominant role of the United States.¹⁵⁵⁴

Africa is trapped in a vicious circle called globalisation and the only way out seems to be the replacement of free trade with fair or just trade. Proponents of Kissinger's definition of globalisation should switch side to the view advocated by Aaronson and Zimmerman. According to them, the signing of the UN Declaration by the community of state was a commitment through multilateral mechanisms

[t]o further the enjoyment by all States...of access, on equal terms, to the trade and the raw materials of the world which are needed for their economic prosperity; to bring about the fullest collaboration between all nations in the economic field with the objective of securing for all, improved labour standards, economic advancement and social security;...and they hope to see established a peace ... which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want.¹⁵⁵⁵

In this perspective, on 30 August 2003, the WTO took a decision¹⁵⁵⁶ in the form of an 'interim waiver' to article 31(f) of the TRIPS Agreement¹⁵⁵⁷ to allow poor countries that are unable to manufacture pharmaceutical to import cheap generic medicines to solve health issues. Commenting on the decision, the former WTO Director-General was of the view that WTO

¹⁵⁵⁴ H Kissinger quoted from MacDonald (2006) 28.

¹⁵⁵⁵ Aaronson & Zimmerman (2008) 12.

¹⁵⁵⁶ General Council Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540 and Corr.1, adopted on 30 August 2003, (the Waiver); available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (accessed 29 December 2010).

¹⁵⁵⁷ Article 31(f) of the TRIPS Agreement says products made under compulsory licensing must be "predominantly for the supply of the domestic market". This applies directly to countries that can manufacture drugs — it limits the amount they can export when the drug is made under compulsory licence. And it has an indirect impact on countries unable to make medicines and therefore wanting to import generics. They would find it difficult to find countries that can supply them with drugs made under compulsory licensing.

ministers ‘recognize the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics’.¹⁵⁵⁸ More importantly, WTO members agreed to transform the 2003 ‘waiver decision into a permanent decision on 6 December 2005. This was done through a decision on ‘Amendment of the TRIPS Agreement’.¹⁵⁵⁹ Pascal Lamy the current WTO Director-General express his satisfaction in these words:

This is personal satisfaction to me, since I have been involved for years in working to ensure that the TRIPS Agreement is part of the solution to the question of ensuring the poor have access to medicines.¹⁵⁶⁰

Unfortunately, access to medicine remains a mystery for the poor. For instance, there was a report on a new seizure by the authorities of the Netherlands of generic drugs being shipped from India to Brazil.¹⁵⁶¹ This shows that in spite of the commitment addressing the ‘Amendment the TRIPS Agreement’ mentioned above, it might be too early to celebrate because two thirds of the WTO’s members must accept the change for the amendment to be finalised. The first deadline was the 1 December 2007,¹⁵⁶² but was extended to the 31 December 2009¹⁵⁶³ and now it has been extended to 31 December 2011. In five years, only 30

¹⁵⁵⁸ ‘Decision removes final patent obstacle to cheap drugs imports’ *WTO News*, 30 August 2003 Press Releases available at http://www.wto.org/english/news_e/pres03_e/pr350_e.htm (accessed 29 December 2010).

¹⁵⁵⁹ Decision of the WTO General Council of 6 December 2005 on the Amendment of the TRIPS Agreement.

¹⁵⁶⁰ ‘Members OK amendment to make health flexibility permanent’ *WTO News* 6 December 2005 Press Releases.

¹⁵⁶¹ 12th Session Working Group on the Right to Development, 5th Session High Level Task Force on the Right to Development, A/HRC/12/WG.2/TF/2, para 32.

¹⁵⁶² General Council Decision on Amendment of the TRIPS Agreement—Extension of the period for the acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/711, adopted on 18 December 2007.

¹⁵⁶³ General Council Decision on Amendment of the TRIPS Agreement—Second Extension of the period for the acceptance by Members of the Protocol Amending the TRIPS Agreement, WT/L/785, adopted on 17 December 2009.

members of the WTO including only two African countries (Mauritius and Zambia) and the EU have accepted the change. This raises the question of: what is in it for Africa since only Mauritius (on 16 April 2008) and Zambia (10 August 2009) sent their acceptance. The advent of NEPAD and its participation to trainings and WTO's workshops did not increase Africa's share of international trade. In fact, Africa is marginalised, hence former President Mbeki's argument that

[T]here is little doubt that we all need to work together to overcome the challenges of development. This will require a massive resource transfer into developing countries and a broad-based development round at the WTO to address the issues. As developing countries we have to be recognized. We want to be part of the rule making process so that our needs can be recognized and addressed.¹⁵⁶⁴

Though Mbeki has a good point, it is also important to look inwards. Africa should learn to present one position, 'the African position' at international forums. It can be the NEPAD/AU position. In accepting the protocol amending the TRIPS Agreement studied above, the EU presented one 'instrument of acceptance' for its community. This is an example of common position to be emulated by Africa through NEPAD or the AU. The single acceptance of the TRIPS Agreement amendment by Mauritius is not a good sign.

The TRIPS Agreement also impacts negatively on the right to food that will be discussed in the next section. The encroachment on the right to food and therefore to health by the TRIPS Agreement lies in the case of genetically modified (GM) crops. It is well known that in Africa and other third world countries, people die because they have no food and consequently no health; but these vulnerable people do not have access to GM crops because they are patented. Even in the name of international solidarity or global justice, the poor should be given unconditional access to seedless crops that are resistant to various parasites. This will go a long way in protecting their RTD and even their lives. Nevertheless, it is important to acknowledge that some GM crops may have some negative side effects on human health, hence the need for a special examination and research on the adequacy of GM crops for human consumption.

Overall, the TRIPS Agreement as it stands does not enhance the prospects of the RTD for various reasons: There are still serious inequities in the repartition of the benefits of

¹⁵⁶⁴ P Galli 'Mbeki lashes WTO, globalization for fuelling SA's woes' *Business Report*, 25 May 2000.

globalisation; allowing least-developed countries to manufacture drugs without paying royalties until 2016 as decided by the WTO in December 2005¹⁵⁶⁵ is a good step, but will not make any difference since they do not have the capacity to manufacture drugs. Lesotho is not equal to Canada and has no means to manufacture drugs and this should be considered while establishing trade rules. In other words, WTO member states should consider the needs of developing countries with a special goal to ‘provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs’ and to ‘take measures to prevent, treat and control epidemic and endemic diseases’.¹⁵⁶⁶ One way of doing this is to set up a system that differentiates the pricing of drugs, allows parallel importation of medicines, and generic substitution of patented drugs. And, to protect the creator, this should be done according to the needs and specific situations of each and every country. Though this approach will have its own shortcomings, it has the potential to address the welfare of the poor. At the same time, Africa through NEPAD should be able to speak the same language at the negotiation’s table and emphasise the need to use a human rights approach in implementing the agreement.

7.3.2.2 Agreement on Agriculture and the RTD

This section looks specifically at the impacts of the AoA on the realisation of the right to food which influences the realisation of the right to health and is at the same time another building block of the RTD. Like the previous section, this one also shows that NEPAD is powerless in using the AoA to better people’s lives in Africa. In terms of structure, the section highlights the main elements of the AoA before assessing their implication on the right to food and the RTD.

Main elements of the Agreement on Agriculture

Before the Uruguay Round, the agricultural trade was in a mess. It was characterised by intense domestic support, use of export subsidies by some wealthy countries, and an

¹⁵⁶⁵ Art 31 (f) TRIPS Agreement.

