

TABLE OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter of the Rights and Welfare of the Child
AGA	African Governance Architecture
AGP	African Governance Platform
AI	Amnesty International
AIFJ	<i>Association Ivoirienne des Femmes Juristes</i>
AIPDH	<i>Association Ivoirienne pour la Promotion des Droits de l'Homme</i>
APRM	African Peer Review Mechanism
AU	African Union
CAT	Convention against Torture and Other Forms of Inhumane and Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CMW	International Convention on the Protection of the Rights of All Migrant Workers
CPFAC	African Union Convention on the Prevention and Fight against Corruption
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disability
DPA	United Nations Department of Political Affairs
DPKO	United Nations Department of Peacekeeping Operations
ECOWAS	Economic Community of West African States
EDICERAP	<i>Les Editions du Centre de Recherche pour la Paix</i>
FAO	Food and Agriculture Organisation
FESCI	<i>Fédération Estudiantine et Scolaire de Côte d'Ivoire</i>
FPI	<i>Front Populaire Ivoirien</i>
GEMDEV	<i>Groupement d'Intérêt Scientifique Pour l'Etude de la Mondialisation et du Développement</i>
HIPC	Highly Indebted Poor Countries
HRBA	Human Rights-Based Approach
HSIC	NEPAD Heads of States and Government Implementation Committee

IJARS	<i>International Journal of African Renaissance Studies: Multi-, Inter- and Transdisciplinarity</i>
IARS	Institute for African Renaissance Studies
IANSA	International Network on Small Arms
ICCPR	International Covenant on Civil and Political Rights
ICCPR-OP1	Optional Protocol to the International Covenant on Civil and Political Rights
2ndOPCCPR	Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IKS	Indigenous Knowledge System
ILO	International Labour Organisation
IMF	International Monetary Fund
LIDHO	<i>Ligue Ivoirienne des Droits de l'Homme</i>
MDG	Millennium Development Goals
MIDH	<i>Mouvement Ivoirien des Droits de l'Homme</i>
MIT	Multi-, Inter-, and Transdisciplinary
NAM	Non-Aligned Movement
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
OAU	Organisation of African Unity
ODA	Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
OEWG	Open-Ended Working Group
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
OPCEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OPCESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

OPACCRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPCCPR1	Optional Protocol to the International Covenant on Civil and Political Rights
OPSCCRC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
P-ACJHR	Protocol on the Statute of the African Court of Justice and Human Rights
P-CAAU	Protocol Relating to the Amendment of the Constitutive Act of the African Union
PDCI-RDA	<i>Parti Démocratique de Côte d'Ivoire – Rassemblement Démocratique Africain</i>
PIT	<i>Parti Ivoirien des Travailleurs</i>
P-PSC	Protocol to the Treaty Establishing the African Economic Community Relating to the Peace and Security Council
P-RWA	Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women in Africa
RADHO	<i>Rencontre Africaine pour la Promotion des Droits de l'Homme</i>
RDR	<i>Rassemblement des Républicains</i>
RtD	Right to Development
UDHR	Universal Declaration of Human Rights
UGTCI	<i>Union Générale des Travailleurs de Côte d'Ivoire</i>
UNAIDS	United Nations Joint Program on HIV/AIDS
UNDP	United Nations Development Program
UNFPA	United Nations Population Funds
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
USA	United States of America
WB	World Bank
WFP	World Food Program

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CHAPTER 1

INTRODUCTION, AIMS, AND FRAMEWORK OF THE STUDY

1.1 Introduction

This study examines one of the contemporary articulations of human rights – the right to development (RtD) – from the perspective of civil society organisations (CSOs) or non-governmental organisations (NGOs), with the aim of establishing how these organisations effectively assist in the realisation of this right in any given country. Côte d'Ivoire has been selected as the area for this study as it exhibits most of the key impediments to peace, stability, and development facing 'fragile' African states which can be addressed through the realisation of the RtD. Generally, a fragile state is acknowledged to exhibit negative patterns such as a lack of control on the use of violence, poor economic performance, corruption and a lack of transparency, high risk of violent conflict, and an underdeveloped democratic culture.¹

Formerly portrayed as a model of political stability and economic prosperity, Côte d'Ivoire has not lived up to its promise, despite presidential elections that were expected to end two decades of crisis. Even though the country is blessed with potential wealth (human capital, world number one cocoa producer, rich in minerals, oil, cotton, and fishing resources),² it continues to be confronted with political tensions, deepening poverty, and a socio-economic crisis. In 1990 Côte d'Ivoire was ranked thirty-second on the United Nations Development Program's (UNDP) human development index (HDI). By 2008, six years after the failed coup d'état, it had dropped to 166th.³ In 2012, a year after the violent post-electoral crisis which claimed at least 3 000 lives according to an official report of the United Nations Mission in Côte d'Ivoire, the country ranked 170th.⁴

¹ Tuominen S (ed) *African perspective on state building, institutional capabilities and legitimacy of the state* (2009) 8.

² *Plan National de Développement* <http://www.ppp.ci/pppci/index.html> (accessed 15 May 2012)

³ See http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_CIV.html (accessed 15 May 2012).

⁴ See <http://hdrstats.undp.org/images/explanations/CIV.pd> (accessed 27 December 2012).

Exploring the RtD in the context of Côte d'Ivoire for this study is further justified by the fact that the principal issues confronting the country can be captured in human rights terms under the RtD. Indeed, exclusion in the management of public affairs, discrimination based on religious or ethnic identity, extreme poverty, and inequality in the sharing of the benefits of national resources, are root causes of the crisis confronting the country. The RtD responds to these issues through the promotion of participation and equity in access to opportunities for development. The RtD was also chosen for investigation because it is an emerging theme in international human rights law and offers an important illustration of the interrelation between the various human rights.

The RtD is explored in this study as having a triple nature: as a stand-alone right, a composite right, and a participatory right. As a stand-alone right, the RtD expands the definition of duty-bearers and rights-holders beyond the state-individual binary relationship. In addition to individuals, the RtD includes groups and communities in the definition of rights-holders, and makes non-state actors – such as corporate organisations – the subject of human rights obligations alongside the state as the primary duty-bearer. A composite right embraces and bridges other rights. As a vector (participatory) right, the RtD encompasses rights belonging to parallel paradigms (civil and political rights on the one hand, socio-economic and cultural rights, on the other). The RtD is an embodiment of all human rights; the mutual reinforcement and indivisibility of human rights as a reality. A participatory right is procedural to the extent that it facilitates the realisation of the other rights. This triple nature of the RtD is discussed in detail in Chapter 2.

The choice of NGOs as the research population for this study is premised on their role, or potential role, as agents for change in the African context – Côte d'Ivoire included. Through their dynamism, flexibility, and persistence, NGOs have contributed to significant achievements in the field of human rights in Côte d'Ivoire. These include the adoption in 2000 of a new Constitution with clear provisions on human rights, the abolition of the death penalty, and the ratification of the Rome Statute of the International Criminal Court in February 2013. It is, therefore, pertinent to examine whether, through the pursuit of the RtD, human rights NGOs will assist in consolidating the culture of respect for human rights and the rule of law in Côte

d'Ivoire, and, by so doing, build a practice of engagement that can be replicated in similar situations across Africa and beyond.

1.2 Aim and objectives of the study

Using a specific country's situation (Côte d'Ivoire) as a model, this study aims to contribute to the understanding of the role of NGOs in the on-going discourse on the recognition and implementation of the right to development. As part of the global social movement, NGOs have played an historic role as agents of change in a number of societies, including several in Africa. However, this role will be effectively assumed in modern Africa only if the African human rights NGOs operate within a framework that can adequately achieve the repositioning of Africa on the world map. This study examines the characterisation of this role in the light of recent knowledge in the field of human rights via the current political situation in Côte d'Ivoire; the theoretical foundations of the right to development; and the notion of civil society and NGOs from Ivorian, African, and global perspectives. This includes the comparison of the position of human rights NGOs in Côte d'Ivoire with other African NGOs that have challenged the infringement (breach or violation) of the RtD, either before domestic courts or before the African Commission on Human and Peoples' Rights. Chapters 3, 4 and 5 elaborate on these issues.

1.3 Statement of the problem

In Africa and elsewhere, general methods of enforcing rights include recourse to courts, monitoring and reporting on breaches of human rights law by duty-bearers, and raising awareness among rights-holders. These methods remain valid both locally and internationally. For example, in the international arena, the United Nations (UN) human rights treaties and Charter-based mechanisms are supplemented by the International Criminal Court (ICC) in addressing war crimes, crimes against humanity, and gross violations of human rights. At the continental level in Africa, the African mechanisms include the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the Committee of Experts on the Rights and Welfare of the Child. At the sub-regional

level, there are a number of community courts with explicit or implied jurisdiction over human rights cases, including the Court of Justice of the Economic Community of West African States and the Tribunal of the Southern African Development Community. This is discussed in Chapter 3. However, in relation to the RtD those means of protecting and promoting human rights – which I qualify here as ‘classic’ – need to be supplemented at the domestic level by policy advice and engaging states on issues relating to policy formulation – for example, the consultations during the development of Poverty Reduction Strategy Papers.⁵ Because the Ivorian society is predominantly rural or semi-urban with a significant influence from local customs and traditions, working on the RtD further requires NGOs to seek knowledge in areas such as customary law.⁶ This study also recommends that African indigenous methods of social mobilisation and advocacy, such as drama, story-telling, and music including local languages, be used to raise awareness of the RtD. In Côte d’Ivoire, the human rights NGOs reviewed have weak internal organisation and a poor financial base. In addition, their focus on civil and political rights has resulted in lack of interest and support from ordinary citizens whose priorities centre around peace and socio-economic rights. The dependence on western organisations or international networks – to echo local concerns – sometimes generates suspicion as to the agenda of local human rights NGOs. For example, the International Federation of Human Rights Leagues (FIDH) often produces joint reports and statements on human rights situations in countries where it has affiliates, including Côte d’Ivoire. On 30 October 2012, FIDH issued a joint report with two Ivorian NGOs, the *Ligue Ivoirienne des Droits de l’Homme* and the *Movement Ivoirien des Droits de l’Homme*, in which they documented gross violations of human rights by government troops.

⁵ Generally, poverty reduction strategy papers (PRSPs) were introduced in the mid-1980s by the Bretton Wood institutions (International Monetary Fund and World Bank) as a framework for cooperation in economic development to replace structural adjustment plans. The United Nations and the donor community support the process of developing PRSPs and encourage the state to ensure that they are participatory by involving civil society organisations and the private sector alongside government institutions and following principles such as universalism, non-discrimination, and gender sensitivity.

⁶ Customary law is generally understood as: ‘[a]n established system of immemorial rules [...] evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and their sons’ sons until forgotten, or until they became part of the immemorial rules’. See Bekker JC *Seymour’s customary law in southern Africa* 5 ed (1989) 11.

The Ivorian government responded by encouraging other local human rights NGOs not affiliated to FIDH to carry out their own investigation.⁷

The RtD is recognised in the 2000 Constitution under articles 6, 7, and 8, as well as in article 22 of the African Charter on Human and Peoples' Rights (African Charter) to which Côte d'Ivoire has been a party since 1992.⁸ The RtD is therefore an enforceable right under Ivorian municipal law. This point is considered further in Chapter 5. Despite its recognition, few, if any, NGOs have any experience in working on the RtD in Côte d'Ivoire. Lack of knowledge in this field is the principal reason given for the lack of recognition and experience in implementing the RtD by leaders of NGOs during the field survey undertaken as part of this study.

This study addresses the following central question:

What role can human rights NGOs play in the realisation of the right to development in Côte d'Ivoire?

The study pursues the following steps of inquiry:

- Discussing the genesis, scope, nature and content of the RtD;
- Defining and exploring the workings and mechanisms of African human rights NGOs in the Ivorian context.

1.4 Demarcation of the field of study

Discussing concepts such as NGOs, the RtD, or the socio-political and economic situation in Côte d'Ivoire, can be undertaken in a number of ways, including historically by highlighting the major periods of evolution; and sociologically by interrogating the underpinning social elements and actors. The delimitation in this thesis is approached through an analysis of the most important concepts, a

⁷ See <http://www.fidh.org/Cote-d-Ivoire-la-justice-pour-12352> (accessed 16 March 2013).

⁸ Côte d'Ivoire ratified the African Charter on Human and Peoples' Rights on 6 January 1992. See <http://au.int/en/sites/default/files/African%20Charter%20on%20Human%20and%20Peoples'%20Rights.pdf> (accessed 15 January 2013).

demarcation of the scope of the study, and an indication of the chapter division in the study.

1.4.1 Conceptual analysis

A conceptual analysis was undertaken of the following concepts: the meaning of, as well as the role and function of civil society organisations/non-governmental organisations; and the nature and scope of the right to development (RtD)

1.4.1.1 *Meaning of civil society and non-governmental organisations*

There is no legal and broadly accepted definition of what constitutes a civil society organisation (CSO) or a non-governmental organisation (NGO). However, various stakeholders have provided both different and similar understandings of these notions. The UN offers no single definition of an NGO; it uses the terms *civil society organisation* and *NGO* interchangeably. This study uses NGO throughout the work. What follows are contemporary definitions of CSOs/NGOs; followed by definitions of those with human rights as their stated area of focus.

Willets outlined the complexity of defining the concept of CSOs and NGOs thus:

At times NGOs are contrasted with social movements. Much as proponents of social movements may wish to see movements as being more progressive and more dynamic than NGOs, this is a false dichotomy. NGOs are components of social movements. Similarly, civil society is the broader concept to cover all social activity by individuals, groups and movements. It remains a matter of contention whether civil society also covers all economic activity. Usually, society is seen as being composed of three sectors: government, the private sector and civil society, excluding businesses.⁹

Kjaerum defined a civil society organisation as a third sector placed between the state and the market economy.¹⁰ For Kjaerum, CSO is an inclusive concept that

⁹ Willets P 'What is a non-governmental organisation?' in *UNESCO Encyclopaedia of life support systems* (2002) Article 1.44.3.7 'Non-Governmental Organisations' available at <http://www.staff.city.ac.uk/p.willets/CS-NTWKS/NGO-ART.HTM#Part1> (accessed 31 October 2012).

¹⁰ Kjaerum M 'The contributions of voluntary organisations to the development of democratic governance' in Micou AM and Lindsnaes B (eds) *The role of voluntary organisations in*

encompasses groups and associations that include, but are not limited to, NGOs, trade unions, co-operatives, consumer and human rights groups, women's associations, youth clubs, the media, community-based organisations, and neighbourhood associations. He equates NGOs with voluntary organisations, which he defines as non-profit organisations organised by groups of people in the sphere of civil society, working for a cause for the benefit of society and very often also contributing to development. Acknowledging the elasticity of his definition, Kjaerum attempts to delimit it by singling out four distinctive features of NGOs:

- They do not belong to the apparatus of the state; meaning that they are not an extension of the 'executive', government, the judiciary, or the legislature (parliament).
- They differ from commercial and profit-oriented organisations operating in the market place, as such, they are not profit driven.
- They are conceived and operated by groups of individuals pursuing a common interest.
- Their activity is the main distinctive feature of voluntary organisations; they occupy the grey zone between the state, which has the monopoly on power, and the capital accumulated in private companies. In the African context and perhaps beyond, NGOs translate the concept of citizenry into practical terms by championing national, sub-regional and continental shared values. In comparison with the media – often referred to as the 'fourth estate' by virtue of their rising influence in the political arena – civil society also plays a public role more significant than a mere grey zone between the state and the private companies. This is further discussed in Chapters 4 and 5 below.

According to the European Union, civil society organisations are the principal structures of society outside of government and public administration, including

emerging democracies: Experience and strategies in eastern and central Europe and in South Africa (1993) 13-6.

economic operators not generally considered to fall within the ‘third sector’.¹¹ The civil society caucus of the World Summit on Information Society defined CSOs as:

Organisations – including movements, networks and other entities – which are autonomous from the state, are not intergovernmental, and do not represent the private sector, and which, in principle, are non-profit-making, act locally, nationally and internationally, in defence and promotion of social, economic and cultural interests and for mutual benefit.¹²

For its part, the Johns Hopkins University’s Comparative Non-Profit Sector Project understands NGO/CSO as any organisations, whether formal or informal, that are not part of the apparatus of government, that do not distribute profits to their directors or operators, that are self-governing, and in which participation is a matter of free choice. For it, both member-serving and public-serving organisations are included. This means that private, not-for-profit health providers, schools, advocacy groups, social service agencies, anti-poverty groups, development agencies, professional associations, community-based organisations, unions, religious bodies, recreation organisations, cultural institutions, and many more, are included within this definition.¹³

The London School of Economics has defined NGO/CSOs as the arena of collective activities around shared interests, purposes and values. In its definition, civil society commonly embraces a diversity of spaces, actors, and institutional forms varying in their degree of formality, autonomy, and power. They are often populated by organisations such as registered charities, development non-governmental organisations, community groups, women’s organisations, faith-based organisations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions, and advocacy groups.¹⁴ For its part, the Organisation for Economic Co-operation and Development (OECD) understands

¹¹ See http://ec.europa.eu/civil_society/consultation_standards/index_en.htm#top (accessed 29 October 2012).

¹² See <http://www.genderit.org/en/index.shtml?apc=j--e--1> (accessed 29 October 2012).

¹³ See <http://www.guidestarinternational.org/whatiscs/> (accessed 31 October 2012).

¹⁴ See http://www.lse.ac.uk/collections/CCS/what_is_civil_society.htm (accessed 29 October 2012).

CSOs as the multitude of associations around which society voluntarily organises itself and which represent a wide range of interests and ties.¹⁵

The Office of the United Nations High Commissioner for Human Rights uses the concept of ‘civil society actors’; and defines these as individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes, and values that are compatible with the goals of the United Nations, and in particular, the promotion and protection of human rights.¹⁶ This definition of civil society actors working on human rights includes human rights defenders, human rights organisations (NGOs, associations, victim groups), related issue-based organisations, coalitions and networks (women’s rights, children’s rights, environmental rights), persons with disabilities and their representative organisations, community-based groups (indigenous peoples, minorities), faith-based groups (churches, religious groups), unions (trade unions as well as professional associations such as journalist associations, bar associations, magistrates’ associations, student unions, etc), social movements (peace movements, student movements, pro-democracy movements), professionals contributing directly to the enjoyment of human rights (humanitarian workers, lawyers, doctors and medical workers), relatives of victims, and public institutions that carry out activities aimed at promoting human rights (schools, universities, research bodies).

In this study, an NGO/CSO is understood as a voluntary and independent association of at least two people acting together on a continuous basis for a common purpose other than achieving government office, making money, or engaging in illegal activity. The concept ‘human rights NGO or CSO’ is, therefore, understood as an independent voluntary association of more than one individual acting together on a continuous basis, for the realisation of human rights. A human rights NGO does not seek to achieve government office, or to make a profit. It also does not embark upon illegal activities. This definition is elaborated upon in Chapter

¹⁵ See ‘Glossary of statistical terms’ in *DAC guidelines and reference series applying strategic environmental assessment: Good practice guidance for development co-operation* (2006) available at <http://stats.oecd.org/glossary/detail.asp?ID=7231> (accessed 29 October 2012).

¹⁶ OHCHR *Handbook for civil society* available at http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf at vii (accessed 16 April 2013).

5 through a comparison of two models in practice in Africa; the Anglophone and the Francophone models, respectively.

1.4.1.2 Role

The 'role' is used here in conjunction with 'function' and refers to the purpose or special duty performed.¹⁷ When speaking of the role of NGOs, this study considers both the purpose and the duties NGOs perform in the field of human rights in general, and with regard to the RtD in particular.

1.4.1.3 The right to development (RtD)

This study uses the definition offered by the Declaration of the United Nations General Assembly resolution 41/128 of 4 December 1986 on the Right to Development (attached to this study as Annexure 1). The UN Declaration on the Right to Development defines the RtD in article 1(1) as:

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.¹⁸

The fact that the RtD is premised on a declaration, which by definition is non-binding, has opened the way for controversy over its recognition as a human right. This aspect is discussed in detail in Chapter 2 below.

1.5 Methodological account

This study uses the legal approach to research. Legal research here refers to 'finding all the law relevant to the legal question being researched, applying the law to the legal question and reaching an answer'.¹⁹ However, while this study has been predominantly driven by the legal approach, the multi-, inter-, and trans-disciplinary (MIT) approach is used in the discussion of the socio-political situation in Côte d'Ivoire, and the notions of civil society and NGOs as they relate to the Ivorian

¹⁷ *Oxford wordpower dictionary* 10th ed (2002).

¹⁸ The full text of the declaration can be found as an annexure to this study.

¹⁹ Bast CM and Hawkins M *Foundations of legal research and writing* (2006) xxii.

context. The choice of this combined method is also based on the triple nature of RtD as a stand-alone right, a composite right, and a participatory right. Indeed, the pursuit of the RtD offers an opportunity for an illustration as well as an examination of the intersection of law, Africa's indigenous knowledge systems, economics, political science, sociology, and anthropology – in short, for the interaction of the natural and social sciences.

The present work was conducted in compliance with the UNISA's 'Policy on Research Ethics', especially the guidelines for research involving human participants.²⁰ In terms of this policy, the rights of the persons involved in the interviews supporting this work should be fully respected and protected. This is in order to ensure that information gathered does not compromise the privacy and dignity of participants, in particular those who are vulnerable owing to their age, poverty, disease, ignorance or powerlessness. The research did not involve this vulnerable population. It focussed on leaders of human rights NGOs and knowledgeable experts. In addition, issues such as prior and informed consent, privacy, anonymity, and confidentiality were taken into consideration. No certificate of authenticity was applied for and administered since this requirement post-dates the time of the interviews.

1.5.1 Literature review

1.5.1.1 Primary sources

Primary sources of law include case law, statutes, ordinances, and regulations. The primary sources of law consulted in this study include the Constitution of the Republic of Côte d'Ivoire, the domestic laws governing NGOs and human rights institutions in that country, and the relevant case law relating to NGOs and the RtD. No Ivorian case law on the RtD was found, a fact explained by the leaders of NGOs interviewed for this study by reason of the ignorance of NGOs about the RtD. Decisions of the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and the Court of Justice of the

²⁰ See https://my.unisa.ac.za/tool/a87dd927-a9e0-4b59-0012-5ab7d72ca660/contents/colleges/col_grad_studies/docs/Policy_research_ethics_21September2007.pdf (accessed 19 April 2013).

Economic Community of West African States are used for the purpose of this study (see Chapter 3).

1.5.1.2 Secondary sources

A large number of secondary sources were consulted for this study, including law reviews, textbooks, research articles, completed Master's dissertations and Doctoral theses, and other documents obtained via scholarly on-line libraries and other Internet sources on NGOs, the RtD, development theories, the political economy of Côte d'Ivoire, and the African Renaissance. These secondary sources were supplemented by structured interviews with some of the authors of the books and dissertations consulted and civil society experts.

1.5.2 Field research and Interviews

Field research is not often undertaken when legal research as defined above is conducted. However, owing to the nature of the subject under investigation which involves NGOs, it became necessary to supplement desk-research with targeted field research limited to interviews with NGOs and experts in Côte d'Ivoire, Ghana, Senegal, Nigeria, the Gambia, Uganda, Ethiopia, and Switzerland (in the context of the work of the United Nations Human Rights Council and the Office of the United Nations High Commissioner for Human Rights), and during sessions of the African Commission.