¹⁵⁶⁶ Statement of Committee on ESCR to the third Ministerial Conference of the WTO, E/C.12/1999/9, para 22 & 37; also Committee on ESCR General Comment No 14, para 43 & 44.

unpredictable world market.¹⁵⁶⁷ In reaction to this unpleasant situation, governments used the Uruguay Round from 1986 to 1994, to comprehensively regulate the liberalisation of agricultural trade. The AoA came into force in 1995. According to its Preamble, the AoA aim is ‘to establish a fair and market-oriented agricultural trading system’ and ‘to provide for substantial progressive reductions in agricultural support and protection’. To achieve its objectives, the AoA strategy is underpinned by

- Market access
- Domestic support
- Exports subsidies

The market access strategy aims to enhance agricultural trade by reducing tariffs such as taxes duties and other border constraints and the limitation of the quantity of agricultural goods entering a market.¹⁵⁶⁸ It is important to note that protectionism can be important in developing local production and improved domestic producers’ right to a better life, even though consumers will face high food prices. However, on the other hand, as the Commission on Human Rights correctly observes, free trade can enlarge national markets and increase the accessibility of global market to national producers.¹⁵⁶⁹ Therefore, enhancing market access will yield different results depending on the specificity and capability of each country.

The AoA domestic support implies the reduction of level of support provided by states to their farmers. Generally, the basket of such support is made of subsidies for production of agricultural product, guaranteed prices and subsidies for agricultural research. However, domestic supports can be provided if they

Meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:

¹⁵⁶⁷ Commission on Human Rights 58 session para 18; also FAO *Multilateral Trade Negotiation in Agriculture – A Resource Manuel* ‘Agriculture in the GATT: a historical account’ part I, module 4.

¹⁵⁶⁸ WTO Agreement on agriculture at http://www.wto.org/english/tratop_e/agric_e/agric_e.htm (accessed 29 December 2010).

¹⁵⁶⁹ Commission on Human Rights 58 session, para 20.

- (a) The support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers;
- (b) The support in question shall not have the effect of providing price support to producers.¹⁵⁷⁰

These exemptions to domestic support are known as the ‘Green Box’. However, there is a controversy or disagreements on the content of the ‘Green Box’ and the mechanisms to handle food security and access to food. Though domestic supports enhance farmers’ capability, they become distortions to international trade when limited to farmers of wealthy countries only and therefore, constraint the realisation of the RTD of third world countries.

Finally the AoA provision on export subsidies prohibits payment of export agricultural cost by governments as well as any introduction of new subsidies. However, WTO members can provide exports subsidies provided they specify for each year the maximum quantity of products subject to export subsidies and the maximum level of outlay for these subsidies and commit themselves to reduce the level of subsidies calculated according to a base period of 1986-1990.¹⁵⁷¹

Export subsidies if allowed, might tear small farmers apart by increasing the load of products on the world market and lowering their price. Farmers from poor countries or unsubsidised farmers will see their market flooded with cheap imported goods that will undermine their capacity to compete and thus, reduce the prospect of their RTD. However, net-food importing countries might gain in the short term due to lower prices of imports from subsidizing export countries.¹⁵⁷² Nevertheless, relying on cheap exports is dangerous because they are uncertain, unstable and above all, they enhance the culture of dependency which is not the receipt to achieve development.

¹⁵⁷⁰ AoA, Annex 2 domestic support – The basis for exemption from the reduction commitment

¹⁵⁷¹ AoA, art 9 (2) (a) (b).

¹⁵⁷² Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights E/CN.4/Sub.2/2001/13, para 21.

In all, the nature of the AoA and the extent of commitment to market access, domestic support and exports subsidies can impact on the WTO's ability to protect the right to food and the RTD. The assessment of the AoA as a key to ending world hunger and achieve the RTD is the object of the next session.

The Agreement on Agriculture, the right to food and the right to development

This section of the thesis demonstrates that developments and practices related to the AoA are characterised by absence of NEPAD which has done very little or nothing to ensure the right to food and the RTD in Africa. From Pogge's perspective, the AoA should promote an adequate standard of living for all by ensuring the realisation of the right to food as prescribed by several instruments.¹⁵⁷³

A proper significance of the right to food as it relates to international trade is provided by the ICESCR. Article 11 (2) recognises 'the fundamental right of everyone to be free from hunger, and the vital role of international cooperation to ensure this rights with a specific attention 'the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'.¹⁵⁷⁴ This right is also covered by the Committee on ESCR¹⁵⁷⁵ and should be respected by all elements of the international community including the WTO, hence the correctness of the argument that

[t]he member States of the WTO hold concurrent responsibilities to promote and protect human rights as well as to implement trade rules and that the norms and standards of human rights [with special attention to the right to food] provide a legal framework to protect the social dimensions of globalization.¹⁵⁷⁶

¹⁵⁷³ The 1974 Universal Declaration on the Eradication of Hunger and Malnutrition, art 1; the 1979 Declaration of Principles of the World Conference on Agrarian Reform and Rural Development, art 1(7) & 1(14); the 1996 Rome Declaration on World Food Security, art 1; the 1996 Plan of Action of the World Food Summit, objective 7.4; the 1989 CRC (art 24(2)); the 1979 Codex Alimentarius Commission of the Code of Ethics for International Trade emphasized art 2(1) & 2(2).

¹⁵⁷⁴ The ICESCR, art 12 (b).

¹⁵⁷⁵ General Comment No 2.

¹⁵⁷⁶ Commission on Human Rights 58 session, para 8.

However, the question of food from a human rights perspective has not being the priority of trade policy makers' especially in GATT era. Even during the Uruguay Round discussion on the liberalisation of agricultural trade, food availability was discussed as non-trade concerns.¹⁵⁷⁷ The question was so complex that parties to the WTO Agreement choose to postpone the negotiation on non trade-concerns.¹⁵⁷⁸ Nonetheless, as Aaronson and Zimmerman put it, they 'agreed to cushion the effect of trade liberalization upon the poor and upon developing countries' and that 'food-importing nations could get both food aid and financial assistance to buy food if they needed'.¹⁵⁷⁹ This looked like a break through to resolve non-trade concern especially when in 2001 at Doha, Qatar, the parties agreed to give strong consideration to developing countries' needs.¹⁵⁸⁰

Unfortunately, the Doha commitment was mere noise. By 2003 parties were divided in 3 groups: The first one including Japan, South Korea, Norway and Switzerland believing that there is a need to improve negotiation on non-trade concern issues. They stand for the adoption of additional mechanisms and argue for specific agricultural measures including human rights because of the specificity of agriculture.¹⁵⁸¹ The second group led by the USA, Canada, Australia and South Africa are of the view that subsidies and other government supports should not be on the agenda of agricultural trade liberalisation. Nevertheless, the USA can be accused of preaching what it does not practice because it subsidises its cotton farmers. Lastly, the third or developing countries group stand against the use of subsidies in developed countries because of the inequality between countries and argue for special and differential treatment for poor countries.¹⁵⁸²

¹⁵⁷⁷ Aaronson and Zimmerman (2008) 55.

¹⁵⁷⁸ AoA, art 20.

¹⁵⁷⁹ Aaronson and J M Zimmerman (2008) 55.

¹⁵⁸⁰ Aaronson and J M Zimmerman (2008) 56; also The Doha Declaration Explained at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#top (accessed 29 December 2010)

¹⁵⁸¹ Aaronson and Zimmerman (2008) 56.

¹⁵⁸² Aaronson and Zimmerman (2008) 56 - 57.

While this debate is going on, people are dying of hunger and international instruments protecting the right to food, to a better standard of living are not respected. In desperation, advocates of the right to food commit the ultimate sacrifice. This is proven by the death of the Korean farmer named Lee Kyung-hae who killed himself in protest against trade liberalisation under the WTO. This sad event happened in 2003 during the WTO Conference in Cancun where Lee Kyung-hae climbed to the top of the security fence and told his fellow protestors, ‘don’t worry about me, just struggle your hardest’ and plunged a knife in his chest.¹⁵⁸³

The AoA should address the needs of the poor who usually rely on agriculture for food, employment, housing, education, development and more importantly to stay alive. As it stands the AoA does not enhance the prospects of the RTD. For instance, the suppression of subsidies to small farmers in Ghana and the opening of market in the framework of the SAPs created a calamity in the country. Cheap goods were offloaded in the country and unsubsidised local farmers could not compete with heavy developed industries as well as subsidised farmers from wealthy countries.¹⁵⁸⁴ The same causes produce similar effects in Zambia where the liberalisation of maize was followed by the collapse of the producer price and the raise of the consumer one.¹⁵⁸⁵ The situation was horrible because people rely on maize to have food on the table. As Lumina puts it

There was a 20% drop in maize consumption and an attendant increase in malnutrition and mortality. Owing to increase level of poverty, health indicator declined and many families were unable to send their children to school.¹⁵⁸⁶

¹⁵⁸³ J Watts, ‘Field of tears,’ *The Guardian*, Tuesday 16 September 2003 available at <http://www.guardian.co.uk/world/2003/sep/16/northkorea.wto> (accessed on 29 December 2010).

¹⁵⁸⁴ C Lumina ‘Free trade or just Trade? The World Trade Organisation, human rights and development’ paper presented at the University of Pretoria, Human Right and Development Course 21, 30 July 2005 (on file with author).

¹⁵⁸⁵ Lumina (2005).

¹⁵⁸⁶ Lumina (2005).

On the effects of international trade on poor countries, Archbishop Emeritus Desmond Tutu says that ‘the poor nations had been forced to accede to the dictate of ‘free trade’ rather than ‘fair trade’, thus exposing their populations to even greater impoverishment and ill health.’¹⁵⁸⁷

From a different angle, it can be argued that the AoA regulates agricultural trade and that free trade can enhance the enjoyment of the right to food and the RTD. This reasoning is based on the fact that free trade has the potential for economic growth, employment creation, better health care, human empowerment and the distribution of technology and capital. In this regard, the Commission for human rights said that

[i]ncreased levels of trade in agriculture can contribute to the enjoyment of the right to food by augmenting domestic supplies of food to meet consumption needs and by optimizing the use of world resources.¹⁵⁸⁸

From the same standpoint, the Food and Agriculture Organisation (FAO) is of the view that the AoA is conducive to the realisation of human rights because it promotes transparency and accountability which are capital for the realisation of human rights.¹⁵⁸⁹

Why encourage free trade in agriculture when millions of peoples around the world are starving? Is it the solution for hunger in the third world? On January 13 2008, it was reported that for a long time, Malawi’s soil was one of the worst in Africa.¹⁵⁹⁰ Therefore, the government’s policy allowed poor farmers to acquire fertiliser at a third of the normal price. Nonetheless, this was seen as a market distortion at international level, hence Malawi in need of loans was pressurised by the World Bank to remove such subsidies. After the removal of subsidies, the country plunged into hunger and poverty. However, in 2006, Malawi could not take it anymore and carried on with subsidies’ policy and by early 2008, Malawi was the ‘single biggest seller of corn to the World Food Programme in Southern Africa and was

¹⁵⁸⁷ D Tutu ‘Forward’ in T H MacDonald (2006) xi.

¹⁵⁸⁸ Commission on Human Rights 58 session, para 33.

¹⁵⁸⁹ Commission on Human Rights 58 session, para 33.

¹⁵⁹⁰ J Hari ‘Free trade is no fair deal for poor countries’ *The Sunday Independent* 13 January 2008, 15.

giving tons of corn to Zimbabwe'.¹⁵⁹¹ This short story on Malawi is a counter argument to the WTO's view sustaining that 'trade liberalization is generally a positive contributor to poverty alleviation',¹⁵⁹² hence the correctness of the argument claiming that 'free trade does not automatically feed the hungry'.¹⁵⁹³

The right to food and the RTD will not become a reality if the AoA does not address the question of food security in the context of a country's development programme. This implies taking into account the needs and the situation of each and every country because of countries' inequality. Taking into account the content of the new EPAs studied below, it can be argued that things are not heading to the right direction or towards fair trade which is needed for the achievement of the RTD. 'Real' special preferential measures should be included in the AoA to provide food for the most vulnerable and neediest groups and this can be done through a special attention on projects in the neediest countries. This will go a long way in ensuring their RTD.

In July 2006, before suspending the WTO negotiations for lack of result, the Director-General of the WTO Pascal Lamy said 'failure of this Round would be a blow to the development prospects of the more vulnerable Members, for whom integration in international trade represents the best hope for growth and poverty alleviation'.¹⁵⁹⁴ Unfortunately, the 2006 pattern was followed in 2008 when the WTO failed to reach an agreement in the Doha Round in Geneva. This failure of the WTO can only enhance unfair trade rules, hence the comment that not getting a new WTO agreement would imply tariffs can be raised and domestic assistance amplified to further distort international transactions¹⁵⁹⁵ and hinder a good standard of living in the poor regions of the world.

¹⁵⁹¹ Hari (2008)15.

¹⁵⁹² D. Ben-David, H. Nordstrom & L.A. Winters, *Trade, income disparity and poverty*, WTO special study No. 5, Geneva, 2000.

¹⁵⁹³ General Assembly Resolution (A/56/210) on the right to food in 2002.

¹⁵⁹⁴ Aaronson and Zimmerman (2008) 57.

¹⁵⁹⁵ 'No global pact after WTO Summit' *Calgary Sun*, July 30 2008, available at <http://calsun.canoe.ca/News/National/2008/07/30/pf-6305486.html> (accessed 30 July 2009).

At the same time, developing countries should understand that their well-being will not come from heaven. To influence agriculture negotiations at the WTO, Africa should speak the same language on the international plane. In the Doha Round negotiation, South Africa is shoulder to shoulder with wealthy countries and not with other African countries.¹⁵⁹⁶ Kenya and Mali for example are all members of the WTO Africa Group, but each country sits at the negotiation table with its own proposal.¹⁵⁹⁷ As mentioned earlier, it is imperative for African countries to consult one another and act within the NEPAD/AU framework. If this does not happen, fair trade might remain a mere dream, the right to food security will not be achieved and the prospects for the RTD can only be reduced.

This section showed through the examination of TRIPS and AoA how NEPAD and Africa are dominated in the WTO. It showed how NEPAD is powerless in front of institutional power exercise through the WTO by western countries.

7.3.3 NEPAD, the ACP Agreement and the RTD

On 25 March 1957, the European Economic Community (EEC) was established through the Treaty of Rome signed by Germany, France, Italy and the Benelux countries (Belgium, Holland and Luxembourg). During the signing of the Treaty, France required and obtained a section (Section 4 of the Treaty) allocated for an 'Association Agreement' with Overseas Countries and Territories. In fact, it was a space reserved for countries associated with France or 'France friends' that received the first European Development Fund (EDF).¹⁵⁹⁸ In 1963 in Yaounde, Cameroun, this friendship yielded the signing of a convention between the

¹⁵⁹⁶ WTO 'Agriculture negotiations: background – countries, alliances and proposal' available at <http://calsun.canoe.ca/News/National/2008/07/30/pf-6305486.html> (accessed 10 July 2009).

¹⁵⁹⁷ WTO 'Agriculture negotiations: background – countries, alliances and proposal' available at http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd04_groups_e.htm (accessed 10 July 2010).

¹⁵⁹⁸ '50 years of ACP-EU cooperation' *The Courier* March 2008, Special Issue. For more on this including the EPAs, see R Haule & F Werema 'EC-ACP Economic Partnership and their economic impacts on developing countries' (2008)1 *Journal of African and International Law* 27 - 50.

European communities and the ‘Associated African states and Madagascar’ for five years. It was the Yaounde Convention between 6 European countries and 18 African countries. This partnership agreement was characterised by free trade between the parties. ‘European products received preferential treatment on the Markets of the associated African countries and vice versa’.¹⁵⁹⁹ This agreement supported by the EDF was renewed for 5 more years in 1969.

In 1973, when the United Kingdom, Ireland and Denmark joined the European Community, they stood for the integration of Commonwealth countries from Africa, Caribbean and Pacific in the Yaounde Convention. The parties to the treaty were broadened into 46 African, Caribbean and Pacific (ACP) states and nine European countries. In early February 1975, the Lomé Convention was concluded for every 5 years and was the main instrument of co-operation between the EEC, current EU and the ACP.¹⁶⁰⁰

At Lomé 1 in 1975, (1975-1980) it was clear on the part of ACP countries that the agreement was purely economic co-operation and that human rights had no place. Contrary to the Yaounde Agreement, Lomé 1 established the trade preferences of the ACP countries on a non reciprocal basis. It also established a mechanism known as Stabex to protect ACP countries from trade deficit linked to the price fluctuation on the market, to protect privileges of the poorest of the ACP countries, level and constancy of aid allocations, and an administration system consisting of joint institutions. At the time, the EEC did not introduce conditions because it did not want to be perceived as being in discord with the principle of non interference and the Chairman of the ACP Council of Ministers said: ‘we are in an agreement that deal with trading, economic, technical and financial co-operation and the provisions of the new convention should relate to that’.¹⁶⁰¹ This approach considered African needs and was likely to lead to the achievement of the RTD.