1.5.2.1 Process of interaction with Non-Governmental Organisations/Civil Society Organisations

This study includes interviews with two groups from Côte d'Ivoire: (1) representatives of NGOs, the main research population; and (2) 'experts' for the convenience of differentiation. Experts are those with established knowledge in human rights and in the work of NGOs but who, for a number of reasons including personal or professional, do not work for or are not engaged in the activities of NGOs. In this category are staff members of the Ministry of Human Rights, judges, magistrates, lawyers, members of the national Human Rights Commission, and

colleagues working in the human rights division of the United Nations Mission in Côte d'Ivoire (UNOCI).

After the first two field visits, which were aimed at a general mapping of human rights NGOs and their focus areas, it became clear that the focus of this study – the RtD – was either unknown or applied at a very notional level in Côte d'Ivoire. This prompted me to dig further into the organisational and structural issues that could impact on the understanding and pursuit of the issues I was seeking to explore among human rights NGOs in Côte d'Ivoire. My analysis shifted focus to three NGOs: *Action pour la Protection des Droits de l'Homme* (APDH), *Mouvement Ivoirien pour les Droits de l'Homme* (MIDH), and *la Ligue Ivoirienne des Droits de l'Homme* (LIDHO) which I assessed as meeting the basic requirements for potentially working on the RtD in the country. These requirements include a minimum organisational base, experience in litigation, and an understanding of the global economic and political context of human rights in the country.

I also conducted field-testing and feedback to those consulted on the outcome of the data analysis for the purpose of identifying workable recommendations to NGOs in the pursuit of the RtD. This entailed submitting my main findings and recommendations to NGOs by electronic mail for comment.

Face-to-face interactions were supplemented by follow-up telephone conversations together with the review of questionnaires administered through electronic mail. For example, in examining and analysing the *Endorois case*²¹ (see Chapter 3 below), I had telephone conversations and electronic mail interaction with some of the lawyers involved in the case, as well as with the NGOs that assisted the Endorois community and some of the scholars who wrote on the internationally acclaimed decision of the African Commission on this matter. The method also involved desk analysis of data collected through interviews and questionnaires, and the review of available literature on the key concepts, especially the African

²¹ This case was heard by the African Commission following upon a complaint of alleged violations of several provisions of the African Charter, including the RtD, resulting from the forced displacement of the Endorois community, an indigenous people, from their ancestral lands by the government of Kenya in order to build a game park. See Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*.

Renaissance, indigenous knowledge, civil society, development, Côte d'Ivoire, and the RtD.

1.5.2.2 *Travel and field work*

While working in Addis Ababa, Ethiopia, for the Office of the United Nations High Commissioner for Human Rights, I held several discussions with the staff of the United Nations Economic Commission for Africa supporting the NEPAD process, as well as those from the South Africa-based NEPAD Secretariat. I also interviewed staff of the African Union Commission. Insights on the NEPAD APRM in this work are largely the result of these interviews and discussions.

I also travelled to Geneva, Switzerland, to the headquarters of the Office of the High Commissioner for Human Rights and engaged with colleagues working directly on the RtD and tasked with the responsibility of directly assisting the Open Ended Working Group on the Right to Development and producing policy briefs on the RtD.

1.5.3 *Areas of field research*

This study involves three areas of research: Côte d'Ivoire as the site of the study; NGOs as the research population; and the RtD as the substantive issue for the legal investigation from the angle of NGOs.

1.5.3.1 *The country chosen for the study*

Côte d'Ivoire is the scene of the study for a number of strategic reasons. The country is a former French colony that is attempting to ensure its economic independence. It was also a leading economy within the Economic Community of West African States (ECOWAS). Its economy is largely dependent upon export agriculture and relies on a labour force that includes no fewer than 26% foreigners (2010 census), especially economic migrants and workers from neighbouring

countries.²² Like many countries in the southern part of Africa which experienced colonialism, Côte d'Ivoire's development was largely economic growth-orientated. Made fragile by a steel-fisted one-party political system and over dependence on the export of raw materials, the country has been unable to cope with the collateral damage of the World Bank-International Monetary Fund-induced structural adjustment programs (SAPs). Generally, SAPs are conditions imposed on developing countries by the IMF and the World Bank for accessing loans or for securing lower interest rates on existing loans. The intended purpose is to ensure that the money lent will be spent in accordance with the overall goals of the loan, and mainly to reduce the borrowing country's fiscal imbalances.²³

Côte d'Ivoire's colonial ties with France, which positioned it as the centre of gravity of French influence in Africa, were severely affected by drastic changes in the global economic landscape. The combination of all these factors plunged the country into an unprecedented political crisis and made Côte d'Ivoire a prototype of the African country that has yet to transform itself, after independence, into a free and prosperous nation. From the perspective of the African Renaissance paradigm, Côte d'Ivoire is an ideal choice for substantive attempts to identify the potential and limitations of the contribution of African human rights NGOs to the realisation of the RtD in Africa. A country that has experienced steady economic development but has failed to integrate a human rights dimension, let alone social interventions to reduce gaps between rich and poor, is open to social unrest and conflict. The RtD, as both a *sui generis* right and a composite right, offers a country such as Côte d'Ivoire tools to achieve durable peace and human and economic development.

²² Information on the country's demographic and administrative data are drawn from a comparative study of data provided by the State House (www.presidence.ci), the National Institute of Statistics (www.ins.ci), and the *Bureau National des Etudes Techniques* – BNET (the National Bureau for Technical Studies) (www.bnet.ci).

²³ The conditions for SAPs, also known as the Washington Consensus, include drastic measures such as cutting expenditure (austerity), devaluing currencies, focusing economic output on direct export and resource extraction, trade liberalisation or lifting import and export restrictions, balancing budgets and not overspending, increasing the stability of investment by supplementing foreign direct investment with the opening of the domestic stock market, privatising all or part of state-owned enterprises, enhancing the rights of foreign investors *vis-à-vis* national laws, improving governance, and combating corruption. See Birdsall N *et al* 'The Washington Consensus: Assessing a damaged brand' Policy Research Working Paper 5316 World Bank and Centre for Global Development May 2010. available at http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2010/05/24/000158349_20100524171316/Rendered/PDF/WPS5316.pdf (accessed 27 June 2012).

However, choosing Côte d'Ivoire as the site of this research presented a number of challenges. For example, the country has:

- limited local remedies for human rights violations
- relatively young and weak human rights NGOs
- a focus on civil and political rights by human rights actors at the cost of other rights
- apparent ignorance of the RtD by human rights NGOs.

1.5.3.2 The researched population

The researched population consist of human rights NGOs. While NGOs, understood as *not-for-profit groups*, have been the driving force for change in many countries, including Côte d'Ivoire, those with human rights as their stated mandate are relatively new in Côte d'Ivoire. The oldest have existed for some twenty years, while the majority have emerged during the past decade in the context of the crisis into which Côte d'Ivoire was plunged after the failed *coup d'état* in 2002. A review of the major human rights NGOs in the country shows that their relative 'youth' is also related to the nature of the regime that ruled the country during the first forty years of its political independence from French colonisation. Human rights and political activism were severely suppressed during the colonial and post-colonial periods. However, the emergence of several human rights NGOs during the past ten years cannot necessarily be interpreted as a sign of openness and a manifestation of the freedoms of assembly, association, and opinion. On the contrary, as I shall show later, a sizable number of these organisations operate as fronts for political, ethnic, and sectarian agendas that tend to undermine genuine human rights monitoring, research, reporting, and advocacy. The picture is therefore not homogenous and some of the key issues that must be addressed by NGOs in order effectively to contribute to the advancement of human rights in Côte d'Ivoire must be explored in this thesis. In addition, this study has omitted a large number of NGOs that are pursuing a human rights agenda without declaring themselves or being perceived as such. A wider definition of human rights organisations would lead to different analyses and conclusions. This study focuses on those NGOs with the pursuit of

human rights as a stated mandate. The choice of the research population was based on the need to focus on a definable subject so as to safeguard the research against over-simplification, generalisation, and ambiguity.

1.5.4 The issue being investigated

By focussing on the role of NGOs in the pursuit of the RtD in Côte d'Ivoire, this study builds on the work of other scholars on the three aspects: the RtD, Côte d'Ivoire, and Human Rights NGOs. This study's contribution to the body of knowledge is to be found in the attempt to find a link between these notions and not to examine them in isolation.

1.5.4.1 Relevance

The interviews and discussions with human rights NGOs randomly selected from within and outside Africa helped to establish the applicability and relevance of these findings beyond Côte d'Ivoire. However, given the relative novelty of the RtD, (in comparison with economic, civil, cultural, social, and political rights), the outcome of this research may be of limited relevance. This work is therefore likely to serve as a contribution towards stimulating further research.

1.5.4.2 Limited scope

Peace and security are essential to the realisation of the right to development. In addition, peace and security condition the performance and impact of the work of the human rights NGOs being examined. By focussing on the RtD, this study nonetheless does not address the fundamental issues relating to peace and security.

1.5.4.3 Validity

While the research here is based on the hypothesis that human rights NGOs will become more relevant if they address the RtD in Côte d'Ivoire, this does not intend to infer that shifting the focus to the RtD is all that is needed to realise the

aspirations of the Ivorian people. However, Côte d'Ivoire remains a country where the indivisibility of human rights has a practical meaning, and there is, therefore, no concept aside from the RtD better suited to the Ivorian human rights reality.

1.5.4.4 Constraints

The general context in which this research was undertaken constitutes its principal limitation. The field research took place between 2009 and 2010 with some updates and radical review of contents in 2012. Some of the information and data collected at that time may have become obsolete, especially in relation to the evolution of the understanding and pursuit of the RtD and the nature of NGOs. In addition, the research took place when Côte d'Ivoire was split as a result of an armed conflict. For security reasons, it was not possible to visit parts of the country. The 2012 update was also done in a context of extremely tense security and social situations.²⁴

1.6 Chapter division

Chapter 1, 'Introduction, aims, and framework of the study', describes the background, aims, delimitation, methodological account, validity, limitation and constraints of this study.

Chapter 2, 'The right to development in international human rights law', examines the RtD in international human rights law. Its legal nature and scope in the context of the controversies surrounding the global acceptance of the RtD as a human right are discussed. This includes discussions of the definition and evolution of the RtD as well as discussions on its content, enforcement, and justiciability.

Chapter 3, 'African and west African mechanisms for the enforcement of the right to development', analyses the concept of NGOs and their intended role

²⁴ I attempted some field visits to Côte d'Ivoire in July and August 2012. However, access to many parts became extremely risky following a succession of sporadic attacks by armed elements. In October I was able to interview a few leaders of human rights NGOs on the occasion of the 52nd session of the African Commission, which took place in Yamoussoukro, Côte d'Ivoire.

and function in a democratic African state with the emphasis on those with human rights as their principal mandate. This starts with an account of the evolution of the concept of NGOs, especially its historical perspective in the context of the 'western world' from the antiquity, the Greco-Roman domination to date. It also includes a discussion of NGOs in the African context. Acknowledging the diverse nature of the evolution and reality of NGOs in the African context, this chapter focuses on West Africa where Côte d'Ivoire is geographically situated. It ends with a discussion of the key roles and functions that African NGOs can perform in the making of democratic African states.

Chapter 4, 'Intended role and function of non-governmental organisations in a democratic African state', builds on the previous chapter and discusses the role of human rights NGOs in the pursuit of the RtD from the perspective of comparative law. In this context, decisions of the Commission on Human and Peoples' Rights relating to the RtD are examined. A detailed discussion of the *Endorois* case, presented here as the main occasion when the African Commission pronounced itself on the RtD, is offered. A brief reference to the jurisprudence of the African Court on Human and Peoples' Rights and the Court of Economic Community for West African States pertinent to the RtD is also provided.

Chapter 5, 'Côte d'Ivoire: The socio-political and economic situation, the evolution and legal regime for human rights non-governmental organisations, and their role in the realisation of the right to development', applies the concepts of RtD and NGOs to the specific context of Côte d'Ivoire. It begins with the socio-political, economic and human rights situation in Côte d'Ivoire. A review of the country's political history and economy is offered alongside a brief chronology of the socio-political crises during the past decade the impact of which is still felt. The country situation is analysed from the angle of respect for the RtD – or the lack of it. Secondly, based on field work and interviews with selected leaders of the selected human rights NGOs in Côte d'Ivoire, this chapter establishes that few, if any, NGOs have prior experience in working directly on the RtD. The discussion is, therefore, oriented towards an examination of the reasons for this *lacuna*. The chapter further explores the role and impact of NGOs, as well as highlighting their potential in the actualisation of the RtD in the country. The analysis focuses on those NGOs with a

potential effectively to embrace the RtD. This chapter also reports on the issues confronting the NGOs and their potentials in the pursuit of the RtD.

Finally, **Chapter 6**, entitled '**Conclusion: Synthesis and recommendations**' offers a synthesis of the findings and recommendations for the effective contribution to the realisation of the right to development in Côte d'Ivoire. It offers the view that in the context of the country, it is desirable and timely for Ivorian human-rights NGOs to prioritise the RtD in order to be part of the solution to the multifaceted problems their country is seeking to overcome in order to achieve its renaissance. The chapter concludes with a set of recommendations premised on the application of the multi-, inter- and trans-disciplinary approach to human rights by combining acquired (western) methods of human rights activism with African indigenous knowledge (systems).

CHAPTER 2

THE RIGHT TO DEVELOPMENT IN INTERNATIONAL HUMAN RIGHTS LAW

2.1 Introduction

The right to development (RtD) is at the centre of intense debate among scholars and practitioners.¹ After nearly thirty years of discussion of its legal nature and scope under the auspices of the United Nations, the RtD remains premised on a United Nations General Assembly (UNGA) Declaration – a soft law declaration that by definition creates non-binding obligations. To date, it continues to raise controversy as to whether it should be treated on the same footing as other human rights that are enshrined in legally binding treaties, or be subsumed under already recognised rights. It is widely accepted among scholars that the Senegalese jurist Kéba Mbaye was the first to articulate the notion of a *right to development* in the public arena, when on 3 July 1972 during an inaugural address at the International Institute for Human Rights in Strasbourg, France, he argued that development should be viewed as a right.² His views on the RtD as a human right were supported by other scholars including Amartya Sen,³ Shadrack Gutto,⁴ and Arjun Sengupta.⁵ In contrast, Donnelly is among the strong opponents of these positions and argues that recognising a separate human right to development leaves the relationship between economic development and the human rights specified in the Universal Declaration of Human Rights and the Covenants, unaddressed.⁶ Mbaye's work and advocacy led to the adoption in 1977 by the then UN Human Rights Commission (now Human

¹ See, for example, Kirchmeier F 'The right to development – where do we stand? State of the debate on the right to development' in (2006) 23/July *Dialogue on globalization* available at <http://www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf> (accessed 20 May 2013).

² See <http://ethiopiennes.refer.sn/spip.php?article736> (accessed 20 May 2013).

³ See Amartya S *Development as freedom* (1999).

⁴ See Gutto SBO 'Responsibility and accountability of states, transnational corporations, and individuals in the field of human rights to social development: A critique' (1984) 3 *Third World Legal Studies* 12.

⁵ See Sengupta A 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837-889.

⁶ Donnelly J 'Human Rights, democracy, and development' (1999) 21/3 *Human Rights Quarterly* 608-632.

Rights Council) of a resolution authorising the UN Secretary General to conduct a study on the international dimension of the RtD as a human right in its relation to other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and fundamental human needs.⁷ The following year, in 1978, the Commission recognised the RtD as a human right and asked the Secretary-General to undertake a study on conditions required for the effective enjoyment by all peoples and individuals of the RtD. Eight years later, in 1986, the efforts of the Commission on Human Rights culminated in the overwhelming adoption by the UNGA of a declaration on the RtD. This chapter discusses the origin, legal nature, and content of the RtD while highlighting some of the issues at the heart of the controversies surrounding its global acceptance as a human right.

2.2 Origin and evolution of discussions on the right to development

2.2.1 Early discussions on the development as a human right

Article 55 of the 1945 Charter of the United Nations, which calls on the United Nations to promote, inter alia, 'higher standards of living, full employment, and conditions of economic and social progress and development' is arguably one of the first legal foundations of the notion of development as a human right.⁸ Further, article 22 of the Universal Declaration of Human Rights adds that everyone, as a member of society, is entitled to the realisation 'of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.⁹ Article 1 of the International Covenant on Economic, Social and Cultural Rights (CESCR) also provides that '[all] peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.¹⁰

⁷ See United Nations Audiovisual Library of International Law http://untreaty.un.org/cod/avl/pdf/ha/drd/drd_ph_e.pdf (accessed 20 May 2013).

⁸ See <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (accessed 20 May 2013).

⁹ See <https://www.un.org/en/documents/udhr/> (accessed 20 May 2013).

¹⁰ See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 20 May 2013).

In 1968, two years after the adoption of the ICESR, the Commission on Human Rights took up, during its twenty-fourth session, the question of economic and social rights under the agenda item entitled 'Study of the Question of the Realization of the Economic and Social Rights Contained in the Universal Declaration of Human Rights'.¹¹ The issue remained on the agenda of the Commission for five consecutive years between 1969 and 1974.¹²

2.2.2 Introduction of the notion of a right to development by Kéba Mbaye

In introducing the notion of a right to development, Kéba Mbaye defined the RtD from three angles/perspectives: in relation to the law of development; the type of development the right addresses; and the methods for addressing this right. He drew a distinction between the right to development and the law of development. For Mbaye, the RtD goes beyond the subject matter of the law of development by integrating freedoms and civil and political rights. His contention, while through the law of development the traditional balance between liberties and social order is disrupted; the RtD binds them together harmoniously. In short, Mbaye referred to the classification of human rights into generations, the first being civil and political, the second economic, and the third 'solidarity rights' including the right to peace, security, and development. It is worth noting that Mbaye wrote in the early eighties and that most of his arguments on the hierarchy of rights have been overtaken by more recent developments. At the continental level, the African Charter on Human and Peoples' Rights adopted in 1981 clearly states in its preamble that:

... Convinced that it is [henceforth] essential to pay a 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.¹³

¹¹ See E/CN.4/1972 and generally United Nations Audiovisual Library of International Law http://untreaty.un.org/cod/avl/pdf/ha/drd/drd_ph_e.pdf (accessed 5 July 2013).

¹² Commission on Human Rights 'Report on the Twenty Fourth Session 5 February - 12 March 1968' Economic and Social Council, Official Records: Forty-Fourth Session E/4475 E/C.4/1972, Supplement No 4 United Nations available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1972 (accessed 5 July 2013).

¹³ African Charter on Human and Peoples' Rights available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 27 May 2013).

The notion of a hierarchy of rights was disavowed at the 1993 World Conference on Human Rights held in Vienna, Austria, when the interdependence, indivisibility, and mutual reinforcement of rights were reaffirmed.¹⁴

2.2.3 Debates on the right to development and its acceptance as a human right

Debates on the RtD began at the international level under the auspices of the United Nations when on 10 February 1975, at its thirty-first session, the Commission on Human Rights adopted resolution 2 (XXXI),¹⁵ by which it decided to place on its agenda, as a standing item with high priority, the 'Question of the realization of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems relating to human rights in developing countries'. Subsequently, during the Commission's thirty-third session in 1977, it took note of the opinion that the existence of a specific right to development could be deduced from the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and other United Nations instruments. On 21 February 1977, the Commission adopted resolution 4 (XXXIII) in which it recommended, *inter alia*, that the Economic and Social Council invite the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the other competent specialised agencies, to undertake a study on the subject of 'The international dimensions of the right to development as a human right in relation with other human rights, based on international co-operation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs', and to make this study available for consideration by the Commission on Human Rights at its thirty-fifth session.¹⁶

¹⁴ Declaration and Programme of Action of the World Conference on Human Rights available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (accessed 27 May 2013).

¹⁵ Commission on Human Rights 'Report on the Thirty-First Session 3 February - 7 March 1975' Economic and Social Council, Official Records: Fifty-Eighth Session Supplement 4 UN E/5635-E/CN.4/1179 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1179 (accessed 5 July 2013).

¹⁶ Commission on Human Rights 'Report on the Thirty-Third Session 7 February - 11 March 1977' Economic and Social Council, Official Records: Sixty-Second Session Supplement 6 UN

In this context, on 2 March 1979, the Commission adopted resolution 4 (XXXV) requesting a study of the regional and national dimensions of the right to development as a human right, paying particular attention to the obstacles encountered by developing countries in their efforts to secure the enjoyment of this right.¹⁷ The Commission also adopted resolution 5 (XXXV) recalling ‘that the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations’.¹⁸ In resolution 35/174 adopted on 15 December 1980 by the UNGA on the recommendation of its Third Committee, the Commission on Human Rights was requested to, *inter alia*, take the necessary measures to promote the right to development as a human right, which is as much a prerogative of nations as of individuals within nations, and to take action for its realisation. To this end, the General Assembly requested the holding in 1981 of a United Nations seminar on the relationship between human rights, peace, and development. Further, at its thirty-seventh session held in 1981, the Commission examined three core documents: a study on the regional and national dimensions of the right to development as a human right, paying particular attention to the obstacles encountered by developing countries in their efforts to secure the enjoyment of this right, prepared by the Secretary-General; the report of the seminar on the effects of the existing unjust international economic order on the economies of the developing countries, and the obstacle that this represents for the implementation of human rights and fundamental freedoms particularly the right to enjoy adequate standards of living as proclaimed in article 25 of the Universal Declaration of Human Rights; and, the report of the Secretary-General on the seminar on relationship between human rights and development.¹⁹

E/5927-E/CN.4/1257 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1257 (accessed 6 July 2013).

¹⁷ Commission on Human Rights ‘Report on the Thirty-Fifth Session 12 February - 16 March 1979’ Economic and Social Council, Official Records 1979 Supplement 6 UN E/1979/36-E/CN.4/1347 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1347 (accessed 6 July 2013).

¹⁸ See Resolution and Decisions of the Economic and Social Council, Organisational Session for 1979 and First Ordinary Session of 1979 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/1979/79 (accessed 6 July 2013).

¹⁹ Commission on Human Rights ‘Report by the Secretary-General on Seminar on relations that exist between human rights, peace and development’; Economic and Social Council, Thirty-seventh Session 2 February - 13 March 1981, Official Records Supplement 5, 1 December 1980, E/1981/25-E/CN.4/1475 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1475 (accessed 6 July 2013).