¹⁵⁹⁹ ‘50 years of ACP-EU cooperation’ *The Courier* March 2008, Special Issue.

¹⁶⁰⁰ ‘50 years of ACP-EU cooperation’ *The Courier* March 2008, Special Issue.

¹⁶⁰¹ L Pagni ‘P.J. Patterson, Chairman of the ACP Council of Minister: so far as we are concerned, we are negotiating a new convention’, *The Courier* no 49 May - June 1978, 6-7; note that the section on the ACP-EU Agreement discussing Lomé 1 – Lomé 4 bis is also reliant on Stokke ‘Conditional partners? Human rights and political dialogue in the EU-ACP relations’.

Lomé 2 (1980-1985) followed the same approach despite the insertion of rural development notion. In addition, the Sysmin which is a mechanism similar to the Stabex was inserted in the agreement to protect the production capacity of the ACP countries mining sector.

At Lomé 3 (1985-1990) however, the EU introduced a section containing more general co-operation objectives. The so-called ‘policy dialogue’ section included in the agreement was viewed as a political intrusion and as a way of bringing in conditionalities because they added more difficulties in accessing assistance. Moreover, references to human rights were integrated in the Preamble and annex sections of the Lomé 3 agreement.¹⁶⁰²

Lomé 4 (1990-2000) brought some changes: for instance, the timeframe of the agreement was doubled (from five to ten years), compliance with human rights was compulsory to qualify for development assistance;¹⁶⁰³ ACP countries had to show that aid was used according to the template designed by donors.

At Lomé 4 (bis), or during the mid term review of the Lomé 4, a suspension clause¹⁶⁰⁴ was added. Furthermore, the development policy is not only connected to human rights, but also to ‘the recognition and application of democratic principles, the consolidation of the rule of law

¹⁶⁰² Annex 1(1) referred to human dignity as an inalienable human right, 1(2) to the obstacles preventing individuals and peoples from enjoying to the full their economic, social and cultural rights and 1(3) to the elimination of all forms of discrimination with a specific mention of apartheid.

¹⁶⁰³ Art 5(1) says “cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of human rights. Cooperative relation shall thus be conceived in accordance with the positive approach, where respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights”. See also <http://www.acpsec.org/en/treaties.htm> to have the Lomé 4 Conventions and the current Cotonou Agreement.

¹⁶⁰⁴ This clause allows the suspension of a state if essential elements were violated; see art 366a (2) and (3) of Lomé 4 (bis).

and good governance’.¹⁶⁰⁵ However, it is important to note that the Lomé Convention allowed ACP industrialised products into the EU on a tax-free basis, except for that quotas were inserted for some products such as sugar for example. The Greek representative, speaking for the EU told the CHR in 2003: ‘The Cotonou Partnership Agreement between the European Union and the African, Caribbean, and Pacific countries constitutes a concrete contribution to the fight against poverty and a further step towards the realisation of the right to development’.¹⁶⁰⁶

Finally under the currently applicable Cotonou Agreement (2000-2020) the conditionality is more pronounced. Article 9(2) of the Agreement reads: ‘respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU partnership, shall underpin the domestic and international policies of the parties and constitutes the essential elements of this agreement’. Moreover, in the revision of the Cotonou Agreement in 2005, and taking into account recent geopolitical developments, ‘the proliferation of weapons of mass destruction and their means of delivery, both to state and non state actors’ was added. In addition, the parties should also fight terrorism through international co-operation.

From a rather unconditional regime in the mid-1970s, the mid-1990 partnership was characterised by a partnership driven by unilateral donor’s policies underpinned by political and economic interests. Stokke correctly argues that the present ACP regime is far more politicised than before and that the aid provider can describe what conditions are to be suitable for the partnership.¹⁶⁰⁷ He adds that ‘if conditions are imposed by one partner on the other, then it is quite clear that the partnership is not based on shared values and objectives, but on conditions to be accepted unilaterally before a partnership can be entered into’.¹⁶⁰⁸ It is

¹⁶⁰⁵ Art 5(1).

¹⁶⁰⁶ Ambassador Tassos Kriekoukis, Head of the Delegation of Greece on Behalf of the European Union, Statement at the Commission on Human Rights, 59th Sess., Item 7: The Right to Development (25 March, 2003).

¹⁶⁰⁷ Stokke (2006) 12.

¹⁶⁰⁸ Stokke (2006) 12.

important to note that a partnership characterised by conditionalities has very little chance or no chance to succeed. In this regard, Arts observes that

[d]eveloping countries are being confronted with an increasing set of human rights, democracy and good governance issues integrated into the European Community (EC) development co-operation. Consequently, one would expect the level of ownership to be low, which raises doubt about the prospect for success.¹⁶⁰⁹

It is difficult to believe that a real partnership can be established between Africa and the developed world, which will put aside its economic concerns to respond to Africa's problems. In this respect, one commentator rightfully observes:¹⁶¹⁰

It is easy to make all the right noises about making globalisation inclusive, but what does this means when the rich countries of the North spend 1 billion a day subsidising their farmers, with an annual subsidy three times as large as the entire amount spent on aid budget? Not a lot.

In the same perspective, Umozorike is correct in calling upon international law to 'provide the legal framework within which the new international economic order [which underpinned the RTD] can be achieved'.¹⁶¹¹

By the look of things, current international co-operation seems to hinder Africa's development. However, NEPAD's faithful or fundamentalists¹⁶¹² could argue that NEPAD was not there when the ACP agreement was concluded. Nevertheless, from 2001 until today, NEPAD could not influence the Agreement. More importantly, where is NEPAD in the ongoing discussion on the EPAs? An analysis of the EPA agreement will provide a response to this question

¹⁶⁰⁹ K Arts *Integrating human rights into development cooperation: The case of the Lomé Convention* (2000) 136.

¹⁶¹⁰ *Mail and Guardian* (Johannesburg), 2- 8 February 2001.

¹⁶¹¹ U O Umozorike *International law and colonialism in Africa* (1979) 138.

¹⁶¹² Former Presidents Mbeki and Obasandjo of South Africa and Nigeria for example.

7.3.4 NEPAD, the EPAs and the RTD

The revision of the Cotonou Agreement in 2005 brought back the practices of the Yaounde Agreement whereby ‘European goods received preferential treatment in developing countries and vice versa. This is the abolition of the ‘preferential system’,¹⁶¹³ a core element of the ACP Agreement which is now in process of being replaced with a system (EPAs) compatible with the WTO Agreements.¹⁶¹⁴

The EPAs bring nothing on the table, but remove preferential rules of trade. Consequently, rich and powerful countries from the EU will trade on ‘equal’ footing with small and weak developing countries. For instance, Sweden will trade on equal footing with Malawi. Notwithstanding its conditionality aspects, the Lomé Conventions recognised the huge economic difference between the EU and ACP countries and provided trade preference to ACP countries without expecting them to reciprocate. Under the EU-ACP agreements, ACP countries had free access to EU markets and had the right to protect their producers from subsidised EU exporters. EPAs expect both partners to open their markets equally to each other as if they were at the same level. Developing countries and African countries in particular do not have the capacity to face the heavy competition from the EU; their economic and financial institutions are weak; their negotiators are ill-prepared and their farmers are as not subsidised as their western counterparts. Most importantly, if ACP countries open up their markets to EU exporters, they will be bombarded with manufactured goods and this will hinder the industrialisation of the developing world in general and Africa in particular. A worried Festus Mogae, President of Botswana states ‘we fear that our economies will not be able to withstand the pressure associated with liberalisation’.¹⁶¹⁵ Though, it can be argued that the aim of the EPAs is to harmonise the integration of ACP countries in the world economy, it is important to note that pushing for free trade between David and Goliath will swallow

¹⁶¹³ The preferential system is the component of the *Lomé* Conventions and Cotonou Agreement empowering ACP countries to export freely to the EU without having to reciprocate to the EU countries.

¹⁶¹⁴ The WTO’s enabling clause allows countries to provide preferences to developing countries as a whole, or just LDCs countries.

¹⁶¹⁵ CAFOD ‘The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

custom revenues that is the main source of government income in the developing world. What will Uganda do without its trade taxes representing 48% of its total revenues?¹⁶¹⁶

However, proponents of EPAs argue that the EU will provide adjustment cost through the EDF which was a practice in assisting ACP countries to cover health care, education, and other infrastructural expenses and was disbursed in five-year cycle. In 2006, the EU committed itself to increase the amount under the European Development Fund funding cycle (2008-13) to 22.7 billion Euros.¹⁶¹⁷

Nevertheless, as Oxfam correctly observed, instead of using the EDF to cover development expenses (education and health care), most of the money will be used to adjust to EPAs arrangements.¹⁶¹⁸ This is not empowering ACP countries. More interestingly, the EDF is usually not delivered entirely and in time. For instance in the 1995-2000 five years cycle, 14.6 billion Euros were promised, but the first load of disbursement was made in the third year and by the end of the cycle, only 20% of the money was disbursed. In the same vein, in the 2001-2006 cycle, from the 15 billion Euros in aid promised to ACP countries, only 28% was disbursed by the end of the cycle.¹⁶¹⁹ Thus, it is correct to argue that the funds allocated to EPAs adjustment will never be a substitute to tax revenues. Koffi Anan the former UN Secretary General is of the view that EPAs will jeopardise Africa's ability to realise the MDGs. He notes:

¹⁶¹⁶ CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

¹⁶¹⁷ Oxfam briefing note 'Unequal partners: how EU-ACP Economic Partnership Agreement (EPAs) could harm the development prospects of many of the world's poorest countries' at <http://www.marketrade-fair.org/en/assesses/english/EPAfinalbriefingnote.pdf> 9-10 (accessed 10 June 2008).

¹⁶¹⁸ CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

¹⁶¹⁹ CAFOD 'The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

A major concern is the impact that the trade liberalisation to be wrought by EPAs would have on fiscal revenue. The prospect of falling government revenue imposes a heavy burden on your countries and threatens to further hinder your ability to achieve the Millennium Development Goals.¹⁶²⁰

Regional integration was the core element of the Cotonou Agreement. Its article 35(2) clearly observes that ‘economic and trade co-operation shall build on regional integration initiative of ACP states, bearing in mind that regional integration is a key instrument of ACP countries into the world economy’. More importantly, article 37(5) makes a commitment that negotiation will take ‘into account the regional integration process within the ACP’. EPAs make the same commitment in these terms: ‘economic and trade integration shall build on regional integration initiatives of ACP States’.¹⁶²¹

However, the EPAs commitment is mere rhetoric. ACP countries have no choice, but to negotiate through EPA regional bodies established by the EU. Eastern and Southern Africa Group (ESA), ECOWAS, SADC, COMESA and Economic and Monetary Community of Central Africa (CEMAC) are EPA negotiating bodies in Sub-Saharan Africa while the Caribbean Forum (CARIFORUM) and the Pacific ACP Group caters for the Caribbean states and the Pacific region respectively.¹⁶²² Nevertheless, more importantly, the SADC’s EPA regional body is different from the well known SADC. Under the EPAs, Malawi, Mozambique, Zambia and Zimbabwe are moved from SADC to ESA. In this regard, pointing out Africa’s disintegration by EPAs, Oxfam, in its 27 September 2006 briefing note quoted Dame Billie Miller Barbados, Minister of Foreign Affairs and Chair of ACP Ministerial Trade Committee who said:

The EC’s insistence on trying to determine what is best for the ACP and how we should configure our economic space seems more than a little disingenuous. It is difficult to see how the [European]

¹⁶²⁰ CAFOD ‘The rough guide to Economic Partnership Agreements (EPAs) at <http://www.cafod.org.uk/var/storage/original/application/phpnAorth.pdf> (accessed 10 June 2008).

¹⁶²¹ European Community (EC) EPAs Negotiating Guidelines, art 35(2), 2002.

¹⁶²² Oxfam briefing note ‘Unequal partners: how EU-ACP Economic Partnership Agreement (EPAs) could harm the development prospects of many of the world’s poorest countries’ at <http://www.marketradeaffair.org/en/assests/english/EPAfinalbriefingnote.pdf> 9-10 (accessed 10 June 2008).

Commission can reconcile its current negotiating approach with the statements made by various Commission officials that it is up to ACP regions to determine the pace and priorities of their regional integration.

Echoing the same concern, the AU called upon the:

European Commission to honour the commitment made by the Council [of Europe] in Brussels on 27 May 2008 to make EPAs an instrument for the promotion of development, support to regional integration, and gradual integration of African, Caribbean and Pacific (ACP) group of States in the world economy, and urges the European Commission to fully reflect this commitment in the negotiation and conclusion of full and comprehensive EPAs.¹⁶²³

SADC's EPA negotiating body put non-least developing countries (Non-LDC) such as Botswana and Swaziland in the same basket with LDC ones (Angola for example). Such a practice does not enhance regional integration because under the 'everything but arms' (EBA) agreement LDC countries already have free access to EU market for everything except arms. Therefore, they do not need further agreements which open their markets for almost nothing in return and if they quit or reject EPAs and stay in their REC for example, they will still be affected by the EU imports entering their countries through their non-LDC regional neighbours. Furthermore having double and overlapping loyalties to an EPA regional group and to an African regional community will lead to region disintegration. Nevertheless, this is not the concern of the EU which in 2006, while preparing for the EPA mid-term review focused extensively on the completion of the agreement scheduled for December 2007 and not on the content as if the latest was perfect.¹⁶²⁴ Nonetheless, the ACP countries stood firm and obtained that the review be 'inclusive and consultative', 'conducted at national and regional levels' and must not forget to take account of 'the structure, process, and substance of the negotiations, the trade and development dimensions, as well as the capacity and preparedness to conclude the EPAs'.¹⁶²⁵

¹⁶²³ Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 6.

¹⁶²⁴ Draft ACP-EC Statement on EPA review, 9 June 2006.

¹⁶²⁵ Joint ACP/EU Declaration on the Review of the Economic Partnership Agreement (EPAs) Negotiations, July 2006.

Unfortunately, the ACP countries' victory was only on paper because as Oxfam puts it 'developing countries were forced to choose between guaranteeing existing exports to the EU on the one hand, and safeguarding small farmers' livelihood and future economic growth on the other' and 'it was an impossible choice'.¹⁶²⁶ Consequently, the signing of interim EPAs by Botswana, Lesotho, Swaziland and Mozambique (SADC region) on 23 November 2007 and five days later the signatures of Seychelles and Zimbabwe (ESA region) were obtained in Brussels. Similarly Kenya, Uganda, Tanzania, Rwanda Burundi from the Eastern Africa communities (EAC) signed the EPAs in Uganda on 23 November 2007.¹⁶²⁷ Analysing the interim EPAs Dr Ping, the Chairperson of the AU Commission observes:¹⁶²⁸

The assessment of these Interim EPAs indicates that, contrary to the objectives set for EPAs in the Cotonou Partnership Agreement, they cannot serve as effective instruments for the promotion of sustainable development, the eradication of poverty, the reinforcement of Africa regional integration initiatives, and the gradual integration of the continent into the global economy. Not only have the Interim EPAs not adequately addressed the development dimension; they have had the implication of complicating rather than assisting Africa's integration efforts.

In other words, the EPA is not conducive to the realisation of the RTD. On the contrary this agreement is actually a roadblock for the achievement of the right, and this happens under NEPAD which is nowhere to be seen in the debate.