Pursuant to its resolution 36 (XXXVII), the Commission decided to establish a working group of fifteen governmental experts appointed by the Chairman of the Commission ensuring equitable geographic distribution, to study the scope and contents of the right to development and the most effective means to ensure the realisation, in all countries, of the economic, social, and cultural rights enshrined in various international instruments, paying particular attention to the obstacles encountered by developing countries in their efforts to secure the enjoyment of human rights.²⁰ The working group was requested to take particular note of the observations of governments and specialised organisations on this subject, especially the opinions expressed during one of the most animated debates on this issue²¹ – the report and three core documents mentioned above. To this end, the Commission requested the working group to submit a progress report with concrete proposals for implementation of the RtD, together with a draft international instrument on this right, to the Commission at its thirty-eighth session. The Working Group of Governmental Experts on the Right to Development held three consecutive sessions between 1981 and 1982. After lengthy debate, they agreed on drafting a declaration.²² Their conclusions were endorsed by the Commission at its thirty-eighth session through resolution 1982/17 of 9 March 1982.²³

2.2.4 The African perspective on the right to development: The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) was drafted in the late 1970s under the chair of Kéba Mbaye in the context of international controversies around the RtD. The African Charter was adopted in 1981

²⁰ *Ibid.*

²¹ Report of the Secretary-General 'Question of the Realization in all Countries of the Economic, Social and Cultural Rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights and Study of Special Problems which the Developing Countries face in their Efforts to achieve these Human Rights' 2 January 1979 Commission on Human Rights, Thirty-fifth session E/CN.4/1334 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1334 (accessed 6 July 2013).

²² Report of the first, second, and third sessions of the Working Group E/CN.4/1489 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1489 (accessed 6 July 2013).

²³ Commission on Human Rights 'Report on the Thirty-Eighth Session 1 February - 12 March 1982, Economic and Social Council, Official Records 1982 Supplement 2 UN E/1982/12-E/CN.4/1982/30 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1982/30 (accessed 6 July 2013).

as the first international human rights treaty to mention the RtD explicitly.²⁴ Emphasis on the RtD is justified in the preamble of the African Charter in the context of the indivisibility and mutual reinforcement of rights. The relevant paragraphs in the preamble state:

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

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.²⁵

In terms of article 22(2), '[S]tates shall have the duty, individually or collectively, to ensure the exercise of the right to development'. This provision does not give a clear definition of the RtD. It does, however, identify 'States' as the sole duty-bearers of the RtD and describes the process of 'ensuring the exercise of the RtD' as either individual, at the level of the state *vis-à-vis* its citizens and its peoples, or collectively, referring to African states. The lack of clear definition of the RtD in the African Charter has led the African Commission on Human and Peoples' Rights to adopt the definition provided by the UN Declaration in pronouncing itself on the substantive content of this right. This is further examined in Chapter 4 below.

2.2.5 On the way towards a compromise on a soft law

Generally, a rule must be authoritative and prescriptive to constitute law. Deriving from this principle is the distinction between 'hard law' – which refers to binding laws – and 'soft law' – which lacks this legal authority. In the present context, soft law refers to rules that are neither strictly binding in nature, nor completely lacking legal significance. They complement hard laws or provide greater detail to hard law. In the context of international law, soft law includes instruments such as guidelines, non-binding resolutions and declarations by the United Nations;

²⁴ See <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (accessed 31 August 2012).

²⁵ African Charter on Human and Peoples' Rights available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 27 May 2013).

declarations of principle; guidelines; standards; action plans; and rules. A soft law is not directly enforceable.²⁶

In 1982, the UN Commission on Human Rights reconvened the working group to draft the Declaration on the RtD. The working group was able to draft the preamble at its fourth session from 28 June to 9 July 1982. However, it could not complete work on the operative paragraphs at the fifth session held from 22 November to 3 December 1982.²⁷ The working group therefore recommended that work on the draft declaration should continue on the basis of all documents already submitted or to be submitted. It was eventually authorised by the General Assembly to continue its work.²⁸ After nine consecutive sessions, the working group was unable to complete the task assigned to it.²⁹ In 1985, therefore, it transmitted its report together with all drafts, documents, and proposals it had examined.³⁰ The Commission transmitted the working group's report to the General Assembly through the Economic and Social Council, with a view to enabling the Assembly to adopt a declaration on the right to development. In addition, the Commission decided to convene the working group for three weeks in January 1986 to study the measures necessary to promote the right to development. In 1986, during the forty-first session of the General Assembly, the Third Committee re-examined the draft declaration and entertained several proposed amendments.³¹ The Third Committee was able to complete its consideration of the draft declaration at the same session; and on 4 December 1986, the General Assembly adopted the final text of the Declaration as an annex to resolution 41/128 (Declaration on the Right to Development).³²

²⁶ See <http://definitions.uslegal.com/s/soft-law/> (accessed 27 May 2013).

²⁷ Report of the fourth and fifth sessions of the Working Group E/CN.4/1983/11 'Report of the Working Group of Governmental Experts on the Right to Development' Commission on Human Rights Thirty-ninth session 31 January - 11 March 1983 Economic and Social Council 9 December 1982 E/CN. 4/1983/11 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1983/11 (accessed 27 May 2013).

²⁸ See GA res 37/199 of 18 December 1982 available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/37/199 (accessed 27 May 2013).

²⁹ Report of the eighth and ninth sessions of the Working Group E/CN.4/1985/11 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1985/11 (accessed 27 May 2013).

³⁰ Commission on Human Rights 'Report of the forty-first session' E/CN.4/1985/66 available at http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1985/66 (accessed 27 May 2013).

³¹ Report of the Third Committee A/41/925 available at http://www.un.org/ga/search/view_doc.asp?symbol=A/41/925 (accessed 27 May 2013)

³² Resolution on the Right to Development available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/41/128 (accessed 27 May 2013).

The 1993 Vienna World Conference on Human Rights reaffirmed the RtD as a universal and inalienable human right in its 'Declaration and Programme of Action'.³³ After the Vienna Conference, the Commission on Human Rights established, for a three-year period, a fifteen-government Expert Working Group on the RtD tasked with identifying obstacles to the implementation and realisation of the RtD. On 22 April 1998, the UN Commission on Human Rights adopted by consensus a resolution on the RtD, recommending to the Economic and Social Council the establishment of a follow-up mechanism consisting of an open-ended working group (OEWG) and the appointment of an independent expert.³⁴ Dr Arjun Segunpta, an Indian economist was appointed independent expert.

The purpose of the OEWG was to monitor and review the progress of the independent expert and report back to the Commission on Human Rights. The independent expert was expected to present to the working group, at each of its sessions, a study on the current state of progress in the implementation of the RtD as a basis for a focussed discussion, taking into account, *inter alia*, the deliberations and suggestions of the OEWG.

In 2003, the Commission on Human Rights decided to request that its Sub-commission on the Promotion and Protection of Human Rights prepare a concept document establishing options for the implementation of the RtD and its feasibility, *inter alia* an international legal standard of a binding nature, guidelines on the

³³ [Par] 10. 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 right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.

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.

[Par] 11. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.' See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx> (accessed 20 May 2013).

³⁴ See United Nations Audiovisual Library of International Law available at http://untreaty.un.org/cod/avl/pdf/ha/drd/drd_ph_e.pdf (accessed 20 May 2013).

implementation of the RtD, and principles for developing partnerships, based on the Declaration on the Right to Development, including issues that any such instrument might address.³⁵ The Commission was referring to a treaty, but the fact that it did not use the term attests to the lack of consensus on such a move among proponents and opponents on elevating the realisation of the RtD to the level of a legally binding obligation. In 2007, resolution A/HRC/4/L14, was adopted on 30 March by the Human Rights Council. It reads in relevant part as follows:

... to agree on a programme of work that would lead to raising the RtD to the same level and on a par with all other human rights and fundamental freedoms enshrined in the core human rights instruments.³⁶

This resolution suggests that the RtD is not yet recognised as a fully-fledged human right, and that the Human Rights Council needs to work toward achieving this goal. At present, the discussions revolve around two main issues: reaching a narrower definition of the RtD and identifying indicators for its fulfilment.³⁷

2.2.6 Summary of main positions on the recognition of the right to development

This short account will end with a summary of the main positions expressed during discussions on the RtD. There are four main groups, although the membership of these groupings as well as positions within them, evolve over time and should therefore be understood here simply as illustrative of some of the key positions during most significant discussions on the RtD.

Group 1 comprises most active members of the 'Non-Aligned Movement' (NAM).³⁸ Group 2 comprises moderate developing countries willing to integrate the RtD in their national policies while continuing to engage donor countries, financial institutions, and development agencies. Group 3 comprises moderate developed countries, including the European Union, for whom the implementation of the RtD can serve as a channel for dialogue with developing countries. Group 4 comprises

³⁵ *Ibid.*

³⁶ See <http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=1244&LangID=E> (accessed 20 May 2013).

³⁷ Kirchmeier n 25 above 4.

‘developed countries’ strongly opposed to the acceptance of the RtD as a human right. This group includes the United States of America, Japan, Denmark, and Australia. Broadly, the main positions expressed can be summarised as follows:

The position of countries supporting the recognition of the RtD as a human rights, is summarised in the statement by the Ambassador of Ethiopia to the UN in Geneva on behalf of the Africa group as follows: summarises the position of the developing countries:

... [T]he repeated failure of the international community to fully observe their international co-operation obligations, including those commitments to which developed countries have agreed, is exacerbating the situation in many parts of Africa, and is hindering African countries’ efforts to achieve the MDGs, a reality widely recognized by the international community and confirmed by the Secretary-General of the United Nations. While the African group recognizes that globalization provides opportunities for growth and development, it reiterates that this can only be achieved under certain conditions. Most importantly, structural obstacles, especially in the multilateral trading system, have to be removed, or else they will continue to significantly undermine the efforts of the continent aimed at achieving its legitimate development aspirations.³⁹

In short for them:

- An unsustainable debt burden is a major obstacle for developing countries in achieving the MDGs and for the realisation of the RtD.
- Heavily indebted countries (HIPC) initiatives and other forms of debt relief should be genuinely additional to bilateral overseas development assistance (ODA) flows, and increasing net transfers to developing

³⁸ The Non-Aligned Movement is an organisation established in 1961 in Belgrade with the prime goal of thwarting the cold war between the western block countries led by the United States of America, and the eastern block countries led by the then Russian Federation. However, it survived the ‘cold war’ and currently consist of 120 member countries. Most active members on the RtD include Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan, and Vietnam. See <http://www.nam.gov.za/background/background.htm#1.1> History (accessed 11 February 2014).

³⁹ Excerpt from statement by Ambassador Fisseha Yimer, Ethiopia, on behalf of the African Group under agenda item 7 ‘The right to development’ at the 61st Session of the Commission on Human Rights, Geneva, 22 March 2005. (on file with the author). See the full report of the session at <http://www2.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf> (accessed 27 May 2013).

countries encompassing all types of external financial assistance should be considered.

- All states should recognise the importance of a successful and timely conclusion of the Doha round of trade negotiations in enabling developing countries to meet their development objectives, as well as the role of special and differential treatment.
- Trade negotiations should be transparent, inclusive, and more focussed on development.
- Market access for developing countries should be improved.⁴⁰

For their part, countries opposed to the recognition of the RtD argue the following:

- 1 Objections linked to economic interests – many, especially from developed countries, insist that the RtD should not be a means to resuscitate the New International Economic Order (NIEO).⁴¹ For the USA, for example, the Declaration on the RtD should not create any entitlement to a transfer of resources; aid is a matter of sovereign decision of the donor countries and cannot be subject to binding rules under the guise of advancing every human being's RtD.⁴²

⁴⁰ *Ibid.* See also records of resolutions adopted by the General Assembly at its fifty-sixth session GA Res 56/150, UN GAOR, 56th Sess, Supp No 49, at 341, UN Doc A/56/150 (2001). <http://www.un.org/News/Press/docs/2001/GA10001.doc.htm> (accessed 11 February 2014).

⁴¹ 'The New International Economic Order (NIEO) was a set of proposals put forward during the 1970s and adopted by the United Nations General Assembly in 1974 at the close the United Nations Conference on Trade and Development to promote their interests. In essence, the NIEO had four main outcomes:

- (1) Developing countries are entitled to regulate and control the activities of multinational corporations operating within their territory.
- (2) Developing countries are free to nationalise or expropriate foreign property on conditions favourable to them.
- (3) Developing countries are free to set up associations of primary commodity producers similar to the OPEC; all other States must recognise this right and refrain from taking economic, military, or political measures calculated to restrict it, and
- (4) International trade should be based on the need to ensure stable, equitable, and remunerative prices for raw materials, generalised non-reciprocal and non-discriminatory tariff preferences, as well as the transfer of technology to developing countries; and should provide economic and technical assistance without any strings attached.'

(End of quote) See Declaration on the Establishment of a New International Economic Order UN GA res A/RES/S-6/3201 <http://www.un-documents.net/s6r3201.htm> (accessed 24 May 2013).

⁴² Marks S 'The human right to development: between rhetoric and reality' (2004) 17 *Harvard HRJ* 143.

- 2 Ideological reasons – these countries argue that the American and Japanese experiences are built on self-reliant, entrepreneurial efforts to create a great country out of the wilderness. The following statement speaks of this position:

We have heard distinguished delegates ... speak of 'obscene profit'. Are we to understand that losses are virtuous? Where there are no profits, there can be only losses and stagnation. But these are the exact opposite of development. Development itself is a form of profit – a reasonable return on investment made, a reasonable growth, and a reasonable surge forward. We recognise that both profits and losses can be judged by a rule of reason ... on the whole, an economy without profit is an economy without development⁴³

Another strong ideological position suggests that the development of the United States of America or Japan, was not premised on 'a right to development' but on 'the responsibility for development'.⁴⁴ In other words, nations aspiring to development should take responsibility for it rather than striving to impose legally binding obligations on others.

- 3 Objections based on the relation between the RtD and economic, social, and cultural rights – these objectors do not share the belief that equal attention needs to be given to socio-economic and cultural rights stressed in the preamble and article 6 of the UN Declaration on the RtD. According to them, the realisation of economic, social, and cultural rights is 'progressive' and 'aspirational'. States, therefore, have no obligation to provide guarantees for the implementation of any purported RtD.
- 4 Conceptual objection – the RtD is still a vague concept with no internationally accepted definition. Commenting on the UN Declaration on the Right to Development, some argue that it is a synthesis of rights without any particular cement.⁴⁵
- 5 Jurisdictional objection – the objectors advanced the idea that the UN Human

⁴³ Excerpts from statement by Dr Michael Novak, US representative to the UN Human Rights Commission, CHR Res 36, UN ESCOR, 37th Session. Sup No 5 237 UN Doc E/CN.4/1475 (1981) (on file with the author).

⁴⁴ *Id* n 64.

⁶⁸ Marks above 148.

Rights Council does not have jurisdiction over matters of trade, international lending, and financial policy, the activities of transnational corporations, and other aspects of globalisation – issues arising under the RtD.⁴⁶

Without dwelling on the merits of arguments raised by the proponents and opponents of the RtD, a few observations can be made by way of concluding this introductory section. As shown above, there are two main schools of thought with regard to the acceptance of the RtD as a human rights. On the one hand, those promoting the RtD argue that this right bridges individual rights and liberties and collective rights. I share this view and will elaborate on my understanding of this right as a ‘composite’ right. For its proponents, the RtD appears to guarantee the enjoyment of individual rights by virtue of its participatory nature.⁴⁷ Further, the proponents of the RtD add that, if a specific state lacks the capacity to meet its obligations *vis-à-vis* its citizens, the international community must endeavour to close this gap.⁴⁸ For their part, those opposing the RtD object to the ‘dual’ nature of the RtD, as both a right within the state and a right between states. They fear that its global acceptance would be interpreted as a ‘right to development assistance’.⁴⁹ The express reference to the NIEO at the start of international discussions on the recognition of the RtD as one of the core factors to be taken into account, impacted on the perception that rendering the RtD legally binding, would imply making the development of some countries a legal obligation for others. Obviously, this narrow interpretation of the resolution on the RtD is bolstered by the position adopted by the NAM countries as summarised above, and can be resisted on this account. While issues such as the debt burden, fair trade, and sharing the benefits of technological advancement expressed in the 1974 NIEO, remain the subject of intense discussion and negotiation between ‘developed’ and ‘developing’ nations, two points are worth noting in the present context. First, the Outcome Document adopted at the close of the 2005 UNGA session elaborated on the ‘responsibility to protect’ which allows ‘powerful countries’, and the UN, to intervene including through military means, when

⁴⁶ *Id* 149.

⁴⁷ Kirchmeier n 25 above.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

a state is weak or unwilling to protect its citizens.⁵⁰ In recent times, this concept has been used to enable military interventions in Côte d'Ivoire, Libya, Syria, and Mali. It can therefore be argued that a similar spirit of solidarity and sense of duty should be extended to development, especially when a state is weak as a matter of 'collective' responsibility. Second, the RtD does not exonerate developing countries from their domestic obligations; it gives legitimacy to collective intervention in the event of a state's inability to meet these obligations. In my opinion, this approach is consistent with the dominant doctrine in contemporary international relations as manifested in several instances, such as the responsibility to protect discussed above, and the millennium development goals (MDG). The 8th MDG requires states collectively to undertake global partnerships for development⁵¹ and to develop a global partnership

⁵⁰ Paragraphs 138 and 139 of the 2005 World Summit Outcome Document elaborate on the responsibility to protect as follows: Paragraph 138 'Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability'. Paragraph 139 reads 'The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts breakout'. See [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf? Open Element](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement) (accessed 9 July 2013).

⁵¹ According to the UN Millennium Declaration, global partnership would be ensured by meeting 7 targets: (1) Develop further an open trading and financial system that is rule-based, predictable and non-discriminatory. Also included is a commitment to good governance, development, and poverty reduction – nationally and internationally. (2) Address the least developed countries' special needs. This includes tariff- and quota-free access for their exports; enhanced debt relief for heavily indebted poor countries; cancellation of official bilateral debt; and more generous official development assistance for countries committed to poverty reduction. (3) Address the special needs of landlocked and small-island developing states. (4) Deal comprehensively with developing countries' debt problems through national and international measures to make debt sustainable in the long term. (5) In cooperation with the developing countries, develop decent and productive work for the youth. (6) In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries. (7) In cooperation with the private sector, make available the benefits of new technologies-especially information and communications technologies. See <http://www.un.org/millenniumgoals/global.shtml> (accessed 27 January 2014).

for development. However, this also exposes the weakness of the argument in favour of the legally binding nature of the RtD: the responsibility to protect and the realisation of the MDGs are based on the free will of nations, not on legally binding obligations.

While failure to adopt a hard law instrument on the RtD attest to the level of controversy around this right, three observations are worth making. First, a soft law can evolve into a hard law instrument. Such is, in my opinion, the spirit of the evolution of debates around the RtD within the UN. As discussed above under the procedural history of the RtD, instructions given to experts, either as members of the working group or the open-ended working group, consistently pointed in this direction. Secondly, soft law can be a flexible instrument for the achievement of policy objectives by states or other actors, who would otherwise be less willing to take action if legally obliged to do so. Implementation of programmes and plans of action in the fight against malaria,⁵² and HIV and AIDS⁵³ – to mention but a few examples – illustrates this line of thinking. Here, the actions by states are not based on treaties *per se* but on declarations and resolutions. Thirdly, reference to soft law can be a practical way of ensuring the adoption of an important and time-bound policy when negotiations on a legally binding instrument have reached an impasse. For example in the context of the European Union, soft law is used to expedite the adoption of policy proposals, either when agreement cannot be reached on a ‘hard law’ instrument, or where the EU lacks competence to enact hard law measures. Implementation of policy proposals adopted through this process is left optional for those member states who do not wish to be bound. However, to limit the negative impact of such a method on the efficacy of measures adopted by the EU, a combination of hard and soft law instruments is used with regard to implementation of a given soft law measure.⁵⁴ These few examples show that implementation of the RtD may not necessarily require the prior adoption of a treaty.

⁵² The Global Malaria Action Plan, also known as ‘Roll Back Malaria’, is implemented by almost all countries without the existence of a legally binding instrument. The African Union, the Economic Community of West African States, and many other regional institutions in ‘malaria affected zones’ have comprehensive programmes in place. See <http://www.rollbackmalaria.org/gmap/index.html>. (accessed 10 January 2014)

⁵³ See <http://www.unaids.org> (accessed 15 January 2014).

⁵⁴ For example, the European Commission has made extensive use of ‘action programmes’ to promote equality between women and men in the workplace, based on a Council decision

However, to clarify the nature and substantive content of the RtD remains one of the main tasks facing the international community before it will be able to set up various mechanisms to actualise this right. I will attempt to contribute to this endeavour below.

2.3 The legal nature of the right to development

Article 1 of the UN Declaration on the Right to Development defines this right as:

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.⁵⁵

The RtD has three characteristics. It is first, a stand-alone right 'to participate in, contribute to, and enjoy economic, social, cultural and political development' which accrues to everyone. Secondly, it is a composite right of other internationally recognised rights, such as economic, civil, cultural, social and political. Thirdly, it represents a vector (participatory) right through which the development process can lead to the full realisation of all human rights and fundamental freedoms. I shall now turn to each of these three 'attributes'.

2.3.1 The right to development as a stand-alone right

As a stand-alone right, the RtD has holders who can claim it and duty-bearers who must fulfil and deliver the right.

2.3.1.1 Rights-holders

The question here is who can lay claim to the RtD. For Mbaye, the rights-holders are the individual, the group, and the 'developing' state. He argues that the

establishing a four-year programme on gender equality for 2001-2005 (Decision 2001/51 [2001]). The resulting European Employment Strategy is implemented through the mechanism of the 'open method of coordination' in which employment guidelines (soft law) are used in combination with article 148(2) TFEU (hard law).

⁵⁵ Declaration on the Right to Development UN GA resolution 41/128 available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 27 May 2013).

under-developed state has the right to claim 'development' from 'developed states' taken individually in bilateral relations; and from the 'international community' as a community of states. He premises his stance on the assertion that the 'social and economic development of people and nations is the responsibility of the state and the international community'.⁵⁶

Mbaye premised his argument of the state as holder of the right to development on ideological positions advanced by some states (in particular the Non-Aligned-Movement) during discussions on the New International Economic Order in the early seventies and subsequently during the early stages of the work of the UN Commission on Human Rights on the RtD. However, Mbaye's position was not followed – not even by the African Charter on Human and Peoples' Rights, the drafting of which Mbaye presided over. This position therefore does not warrant further consideration and is not contemplated in this study.

For his part, Sengupta commented that:

... even if 'people' or collectives of human persons are entitled to some rights such as full sovereignty over natural wealth and resources in terms of territory, it is the individual human person who must be the active participant in and beneficiary of this right.⁵⁷

I disagree with Sengupta's argument which tends to exclude 'people' from the category of holders of the RtD. In essence, while recognising that 'people' are entitled to some of the elements of the RtD, he fails to see how 'people' as a collective can participate in and benefit from the realisation of the RtD. He also tends to distinguish between the 'individual' and 'people'. In the African context, which may admittedly differ from that of Sengupta, there is no contradiction or conflict between the individual and the group he/she belongs to when it comes to the enjoyment of rights. The African concept of *ubuntu* conveys the notion that individual rights can and should be realised within the communal cohesion and not at the expense of the

⁵⁶ See Mbaye K 'Le droit au développement' (2008) article published in French on <http://ethiopiennes.refer.sn/spip.php?article736> (translated from the French by the author).