A quick look of the EU's EPA with SADC discloses that LDC will keep their advantage under EBA while non-LDC will enjoy EPAs benefits. More importantly, Botswana, Lesotho, Namibia, Lesotho and Swaziland agreed to 86% liberalisation in many years. 44% sensitive

¹⁶²⁶ Oxfam GB 'Oxfam International on Economic Partnership Agreements in 2008' at http://www.oxfam.org.uk/applications/blogs/pressoffice/2008/01/oxfarm_international_on_economi.html (accessed 13 June 2008).

¹⁶²⁷ December 2007 – Evolution of the EPAs at http://www.aefjn.be/index.php?option=com_content&task=view&id=290&lang=en (accessed 13 June 2008).

¹⁶²⁸ Address by Dr Jean Ping, Chairperson of the AU Commission at the opening of the 13th Ordinary Session of the AU Executive Council, 8; 27 June 2008, Sharm El Sheikh, Egypt.

tariff lines liberalisation is scheduled for 2015 and for 3 lines by 2018. Similarly, Mozambique agreed to liberalise 80% of trade immediately and 100 tariff lines by 2018. In other regions, the EPAs follow the same pattern characterised by a gradual liberalisation in ACP countries.

However, this looks like a very big trap for developing countries which in the long run will not be able to compete with giants and subsidised industries from the developed world. South Africa learnt the lesson the hard way. As a member of Southern Africa Customs Union (SACU),¹⁶²⁹ in 1999 South Africa concluded the Trade, Development and Co-operation Agreement (TDCA) with the EU without a consideration of its SACU membership. After the conclusion of the TDCA, there was a boom of South African export to the EU, but when it was time to implement lower tariff levels, the EU was the only beneficiary. Keet observes that ‘trade deficits between South Africa and the EU are growing at about two billion Euros per annum in the EU’s favor’.¹⁶³⁰ Keet also establishes a clear link between the ‘slow pace of employment creation in South Africa’ with the TDCA agreement which enhances the EU penetration in the financial service and high technology sectors in South Africa.¹⁶³¹ Now, South Africa is arguing for a revision of the agreement on the ground that it should consider the interest of other SACU and SADC members. Obviously, the EU disagrees and will do so only in the context of the EPAs, which does not benefit South Africa. In reaction, on the 24 April 2008, South Africa through its Deputy Minister of Trade and Industry, Rob Davies called upon African Heads of State to stand together in opposition to EPAs.¹⁶³² In the same vein, Zenawi, Ethiopian Prime Minister and current Chairperson of NEPAD used the 33rd

¹⁶²⁹ SACU was established in 1910 and is made of Botswana, Namibia, Swaziland, Lesotho and South Africa.

¹⁶³⁰ A Kwa ‘Africa: EPA Threatens to Dismantle Oldest Customs Union’ *IPS News* at http://www.eepa.be/wcm/index2.php?option=com_content&task=view&id=685&Itemid=137&pop=1&page=0 (accessed on 13 June 2008).

¹⁶³¹ A Kwa ‘Africa: EPA Threatens to Dismantle Oldest Customs Union’ *IPS News* at http://www.eepa.be/wcm/index2.php?option=com_content&task=view&id=685&Itemid=137&pop=1&page=0 (accessed 13 June 2008).

¹⁶³² A Koranteng ‘Africa Leaders must unite against EPA agreements’ at http://www.bilaterals.org/article.php3?id_article=11938 (accessed 16 June 2008).

ACP-EU Joint Council of Ministers held in Addis Ababa to present ACP's position. He stated:¹⁶³³

We in the ACP are concerned that while the process made so far with respect to the EPA negotiations may be compatible with WTO rules, they are not adequately compatible with our development needs. We need to address those concerns in a spirit of understanding of each other's interests and accommodation.

In the same perspective, the AU at its 11th Summit in Egypt called upon the EU

[t]o consider providing an alternative trading arrangement, that is World Trade Organisation (WTO) – compatible but not less favourable than the Lomé /Cotonou trading regime, to African countries /groups that have not initialled Interim EPAs and may not be in a position to conclude full EPAs.¹⁶³⁴

Thanks to EPAs, regional integration in Africa has many cracks. While Swaziland, Botswana and Lesotho are calling upon their neighbours to accelerate negotiation with the EU and intend finalise full EPAs, Namibia is cautious and intends to renegotiate the interim EPA before a final ratification and South Africa simply opts out. The life of SACU and even SADC is on the verge of becoming history. This sad situation is not unique to Southern Africa. It had been reported that Mamadou Diop, the Minister of Trade and Industry of Senegal had 'criticised Ghana and Cote d'Ivoire for signing the EPA interim when the other subregional countries had advocated against it'.¹⁶³⁵ This may be one reason which led the AU to call on 'African negotiating countries and groups to remain united in their engagement with the European Union Commission on EPAs'.¹⁶³⁶

¹⁶³³ M Zenawi 'EU is ACP's main Trading Partner' ACP Press Statement at http://www.acpsec.org/en/com/addis/pr_8.html (accessed 16 June 2008).

¹⁶³⁴ Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 8.

¹⁶³⁵ A Koranteng 'Africa Leaders must unite against EPA agreements' at http://www.bilaterals.org/article.php3?id_article=11938 (accessed 16 June 2008).

¹⁶³⁶ Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 10.

However, the main question remains: where is Africa's voice in the whole process? Where is NEPAD? The African institution should be involved and defend African interests. It can at least send African RECs or countries on the negotiating table with 'one voice'. In this regard, the AU calls on 'the AU Commission to strengthen its coordination and harmonisation of the positions of the countries and groups in the negotiations of full EPAs.'¹⁶³⁷ In other words, NEPAD should play a role and ensure that EPAs consider Africa's development needs. In short, NEPAD must strive to humanise trade and request the establishment of global governance. This will be in line with the commitment in the 2005 World Summit Outcome 'to governance, equity and transparency in the financial, monetary and trading systems';¹⁶³⁸ NEPAD shall stand for an RTD approach in its partnership with the international community, using the revised draft RTD criteria established by the High Level Task Force (studied earlier) as the benchmark. In doing so, NEPAD through partnership will improve the prospects of the RTD in Africa.

7.4 Concluding remarks

The aim of this chapter was to examine to what extent NEPAD strategy to set up a new global partnership could be conducive to the realisation of the RTD. After a brief overview of the concept of partnership, the chapter looked at the partnership between NEPAD and the G8, focused on the possible role of NEPAD in the WTO in general and with specific attention to some aspects of the TRIPS and AoA agreement, looked at its place in the ACP Agreement and analysed its inputs in the EPAs. All these partnerships activities revealed that NEPAD is way behind its target of establishing a true partnership between Africa and the rest of the world. In fact, NEPAD and African countries are victims of powers. As a result, NEPAD appears to be the weakest link in all these partnerships endeavours. Indeed, in its relation with the G8 and in the WTO, it does not make a significant impact; the same observation is made in the development of the ACP Agreement to the APAs where NEPAD shines by its absence. By the look of things, one can argue that establishing a 'new global partnership' is the most

¹⁶³⁷ Assembly/AU/Dec.197 (XI) 1; Decision on the Report on negotiations of Economic Partnerships Agreement (EPAs). Doc. EX.CL/422 (XIII), para 11.

¹⁶³⁸ General Assembly resolution 60/1, 2005 World Summit Outcome, para 36; also E/CN.4/2006/26, para 46.

difficult task on NEPAD's desk and this does not in anyway increase the prospects for the realisation of the RTD in Africa.

CHAPTER 8 CONCLUSIONS AND RECOMMENDATIONS

8.1	Introduction
8.2	Summary of findings
8.3	Recommendations

8.1 Introduction

This research set out to examine the prospects for the realisation of the RTD in Africa under NEPAD. This could not be achieved in a straightforward manner. Therefore, in order to provide an answer, it was necessary to understand several other factors framed around the following questions:

- What is the nature of the RTD?
- What is its place in the African human rights system?
- To what extent is NEPAD informed by human rights? To what extent could it improve the prospects for the RTD?
- To what extent is the NEPAD plan integrated into national development plans of African states?
- Is NEPAD capable of setting up the new global partnership needed for the realisation of the RTD?
- What measures should be taken to enhance NEPAD's capacity to deliver the RTD in Africa?