⁵⁷ Sengupta A 'Right to development as a Human Right' (2001) July 7 *Economic and Political Weekly* 2527.

group. *Ubuntu* is an African humanist concept that is shortened from the isiZulu proverb *Umuntu ngumuntu ngabantu* which literally means that ‘a person is a person because of other people’ or simply put ‘a person is through other people’. *Ubuntu* translates the notion that the African is a person that belongs to his/her community and is not defined outside of this reality. *Ubuntu* also implies that the life, welfare, and integrity of the group are conditioned by ‘active participation’, which is the respect and promotion of the rights of the individuals constituting it.⁵⁸ In the South African Constitutional Court decision of *S v Makwanyane*, Mokgoro J explains the concept of *ubuntu* as follows:

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one’s own. Respect for the dignity of every person is integral to this concept.

ubuntu ... calls for a balancing of the interest of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading of the individual.

In my view, life and dignity are like two sides of the same coin. The concept of *ubuntu* embodies them both.⁵⁹

This work adopts the definition offered in article 1 of the UN Declaration on the RtD cited above, which clearly recognises the ‘individual’ and ‘people’ as the holders of the RtD.

2.3.1.2 The duty-bearer of the right to development

The UN Declaration on the RtD identifies the ‘state’ and ‘states’ as bearers of the duty to realise the RtD. Here, the state is taken both individually as part of its territorial responsibility (to meet its human rights obligations), and collectively, in association with other states. From this angle, the RtD has the dual nature of being a

⁵⁸ See <http://www.saflii.org/za/cases/ZACC/1995/3.html> (15 January 2014).

⁵⁹ See *S v Makwanyane and Mchunu* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) paras 225, 250, 308 available at <http://www.saflii.org/za/cases/ZACC/1995/3.html> (accessed 7 July 2013).

right within and between states.⁶⁰ As seen above when discussing the origin and evolution of the RtD, controversy persists around the acceptance of the RtD as a binding obligation on states as a collective. There are specific obligations on the 'state' taken individually which are uncontroversial; and duties imposed on states collectively which the opponents of the RtD argue should remain purely voluntary, aspirational and not legally binding.

2.3.1.2.1 *The right to development as a right 'within a state': Duties of the state taken individually*

At the domestic/municipal level, the duties of the state include the obligation to respect, protect and fulfil. In accordance with the UN Declaration on the RtD, the state is required to meet three sets of obligation. It has a general obligation to create conditions favourable to the realisation of the RtD; and to take both positive and negative 'steps' to consolidate this right. First, pursuant to article 3(1), the state must create conditions favourable to the realisation of the RtD. The notion of 'favourable conditions' refers to both legislative and policy measures aimed at facilitating the enjoyment of the RtD. Second, article 4(1) imposes on the 'state' the duty to '*take [positive] steps to formulate policies with a view to facilitating the full realisation of the RtD*' [my emphasis]. While admitting that the realisation of the RtD is progressive in nature,⁶¹ the drafters of the UN Declaration made no compromise on the steps that must be taken towards its full realisation. There is, therefore, a distinction between the 'full realisation' of the RtD, which is progressive, meaning happens gradually, and the steps that must be concrete, feasible and measurable. Emphasis on 'steps to formulate policies' is reminiscent of article 2 of the CESCR which states that:

⁶⁰ Kirchmeier n 25 above.

⁶¹ The concept of 'progressive realisation' constitutes the recognition of the fact that full realisation of all economic, social, and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. See General Comment 3 para 9 at 16 available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En) (accessed 17 November 2013).

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 resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures[.]⁶²

and so also refers to the notion of the progressive realisation of rights.⁶³ With reference to article 2 of the CESCR, the UN Commission on Human Rights expounded on the notion of ‘steps’ in its ‘General Comment 2’ in the following terms:

Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.⁶⁴

Here the UN Declaration refers to ‘positive steps’ generally understood to include the adoption of legislative and policy measures to ensure the effective realisation of the RtD; and judicial remedies to render it justiciable.⁶⁵ Third, the UN Declaration requires the state to take measures to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights (article 6(3)). From this angle, the state’s obligation is premised on the indivisibility of rights and the RtD as composite in nature. This point is further expanded below.

2.3.1.2.2 *The right to development as a right ‘between states’: Duties of the states taken collectively*

Collectively, states have the twin duties to cooperate and to take steps. First, according to the UN Declaration on the RtD, states must collectively take steps to formulate development policies with a view to facilitating the full realisation of the

⁶² International Covenant on Economic, Social and Cultural Rights <http://www.un-documents.net/icescr.htm> (accessed 17 November 2013).

⁶³ General Comment 3 n 84 above

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

RtD,⁶⁶ and to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, and colonialism.⁶⁷ Secondly, the UN Declaration requires states to cooperate in ensuring development and eliminating obstacles to development (article 3(3)), including those resulting from failure to observe civil and political, as well as economic, social and cultural rights (article 6(3)).

In essence the UN Declaration imposing on the states – as a collective entity – obligations similar to those required at the domestic level. The rationale here is to ensure that failure by a particular state does not result in non-realisation of the RtD, and that other states may step in to fill the implementation gap.⁶⁸ A similar view has been developed by the UN Commission on Human Rights in interpreting provisions of the CESCR. The Commission elaborated on this notion in the following terms:

A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is ‘to take steps, individually and through international assistance and cooperation, especially economic and technical ...’. The Committee notes that the phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23.⁶⁹

The Committee notes that the phrase ‘to the maximum of its available resources’ was intended by the drafters of the Covenant to refer to both the resources existing within a state, and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realisation of the relevant rights, is further underlined by the specific provisions of articles 11, 15, 22 and 23. With respect to article 22, the Committee has already drawn attention, in general

⁶⁶ UN Declaration on the RtD (article 4(1)) available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 11 February 2014).

⁶⁷ *Id* articles 4(1) and 5, respectively.

⁶⁸ Kirchmeier n 25 above.

⁶⁹ United Nations Commission on Human Rights The nature of States parties obligations (Art 2, par 1): 12/14/1990. CESCR General comment 3 (General Comments) [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664) (accessed 11 February 2014).

comment No 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies ‘the furnishing of technical assistance’ together with other activities, as being among the means of ‘international action for the achievement of the rights recognized ...’ In general comment 3 the Committee further elaborated:

The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the committee also recalls the terms of its general comment No 2 (1990).⁷⁰

Finally, international cooperation should also be geared towards promoting, encouraging, and strengthening universal respect for and observance of all human rights and fundamental freedoms without any distinction as to race, sex, language, or religion (article 6(1)). This requirement is consistent with the principle of universality of rights enshrined in article 2 of the Universal Declaration of Human Rights (UDHR) which provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.⁷¹

⁷⁰ *Ibid.*

⁷¹ Universal Declaration of Human Rights available at <http://www.un.org/en/documents/udhr/> (accessed 28 May 2013).

2.3.2 The right to development as a composite right

The second dimension of the definition of the RtD as defined in the UN Declaration is its composite nature. The RtD comprises and blends together other stand-alone rights that are in general internationally recognised. These include:

- the right to self-determination
- full sovereignty over natural resources
- the right to freedom of association and to peaceful assembly recognised in several international and regional human rights instruments such as Universal Declaration of Human Rights (UDHR) (article 20);⁷² the International Covenant on Civil and Political Rights (CCPR) (article 21),⁷³ the European Convention on Human Rights (article 11);⁷⁴; the African Charter on Human and Peoples' Rights (ACHPR) (articles 10 and 11 respectively);⁷⁵ and the American Convention on Human Rights (article 15 and 16).⁷⁶
- freedom of expression enshrined in article 19 of the UDHR, article 19 of the CCPR and subsequently in all the other instruments cited above.
- the right not to be discriminated against on grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as enshrined in article 2 of the UDHR and common to almost all international and regional human rights treaties.
- the right to health provided in among others, international instruments – in article 25 of the UDHR; article 12 of the CESCPR; article 25 of the

⁷² *Ibid.*

⁷³ International Covenant on Civil and Political Rights available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (accessed 28 May 2013).

⁷⁴ European Convention on Human Rights available at <http://www.hri.org/docs/ECHR50.html> (accessed 28 May 2013).

⁷⁵ African Charter on Human and Peoples' Rights available at <http://www.achpr.org/instruments/achpr/> (accessed 28 May 2013).

⁷⁶ American Convention on Human Rights available at <http://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (accessed 28 May 2013).

International Covenant on the Rights of Persons with Disability (ICRPD);⁷⁷ and in article 16 of the regional ACHPR.

- the right to education provided by article 26 of the UDHR; article 14 of CESCR; article 24 of the ICRPD; and in article 17 of the regional ACHPR.
- the right to housing provided by article 25 of the UDHR; and article 11(1) of the CESCR. It is worth noting that the African Charter does not provide expressly for the right to housing. It also contains no mention to the right to food. However, in the case *SERAC v Nigeria* (2001), the African Commission on Human and Peoples' Rights ruled that the African Charter should be understood to include a right to housing and a right to food as 'implicit' in the Charter, particularly in light of its provisions on the right to life (article 4); right to health (article 16) and the right to development (article 22)⁷⁸
- The right to an adequate and healthy environment enshrined in instruments such as UDHR (article 25); CESCR (articles 11 and 12); article 14 of the Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW) (1979); articles 6 and 24 of the Convention on the Rights of the Child (CRC) (1989), article 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination (1965); and the regional ACHPR (article 24).
- The right to participate in public affairs, voting rights, and the right of equal access to public services pursuant to article 21 of UDHR; article 25 of CCPR; articles 7 and 8 of CEDAW; and article 29 of CRPD. The UN

⁷⁷ International Covenant on the Rights of Persons with Disability available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 28 May 2013).

⁷⁸ The African Commission ruled that '... Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated'. See <http://www1.chr.up.ac.za/index.php/browse-by-subject/410-nigeria-social-and-economic-rights-action-centre-serac-and-another-v-ni> at para 60 (accessed 28 May 2013).

Commission on Human Rights elaborates on the concept of 'participation' in its General Comment 25 in relation to the right to participate in public affairs, voting and the right of equal access to public services in accordance with provision of article 25 of CCPR.⁷⁹

Article 25 of CCPR reads

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 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.⁸⁰

In the opinion of the Commission, the right to participate in public life is at the 'at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant'. It therefore explains that the Covenant recognises and protect this right, and imposes on States the obligation to adopt legislative and policy measure to ensure that every citizens enjoys it regardless of 'the form of constitution or government is in force'. The Commission distinguishes the right to participate from the right to self-determination while acknowledging that they related. In its commentary, the Commission also underlines that this right is for every citizen and therefore encourage State to specify the conditions for citizenry.

Out of this list of rights constituting the substantive content of the RtD, two appear to be the most controversial in the context of the on-going discussion on the acceptance of the RtD as set out above, and will therefore be explored below: the right to self-determination, and the right to full sovereignty over natural resources.

⁷⁹ General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25): 07/12/1996. CCPR/C/21/Rev.1/Add.7, General Comment No 25 (General Comments) 1996. <http://www.unhchr.ch/tbs/doc.nsf/0/d0b7f023e8d6d9898025651e004bc0eb> (accessed 28 May 2013).

⁸⁰ International Covenant on Civil and Political Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed 28 May 2013).

2.3.2.1 *The right to self-determination*

As a key principle of international law, the right to self-determination finds its basis in article 1(2) of the Charter of the UN⁸¹ and article 1(1) common to both the CCPR and the CESCR.⁸²

The UN Human Rights Committee (the treaty-monitoring body established by CCPR) stresses that the right to self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights, and for the promotion and strengthening of those rights.⁸³

According to the Committee, the right to self-determination combines both internal and external dimensions. The internal dimension is understood as 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'. The Committee, however, added that this internal dimension of the right to self-determination comes with a duty placed on the government to 'represent the whole population without distinction as to race, colour, descent or national or ethnic origin'. The external dimension implies that all peoples have the right to determine freely their political status and their place in the international community based on the principle of equal rights and exemplified by the liberation of peoples from colonisation and by the prohibition to subject peoples to

⁸¹ Article 1(2) of the UN Charter states the purpose of the UN is, *inter alia*, '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'. See <http://www.un.org/en/documents/charter/index.shtml> (accessed 31 August 2012).

⁸² Joint article 1 reads as follows: '1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2 All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3 The States parties to the present covenant, including those having responsibility for the administration of non-self-governing and trust territories, 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'. See <http://www2.ohchr.org/english/law/cescr.htm> and <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 31 August 2012).

⁸³ Human Rights Committee General Comment 12 'The right to self-determination of peoples' (art 1) 03/13/1984; CCPR General Comment 12 (General Comments) 1984 available at <http://www.unhcr.ch/tbs/doc.nsf/0/f3c99406d528f37fc12563ed004960b4> (accessed 31 August 2012).

alien subjugation, domination, and exploitation.⁸⁴ In the context of the RtD the right to self-determination is closely linked to the right to permanent sovereignty over wealth and natural resources.

2.3.2.2 Full sovereignty over natural resources

In its preamble, the UN Declaration on the RtD reminds the reader that full sovereignty over natural resources is a right to which people are entitled subject to the relevant provisions of both the CCPR and the CESC. UNGA resolution 1803(XVII)⁸⁵ explains that the right of peoples and nations to permanent sovereignty over their wealth and natural resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned. Historically, the right to sovereignty over natural resources was championed by newly independent states as they joined the United Nations. In the 1950s, this issue was initially approached from two angles. First was within the context of financing and promoting the economic development of 'under-developed' countries by allowing them 'full access' to their own natural resources. To this end, the UNGA adopted resolutions 523(VI) and 626(VIII) on 12 January and 21 December 1952, respectively.⁸⁶ Secondly, in the 1960s, this right was explored for inclusion in the drafting of an international instrument that was intended as a single 'covenant on human rights' and which was eventually split into the CCPR and CESC, respectively.⁸⁷

The 'right to regain control over natural resources' was introduced as a third dimension in the early 1970s by the UNGA through resolution 3171(XXVIII) adopted on 17 December 1973.⁸⁸ Further, in 1974, the UN Declaration on the New

⁸⁴ UN Commission on Human Rights *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (2004) available at <http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f> (accessed 29 May 2013).

⁸⁵ UN GA resolution 1803(XVII) available at [http://www.un.org/ga/search/view_doc.asp?symbol=A/res/1803\(XVII\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/res/1803(XVII)) (accessed 29 May 2013).

⁸⁶ UN GA res 523(VI) and 626(VIII) available at <http://www.un.org/documents/ga/res/6/ares6.htm> (accessed 29 May 2013).

⁸⁷ UN GA res 421 D (V) of 4 December 1950 available at [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/421\(V\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/421(V)) (accessed 29 May 2013).

⁸⁸ UN GA res 3171(XXVIII) available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/282/43/IMG/NR028243.pdf?OpenElement> (accessed 29 May 2013).

International Economic Order reinforced this notion by stating that the right to permanent sovereignty includes, in case of violation, the right to 'restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples'.⁸⁹

The composite nature of the RtD which encompasses several rights, as well as principles (such as indivisibility, universalism, equality, and non-discrimination), led its critics to refer to it as a 'right to everything' and as vague and more appropriately subsumed under other rights.⁹⁰ I differ with such an understanding of this right. The fact that it integrates rights covered in other instruments should be read as a statement of their relevance and equal importance to the realisation of the concept of 'development' promoted in the UN Declaration. Reference to these rights is illustrative of the discourse on the indivisibility and mutual reinforcement of all human rights;⁹¹ a notion that has been consistently stressed in subsequent soft law legal instruments adopted under the auspices of the United Nations, such as the 1992 Rio Declaration on Environment and Development⁹² and the Declaration and Programme of Action of the 1993 World Conference on Human Rights.⁹³ The RtD cannot be subsumed in one of its constitutive rights, rather it cements them together to ensure that individuals and peoples participate in, contribute to, and enjoy the benefit of development. I refer to this 'unique' cementing function as 'participatory' and submit that the RtD is such a participatory right.

⁸⁹ Declaration on the Establishment of a New International Economic Order, paragraph f available at <http://www.un-documents.net/s6r3201.htm> (accessed 29 May 2013).

⁹⁰ Kirchmeier n 25 above.

⁹¹ In its preamble, the UN Declaration on the RtD underlines that the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent. In order to promote development, equal attention and urgent consideration should be given to the implementation, promotion, and protection of civil, political, economic, social, and cultural rights. Accordingly, the promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.

⁹² Rio Declaration on Environment and Development available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (accessed 30 May 2013).

⁹³ World Conference on Human Rights available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en) (accessed 30 May 2013).

2.3.3 The right to development as a participatory right

The third leg of the definition of the RtD as provided by article 1 of the UN Declaration on the RtD speaks of the right as one that enables individuals and people to ‘participate in’; to ‘contribute to’; and to ‘enjoy’ economic, social, cultural and political development. The aspect of ‘enjoyment of [a] right’ is premised on the understanding that individuals and peoples are holders of the RtD as elaborated above, and will not be revisited here. Emphasis is therefore placed on the concepts of ‘participation in’ and ‘contribution to’.

To ‘participate’ means to take part or become involved in something.⁹⁴ However, the question of ‘participation’ as a social process is complex to define. Less or more participation leaves room for subjective interpretation; and an answer to what it entails may vary from one case to another. There are no clear criteria for a social process such as participation. Quantitatively, one may attempt to rate the process by looking at the percentage of rights-holders consulted. Qualitatively, it is not sufficient to consult. The RtD requires ‘participation’, a notion that refers to a more active and informed involvement. For example, article 25 of the CCPR defines the notion of ‘participation’ in relation to the conduct of public affairs as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 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.⁹⁵

The notion of ‘participation’ is further explained by the UN Commission on Human Rights in its general comment 25 relating to article 25 of the CCPR cited

⁹⁴ *Oxford Wordpower Dictionary* 3 ed (2006) 521.

⁹⁵ International Covenant on Civil and Political Rights available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (accessed 31 August 2012).

above.⁹⁶ Generally, the UN human rights mechanisms use the term ‘participation’ as a process principle of good governance, in conjunction with a qualifying adjective such as ‘popular’ or ‘full’ referring to it as inclusive, non-discriminatory, accessible to and involving all. It is underscored in all major international and regional human rights instruments. The UNGA stressed that:

... the importance of the adoption of measures to ensure effective participation, as appropriate, of all the elements of society in the preparation and implementation of national economic and social development policies and of the mobilization of public opinion and the dissemination of relevant information in the support of the principles and objectives of social progress and development.⁹⁷

The UN Declaration guides on the nature of the ‘participation’ required for the RtD. It must have three cumulative attributes: It must be ‘active, free and meaningful’.⁹⁸

‘Active participation’ implies that those affected by development are also actors on the understanding that they will then be in a position to influence decisions and actions relating to both the process and the outcome of development. In other words, the holders of the RtD should participate actively in the formulation and implementation of policies that affect their well-being and share their knowledge and skills.⁹⁹

I understand ‘free’ participation as one that is facilitated by an enabling environment where the participant feels safe and willing to engage, is not undermined by obstacles such as coercion and discriminatory laws, or faced with incorrect guidance and misinformation. As such, ensuring ‘free participation’ in the RtD requires that state parties should not interfere with citizen’s rights to participate in elections, stand for elections, and compete for public service. This implies further

⁹⁶ General Comment 25 ‘The right to participate in public affairs, voting rights and the right of equal access to public service’ (article 25) 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No 25 available at <http://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf> (accessed 29 May 2013).

⁹⁷ See <http://www.un.org/documents/ga/res/37/a37r055.htm> (accessed 31 August 2012).

⁹⁸ Preamble to the UN Declaration on the RtD para 2 (accessed 29 May 2013).

⁹⁹ General Comment 6 ‘The social, economic and cultural rights of older persons’ available at [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf) (accessed 29 May 2013).

that the state should respect basic freedoms such as peaceful assembly, association, and expression. The state should take constitutional and legislative measures to establish citizenship in a non-discriminatory manner, and to promote political participation. The state should also take appropriate measures to ensure that third parties (individuals or groups) do not interfere with citizens' political rights; and promote political participation through activities such as the registration of voters and voter education, as well as permitting the exercise of the right to information including freedom to debate public affairs. The understanding of participation here is closely linked to the requirements laid down by the UN Commission on Human Rights in interpreting provisions of article 25 of CCPR relating to the right to participate in public affairs and the right to vote.¹⁰⁰

Finally, participation is deemed 'meaningful' if it enables the right-holders to contribute (their knowledge and skills) effectively to the development process and to enjoy its benefits.

In summary, the RtD is a participatory right which seeks to operationalise the indivisibility and interconnectivity of rights in the context of development. Article 6(2) of the Declaration on the RtD clearly states that all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of civil, political, economic, social, and cultural rights. Article 9 adds that 'all the aspects of the RtD are indivisible and interdependent and each of them should be considered in the context of the whole'. In order to realise the indivisibility and interdependence of rights, states are expected to take the concrete steps listed in articles 5 to 8. These steps include the elimination of flagrant violations of human rights (article 6); cooperation among states towards the universal respect for and observance of all human rights and fundamental freedoms (article 7); and ensuring the indivisibility and mutual reinforcement of rights (article 9).

¹⁰⁰ UN Commission on Human Rights n 105 above.

2.4 Content of the right to development

Human rights were, in the early stage of their definition, 'classified' under three categories: first generation rights (the traditional civil and political rights as recognised in the CCPR); second generation rights (the socio-economic rights recognised in the CESCRR); and the so-called 'contested rights of the third generation' or 'rights of solidarity' which include 'the right to development, the right to environment and the right to peace'.¹⁰¹ The African Charter on Human and Peoples' Rights does not make any distinction. Since the 1992 Rio Declaration on Environment and Development and the 1993 World Conference on Human Rights, however, the notion of a 'hierarchy of rights' has been disavowed and rights are today seen as interlinked and not to be separated into categories. The substantive content of the RtD is therefore examined with the inter-relatedness of rights in mind. The UN Declaration is the normative basis for the analysis. The discussion here aims at deepening the understanding of the notion of 'development' that the RtD seeks to address. Therefore, a review of various theories on the concept of 'development' is not addressed in this narrative.

2.4.1 What 'development' does the right to development address?

When the UNGA adopted the Declaration on the RtD in 1986, it did so on the understanding that the development it was referring to was:

a comprehensive economic, social 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 there-from.¹⁰²

From the outset, it is important to note that the UN Declaration does not refer to a concept such as the economic development of the state – which generally belongs to economics as a field of study; or to the stages of the development of the

¹⁰¹ Rosas A 'So-called rights of the third generation' in Eide *et al* *Economic, social and cultural rights: A textbook* (1995) 243.

¹⁰² UN Declaration on the RtD, preamble para 2 available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 2 September 2012).

human being – which encompasses physical, emotional, psychological, intellectual and social well-being of the individual and is often addressed in social sciences including psychology and sociology. Here the notion of ‘development’ implies a three-pillar *process* involving economic, social and political dimensions; and involves both individuals and peoples. In this context, I will borrow the understanding of ‘development’ advanced by the late Arjun Sengupta, formerly UN Special Rapporteur on the Right to Development. For him ‘development’ is ‘a comprehensive process, going beyond economics to cover the social, cultural and political fields and aiming at “constant improvement” meaning progressive and regular improvement of well-being’.¹⁰³ The process, Sengupta added, ‘must be genuinely participatory, with a fair and equitable distribution of benefits that result in the steady improvement of the well-being of all people’.¹⁰⁴ This definition has the merit of taking into account the social aspects of development as provided by the Human Development Index (HDI)¹⁰⁵ introduced by the United Nations Development Program in 1990; a period in the modern history of Africa which witnessed democratisation, the return to multi-partyism, and a rise in the number of NGOs. Okumu defined ‘development’ as the process of a country moving towards greater inclusion, health, opportunity, justice, freedom, fairness, forgiveness and cultural expression’.¹⁰⁶ Amartya Sen, Nobel prize-winning economist went further when he suggested that the development process involves:

... the removal of various types of ‘unfreedoms’ that leave people with little choice and little opportunity of exercising their reasoned agency.¹⁰⁷

¹⁰³ Sengupta *A Reflection on the right to development* (2006).