The aim of this chapter is to present the findings of the research and provide recommendations.

8.2 Summary of findings

At the onset of the research, the study clarifies the rationale of looking at a primarily economic institution from a human rights approach. It locates NEPAD within the 'AU based human rights based system'. Not only is the AU human rights mandate described, but an

analysis of NEPAD framework documents confirms that NEPAD covers all the AU objectives including its human rights mandate.

In setting the stage for the discussion, the research proceeded to explain the main concepts and terminologies used in the study, to call for the use of human rights to realise the RTD with emphasis in using the concept human dignity as the benchmark. The research also demonstrated that in its early days, the claim for the RTD was based on the request for the establishment of a NIEO by developing countries; then the claim evolved to be linked to the effects of the World Bank, IMF sponsored SAPs as well as the WTO unfair trade rules which impoverished Africa. Finally, the claim for the RTD was based on the request for global justice and fairness in the distribution of world's resources.

In terms, of theory, the research also found out that the RTD is grounded in the cosmopolitanism philosophy which sees the world as a global village where based on their humanity, all human beings are equal. It identified the utilitarianism, rights based cosmopolitanism and obligation based cosmopolitanism as theory through which global justice can be achieved. It however, presented the critique of cosmopolitanism which revolves around the nationalism, liberalism and individualism theories that maintains that the individual is paramount and advocates for the right to property.

Focusing on NEPAD, the research located the African institution in the context of development policies which preceded its advent, the context of widespread poverty in Africa before concluding that the defining moment for its adoption was the poverty crisis caused by the neoliberal SAPs in Africa. The research provided several other findings; on the nature of the right:

First, the study shows that the RTD is inalienable, is a multifaceted human right which comprises civil and political as well as socio-economic and cultural rights. It underlines the vital place of the right to participation, to self-determination and stresses the principle of universality, interdependency and indivisibility of human rights elements of the RTD.

Second, the research demonstrates that the RTD is very contentious in the academic arenas as well as at the UN level. In the academic arenas, the contentions are visible through the debate

on the law of development as well on the nature of the RTD *per se*. At the UN level, on the other hand, the controversy on the right is characterised by its politicisation, the reflection of such politicisation on the voting pattern of UN resolutions on the right and the adoptions of different approaches to the right by various international organisations. In fact, developing countries always vote for the RTD while most developed ones led by the US stand against the right. International organisations have different and unpredictable approaches.

Third, while focusing on the implementation of the right, the research attempted to identify the duty bearers as well as the beneficiaries of the RTD. At national level, the state is the duty bearer, whereas at the international level, the international community has the responsibility to ensure the realisation of the RTD. This point is one source of a broad controversy on the right because there is no international binding instrument on the RTD. More importantly, IFIs are not parties to international agreements between states, hence the difficulty of holding them accountable for the realisation of the right. Nonetheless proponents of the right rely on article 55 and 56 of the UN Charter among others to claim the right from the international community.

As far as the right holders are concerned, the study shows that individual as well as peoples are the beneficiaries of the right. More importantly, it demonstrates that the state is also a right holder of the right when it claims it from the international community on behalf of its citizens.

The second question the research had to deal with was to identify the place of the RTD in the African human rights system. The research demonstrates that the RTD is well secured in the African human rights architecture. From the ACHPR (article 22), it flows in other African instruments cascading to national laws. In fact, the RTD is enshrined in the ACHPR, in the Protocol on the Right of Women in Africa, the African Children Charter and in 1993 SADC treaty. In addition, the thesis underlines the important place of the RTD in Cameroonian, Ugandan, Malawian and Ethiopian Constitutions before showing that the right is yet to be implemented in these countries.

Though the South African Constitution does not expressly provide for the RTD, South Africa provides examples of good practice (through a strong separation of power, a strong civil society and the justiciability of socio-economic rights) on how to implement the right.

Still in assessing the importance of the RTD in the African human rights system, the study observes that the right is part and parcel of the African Commission jurisprudence. In, this regard, the *Bakweri* case, the *Democratic Republic of Congo* case (*Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*) and more importantly the *Endorois* case are the communications in which the African Commission had to decide on the right. In the *Endorois* or the landmark case on the RTD, the African Commission highlighted the multifaceted character of the right which entails a holistic approach for its realisation.

In sum, the study is of the view that the RTD has an important place in the African human rights system. Adding to the place of NEPAD in the African human rights system, this finding sets the stage to examine the prospects for the achievement of the RTD.

The third question on the table was examining whether NEPAD is informed by human rights and to what extent it could improve the prospects for the RTD.

The thesis demonstrates that NEPAD objectives and purposes are to enhance the human welfare which is also the objective of the RTD. However, NEPAD's plan to foster the provision of goods and services are not defined in terms of legal entitlements with legal mechanisms to claim such rights. However, the thesis warns about confusing legal rights to human rights and contends that the non justiciability of a right does not negate its value. Hence, the conclusion that NEPAD is informed by human rights and could therefore improve the prospects for the realisation of the RTD.

However, after observing that NEPAD aims to realise human rights and the RTD, the chapter deplores the lack of participation of African people in the early days and during the implementation of NEPAD and shows that these shortcomings are serious roadblocks for NEPAD's ability to realise the RTD. Further, the non binding feature of the plan did not improve the prospects for the RTD, though the now finalised integration of NEPAD in the AU is expected to remedy several problems including its lack of legitimacy.

The thesis also shows that financial constraints affecting NEPAD activities and the wasteful spending by African leaders do not increase its ability to realise the RTD. The thesis is of the view that though NEPAD aims at realising the RTD, few challenges need to be addressed urgently: African leaders have to ensure popular participation or transfer ownership of the plan to African people, strengthen its legitimacy by finalising its integration in the AU and decrease wasteful spending to commit more money to the continental programme.

The fourth interrogation was to assess to what extent NEPAD is integrated into national frameworks for the realisation of empowering rights such as the right of vulnerable groups to be protected and the right participation. The thesis examines these rights in Cameroon and South Africa. The latter is a NEPAD founder with an advanced Constitution in terms of human rights protection, while the author is familiar with the former's legal system which provides for the RTD.

As far as the integration of vulnerable groups in the economy is concerned, Cameroon through the national subprogramme to integrate vulnerable groups in the economy and South Africa through the NGP strive to ensure a better life for the beneficiaries. Notwithstanding few problems such as the lack of education of the beneficiaries in Cameroon and the controversy on the newly established NGP in South Africa, the initiatives have the potential to create employments and transform the countries into workfare states where vulnerable groups are given a voice and trained to be fully integrated in the economy and the running of the countries. This is not only in line with MGDs, but also with NEPAD's standards on poverty eradication. On this point, NEPAD enhances the prospects for the RTD in Cameroon and South Africa.

In terms of the right to participation, the research found that the institutionalisation of the right to participation through direct and indirect participation (referendum and elections respectively) as well as regional decentralisation in Cameroon does not do enough to ensure the effective participation of Cameroonians in the affairs of their land. This is due to the fact that the central authority is too powerful; the President of the Republic is the only person who can instigate a referendum and more importantly the institution in charge of organising and ensuring free and fair elections is far from being independent.

As far the right to participation through regional decentralisation is concerned, the implementation of this right is held back by the heavy power of the central authority on the regional council, the lack of constitutional provisions sharing power between the central power and the local authorities who have no genuine power, apart from the one allocated to them by the central authority. Furthermore, the President of the Republic has the power to appoint delegates to lead a city council with 'special status', which should normally be headed by an elected official. Despite the Cameroonian move towards been peer reviewed, the country does not integrate NEPAD's standards on the right to participation in its national plan.

In contrast, South Africa has a strong Independent Electoral Commission, a decentralisation with equitable sharing of resources between local governments, a constitutional provision catering for the sharing of power between the central authority and the local government. In addition, the country enacted policies to transfer power to the masses and more importantly a strong judiciary which is constantly at work to guarantee the right to participation. At local level, national programme such as the establishment of ward Committee, *imbizo* and *Batho Pele* transfers the power to the grass roots. All these initiatives integrate the NEPAD's standards on the right to participation in the national framework and enhance the prospects for the realisation of the RTD in South Africa.

Having observed that international co-operation and partnership were vital for the realisation of the RTD, the final question addressed in the thesis was to examine to what extent the NEPAD strategy to set up a new global partnership could be conducive to the realisation of the RTD.

After highlighting that the concept of partnership entails the principle of equality, common interest and equal sharing of benefits between the parties, the study looks at the partnership between NEPAD and the G8, focuses on the role of NEPAD in the WTO, looks at its place in ACP Agreement and analysed its inputs in the EPAs. The study demonstrates that in all these partnership agreements, NEPAD is way behind its target of establishing a true partnership between Africa and the rest of the world. It seems to be the weakest link in all these partnerships endeavours. Indeed, in its relation with the G8 and in the WTO in general and in

the TRPIS and AoA agreements specifically, it does not make a significant impact; the same observation is made in the development of the ACP Agreement to the EPAs where NEPAD shines by its absence. Truly, an examination of the weight of NEPAD in these partnerships reveals that the plan of setting up a new global partnership conducive to the realisation of the RTD is the most complex task on NEPAD's desk and this does not in anyway increase the prospects for the realisation of the RTD in Africa.

Overall, the prospects for the realisation of the RTD under NEPAD as it stands are very thin. While waiting to see what its integration into the AU will do in terms of human rights realisation and the RTD in particular, it is submitted that NEPAD is not doomed. The following recommendations may assist NEPAD in successfully discharging its human rights mandate and enhance the prospects for the RTD.

8.3 Recommendations

To enhance the prospects of the RTD through NEPAD, much needs to be done:

Since NEPAD is now part of the AU, there is a need to harmonise other AU institutions with NEPAD to avoid overlaps and unnecessary wastages of human, financial and other resources.

As for the ideological battle (MAP/OMEGA) affecting the nature, legitimacy and effectiveness of NEPAD, African leaders must get their act together, make the necessary compromise, clear up the confusion on the nature of NEPAD, reassure African people, bring back the euphoria that was visible in NEPAD's early days and always view African's welfare as paramount. This will go a long way in addressing the lack of participation which does not enhance the prospects of the RTD under the institution.

In enhancing the right to participation, Cameroon should establish a genuine independent electoral commission and reduce the omnipotence of the central authority in its decentralisation policies. Broadly, NEPAD should be infused in national development policies. It should establish and strengthen mechanisms to domesticate its plan and standards in African states. In doing so, the momentum on NEPAD should be kept alive, national goals should encompass NEPAD objectives and standards addressed through discussions between

governments and NEPAD representatives. The recognition of NEPAD in national development plans will go a long way in legitimising NEPAD and improving the chances of the RTD.

NEPAD should remedy its legitimacy problem by enhancing civil society participation in order to realise the African dream of post colonial era which is freedom from poverty, self-reliance, self-sustainment, holistic human development and the democratisation of the development process. This can be done through a bottom up approach implying the involvement of the civil society including churches, private sector, opposition parties, syndicates, human rights movements and traditional leaders who all have important contributions in ensuring the RTD. This could be done simply by seeking others views on NEPAD draft documents before their final adoption. Consulting on these drafts documents through NEPAD website enhance the legitimacy as well as the ownership of the process.

In its attempt to establish a new global partnership, NEPAD should always be involved in international negotiations and make sure that Africa's development contracts and agreements are informed by international human rights law and the RTD criteria in particular. NEPAD should keep calling for global responsibility for human rights from Pogge's perspective which highlights the obligation of the affluent not to harm the poor. It should emphasise that wealthy countries and global institutions have not only the obligation conduct, but also the obligation of result in ensuring the realisation of human rights in Africa. It should also emphasise the need to establish an independent body (with binding decisions) in charge of monitoring the partnership between itself and its partners. This will be a good move in ensuring global governance which is needed for a victory in the battle against poverty and the improvement of the prospects of the RTD in Africa.

In terms of looking inwards, NEPAD member states should speak with 'one voice' and present the AU/NEPAD's position at international level. Using this approach, NEPAD should engage with the international community at large and the WTO in particular to get concessions that consider poor countries specific needs. In such concessions, Africa should be given preferential treatments and this will be an important step in humanising trade.

As far as the APRM is concerned, the fourth stage of the review or peer review phase should not happen in secrecy; it should be done in the country under review and opened to Civil Society Organisations (CSOs). In the same line of thought, the APRM Forum made of Heads of State and Government of participant countries (in charge of the fourth stage) needs to be revised. Members of this forum are not experts in governance issues, hence the need to include experts on governance and give room to civil society participation. These measures will go a long way in improving the legitimacy, credibility and efficiency of the process as well as improving the prospects for the RTD in Africa.

The Panel of Eminent Persons in charge of country review mission should be also revised. Members of this institution should include qualified people who are admitted in the structure not only because of their integrity, but also because of their competence. More importantly there is a need to adopt the 'Charter of the Panel' which will clarify the mandate of the Secretariat and the Panel. Furthermore to strengthen this separation of power, a Code of Conduct (comprising enforceable disciplinary sanctions) for APRM panels should be adopted to ensure that the panel respects its Charter. In addition, there is a need to limit the mandate of the members of the Panel to four years as stipulated by the APRM Base Document.

As a far the Questionnaire is concerned, there is a need to reduce its length, harmonise the use of similar concepts, simplify the language used; correct the multifaceted and repetitiveness of some questions and give a specific focus to NEPAD.

In strengthening the process, at continental level, it is necessary to create a 'Conference of stakeholders' which will include National Focal Points, the APRM Panel, the APRM Secretariat, National Government Councils partners and other members of the civil society under the chairmanship of the APRM Forum. This will provide a stage outside 'Peer Review Summit' to address hindrances to the operationalisation of the process.

Furthermore, the APRM should be reviewed in compliance with the APRM Base Document that provides for the review every five years.

Weaknesses of the Questionnaire which include its length, the lack of harmony in the use of similar concept, the complexity of the language used; the multifaceted aspect of some

thematic areas, the repetitiveness of some questionnaires, the broadness of the questions and the lack of a specific focus on NEPAD should be corrected.

Still in terms of strengthening the process, though Mauritania had been excluded from the APRM because of the *coup d'Etat* which yielded an unconstitutional change of government, APRM's efficiency is hindered by the lack of sanctions on 'bad' states. To address this problem, it is imperative to involve the African Commission in the APRM process. Involving this body in country review missions and consideration of the country reports will enhance the quality of the process because of its expertise in human rights issues. More importantly, involving the African Commission can be instrumental in ensuring that participant states to the review process comply with the provisions of the ACHPR and especially article 22 which provides for the RTD. There is also a need to trim down APRM governance standards by avoiding mixing binding and non binding human rights instruments because this approach weakens the binding ones.

As far as the POA is concerned, it should be a true reflexion of a participatory and transparent country self-assessment. It should have clear deadlines and defined plan and budget for its realisation.

From a national standpoint, it is observed that the APRM National Focal Points belong to the executive power in the country under review. It is imperative to ensure the independence of the National Focal Points and the National Commissions by opening their doors to various CSOs including NGOs, churches and political parties from the opposition in the country under review. Not only should these organisations participate to the process, they should be trained to have an impact on the design and implementation of the POA. To use Matlosa's words:

There should be a shadow process by CSOs [civil society organization] so that if they cannot participate in the formal process, they have their own process to keep it honest. As civil society, agencies must interrogate peer review, conduct research and share information with others.¹⁶³⁹

¹⁶³⁹ K Matlosa 'How should civil society respond to peer review?' (2003) *Africa Electronic Journal of Governance and Innovation* 13.

Though this thesis is not the solution to achieving the RTD in Africa, the author hopes that it might lead to further thoughts and reflections on how to use continental institutions as tools to better human lives.

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- o APRM Base Document, NEPAD/HSGIC/03-2003/APRM/MOU/ANNEX II
- o Memorandum of understanding of the African Peer Review Mechanism [NEPAD/HSGIC/03-2003/APRM]
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