¹⁰⁴ *Ibid.*

¹⁰⁵ The Human Development Index (HDI) is a composite statistic of life expectancy (as an index of population health and longevity); education (knowledge and education), as measured by the adult literacy rate (with two-thirds weighting) and the combined primary, secondary, and tertiary gross enrolment ratio (with one-third weighting), and income indices (standard of living, as indicated by the natural logarithm of gross domestic product per capita at purchasing power parity) to rank countries into four tiers of human development. The underlining idea behind HDI is that the main criteria for assessing the development of a given country should be people and their capabilities, and not economic growth alone. HDI was created in 1990 by the Pakistani economist Mahbub ul Haq, refined by economist Amartya Sen in 1990 before being published by the United Nations Development Programme (UNDP) as part of its annual Development report. From 2010, HDI combined a long and healthy life with life expectancy at birth, education index which implies years of schooling and expected years of schooling and a decent standard of living measured by the gross national income (GNI) per capita (PPP).

¹⁰⁶ Okumu *W The African Renaissance: History, significance and strategy* (2002) 25.

¹⁰⁷ According to Sen, the removal of substantial ‘unfreedoms’ (civil, cultural, economic, social, and political) is constitutive of development. See Sen *A Development as freedom* (1999) (ii).

Sen based his definition on the fact that we live in a world of unprecedented opulence – of a kind that would have been hard to imagine a century or two ago – and yet we live in a world with remarkable deprivation, destitution, and oppression. There are many new problems as well as old ones, including the persistence of poverty and unfulfilled basic needs; famine and widespread hunger; violation of elementary political freedoms as well as basic liberties; extensive neglect of the interests and agency of women; and worsening threats to the environment and to the sustainability of our economic and social lives.¹⁰⁸ Many of these deprivations can be observed, in one form or another, in both rich and poor countries. Overcoming these problems, Sen argued, is a central part of the process of development.¹⁰⁹

From the perspective of the United Nations, the human rights-based approach to development cooperation is one of the ways in which these deprivations can be addressed. Since the early 2000s, all UN agencies and programmes, as well as many other international and regional actors, have striven to emphasise the rights-based approach in all their activities, including the realisation of the RtD. In his report to the General Assembly of the United Nations, then Secretary-General Kofi Annan argued in favour of adopting human rights as both a central goal, and part of the process of achieving the objectives of the UN. He stated:

We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.¹¹⁰

In essence, Annan stressed the indivisibility and mutual reinforcement of rights – two principles articulated by the RtD.

2.4.2 A human-rights based approach to development cooperation

In May 2003, the UN held an inter-agency meeting in New York which adopted a common understanding, ie, a single definition, of a human rights-based approach to development in the following terms:

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ See United Nations 'In larger freedom: Toward security, development and human rights for all' (2005) available at <http://www.un.org/largerfreedom/> (accessed 31 August 2012).

- 1 All programs of development cooperation, policies, and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
- 2 Human rights standards contained in, and the principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
- 3 Development cooperation contributes to the development of capacities of 'duty-bearers' to meet their obligations and/or 'rights-holders' to claim their rights.¹¹¹

The operationalisation of the human rights-based approach to development led the UN to issue further guidelines, working tools, and compilations of best practices from different policy manuals and training packages, to build the capacity of UN staff and agencies to apply this approach effectively in their day-to-day work.¹¹² Five key features emerged as principal-added values through the rights-based approach to development:

- 1 *Fulfilment of human rights as the ultimate goal.* In terms of this feature, genuine development policies and programs should be expressly linked to specific international, regional, and/or national human rights instruments. In essence, there is no trade-off between development and human rights. The intention here is not to turn development programs into legally binding human rights instruments. Neither is it to invite development experts to become human rights specialists. The idea is to use the body of human rights knowledge, norms, commentaries, and jurisprudence as reference points, benchmarks, and indicators for setting development priorities and measuring their impact. It is also important to underline that the collateral effect of the requirement of an express linkage to human rights, is to disallow development policies, projects, or activities that may violate human rights or lead to the violation of human rights such as the construction of factories and other economic infrastructure

¹¹¹ OHCHR *Frequently asked questions on the human rights based approach to development cooperation* (2006) 35.

¹¹² These materials are internal to the UN and known as the 'Common Learning Package on the Human Rights Based Approach'. The United Nations agencies established an online community of practice known as HURITALK, which allows for the sharing of materials related to the human rights-based approach. See www.huritalk.org (accessed 15 July 2012).

that lead to the forceful displacement of the inhabitants of a specific area, or the degradation of the environment.

- 2 *Accountability and provision of adequate remedies.* Accountability is facilitated by the development of adequate laws, policies, institutions, administrative proceedings and practices, and mechanisms of redress and accountability to deliver an entitlement and respond to denials and violations. Courts, administrative structures, and special commissions serve as a conduit for the promotion of accountability when they are strengthened and their independence and integrity are safeguarded.
- 3 *Enabling agency roles through empowerment as opposed to charity.* In the modern vocabulary of development, empowerment has emerged as a concept that, unlike the traditional charitable response, aims at giving people the power, capacity, capabilities, and accessibility necessary to change their own lives and influence their own destinies.
- 4 *Informed and meaningful participation.* As discussed above, from the perspective of the UN Declaration on the Right to Development, participation should be free, informed, and meaningful at all stages, from conception to evaluation, of a given development program.
- 5 *Non-discrimination and equity.* From the perspective of the RtD, these requirements aim at reviewing social constructs and correcting historical injustices. The objective is twofold. First, it enables the vulnerable segment of society, often populations affected by development-induced displacement, minorities, women, the aged, children, and persons with disabilities, to be included and to play their role as agents of development. Secondly, it makes individuals and groups beneficiaries of the output of collective efforts.

2.5 Enforcement and justiciability of the right to development

A right must be enforceable in order to translate it into reality for the right-holders, and be justiciable so that it can be remedied by a court of law or the appropriate judicial process if not enforced or if affected/impinged upon. The enforcement of the RtD relates to the obligations of the duty-bearer to respect, protect, and fulfil the right, including creating an enabling environment to facilitate the realisation of the right.

‘Justiciability’ is defined by the International Commission of Jurists as follows:

The term ‘justiciability’ refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognised rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duty ... An extended judicial protection of rights may include other forms of adjudication – such as litigation brought by non-victims on behalf of victims, or on behalf of the public interest, but the absence of any role for victims seriously hampers the idea that they are true right-holders.¹¹³

The justiciability of the RtD can be approached from both the enforcement and the violation angles. How can it be enforced, and when is it violated? The enforcement of a right requires a set of clear indicators against which the performance of the duty-bearer is assessed. The normative content of the RtD is the right to participate in a process of, and enjoy the proceeds of development that leads to the realisation of all human rights. Performance indicators can be drawn from two operative concepts: participation in development, and the enjoyment of the proceeds of development.

2.5.1 Measuring participation

Theoretically, the state is expected to realise the RtD by taking appropriate measures to ensure the participation of the rights-holders in development along the

¹¹³ International Commission of Jurists *Courts and the legal enforcement of economic, social and cultural rights: Comparative experiences of justiciability* (2008) 6.

lines promoted by the 'human rights-based approach to development'. *A contrario*, the failure of the state to ensure effective participation in development can be invoked as a violation of the RtD. Such was one of the arguments advanced by the Endorois communities to substantiate their claim of the violation of their right to development following their eviction from their ancestral land by the government of Kenya.¹¹⁴ This case will be analysed in greater detail in Chapter 4 below. More complex, is the matter of assessing the level of participation as being either satisfactory or below expectation. There are no clear criteria for effectively measuring a social process such as participation. Quantitatively, one may attempt to rate the process by looking at the percentage of rights-holders consulted. Qualitatively, it is not enough to consult. The RtD requires 'participation', a notion that refers to a more active and informed involvement. Besides, less or more participation is often a subjective question the answer to which will depend on the circumstances of the particular case.

2.5.2 Measuring the enjoyment of the proceeds of development

This requirement speaks to the concept of justice of which the notions of equality and equity are elements. The RtD imposes on the state the obligation to ensure that every individual and all people enjoy the outcome (proceeds) of development on an equal footing. In relation to socio-economic and cultural rights, the UN Human Rights Committee¹¹⁵ explained that the principal obligation of the result reflected in article 2(1), is to take steps 'with a view to achieving progressively the full realization of the rights recognized in the Covenant'. Owing to the fact that the RtD encompasses socio-economic and cultural rights alongside civil and political rights, it is my submission that this understanding of the progressive realisation of rights applies to the RtD. The UN Human Rights Committee further elaborated thus:

¹¹⁴ See Communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya* available at <http://caselaw.ihrrda.org/doc/276.03/> (accessed 9 July 2013).

¹¹⁵ General Comment No 3: 'The nature of States' parties' obligation' (article 2, para 1, of the Covenant [on Economic, Social and Cultural Rights]) in *United Nations Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*. HRI/GEN/1/Rev.8 of 8 May 2006 See [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (accessed 9 July 2013).

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.

The Committee, however, cautions against a misinterpretation of the concept of 'progressive realisation of rights' by arguing that:

It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.¹¹⁶

Article 2(1) mentions the means by which the 'obligation to take steps' is to be satisfied: by 'all appropriate means, including particularly the adoption of legislative measures'. The emphasis on legislative measures as one of the key means, makes the realisation of this obligation by the state realistic since the law will place an obligation on various actors, including companies, involved in such matters as extractive industries and tourism, and regulate behaviour in society with a view to ensuring the respect, protection, and fulfilment of the RtD.

The Committee went further, indicating in paragraphs 13 and 14 of its general comment No 3 that the obligation of the state to 'take appropriate steps' should be approached both individually and through international assistance and cooperation, and 'to the maximum of its available resources'. The notion of 'maximum available resources' was, according to the Committee, 'intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance'.¹¹⁷ The Committee stressed international solidarity as the legal and moral basis for the

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

realisation of economic, social, and cultural rights. However, as shown above, the extension of 'international cooperation and assistance' to the RtD is unlikely to prosper until an agreement is reached internationally on its content and scope.

In the context of the RtD, 'development' is seen as a process in which states will take all appropriate measures to ensure the progress and full realisation of all human rights through the use of the maximum available resources within individual states, and through international cooperation. The RtD introduces a concept of development that seeks the fulfilment of rights in their totality and not in a compartmentalised fashion. What is to be measured, therefore, are

Whether the steps taken are appropriate to the full realisation of all rights. There must be a correlation between the claim and the duty in terms of rights on the one hand, and the efforts made by the duty-bearer to ensure the duty has met the claim on the other hand.

Whether the resources allocated are the maximum available, primarily within the individual state, and secondly through the international community of states on the basis of international cooperation and assistance.

It follows that, from the perspective of this work, the RtD is an enforceable right of progressive realisation similar to the rights enshrined in the CDESCR. For this reason, the Human Rights Council¹¹⁸ resolved to work towards 'raising the RtD to the same level and on a par with all other human rights and fundamental freedoms enshrined in the core human rights instruments'.¹¹⁹ In the African context, the justiciability of this right is not questioned, and this reality will be elaborated on in Chapter 4 below.

¹¹⁸ The Human Rights Council replaced the UN Human Rights Commission, which was abolished in 2006. The Human Rights Council came into being through UN GA res 60/251 of 15 March 2006. It comprises 47 UN member states elected by the UN GA.

¹¹⁹ Resolution 9/3 adopted by the Human Rights Council on the right to development (30 March 2007) reads as follows: '... Decides: (a) To continue to act to ensure that its agenda promotes and advances sustainable development and the achievements of the Millennium Development Goals and, in this regard, to lead to raising the right to development, as set out in paragraphs 5 and 10 of the Vienna Declaration and Programme of Action, to the same level and on a par with all other human rights and fundamental freedoms'. See http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_9_3.pdf (accessed 2 September 2012).

2.6 Conclusion

As shown in this chapter, discussions on the legal content and scope of the RtD are far from over. In this context, by focussing on the role human rights NGOs can play in its pursuit, this study aims at contributing elements in support of its universal recognition and acceptance. Throughout this work, the RtD will be understood as having the following features: a stand-alone, composite and participatory right. The substantive content of this right is a concept of 'development' explained in the UN Declaration on the RtD as:

a comprehensive economic, social 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 there from.¹²⁰

The realisation of the RtD can be achieved using the UN-adopted human rights- based approach to development cooperation. Having established the normative basis of the RtD, in Chapters 3 and 4, I turn to the second leg of this study: human rights NGOs as I look at their intended role and function in a democratic country, and in the context of comparative law, respectively.

¹²⁰ UN Declaration on the RtD, preamble, para 2. See <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed 2 September 2012).

CHAPTER 3

AFRICAN AND WEST AFRICAN MECHANISMS FOR THE ENFORCEMENT OF THE RIGHT TO DEVELOPMENT AND THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS

3.1 Introduction

The African system for the promotion and protection of human rights includes several instruments which reflect specific African values such as the concept of *ubuntu* (discussed in Chapter 2 above); emphasis on socio-economic and cultural rights; individual duties alongside rights; as well as group rights. The African Charter on Human and Peoples' Rights (African Charter)¹ also known as the Banjul Charter, is the primary instrument around which the African regional system has evolved over the years. The African Charter is also the first regional and legally binding instrument to recognise the RtD. At the time of writing, the African Charter has been supplemented by a variety of legal instruments, amongst others the African Charter on the Rights and Welfare of the Child;² the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights;³ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁴ The African Charter is unique in the international law context in that it affirms the indivisibility of rights;⁵ and renders economic, social and cultural rights justiciable (articles 15 to 24). The African Charter allows no derogation, although it does contain

¹ The African Charter on Human and Peoples' Rights was adopted on 1 June 1981 and entered into force on 21 October 1986.

² The African Charter on the Rights and Welfare of the Child was adopted on 1 July 1990 and entered into force on 29 November 1999. See <http://au.int/en/content/african-charter-rights-and-welfare-child> (accessed 27 September 2013).

³ The Protocol on the Establishment of an African Court on Human and Peoples' Rights was adopted on 10 June 1998 and entered into force on 25 January 2004. See <http://au.int/en/content/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-people> (accessed 27 September 2013).

⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted on 11 July 2003 and came into force on 25 November 2005. See <http://au.int/en/content/protocol-african-charter-human-and-peoples-rights-rights-women-africa> (accessed 27 September 2013).

⁵ From its preamble, the African Charter enunciates the principle of the indivisibility of rights and sets the premises upon which rights are to be understood as follows:

'... [C]onvinced that it is henceforth essential to pay a 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 ...'.

a number of 'claw-back' clauses which permit states to suspend several fundamental rights in their municipal law. It needs to be noted that a claw-back clause is not identical to a limitation clause. The claw-back clause relates to an internal limitation within a right while a limitation clause sets the external boundaries of the right. As commented by Rautenbach, the claw-back clause 'neutralises the protection that the constitutional definition of the right is supposed to provide'.⁶ Indeed, the enjoyment of certain civil and political rights is limited by terms such as 'except for reasons and conditions previously laid down by law',⁷ 'subject to law and order',⁸ or 'within the law'⁹ which empty these rights of their substance. The African Charter further recognises the RtD (article 22) and imposes duties on individuals (articles 27 to 29).¹⁰

The relevance of this chapter to the present study lies in the central role played by human rights NGOs in the work of the mechanisms established to promote and protect human rights in Africa. The majority of the cases used to illustrate the enforcement of the RtD, decided by the African Commission, the African Court on Human and Peoples' Rights, and by the Court of the Economic Community of West African States, were initiated by NGOs acting on behalf of alleged victims of human rights violations. The importance of the role played by NGOs will emerge in the next chapter when the dawn of the NGO movement and its development, nature and functions are examined specifically from the perspective of the realisation of the RtD.

The chapter begins with a brief historical overview of the African human rights system. The genesis and an examination of the socio-political factors which triggered the establishment of the African human rights system are highlighted to provide a contextual background to its original deficiencies and subsequent evolution. This is followed by a review of the mandate and the enforceability of the decisions of the African Commission on Human and Peoples' Rights. On reviewing the work of the

⁶ Rautenbach IM *Introduction to the bill of rights: trade, occupation and profession* (May 2008) 1A70.3. <http://0-beta.mylexisnexis.co.za.oasis.unisa.ac.za/Index.aspx> (accessed through Unisa Library 11 February 2014).

⁷ African Charter article 6 (Right to liberty and security).

⁸ *Id* article 8 (Freedom of conscience and religion).

⁹ *Id* article 9 (Freedom of expression).

¹⁰ See also 'Celebrating the African Charter at 30: A guide to the African human rights system' 8-11 available at http://www.pulp.up.ac.za/pdf/2011_13/2011_13.pdf (accessed 27 September 2013).

African Commission, a detailed discussion of the *Endorois* case is presented as the main occasion on which the Commission made far-reaching pronouncements on the RtD. This chapter also examines the jurisprudence of the African Court on Human and Peoples' Rights relating to the RtD. Finally, a brief outline of the decisions of the Court of Economic Community for West African States is provided as this body affords ideal opportunities to Ivorian NGOs for human rights litigation.

3.2 Historical background to the African human rights system: An overview

3.2.1 The 'Lagos Law'

Equipping Africa with mechanisms for the promotion and enforcement of human rights was a project championed by African lawyers and NGOs soon after the wave of independence of most of the African countries from colonial domination in the mid-fifties and mid-seventies.¹¹ It was a logical consequence of socio-political events on the continent, that after hard-won political liberation, newly independent countries aspired to build their nations on core values such as respect for human rights and human dignity. For example, the Charter of the Organisation of African Unity states in its preamble that:

¹¹ About 70% to 80% of the African, gained independence between 1958 and 1970. The chronology of independence of African countries runs as follows: Liberia (26 July 1874), Libya (24 December 1951), Egypt (independent from the United Kingdom on 28 February 1922, then declared sovereign state on 18 June 1953), Sudan (1 January 1956), Tunisia (20 March 1956), Morocco (7 April 1956), Ghana (6 March 1957), Guinea (2 October 1958), Cameroon (1 January 1960), Senegal (4 April 1960), Togo (27 April 1960), Madagascar (26 June 1960), Democratic Republic of Congo (30 June 1960), Somalia (1 July 1960), Benin (1 August 1960), Niger (3 August 1960), Burkina Faso (5 August 1960), Côte d'Ivoire (7 August 1960), Chad (11 August 1960), Central African Republic (13 August 1960), Congo (15 August 1960), Gabon (17 August 1960), Mali (22 September 1960), Nigeria (1 October 1960), Mauritania (28 November 1960), Sierra Leone (27 April 1961), Tanzania (9 December 1961), Rwanda (1 July 1962), Burundi (1 July 1962), Algeria (5 July 1962), Uganda (9 October 1962), Kenya (12 December 1963), Malawi (6 July 1964), Zambia (24 October 1964), The Gambia (18 February 1965), Botswana (30 September 1966), Lesotho (4 October 1966), Mauritius (12 March 1968), Swaziland (6 September 1968), Equatorial Guinea (12 October 1968), Guinea-Bissau (24 September 1973), Mozambique (25 June 1975), Cape Verde (5 July 1975), Comoros (6 July 1975), Sao Tome y Principe (12 July 1975), Angola (11 November 1975), Sahrawi Arab Democratic Republic (27 February 1976), Seychelles (29 June 1976), Djibouti (27 June 1977), Zimbabwe (18 April 1980), Namibia (21 March 1990), Eritrea (24 May 1993), South Africa (31 May 1910 independence from the United Kingdom and 27 April 1994 – end of the apartheid regime), and South Sudan (9 July 2011).

We, the Heads of African States and Governments assembled in the City of Addis, Ababa, Ethiopia ...

... Conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples ...

... Persuaded that the Charter of the United Nations and the Universal Declaration of Human Rights, to the Principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive cooperation among States, ...¹²

The idea of having an African regional mechanism for the protection of human rights originated from the 1961 African Conference on the Rule of Law which adopted a declaration referred to as the 'Law of Lagos'. One of the key recommendations in the Law of Lagos was:

In order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.¹³

In essence, the African lawyers and NGOs gathered at the Lagos Conference, called for a court on human rights, accessible to individuals as a guarantee for the effective promotion and protection of human rights as enshrined in the Universal Declaration of Human Rights (UDHR). It should be noted here that the sole reference to the UDHR is justified by the fact that it was, at that time, the only reference available in international human rights law. In 1967, the first conference of Francophone lawyers recalled the Lagos Conference and called for the creation of a regional mechanism for the protection of human rights.¹⁴ Nearly a decade after the

¹² OAU Charter available at http://au.int/en/sites/default/files/OAU_Charter_1963.pdf (accessed 12 October 2013).

¹³ The first African conference on the rule of law was convened by the International Commission of Jurists in Lagos, Nigeria from 3-7 January 1961 and adopted a declaration known as 'The Law of Lagos'. See http://www.globalwebpost.com/genocide1971/h_rights/rol/10_guide.htm#lagos (accessed 8 October 2013).

¹⁴ The first Congress of French-speaking African Jurists was jointly organised in Dakar, Senegal from 5-9 January 1967 by *Association Sénégalaise d'études et de recherche juridiques* ('The Senegalese Association for Legal Studies and Research) and the International Commission of Jurists'. See MacDermot Niall *Mémoire sur les conclusions des conférences de la commission internationale de juriste à Lagos (1961), Dakar (1967) et autres régions présenté à*

'independence euphoria', a period of deception set in in parts of the continent with the consolidation of one-party systems,¹⁵ the rise of *coups d'état*, and military dictatorships.¹⁶ In southern Africa the struggle for political liberation was on-going in

la conférence des juristes africain sur le thème 'African Legal Process and the individual', Addis-Ababa (Ethiopia) 18 to 23 April 1971, Document CIJ S-2895 (b) 1.

¹⁵ Almost every newly independent African state experienced a one-party-system during this period. The following is a compilation drawn from web-based literature on the history of the various countries: Algeria (National Liberation Front) 1962-1989; Angola (MPLA) 1975-1991; Benin (People's Revolutionary Party of Benin) 1975-1990; Burkina Faso (African Democratic Rally) 1960-1966; Burundi (Union for National Progress) 1966-1992; Cameroon (Cameroon National Union) 1966-1985, (Cameroon People's Democratic Movement) 1985-1990; Cape Verde (African Party for the Independence of Guinea and Cape Verde) 1975-1981, (African Party for the Independence of Cape Verde) 1981-1990; Central African Republic (Movement for the Social Evolution of Black Africa) 1962-1980, (Central African Democratic Union) 1980-1981, (Central African Democratic Rally) 1987-1991; Chad (Chadian Progressive Party) 1962-1973, (National Movement for the Cultural and Social Revolution) 1973-1975, (National Union for Independence and Revolution) 1984-1990; Comoros (Comorian Union for Progress) 1982-1990; Congo-Brazzaville (Congolese Party of Labour) 1969-1990; Congo-Kinshasa (Popular Movement of the Revolution) 1970-1990; Djibouti (People's Rally for Progress) 1977-1992; Egypt (National Union) 1956-1958 and 1961-1962, (Arab Socialist Union) 1962-1976; Equatorial Guinea (Worker's National United Party) 1970-1979, (Democratic Party of Equatorial Guinea) 1987-1991; Ethiopia (Workers' Party of Ethiopia) 1984-1991; Gabon (Gabonese Democratic Party) 1968-1990; Ghana (Convention People's Party) 1964-1966; Guinea (Democratic Party of Guinea – African Democratic Rally) 1958-1984; Guinea-Bissau (African Party for the Independence of Guinea and Cape Verde) 1974-1991; Côte d'Ivoire (Democratic Party of Côte d'Ivoire – African Democratic Rally) 1960-1990; Kenya (Kenya African National Union) 1982-1991; Liberia (True Whig Party) 1878-1980; Madagascar (National Front for the Defence of the Revolution) 1976-1989; Libya (Arab Socialist Union) 1971-1977; Malawi (Malawi Congress Party) 1964-1993; Mali (Sudanese Union – African Democratic Rally) 1960-1968, (Democratic Union of the Malian People) 1976-1991; Mauritania (Mauritanian People's Party) 1961-1978; Mozambique (FRELIMO) 1975-1990; Niger (Nigerien Progressive Party – African Democratic Rally) 1960-1974, (National Movement for the Development of Society) 1989-1991; Rwanda (Parmehutu) 1965-1973, (National Republican Movement for Democracy and Development) 1975-1991; São Tomé and Príncipe (Movement for the Liberation of São Tomé and Príncipe/Social Democratic Party) 1975-1990; Senegal (Socialist Party of Senegal) 1966-1974; Seychelles (Seychelles People's Progressive Front) 1977-1991; Sierra Leone (All People's Congress) 1978-1991; Somalia (Somali Revolutionary Socialist Party) 1976-1991; Sudan (Sudanese Socialist Union) 1971-1985, (National Congress Party) 1989-2005; Tanzania (Chama cha Mapinduzi) 1977-1992; Tanganyika (Tanganyika African National Union) 1961-1977; Togo (Party of Togolese Unity) 1962-1963, (Rally of the Togolese People) 1969-1991; Uganda (Uganda People's Congress) 1969-1971; Zambia (United National Independence Party) 1972-1990; Zanzibar (Afro-Shirazi Party) 1964-1977.

¹⁶ *Coups d'état* occurred in the following countries: Algeria (1972, 1965 and 1992); Benin (1963, 1965, 1967 and 1972); Burkina Faso (1966, 1980, 1982, 1983 and 1987); Burundi (1966 (twice), 1976, 1987 and 1996); Central African Republic (1966, 1979, 1981, 2003 and 2013); Chad (1975, 1982 and 1990); Côte d'Ivoire (1999); Comoros (1975, 1978, 1989, 1995 and 1999); Republic of Congo (1963, 1968, 1979 and 1997); Democratic Republic of Congo (1960, 1965 and 1997); Egypt (1952 and 2013); Equatorial Guinea (1979); Ethiopia (1910, 1916, 1974 (twice), 1977 and 1991); The Gambia (1994); Ghana (1966, 1972, 1978, 1979 and 1981); Guinea (1984 and 2008); Guinea-Bissau (1980, 1999, 2003, 2012); Lesotho (1986, 1990 and 1991); Liberia (1980 and 1990); Libya (1969); Madagascar (1972, 1975 and 2009); Mali (1968, 1991 and 2012); Mauritania (1978, 1979, 1980, 1984, 2005 and 2008); Niger (1974, 1996, 1999 and 2010); Nigeria (1966 (twice), 1975, 1983, 1985 and 1993); Rwanda (1973 and 1994); São Tomé and Príncipe (1995 and 2003); Seychelles (1977); Sierra Leone (1967, 1968, 1992, 1996, 1997 and 1998); Somalia (1969 and 1991); Sudan (1958, 1969, 1985 and 1989); Togo (1963 and 1967); Tunisia (1957, 1987 and 2011); and Uganda (1966, 1971, 1979, 1980, 1985

countries such as the then Southern Rhodesia (now Zimbabwe) and South Africa where apartheid was still the guiding policy.¹⁷ In this political climate, it was inconceivable that African states would agree on a legally binding human rights treaty, especially on a court which could deliver decisions by which they would be legally bound.

3.2.2 Impact of the 'cold war' on human rights in Africa¹⁸

The proliferation of one-party systems and military dictatorships in Africa was also facilitated by the 'cold war' during which the Russian Communist party leadership in the then Soviet Union, served as a model for the African one-party system.¹⁹ Naturally, the changing global political context inaugurated by the 'reconstruction/restructuring' program known as the *Perestroika*, and the period of transparency referred to as *Glasnost*, undertaken between 1981 and 1991 by the Russian Communist party under the leadership of Mikhail Gorbachev,²⁰ largely contributed to the change in attitude amongst African leaders with regard to democracy and human rights. *Perestroika* and *Glasnost* were necessitated internally in the Soviet Union, as over-centralisation of the Russian economy had become an impediment to the development of the private sector, to entrepreneurship, and to economic growth. In addition, the Russian Federation had to face economic competition not only from the United States of America; but also from Japan, the

and 1986). See coup d'états in Africa 1946-2004 <http://www.systemicpeace.org/africa/ACPPAnnex2b.pdf> (accessed 18 November 2013).

¹⁷ Zimbabwe became independent from Great Britain in April 1980. In South Africa, the apartheid regime was enforced by the National Party (ruling party) from 1948 to 1994. The apartheid regime ended in 1994 with the introduction of the new democratic order.

¹⁸ The term 'cold war' is generally used in reference to the tense relationship between the United States of America and the Soviet Union which set in soon after they won World War II as allies. The cold war lasted from 1945 to 1980. As such there was never open confrontation between the two super-powers. Instead, they battled it out (based on their respective ideologies/belief systems) using 'satellite states' who sometimes went into open confrontation for their respective beliefs on their behalf. Such was the case between South Korea (an anti-communist country supported by the USA) and North Korea (a pro-Communist country supported by Russia). This confrontation culminated in the Korean War waged in the early 1950s. In Afghanistan, the Americans supplied the rebel Afghans with weapons after the Soviet Union invaded the country in 1979, while they never physically involved themselves in the confrontation thus avoiding a direct clash with the Soviet Union. See 'The Cold War' available at <http://www.history.com/topics/cold-war> (accessed 14 October 2013).

¹⁹ Mbaye Kéba *Les droits de l'Homme en Afrique* (1992) 8.

²⁰ Gorbachev Mikhail *Perestroika: New thinking for our country and the world* (1987). See <http://college.cengage.com/history/west/resources/students/primary/perestroika.htm> (accessed 14 October 2013).

then West Germany, and China. The reforms began with the revision of the Russian Constitution in 1977, in particular through the creation of the position of President and the institution of multi-party elections. Four years later, Mikhail Gorbachev's ten-year reform programme was articulated around the following issues: land redistribution to farmers through fifty-year leases; granting of permission for individuals to set up their own businesses; liberalisation of state companies; the reduction of the dominant position occupied by the Communist party by allowing the formation and functioning of other political parties; and the adoption of a new press law in a bid to promote transparency (*Glasnost*).²¹ Whether these reforms had the expected impact in Russia is beyond the scope of this study. Suffice to observe that these reforms contributed to the creation of an enabling environment for the democratisation process and enhancement of human rights protection on the African continent. It became particularly difficult for African leaders to continue leaning on the Russian one-party-system to reject multiparty democracy. Internally, the combined effects of severe economic recession, drought and unequal trade opened the way for social uprisings and calls from NGOs for democracy and human rights reform in many parts of Africa.

3.2.3 The post-cold war era and the adoption of the African Charter on Human and Peoples' Rights

Discussions on the adoption of an African mechanism for the promotion and protection of human rights which had been dragging since the early sixties, accelerated with the support of the United Nations. The African Charter on Human and Peoples' Rights saw the light of the day against this background in 1981. Two of its distinctive (some will say, 'unique') features are that the Charter expresses the African concept of human rights by placing individual rights in the context of group's rights (articles 18 to 24); and articulates the quest for social cohesion and harmony between the individual and the group by introducing the notion of duties of the individual *vis-à-vis* other individuals, the family, and the group at large (articles 27 to 29). The African concept of human rights is better expressed by the concept of *ubuntu* discussed in Chapter 2 above. The African Charter is also distinctive in that it

²¹ *Ibid.*

brings together in a single legally binding document, the recognition of the traditional civil, and political rights as well as cultural, economic, and social rights, in addition to environmental and developmental rights, thus setting an example of the complementarity and mutual reinforcement of rights – a notion that only gained global recognition years later in the 1993 Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights held in Vienna, Austria, from 14-15 June 1993.²²

The African Charter creates a single enforcement mechanism, the African Commission on Human and Peoples' Rights. To the disappointment of the promoters of the Lagos Law, the African Charter failed to establish a court. Kéba Mbaye, one of the drafters of the first proposal of the Charter, explained that the absence of a court in the final draft was based on two considerations: First, that the experts commissioned to draft the African Charter were instructed, especially by African leaders such as Leopold Sedar Senghor, then President of Senegal,²³ to reflect the conciliatory nature of the African conflict resolution system in terms of which referral to a court is the exception rather than the rule. Secondly, Mbaye argued that the idea of a court was promoted against the background of the struggle against the apartheid regime in South Africa. Its proponents wanted to use the court to forestall or punish the human rights violations occurring under the apartheid regime as an additional tool in their struggle to dismantle racial discrimination. But the idea of the court did not win universal support among African leaders at that time because some of them were in favour of dialogue (and cooperation) with the South African apartheid regime, while others were strongly opposed to such dialogue.²⁴ I fully

²² Adopted on 23 June 1993 UN Document A/Conf 157/23 (1993).

²³ Mbaye Kéba *Les droits de l'Homme en Afrique* (1992) 149.

²⁴ It is generally argued that President Felix Houphouët-Boigny of Côte d'Ivoire was among the strongest proponents of the 'dialogue' with the apartheid regime of South Africa in the mid-seventies. He was reportedly supported by Francophone African leaders such as Jean-Bedel Bokassa of the Central African Republic, Omar Bongo of Gabon, and Philibert Tsiranana of Madagascar. Critics link this to the fact that France was a strong supporter of the apartheid regime and a key economic partner (while the United Nations imposed sanctions against this regime). See, for example, *'la France était le meilleure alie de l'Afrique du Sud'* available at <http://lesactualitesdudroit.20minutes-blogs.fr/archive/2013/06/29/la-france-etait-le-meilleur-soutien-de-l-apartheid-en-afriqu.html> (accessed 18 November 2013). It then followed that France's key allies on the African continent, especially among its former colonies, followed its position at the level of the Organisation of African Unity. An investigation into this issue is beyond the scope of this work. For a more detailed discussion on this issue see, for example, Comte G *Le Président Houphouët-Boigny aura du mal a ralié les Etats francophones a sa thèse* in *Le Monde Diplomatique* (juin 1971) 147.

agree with the African scholar, Makau wa'Mutua, who maintained that having an enforcement mechanism with very limited powers and non-binding decisions was a 'comfortable' option for dictators – either civilian operating under a one-party regime, or military.

It was not until after the fall of the apartheid regime and the advent of the African Union that the notion of an African court on human rights gained meaningful support among African states. In the mid-to-late nineties, events on the continent, especially the genocide in Rwanda (1994), and the civil wars in Sierra Leone (1991) and Liberia (1997), prompted NGOs and other actors to push for the creation of a court in the hope that it would strengthen human rights protection in Africa. As Mutua reports, there were two polar views on the creation of the court.²⁵ One view (to which Mutua subscribes) held that a human rights court should be established as soon as possible to salvage the entire system.²⁶ The other saw the work of the African human rights system as evolving gradually and primarily for promotional rather than adjudicative purposes. In terms of this view, the African regional system should focus on human rights promotional activities.²⁷

3.3 The African Commission on Human and Peoples' Rights

3.3.1 Mandate and the enforceability of its decisions

As briefly indicated above, the African Commission on Human and Peoples' Rights (African Commission) was until recently, the only African regional mechanism for the promotion and protection of human rights. This is reinforced by Part II (articles 30 to 63) of the African Charter relating to the 'measures of safeguard' (of the rights

²⁵ Makau wa'Mutua *The African human rights system: a critical evaluation* (2000) 24-25. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013). wa'Mutua Makau is an American of Kenyan origin. He is professor of law and the Dean of the University at Buffalo Law School, where he is also a SUNY Distinguished Professor and the Floyd H and Hilda L Hurst Faculty Scholar. This article was written as reference material to the 2000 Human Development Report published by UNDP on the theme: 'Human rights and development'. wa'Mutua was chair of the Kenyan Human Rights Commission (NGO) at the time of his writing.

²⁶ Komeja M 'The African system of human and peoples' rights: An annotated bibliography', (1996) 3 *East Afr J of Peace and HR* 271 284-85.

²⁷ Ankumah Evelyn A *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 195.

enshrined therein), and the establishment and functioning of the African Commission headquartered in Banjul, the Gambia. The African Commission comprises eleven members expected to be:

African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience.²⁸

The African Commission is supported by a secretariat. It holds bi-annual ordinary sessions and an unlimited number of extraordinary sessions as the need arises.

The African Commission is established by article 30 of the African Charter which reads as follows:

An African Commission on Human and Peoples' Rights, hereinafter called 'the Commission', shall be established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa.

Article 45 specifies the mandate of the African Commission as:

- 1 To promote Human and Peoples' Rights and in particular:
 - (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
 - (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
 - (c) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
- 2 Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.

²⁸ African Charter article 31.

- 3 Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
- 4 Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

It is also worth noting that at the time of its creation, the African Commission differed from similar institutions such as the Inter-American Commission on Human Rights²⁹ and the European Commission on Human Rights,³⁰ in at least two respects. First, the African Commission was not supplemented by a court and therefore performed quasi-judicial functions³¹ to the extent that it exercised functions similar to those of a court. Generally, a quasi-judicial body is understood as having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations, and to make decisions in the general manner of courts.³² In implementing its protection mandate provided for by article 45(2), the African Commission receives communications from states and others, carries out investigations into human rights claims, and pronounces on these issues itself. It differs from a court, however, in that its decisions are not orders, but recommendations. Secondly, it performs quasi-legislative functions such as formulating principles and rules (article 45(1b)),³³ and interprets provisions of the African Charter pursuant to article 45(3).³⁴ In 2011, the Commission, for example, developed '[D]raft Guiding Principles on Economic, Social

²⁹ American Convention on Human Rights (also known as the Pact of San José, Costa Rica) which was adopted on 22 November 1969 and came into force on 18 July 1978 available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (accessed 3 October 2013).

³⁰ The [European] Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953 available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 5 October 2013).

³¹ For example, in the presentation of its mandate, the African Court on Human and Peoples' Rights explains that it was established to complement and reinforce the function of the African Commission, which is a quasi-judicial body charged with monitoring the implementation of the African Charter. See <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-2/basic-facts#sthash.srCKeV7N.dpuf> (accessed 10 October 2013).

³² Quasi-judicial <http://www.merriam-webster.com/dictionary/quasi-judicial> (accessed 10 October 2013).

³³ Article 45(1) reads: 'To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations'.

³⁴ Interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU, or an African Organisation recognised by the OAU.

and Cultural Rights in the African Commission on Human and Peoples' Rights',³⁵ as well as a 'Model Law for African States on Access to Information'.³⁶ Again, guiding principles and model laws, and interpretations offered by the African Commission, are purely advisory and do not carry the weight of laws enacted by a legislature/parliament. It is, however, striking to observe that while the African Charter is very specific on the promotional functions of the Commission, it remains somewhat vague when it comes to protection. Mutua explains this imbalance by referring to the general political environment prevailing in Africa at the time of the drafting of the Charter. For him:

[T]his [the absence of an explicit protection function] is hardly surprising because virtually no African state, with the exceptions of the Gambia, Senegal and Botswana could boast of a nominal democracy in 1981, the year that the Organisation of African Unity adopted the African Charter.³⁷

I share this view, especially against the background of the widespread dictatorship and violations of human rights observed on the continent from the early seventies to the late nineties.³⁸

In carrying out its mandate, the Commission has also established a number of 'subsidiary mechanisms' including special rapporteurs, committees, and working groups (Chapter V 'subsidiary mechanisms' – rules 23 and 24 of the Rules of Procedure of the African Commission).³⁹ Generally, a working group monitors a

³⁵ 'Draft guiding principles on Economic, Social and Cultural Rights in the African Commission on Human and Peoples' Rights' available at <http://www.achpr.org/instruments/economic-social-cultural/> (accessed 21 November 2013).

³⁶ 'Draft model law for African Union member states on access to information' available at http://www.achpr.org/files/instruments/access-information/achpr_instr_draft_model_law_access_to_information_2011_eng.pdf (accessed 21 November 2013).

³⁷ wa'Mutua Makau *The African human rights system: A critical evaluation* (2000) 12. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013).

³⁸ See background above.

³⁹ Rule 23 'Special Rapporteurs, Committees and Working Groups'

(1) The Commission may create subsidiary mechanisms such as special rapporteurs, committees, and working groups.

(2) The creation and membership of such subsidiary mechanisms may be determined by consensus, failing which, the decision shall be taken by voting.

(3) The Commission shall determine the mandate and the terms of reference of each subsidiary mechanism. Each subsidiary mechanism shall present a report on its work to the Commission at each ordinary session of the Commission.

Rule 24 'Applicable rules for Subsidiary Mechanisms' The Rules of Procedure of the Commission shall apply *mutatis mutandis* to the proceedings of its subsidiary mechanisms. See

specific human rights issue, while the special rapporteur handles specific allegations of human rights violations.

The following table reflects the number and activities of the subsidiary mechanisms established to date by the Commission.

Special Mechanism	Establishment	Missions	Resolutions
Special Rapporteur on Freedom of Expression and Access to Information	2004	1	10
Special Rapporteur on Prisons and Conditions of Detention	1996	16	7
Special Rapporteur on Human Rights Defenders	2004		10
Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons	2004		8
Special Rapporteur on the Rights of Women	1999	5	7
Committee for the Prevention of Torture in Africa	2004	1	5
Working Group on Economic, Social and Cultural Rights	2004	1	5
Working Group on the Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa	2005		8
Working Group on Indigenous Populations/Communities in Africa	2000	14	11
Working Group on Specific Issues Related to the work of the African Commission	2004		5
Working Group on Rights of Older Persons and People with Disabilities	2007		7
Working Group on Extractive Industries, Environment and Human Rights Violations	2009		5
Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV	2010		4
Advisory Committee on Budgetary and Staff Matters	2009		3
Working Group on Communications	2011		4

Source: African Commission on Human and Peoples' Rights: <http://www.achpr.org/mechanisms/> (accessed 21 November 2013). The author was unable to find any up-to-date (that is up until the beginning of 2014) information on either the website or elsewhere.

3.3.1.1 The protection mandate and competence of the Commission

The Commission protects human and peoples' rights in three ways: (1) it considers communications on alleged violations of human rights (as enshrined in the

African Charter and other international human rights instruments);⁴⁰ (2) it examines state reports on the implementation of the African Charter; and (3) it interprets the African Charter.⁴¹

Ratione materiae, and in terms of article 47, the African Commission is competent to hear claims of violations of the provisions of the African Charter.⁴² The Commission can be approached on the basis of violations of the provisions relating to human and peoples' rights. It is also competent to entertain claims of the breach international human rights instruments to which member states are party under the principles laid down in articles 60 and 61.⁴³

Ratione loci, the African Charter imposes no limitation on a state party's obligation to protect its citizens, whether the alleged violation took place within or outside of its territory.⁴⁴ In contrast, the European Convention on Human Rights provides in article 1:

The High Contracting Parties shall secure to everyone *within their jurisdiction* [my emphasis] the rights and freedoms defined in Section 1 of this Convention.⁴⁵

⁴⁰ Regarding the principles applicable to the work of the African Commission, article 60 allows 'draw[ing] 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 Organization 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 Specialized Agencies of the United Nations of which the parties to the present Charter are members'. Article 61 adds that the Commission can 'ins into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.

⁴¹ Article 45(3) of the African Charter.

⁴² Article 47 reads as follows: 'If a state party to the present Charter has good reasons to believe that another state party to this Charter has violated the provisions of the Charter, it may draw, by written communication, the attention of that State to the matter ...'

⁴³ See Vazak *Dimension internationale des droits de l'homme* (1978) 544 para 1221 available at <http://unesdoc.unesco.org/images/0013/001342/134209fo.pdf> (accessed 3 October 2013). See also Mbaye Kéba *Les droits de l'Homme en Afrique* (1992) 233.

⁴⁴ *Ibid.*

⁴⁵ See http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 3 October 2013).

Ratione personae, the Commission only entertains claims against a state party to the African Charter. As of October 2013, all African states meet this requirement, save for the newly created state of South Sudan.⁴⁶

Ratione temporis, both the Charter and the rules of procedure of the African Commission are silent as to whether the Commission is competent to examine communications on allegations of human rights violation that may have occurred before the Commission was established. On this, Mbaye argues that retroactivity should only apply in cases of gross human rights violations amounting to crimes against humanity.⁴⁷ While I may agree with this view, I also opine that it may not apply in situations of the 'continuity of violation' like the one faced by the Endorois community. In my view, insofar as the violation continues, whether or not the violation began before or after the Charter came into force, the Charter will apply.

3.3.1.2 Access to the Commission

Access to the Commission is afforded to the states, individuals, and NGOs with observer status and they are entitled to submit communications. Observer status at the African Commission is granted to NGOs meeting the following requirements:

[When they] have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples' Rights; (b) [are] organisations working in the field of human rights; and (c) [if they] declare their financial resources.⁴⁸

The issue of *locus standi*⁴⁹ is not contentious under the African Charter. There is no requirement of being a direct victim of the violation complained of. Any individual, group, or NGO may file a communication⁵⁰ before the Commission alleging violation of any of the provisions of the Charter by a state party.

⁴⁶ South Sudan seceded from the Republic of Sudan in 2011 and became the 54th member of the African Union. The South Sudan signed the African Charter on 24 January 2013. It had not yet ratified the Charter at the time of this writing.

⁴⁷ *Id* 234 n 181.

⁴⁸ Resolution 33 on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights adopted at the 25th ordinary session of the African Commission held in Bujumbura, Burundi, from 26 April - 5 May 1999 available at <http://www.achpr.org/sessions/25th/resolutions/33/> (accessed 3 October 2013).

⁴⁹ *Locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged, to support that party's participation in the case.

⁵⁰ wa'Mutua Makau n 177 above 17.

3.3.1.3 *Admissibility*

With regard to admissibility, the Charter distinguishes between ‘communications from a state’ (articles 47-54) who must be a party to the African Charter, and ‘other communications’ (articles 55-56). Admissibility of ‘other communications’ is subject to a number of rules including: indication of the identity of the author; not being couched in insulting or disparaging language; and not being incompatible with both the OAU Charter (now the Constitutive Act of the African Union) and the African Charter. Communications from NGOs and individuals must also comply with the requirement of the exhaustion of local remedies. Article 56(5) requires that local remedies, if any, be exhausted, unless there is an undue delay. On several occasions, the African Commission has expounded on this requirement when examining the admissibility of communications submitted by NGOs and individuals. Suffice to mention that in the opinion of the Commission:

[O]ne purpose of the exhaustion of the local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels.⁵¹

Still on the interpretation of the provisions of article 56(5), in the case *Purohit and Moore v The Gambia* (Communication No 241/2001), the Commission declared the communication submitted by mental health advocates admissible as the remedies provided by The Gambia (general provisions in law) were ‘not realistic for this category of people (the mental health patient) and therefore not effective’.⁵² In this case, the complainants alleged that the provisions of the Lunatic Detention Act of The Gambia, and the way in which mental patients were being treated, amounted to a violation of specific provisions of the African Charter – including the right to health (article 16). The applicants submitted that the Act failed to provide safeguards for patients who were suspected of being insane during their diagnosis, certification, and detention. According to them, the Act failed, inter alia, to allow for the review of,

⁵¹ *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples’ Rights* Communication 155/96 (2001) para 37. See <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html> (accessed 15 October 2013).

⁵² *Purohit and Moore v The Gambia*: Communication 241/2001, 16th Activity Report 2002-2003, Annex VII paras 36, 37 and 38. See http://www.law.syr.edu/media/documents/2009/9/Purohit_and_Moore_v_Gambia.pdf (accessed 15 October 2013).

or appeal against, orders of detention, or to provide any remedy for incorrect detentions. It was also argued that no provision existed for the independent examination, management, and living conditions within the unit itself.

The Commission ruled that The Gambia had violated several provisions of the African Charter, and held that the Lunatic Detention Act was discriminatory because of the categories of people who would be detained under it were likely to be people picked up from the streets and people from poor backgrounds; in other words, people with no means of challenging erroneous detention or wrong treatment done to them. In the opinion of the Commission, the remedies put in place by the respondent state were not accessible to this category of people. The Commission therefore reminded the respondent state that under article 16 of the Charter on the right to health, it is obliged to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination. The requirement of 'realistic' remedies used by the Commission to establish admissibility of communication is an important one. It is grounded in the general situation of poverty prevailing in Africa where social protection of the poor requires concrete steps on the part of the state as principal duty-bearer. The position taken by the Commission on the obligation imposed on states to put in place non-discriminatory policies and measures is consistent with the stance taken by the UN Committee on Economic, Social and Cultural Rights in its interpretation of article 12 of the CESCR.⁵³

3.3.2 Overview of decisions of the African Commission on Human and Peoples' Rights on the right to development

Over the past few years, the African Commission has entertained a number of cases based on the alleged violation of article 22 of the African Charter, which

⁵³ The steps required of the state are set out in paras 30 to 37; and include general obligations such as the guarantee that the right will be exercised without discrimination of any kind (article 2.2) and the obligation to take steps (article 2.1) towards the full realisation of article 12. Such steps must be deliberate, concrete, and targeted towards the full realisation of the right to health. It also includes specific legal obligations and international obligations. See UN Committee on Economic, Social and Cultural Rights. The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights): General Comment 14 9-11. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/439/34/PDF/G0043934.pdf?OpenElement> (accessed 20 November 2013).

provides for the RtD. In the selected cases which follow I review these decisions with a view to finding entry points for NGOs, especially those in Côte d'Ivoire. This review serves two purposes: First, considering these cases chronologically allows the establishment of a trend and for a gradual progress towards the full and express recognition of the RtD which finally emerged in the *Endorois* case when the Commission pronounced itself on the nature and scope of the RtD. Secondly, as will be shown in Chapters 5 and 6 below, the denial of the RtD is a root cause of the crisis which affected Côte d'Ivoire for over a decade. Yet, few, if any, NGOs in this country has any experience in working on the RtD, let alone submitting a communication to the Commission based on the RtD. The purpose of this review is, therefore, to support the principal argument of this thesis – that the RtD is yet another right Ivorian NGOs must work on and can (and should) rely on in their pleadings.

3.3.2.1 William A Courson v Zimbabwe: Communication 136/94⁵⁴

In 1995, the African Commission admitted a communication by William A Courson regarding the legal status of homosexuals in Zimbabwe in which the complainant claimed, *inter alia*, that the criminalisation of homosexuality by Zimbabwean laws was in breach of articles 1 (general obligation of the state to guarantee all rights enshrined in the African Charter); 2 (freedom from discrimination);⁵⁵ 3 (right to equality before the law); 4 (right to life and personal dignity); 5 (right to dignity); 6 (right to due process concerning arrest and detention); 8 (freedom of religion); 9 (freedom of information and expression); 10 (freedom of association); 11 (freedom to assembly); 16 (right to health); 20 (right to self-determination); 22 (right to development);⁵⁶ and 24 (right to a generally satisfactory

⁵⁴ *William A Courson v Zimbabwe* Communication 136/94 available at <http://caselaw.ihra.org/doc/136.94/view/> (accessed 2 October 2013).

⁵⁵ Freedom from discrimination is also provided by article 18(3) especially in the context of the 'family' regarded in the Charter as custodian of moral and traditional values recognised by the community to the extent that 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. And the aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

⁵⁶ Article 22 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.

environment). The complainant withdrew the communication and so the Commission did not decide on the merits.

3.3.2.2 Bakweri Land Claims Committee v Cameroon: *Communication 260/02*⁵⁷

The Bakweri Land Claims Committee (the Bakweri) filed a communication with the African Commission following Presidential Decree No 94/125 of 14 July 1994 by the government of Cameroon, ceding a large parcel of land to the Cameroon Development Corporation (CDC). The complainants alleged that this would result in the alienation (to private purchasers) of approximately 400 square miles (104 000 hectares) of land in the Fako division traditionally owned, occupied, used, and/or generally in effective possession of the Bakweri. The complainant alleged that the transfer would extinguish the Bakweri title rights and interests in two-thirds of the minority group's total land area, and considered this to represent a violation of several provisions of the African Charter, namely articles 7(1)(a), 14, 21, and 22. The African Commission declined admissibility on the basis of the non-exhaustion of local (internal) remedies as required under article 56(5) of the African Charter. Once again, an opportunity for a quasi-judicial pronouncement on the meaning and application/applicability of article 22 of the African Charter was missed.

3.3.2.3 Democratic Republic of Congo v Burundi, Rwanda and Uganda: *Communication 227/99*⁵⁸

On 8 March 1999, during the armed conflict which threatened the Democratic Republic of the Congo (DRC), the complainant (DRC) filed a complaint against its neighbours, Burundi, Rwanda and Uganda alleging, amongst others, that it was the victim of armed aggression perpetrated by those countries. The DRC further alleged that this aggression amounted to a violation of the fundamental principles that

2 States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

⁵⁷ Communication 260/02 *Bakweri Land Claims Committee v Cameroon* available at http://www.achpr.org/files/sessions/36th/communications/260.02/achpr36_260_02_fra.pdf (accessed 5 October 2013).

⁵⁸ Communication 227/99 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* available at <http://caselaw.ihrda.org/doc/227.99/view/> (accessed 5 October 2013).

govern friendly relations between states, as stipulated in the Charters of the United Nations (UN) and the Organisation of African Unity (OAU). In particular, the principles of non-recourse to force in international relations; the peaceful settlement of disputes; respect for the sovereignty and territorial integrity of states; and non-interference in the internal affairs of states were alleged to have been violated. The DRC also alleged that it was a victim of violation of articles 2 (freedom from discrimination); 4 (right to life and personal dignity); 6 (right to due process concerning arrest and detention); 12 (freedom of movement and residence); 16 (right to health); 17 (right to education); 19 (right to equality); 20 (right to self-determination); 21 (right to freely dispose of wealth and natural resources); 22 (right to development); and 23 (right to peace and security) of the African Charter.

The complainant requested the African Commission to:

... deploy an investigation mission with a view to observing *in loco* the accusations made against Burundi, Rwanda and Uganda.⁵⁹

As part of the process of determining the allegations against the respondents, the Commission carried out an analysis of the acknowledgement made by the respondent states of their presence in the area,⁶⁰ and on the findings of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Wealth in the DRC.⁶¹ In response to this analysis, the Commission ruled that the occupation of the complainant's territory by armed forces from the respondents amounted to a violation of article 23 relating to peoples' right to peace and security.⁶² The Commission found that the alleged occupation of parts of the provinces of the complainant states by the

⁵⁹ See para 11(c).

⁶⁰ In para 72 of the case report, the African Commission states that 'The Complainant States allege the occupation of the eastern provinces of the country by the respondent States and armed forces. It alleges also that most parts of the affected provinces have been under control of the rebels since 2nd August 1998, with the assistance and support of the respondent States. In support of its claims, it states that the Ugandan and Rwandan government have acknowledged [the] presence of their respective armed forces in the eastern provinces of the country under what it calls the "fallacious pretext" of "safeguarding their interests". The [African] Commission takes note that this claim is collaborated by the statements of representatives of the Respondent States during the 27th Ordinary Session [of the African Commission] held in Algeria'.

⁶¹ On 2 June 2000, the President of the Security Council issued a statement (S/PRST/2000/20) requesting the Secretary-General to establish a panel of experts on the illegal exploitation of natural resources and wealth in the Democratic Republic of the Congo for a six month period. The Secretary-General submitted the panel's report on 12 April 2001. See <http://www.un.org/News/dh/latest/drcongo.htm> (accessed 5 October 2013).

⁶² Paragraphs 76 and 77.

respondents, to be a violation of the Charter to which it could not turn a blind eye.⁶³ Consequently, it ruled that the respondent states were in breach of several provisions of the African Charter, including article 22 on the RtD; recommended a withdrawal of their troops from occupied provinces and payment of compensation to the complainant state on behalf of the populations' victims of human rights violations.⁶⁴ In this case, it is striking to note that the Commission made no reference to its own findings. Coming to such a strong conclusion without the Commission's own investigations, is questionable. The African Charter provides in article 46 as follows:

The Commission may resort to any appropriate method of investigation; it may hear from the Secretary General of the Organization of African Unity or any other person capable of enlightening it.⁶⁵

Such 'enlightenment' can amount to hearsay and may be an insufficient basis for the Commission to make its ruling. For this reason, the Commission has established a number of subsidiary mechanisms (special rapporteurs, committees, and working groups) which it could have used in this case as 'methods of investigation'. Nothing in the case report shows that the Commission made use of these methods in establishing the facts.

The African Charter also recognises under article 60 that the Commission shall draw inspiration from a variety of sources, including 'other instruments adopted by the United Nations',⁶⁶ which in my opinion may include reports and resolutions of

⁶³ Paragraph 69.

⁶⁴ In its ruling, the African Commission, 'finds the respondent states in violation of articles 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22 and 23 of the African Charter; Urges the Respondent States to abide by their obligations under the Charters of the UN, the OAU, the African Charter, the *UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States* and other applicable international principles of law and to withdraw its troops immediately from the Complainant's territory; Takes note with satisfaction, of the positive developments that occurred in this matter, namely the withdrawal of the Respondent States armed forces from the territory of the Complainant State; Recommends that adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations'.

⁶⁵ See <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> (accessed 7 October 2013).

⁶⁶ Article 60 provides: '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 Organization of

organs such as the Security Council. It is in this context that the Commission relied on the findings by the UN Panel of Experts cited above. The report in question only covers the alleged violation of article 21 (right to freely dispose of wealth and natural resources), but is silent on the other human rights claims raised by the complainant state. As such, it is of limited relevance to an analysis of the alleged violation of article 22 of the African Charter (right to development). It follows that in my opinion reference to this UN report is insufficient as a method of investigation required of the Commission in discharging its duties under article 46. This is exacerbated in the case of an inter-state Communication like the one under discussion, where the Commission had both the time and the opportunity to verify the allegations of the complainant state through field visits and use of special rapporteurs and working groups.

Referring to the RtD, the Commission described the occupation of the eastern provinces of the complainant by the respondents' armed forces as:

barbaric and in reckless violation of the Congolese peoples' rights to cultural development guaranteed by article 22 of the African Charter, and an affront to the noble virtues of the African historical tradition and values enunciated in the preamble to the African Charter.⁶⁷

The Commission failed to provide any explanation of how the occupation violated the right to cultural development. However, it did identify the notion of 'cultural development' as an element of the RtD. It was only later, in the *Endorois* case, that it provided details on its interpretation of the concept of 'cultural development' and of the RtD *per se*.

In its considered communication on this matter, the Commission also found the illegal exploitation/looting of the natural resources of the complainant state to be in contravention of article 21 of the African Charter.⁶⁸ In this way, the African

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 Specialized Agencies of the United Nations of which the parties to the present Charter are members'.

⁶⁷ Paragraph 87.

⁶⁸ Article 21 stipulates that:

Commission introduced another facet of the RtD as defined in the UN Declaration on the Right to Development when it concluded that the deprivation of the right of the people of the Democratic Republic of Congo freely to dispose of their wealth and natural resources, constituted a further violation – a violation of their right to economic, social and cultural development and of the general duty of states to ensure the exercise of the right to development as guaranteed under article 22 of the African Charter. To a certain extent, I will argue that articles 21 and 22 should be read together, and that both relate in some way to the RtD as defined by the UN Declaration and as interpreted in Chapter 2 above. Article 21 relates to physical possessions, while article 22 ‘operates’ on a more ‘psychological’ plane with its reference to ‘cultural development’. It is the combination of these two articles that brings the definition offered by these two instruments closer. Distinguishing between them, leaves room for misinterpretation of the substantive content of the RtD and a possible limitation of ‘cultural’ development. Such was, for example, the interpretation used by Côte d’Ivoire in its initial and combined report to the African Commission in October 2012.⁶⁹ In accounting for measures taken to fulfil its obligations under the RtD,⁷⁰ Côte d’Ivoire reported on efforts made in promoting economic development (such as those relating to the achievement of the millennium development goals)⁷¹ on the one hand, and on the other, activities relating to culture, such as the establishment of a ministry of culture, and the protection of property rights and sites considered as world cultural heritage. This account of the implementation of the RtD undermines the nature of this right as composite and participatory.⁷²

1 All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it ...

2 States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

⁶⁹ The Republic of Côte d’Ivoire’s initial and combined report submitted the African Commission on Human and Peoples’ Rights on 4 July 2012 and examined at the 52nd ordinary session held in Yamoussoukro (Côte d’Ivoire) in October 2012 available at http://www.achpr.org/files/sessions/52nd/state-reports/1-1994-2012/initial_combined_periodic_report_194_2012_eng.pdf (accessed 23 November 2013).

⁷⁰ *Id* 41-42.

⁷¹ In 2000, the UNGA adopted a declaration known as the ‘Millennium Declaration’ which contains eight development goals ranging from halving extreme poverty and providing universal primary education, to stopping the spread of HIV and AIDS by 2015. For more on the MDGs, see <http://www.un.org/millenniumgoals/> (accessed 23 November 2013).

⁷² Definition provided in Chapter 2 above.

In this communication, I submit, the Congolese NGOs, acting on behalf of victims of the occupation by the respondent states' armed forces, could have networked both internally and with international human rights groups to demand payment of reparation for the violation of the RtD, among other rights. In my opinion, this opportunity is still open and should be explored, including by approaching the African Court on Human and Peoples' Rights.

3.3.2.4 Socio Economic Rights and Accountability Project v Nigeria: Communication 300/05⁷³

In this communication the Nigerian NGO, Socio Economic Rights and Accountability Project (SERAP), claimed that Nigeria had violated article 17 (the right to education); article 21 (the right of the people not to be dispossessed of their wealth and natural resources); and article 22 (the right of the people to economic, social and cultural development) following a controversial television announcement by former President Olusegun Obasanjo, alluding to the fact that some senior officials in government had taken bribes. SERAP claimed that the diversion of the sum of 3,5 billion naira from the National University Commission by certain public officers in ten states of the Federation of Nigeria, was illegal and unconstitutional as it violated articles 21 and 22 of the ACHPR. However, the case was declared inadmissible by the African Commission, again on the basis of non-exhaustion of available domestic remedies (article 56(5)).⁷⁴ Not satisfied with this conclusion, SERAP then submitted the same Communication to the Court of Justice of the Economic Community of West African State (ECOWAS Court) on the same facts.⁷⁵

Although this case is not examined in detail here, it is noteworthy – and indeed innovative – that contrary to the general principle of international law (and municipal/national law), the exhaustion of domestic remedies is not a requirement for admissibility of communications before the ECOWAS Court of Justice, hence the admission of the case by the court which had earlier been declared inadmissible by

⁷³ Communication 300/05 *Socio Economic Rights and Accountability Project v Nigeria* available at <http://caselaw.ihrda.org/doc/300.05/view/> (accessed 3 October 2013).

⁷⁴ Article 56(5) provides that communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

⁷⁵ Communication 338/07 *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* available at <http://caselaw.ihrda.org/doc/338.07/view/> (accessed 5 October 2013).

the African Commission. (A more extensive discussion of the ECOWAS Court of Justice is undertaken below.)

3.3.2.5 Sudan Human Rights Organisation (SHRO) & Centre on Housing Rights and Evictions (COHRE) v Sudan: *Communication 279/03-296/05*⁷⁶

These two communications were filed against Sudan on behalf of the Darfuree people by a group of both international and national NGOs. The first communication was submitted by the Sudan Human Rights Organisation (London); the Sudan Human Rights Organisation (Canada); the Darfur Diaspora Association; the Sudanese Women's Union in Canada; and the Massaleit Diaspora Association (the complainants). The second communication, *Centre for Housing Rights and Evictions v Sudan* (the *COHRE* case), was submitted by an NGO based in Washington, DC (the complainant) against the same respondent state, the Sudan. Since the last-mentioned communication was based on allegations virtually identical to those raised in the *SHRO* case, the African Commission consolidated the complaints.⁷⁷ It is worth noting in passing that the Commission made use of rule 96 (joinder and disjoinder of Communications) of its Rules of Procedure.⁷⁸

In substance, the complainants alleged gross, massive, and systematic violations of human rights by the Republic of Sudan (the respondent state) against the indigenous black African tribes in the Darfur region (Western Sudan); in particular, members of the Fur, Marsalit, and Zaghawa tribes. They claimed that the violations committed in the Darfur region included large-scale killings; the forced displacement of populations; the destruction of public facilities and properties; and disruption of life through the bombing of densely populated areas by military fighter jets.

⁷⁶ *Sudan Human Rights Organisation (SHRO) and Centre on Housing Rights and Evictions (COHRE) v Sudan* Communication 279/03-296/ available at http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr45_279.03_296.05_eng.pdf (accessed 5 October 2013).

⁷⁷ See paras 33 and 50 of Communication 279/03-296/05.

⁷⁸ Rule 96 provides:

- 1 If two or more Communications against the same State Party address similar facts, or reveal the same pattern of violation of rights, the Commission may join them and consider them together as a single Communication.
- 2 Notwithstanding paragraph 1 of the present Rule, the Commission may decide not to join the Communications if it is of the opinion that the joinder will not serve the interest of justice.
- 3 Where in accordance with paragraph 1 of the present Rule, the Commission decides to join two or more Communications, it may subsequently, where it deems appropriate, decide to disjoin the Communications.

In this case, the African Commission found the Darfuree people to be victims of violations of several articles of the African Charter, including article 22 (the RtD). The African Commission restated Sudan's obligation under the African Charter to protect the rights of every individual and peoples of every race, ethnicity, religion, and other social origin.⁷⁹ In addressing the violations committed against the people of Darfur, the Commission found that the people of Darfur in their collective are 'a people', who should not be dominated by a people of another race in the same state. The Commission understood that their claim for equal treatment arose from their alleged underdevelopment and marginalisation. On this ground, the Commission concluded that the response by Sudan which, in the course of fighting the armed conflict, targeted the civilian population instead of the combatants, constituted a form of collective punishment which is prohibited under international law. It is in that respect that the Commission found Sudan in violation of article 22 of the African Charter. In this instance the African Commission introduced the notion of respect for human rights in general and the RtD in particular, during an armed conflict by stressing the line between non-combatant civilian populations entitled to the respect and protection of their rights, and combatants. The Commission motivated the breach of the RtD as resulting from the fact that the attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social, and cultural activities.⁸⁰ The Commission did not elaborate on this point in the case under review.

The African Commission finally afforded the RtD full attention through providing a detailed and elaborate analysis of the definition and application of the African Charter to the RtD in the *Endorois* case discussed next.

⁷⁹ See articles 2 and 19 of the African Charter on Human and Peoples' Rights (ACHPR).

⁸⁰ Paragraph 224: 'The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, which was the main cause of the conflict, the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic social and cultural rights, but other individual rights of the Darfurian people.'

3.3.2.6 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya: Communication 276/03⁸¹

The communication was filed by the Centre for Minority Rights Development (CEMIRIDE) who acted on behalf of the Endorois community. CEMIRIDE received assistance from two international organisations, Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE – which submitted an *amicus curiae* brief). CEMIRIDE alleged human rights violations arising from the displacement of the Endorois community, an indigenous people, from their ancestral lands; failure to compensate them adequately for the loss of their property; the disruption of the community's pastoral enterprise; and violations of the right to practice their religion and culture; as well as the overall process of development of the people. The complainant claimed these constituted violations of articles 8 (freedom of religion); 14 (right to property); 17 (right to education); 21 (right to freely dispose of wealth and natural resources); and 22 (right to development) of the African Charter.

They requested that these violations be remedied by the restitution of their land with legal title and clear demarcation of their boundaries, and compensation of the community for all the losses suffered. They also requested respect for and protection of their freedom to practice their religion and culture.

In considering the case based on the failure of the respondent state (Kenya) to submit arguments on the admissibility of the communication despite numerous reminders, the African Commission decided that the complaint complied with article 56 of the African Charter and accepted jurisdiction.⁸²

⁸¹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* Communication 276/03 available at <http://caselaw.ihra.org/doc/276.03/view/> (accessed 5 October 2013).

⁸² Paragraph 60: 'The African Commission notes that there was a lack of cooperation from the respondent State to submit arguments on admissibility of the communication despite numerous reminders. In the absence of such a submission, given the face value of the complainants' submissions, the African Commission holds that the complaint complies with article 56 of the African Charter and hence declares the communication admissible.'

In considering the case on its merits, the Commission examined each of the claims founded on specific provisions of the African Charter and pronounced on each. For the purpose of this thesis, reference is only made to the decision of the Commission on the dispute relating to the alleged violation of the provisions of article 22 (the RtD).

The respondent state argued that the Endorois did not qualify as ‘peoples’ in the terms of the definition in the African Charter. On this, the African Commission stated:

The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of ‘peoples’. ... It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three ‘generations’ of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights. In that regard, the African Commission notes its own observation that the term ‘indigenous’ is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.⁸³

The Commission therefore considered that the Endorois could not be denied a right to legal personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community. The African Commission agreed that the Endorois consider themselves a distinct people, sharing a common history, culture, and religion. It was satisfied that the Endorois are ‘a people’, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Commission was further of the view that the alleged violations of the African Charter, involved those rights that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands.⁸⁴ In relation to the particular components of the RtD, the African

⁸³ Paragraph 149.

⁸⁴ In para 157, the Commission expounds on this point thus: ‘[I]n addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples. The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed

Commission offered a detailed account of its understanding of the RtD as including the people's participation and consultation in decision-making; benefit sharing; and ultimately, the creation of favourable conditions for development. These components of the RtD are listed here as they go a long way in furthering an understanding of the definition of the RtD in Africa.

First, the African Commission used its mandate to interpret the provisions of the African Charter under article 45(3)⁸⁵ to elaborate on the dual nature of this right. It found that the right to development required a two-pronged approach as the right is both 'constitutive' and 'instrumental', or useful as both a means and an end. A violation of either the procedural or substantive element will constitute a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development.⁸⁶ This interpretation of the RtD is consistent with the definition of the UN Declaration on the RtD⁸⁷ and my understanding of this right as a composite and participatory right (see Chapter 2 above).

indigenous. The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as "peoples" is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems. The African Commission further notes that the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples' self-identification is an important ingredient to the concept of peoples' rights as laid out in the Charter. It agrees that the alleged violations 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, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.'

⁸⁵ Article 45(3) provides that the functions of the African Commission shall be to '[i]nterpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African Organization recognized by the OAU' (now the African Union).

⁸⁶ Paragraph 277.

⁸⁷ Article 1 of the UN Declaration on the RtD provides:

- 1 The right to development is 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.

The African Commission identified five main criteria and listed them as the requirements for the enforcement of the RtD. It (development) must be equitable,⁸⁸ non-discriminatory (on any ground such as sex, opinion, origin, belief, social status); participatory (involving the beneficiaries); accountable (this would imply specifying obligations for different duty-holders who are responsible for carrying out the programme); and involves establishing appropriate adjudicating and monitoring mechanisms through a formal, legal process.⁸⁹

Second, on the concept of participation, the African Commission relied on article 2(3) of the UN Declaration on the Right to Development which states that the RtD includes 'active, free and meaningful participation in development'. On this basis, the African Commission recommended that the result of development should be empowerment of the Endorois community. It was therefore insufficient for the Kenyan authorities merely to give food aid to the Endorois.⁹⁰ It further held that even though the respondent state claimed that it had consulted with the Endorois community, the African Commission was of the view that this consultation had been inadequate. The Commission found that in fact, the respondent state had not obtained the prior, informed consent of all the Endorois before designating their land as a game reserve and embarking upon their eviction.⁹¹ Next, the African Commission introduced an interesting perspective on the African indigenous knowledge system as part of its definition of participation in decision-making, when it espoused the view that before any development or investment projects that would have a major impact within the Endorois territory could be embarked upon, the state had a duty to consult with the community and obtain their free, prior, and informed consent, in accordance with their customs and traditions.⁹²

⁸⁸ According to the fourth report submitted by Arjun Sengupta, then UN Independent Expert on the Right to Development, 'equity' in the field of development, implies a change in the structure of production and distribution in the economy to ensure growth and equity. It would also imply providing for equality of opportunity or capabilities, which could translate into equitable distribution of income or amount of benefits accruing from the exercise of the rights. See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/164/02/PDF/G0116402.pdf?OpenElement> (accessed 5 October 2013).

⁸⁹ Sengupta Arjun 'Development cooperation and the right to development' available at http://www.tanzaniagateway.org/docs/Development_cooperation_and_the_Right_to_Development.pdf especially at 7 (accessed 5 October 2013).

⁹⁰ Paragraph 283.

⁹¹ Paragraph 290.

⁹² Paragraph 291.

Regarding benefit sharing as a constitutive part of the RtD, the African Commission observed that in accordance with the 1990 'African Charter for Popular Participation in Development and Transformation',⁹³ benefit sharing is key to the development process. It therefore ruled that in the present case of the Endorois, the right to obtain 'just compensation' in the spirit of the African Charter translates into a right of the members of the Endorois community reasonably to share in the benefits accrued to the state as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands, and of those natural resources necessary for their survival.⁹⁴

Finally, and in accordance with article 22 of the African Charter, the African Commission ruled that Kenya was a duty-bearer whose obligations included creating conditions favourable to a people's development, and on this ground to ensure that the Endorois were not excluded from the development process or benefits. The Commission agreed with the complainant that the failure to provide adequate compensation and benefits or to provide alternative suitable land for grazing was an indication that the respondent state had not adequately provided for the Endorois in the development process.⁹⁵ On the basis of the above, the African Commission ruled that Kenya had violated article 22 of the African Charter and recommended reparation in favour of the Endorois community. From information accessible to us as of December 2013, Kenya had not complied with the decisions of the Commission on this matter.

The *Endorois* case briefly summarised here represents the first definitive explanation and expansion on the definition and enforcement of the RtD by the African Commission. From this perspective, this case is not only useful but also crucial as an aid to litigation by human rights NGOs on the subject of the RtD.⁹⁶ The main points to substantiate this particular assertion are highlighted in what follows.

⁹³ African Charter for Popular Participation in Development and Transformation available at <http://www.afrimap.org/english/images/treaty/file4239ac8e921ed.pdf> (accessed 10 October 2013).

⁹⁴ *Endorois* case para 295.

⁹⁵ *Id* para 298.

3.4 Significance of the *Endorois* case for human rights non-governmental organisations and the realisation of the right to development

3.4.1 Impact of development on people against the background of the *Endorois* case

As with the *Bakweri* case above, the *Endorois* case typifies development-oriented displacement on which the African Commission has been required to make specific legal pronouncements. Given the magnitude of forced displacement in Africa, the African Commission established a subsidiary mechanism to address this issue through the position of a special rapporteur on refugees, asylum seekers, migrants and internally displaced persons (IDPs).⁹⁷ Commissioner Nyanduga, the first incumbent, explains that:

In response to the prevalence of displacement, and the gross violations of the human rights of IDPs in Africa, the African Commission on Human and Peoples' Rights, the organ charged by the African Union to promote and protect human rights, established a special mechanism to monitor and report to the Commission on a regular basis, the displacement situation on continent, and violations of the rights of IDPs.⁹⁸

It is common for local communities in Africa to experience displacement by the state (or with its support) as part of the construction of infrastructure for development, such as the building of dams, highways, game parks, or even housing estates.⁹⁹ Central to development-oriented displacement is the fact that the affected populations are perceived as a necessary sacrifice in the development process.

⁹⁷ African Commission on Human and Peoples' Rights: Special Rapporteur of Refugees, Assylum Seekers, Migrants and Internally Displaced Persons available at <http://www.achpr.org/mechanisms/refugees-and-internally-displaced-persons/> (accessed 23 November 2013).

⁹⁸ Statement by Bahame Tom Nyanduga on the occasion of the 10th anniversary of the 'Guiding principles on internal displacement: An African perspective' 3 available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/6AB5850D2E1F89ABC12574E20048ED25/\\$file/Statement%20by%20Bahame%20Tom%20Nyanduga,%20Commissioner,%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/6AB5850D2E1F89ABC12574E20048ED25/$file/Statement%20by%20Bahame%20Tom%20Nyanduga,%20Commissioner,%20African%20Commission%20on%20Human%20and%20Peoples'%20Rights.pdf) (accessed 23 November 2013).

⁹⁹ See Terminski Bogumil *Development-induced displacement and resettlement: Theoretical frameworks and current challenges* (2013) 47-68 available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8833/Bogumil%20Terminski,%20developmentinduced%20Displacement%20and%20Resettlement.%20Theoretical%20frameworks%20and%20current%20challenges.pdf?sequence=1> (accessed 23 November 2013).

Within this paradigm, the positive gains of development projects, encapsulated in the notion of the public interest (or the public good), are seen to outweigh the negative consequences – the displacement of a few, being one of them. Robinson from the Migration Policy Institute, an international NGO with an established record in displacement issues, has observed that:

People who are forced to flee from a disaster or conflict usually receive sympathetic attention and international aid. The same cannot be said for the millions of people worldwide who have been displaced by development, even though the consequences they face may be comparably dire. In decades past, the dominant view of those involved in the ‘development’ of traditional, simple, Third World societies was that they should be transformed into modern, complex, Westernized countries. Seen in this light, large-scale, capital-intensive development projects accelerated the pace toward a brighter and better future. If people were uprooted along the way that was deemed a necessary evil or even an actual good, since it made them more susceptible to change.¹⁰⁰

The challenges posed by development-oriented displacement are highlighted by Sing’Oei, one of the lawyers involved in the *Endorois* case and a founding trustee of the Centre for Minority Rights Development in Kenya. He argues that the marginal position occupied by pastoralism in the economic matrix of the Kenyan state, has led to the de-emphasis of pastoralism in favour of economic activities that respond to market demands, in this case tourism, mining, and energy extraction.¹⁰¹ Cernea’s work on the sociological impact of the economics of resettlement for purposes of development, indicates the high risk for the displaced population including impoverishment as a result of landlessness, loss of jobs and houses, food insecurity, marginalisation, and social disintegration.¹⁰²

In my opinion, the major challenge lies in striking a balance between the right of the affected communities and the imperatives of development embedded in the RtD. If a given group/people has to be sacrificed in the name of development, then justice and fairness have to be considered taking into account the way in which the

¹⁰⁰ Robinson C ‘Minimizing development-induced displacement’ available at <http://www.migrationinformation.org/feature/display.cfm?ID=194> (accessed 23 November 2013).

¹⁰¹ Sing’Oei ‘The Endorois’ legal case and its impact on state and corporate conduct in Africa’ (2010) *Buffalo Human Rights Law Review* 57.

¹⁰² Cernea M ‘For a new economics of resettlement: A sociological critique of the compensation principle’ (2003) 175 *International Social Science Journal* 16-17.

displacement occurs, the process involved, and the compensatory measures taken to accommodate the losses experienced by the affected group/people. The *Endorois* case illustrates the negation by the government of Kenya of its domestic and international human rights obligations to protect the rights of the affected group/people (a minority group). From this perspective, the decision of the African Commission is significant, not only for the Endorois community, but beyond it for thousands of other communities facing similar situations in Africa and beyond.

Although the impact of NGOs and the RtD relevant to Côte d'Ivoire will be examined in Chapter 5 below, it is nonetheless notable that a scenario similar to that witnessed in Kenya, played out earlier in Côte d'Ivoire. However, there was a major difference between the situation in Kenya and Côte d'Ivoire. Similar to the Endorois community, the Baoulé people were displaced from Kossou in 1969 (at virtually the same time as the *Endorois* were forcefully evicted) for the construction of the Kossou Dam, Côte d'Ivoire's second largest dam. Kossou is located in the central region of the country, and the Baoulé people rely on farming for their livelihood and trade. The Baoulé are African traditional religion believers. The building of a dam on the Ivorian river Bandaman for hydro-electricity, led to the creation of an artificial lake forcing some 75 000 locals from their ancestral lands and depriving them of their means of livelihood. The Ivorian government established the *Autorité pour Aménagement de la vallée du Bandaman*, a public agency to resettle the affected populations on the banks of the new lake. Means of livelihood were to be restored through an ambitious land clearing scheme by which annual rainwater-fed crops were to be cultivated. The farming was highly mechanised with crop rotation and associated cattle breeding. This scheme was largely supported by international financing organisations, including the Food and Agriculture Organisation and the European Development Fund. The locals could not cope with the new farming system which they found constraining and unprofitable. They thus returned to the traditional cultivation of their crops. The new scheme was abandoned by the disillusioned locals and eventually collapsed and was terminated in 1981.¹⁰³

¹⁰³ Lassailly-Jacob 'Colonisation planifiée des rives du Lac de Kossou en Côte-d'Ivoire Centrale: la genèse d'un échec' (1982) 147-148 *Économie rurale*. 45-50.

The two main consequences of the construction of the dam were the displacement of some 75 000 people from their ancestral land and the re-orientation of the habits and lifestyles of some 3 000 people who opted to stay behind. However, in contrast to the *Endorois* case, the state undertook to compensate the displaced population and to sponsor skills-development for those who stayed on their ancestral land. The then President appointed a local from the Kossou region as director of the resettlement agency in an attempt to diffuse any likely tension that could arise in the course of the resettlement process. Although these two development-induced displacements occurred at almost the same time, the Kossou population did not organise themselves into a pressure group and did not have to resort to court-based remedies, as did the Endorois. The reason for this difference in reaction could most certainly be found in the way in which development-induced eviction took place in these two instances.

The first difference relates to the recognition of the relevant group as a 'people'. In Côte d'Ivoire the state did not deny the existence of the Baoulé as indigenous inhabitants of the Kossou land and so the issue of land ownership did not arise. In fact, whereas the Ivorian law states that the land is a national heritage which every individual and legally constituted body can access, ownership is limited under specific conditions, to the state, local communities, and Ivorian nationals.¹⁰⁴ Customary law still prevails making indigenous people owners of their ancestral land.¹⁰⁵ In the *Kossou* case, the state avoided dispossessing local communities of their land without compensation. In contrast, in Kenya the Endorois were denied *locus standi* before municipal courts on the alleged ground of the non-existence of the group as a legal entity with an adjudicative right. Such a stance, if taken in Côte d'Ivoire and perhaps in other African countries as well, would have generated a reaction similar to, if not more violent than, that opted for by the Endorois. Côte d'Ivoire, as will be discussed in Chapter 5 below, consists of at least sixty major ethnic groups located in different parts of the country with different lifestyles, cultural practices, and belief systems which they claim as their (cultural) heritage.

¹⁰⁴ See article 1 of the *Loi n°98-750 du 23 décembre 1998 modifiée par la loi du 28 juillet 2004* available at http://www.droit-afrique.com/images/textes/Cote_Ivoire/RCI%20-%20Domaine%20foncier%20rural.pdf (accessed 10 October 2013).

¹⁰⁵ *Id* article 3.

In terms of participation in decision-making, the Endorois also complained of the Kenyan government's failure to involve them in decisions affecting them. In contrast, the Ivorian government ensured the presence of the affected people on the board of the *Autorité pour l'aménagement du vallée du Bandama*. The authorities also recognised and relied on the 'Kossou Native Association', a development group comprising the elite, students, and other middle-class people from the affected area. According to Chauveau, this association played a prominent 'brokering' role between rural populations and the wider social and political environment.¹⁰⁶

With regard to the sharing of benefits, the Ivorian government built modern houses, schools, and healthcare facilities as part of the compensatory measures. This did not happen for the Endorois in Kenya. Although the Endorois are mainly pastoralists while the Baoulé are agriculturalists, there are similarities in religious and cultural practices between the two groups. Both groups perform religious and cultural rites on their ancestral lands, on the banks of their rivers, and in their valleys. They also have a deep attachment to their ancestors and perform certain rites at intervals at the graves of their ancestors seeking protection against wars and calamities and the favour of their gods in carrying out their pastoralist or agricultural activities. The displacement of both groups affected these practices profoundly.

3.4.2 Enforcement of decisions of the African Commission

As part of its protective mandate (discussed above), and in accordance with provision of articles 45(2)¹⁰⁷ and 46¹⁰⁸ of the African Charter, the Commission entertains communications from states (articles 47-54 of the Charter) and other communications (individuals and groups), in accordance with articles 55 and 56. In discharging its protective mandate, the Commission carries out investigations, confronts the positions of the parties, interprets the law, and makes rulings –

¹⁰⁶ Jean-Pierre Chauveau 'The land tenure question in Côte d'Ivoire: A lesson in history' (2000) 78 *Politique Africaine* 12 under the general title 'Question foncière et construction nationale en Côte d'Ivoire. Les enjeux silencieux d'un coup d'Etat' available at http://www.hubrural.org/IMG/pdf/iied_dry_ip95english.pdf (accessed 10 October 2013).

¹⁰⁷ '[To] ensure the protection of human and peoples' rights under conditions laid down by the present Charter'.

¹⁰⁸ The Commission may resort to any appropriate method of investigation; it may hear from the Secretary-General of the Organisation of African Unity, or any other person capable of enlightening it.

including ordering provisional measures.¹⁰⁹ However, it can only make recommendations, and by definition these do not carry the same legal weight as court rulings. This limitation on the protection mandate of the Commission has prompted the establishment of the African Court on Human and Peoples' Rights which will be discussed in brief below.

What steps can the Endorois take to ensure compliance with the Commission's ruling? Since the Endorois group was represented by NGOs, the question is in fact what can an NGO do should a state fail to implement a decision by a human rights body – in the present case the African Commission? Generally international law provides for several mechanisms to ensure state compliance. The three major mechanisms are 'coercion' as a mechanism by which states and institutions influence the behaviour of other states by escalating the benefits of compliance, or escalating the costs of non-compliance through material rewards and punishments.¹¹⁰ 'Persuasion', which is achieved through dialogue, negotiation, and diplomatic means and involves the active and often strategic, inculcation of norms;¹¹¹ and 'acculturation' – the general process by which a state adopts the beliefs and behavioural patterns of the surrounding culture.¹¹² This translates in notions such as the promotion of the culture of democracy, and implies on the part of the state at fault, that action is taken because other states in close vicinity do the same.

In the context of *Endorois* case, enforcement of the RtD requires what is termed here either 'restorative' or 'remedial measures'. 'Restorative measures' entail restitution of property taken from the people, return to the *status quo ante*, and

¹⁰⁹ For example, in the Communications 137/94, 139/94, 154/96 and 161/97 (1998). *International Pen and Others v Nigeria*, the African Commission ordered the respondent states to suspend the execution of the death sentence imposed on Ken Saro-Wiwa and eight of the co-defendants (Saturday Dobe, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera). The respondent state ignored the order and executed them. The African Commission ruled that the respondent state had violated article 1 of the African Charter. See http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html (accessed 13 October 2013). On provisional measures, see Yuma Dan 'Provisional measures under the African human rights system: The African court's order against Libya' 359. Available at <http://hosted.law.wisc.edu/wordpress/wilj/files/2013/01/Juma.pdf> at 359 (accessed 13 October 2013).

¹¹⁰ Goodman, Ryan and Jinks 'How to influence states: Socialization and international human rights law' (2004) 54 *Duke LJ* 9 available at SSRN: <http://ssrn.com/abstract=519565> (accessed 30 September 2013).

¹¹¹ *Id* 10.

¹¹² *Id* 5.

protection against further disturbance in the enjoyment of their rights to the restored land. As such, 'restorative measures' derive their legal authority from the human rights obligations to respect and to protect.¹¹³ They add nothing in terms of any benefit to the affected people, but they do bring an end to the damage. In the case of the Endorois, these were the measures recommended by the African Commission. 'Remedial measures' on the other hand, are premised on the obligation to implement steps such as ensuring inclusion of the affected population and their participation in decision-making before displacement and compensation in the form of material arrangements as elaborated above and the sharing of the benefits from the exploitation of the development project. The African Commission recommended that the benefits of the exploitation of the Rift Valley be shared with the Endorois. However, available information shows that to date neither restorative nor remedial measures have been taken by Kenya as regards the Endorois people. Viljoen discusses the enforcement issues and highlights three major steps to ensure compliance with African Commission recommendations: political will on the part of the state; the recognition of the nature of the decisions of the African Commission as legally binding; and advocacy beyond court-based remedies.¹¹⁴ These three steps will now be examined in greater detail.

First, 'political will' on the part of the state is a prime element in triggering compliance. However, this trigger also exposes the limitation of the African protection system based largely on the political goodwill of the state. In the African context, I concur with Viljoen's observation that this goodwill needs to be supplemented by consideration of the fact that the political will of the regional and sub-regional institutions also plays an important, if not key, role.¹¹⁵

¹¹³ Generally, under international human rights law, there are three obligations: to respect, protect, and fulfil. The duty-bearer, and in the present context the state, assumes obligations and duties under international law to respect, to protect, and to fulfil human rights. The obligation to respect means that state must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the state to protect individuals and groups against human rights abuses. The obligation to fulfil means that state must take positive action to facilitate the enjoyment of basic human rights. See <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 10 October 2013).

¹¹⁴ Viljoen F 'State compliance under the African Charter on Human and Peoples' Rights' (2010) 16/2 *Interrights Bulletin* 62.

¹¹⁵ *Ibid.*

The African Commission is of the view that its recommendations are legally binding on the state, and therefore carry an obligation to comply.¹¹⁶ Although this is the ideal, in my opinion recommendations of the African Commission are and will remain non-binding¹¹⁷ until the African Charter states differently, or the defendant state acts in a different way. The African Charter makes no provision for this as is the case with the decisions and recommendations formulated by bodies established under UN human rights treaties. Compliance with treaty body decisions is therefore subject to the goodwill of the state.¹¹⁸ With respect to implementation of the decisions of the African Commission, I again agree with Viljoen's view referred to above, that in combining pressure from NGOs, members of parliament, national human rights commissions, and the judiciary, an unstoppable momentum towards compliance can be created.¹¹⁹ This role of NGOs as pressure groups will be discussed further in Chapter 4 below.

I turn now to a brief discussion of the African Court on Human and Peoples' Rights.

3.5 The African Court on Human and Peoples' Rights

3.5.1 Genesis, mandate and the enforceability of its decisions

The African Court on Human and Peoples' Rights was established by the African Union through the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ('the

¹¹⁶ In the case *Kenneth Good v Botswana*, the African Commission rejected Botswana's argument that the African Charter does not impose legally binding obligations because, among other reasons, the drafters decided to adopt a treaty rather than a declaration (which is not legally binding). See Communication 313/05 *Kenneth Good v Botswana* 28th Activity Report of the African Commission on Human and Peoples' Rights AU Doc EX.CL/600 (XVII) Annex IV.

¹¹⁷ See wa'Mutua Makau *The African human rights system: A critical evaluation* (2000) 19. See <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 13 October 2013).

¹¹⁸ See, for example, Van Alebeek Rosanne and Nollkaemper André 'The legal status of decisions by Human Rights Treaty Bodies in National Law' ACIL research paper 2011-02, finalised 11 April 2011 23-25 available at SSRN <http://dare.uva.nl/document/450293> (accessed 2 October 2013).

¹¹⁹ Viljoen 'State compliance under the African Charter on Human and Peoples' Rights' (2011) 16/2 *Interrights Bulletin* 62.

Protocol') in 2006 in Arusha, Tanzania to complement and reinforce the protection functions of the African Commission.¹²⁰

The African Court comprises eleven judges, nationals of member states of the African Union with a track record in human rights (article 11).¹²¹ The judges of the court elect a President and Vice-President from among themselves who serve a two-year term, renewable once. Ten judges work on part-time basis, while the President works full time at the seat of the court in Arusha, Tanzania (article 21(2)). S/he is assisted by a registrar who also performs managerial and administrative oversight of the court.¹²²

3.5.1.1 Access to the Court

Access to the court depends on the nature of the applicant/defendant. In terms of article 5 of the Protocol, access is unconditional or an 'entitlement' to the following:

- a The Commission;
- b The State Party which has lodged a complaint to the Commission;
- c The State Party against which the complaint has been lodged at the Commission
- d The State Party whose citizen is a victim of human rights violation
- e African Intergovernmental Organisations.

¹²⁰ Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights available at <http://african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (accessed 13 October 2013).

¹²¹ The first judges of the court were elected in January 2006, in Khartoum, Sudan. They were sworn in before the Assembly of Heads of State and Government of the African Union on 2 July 2006 in Banjul, the Gambia.

¹²² Article 24 provides that:

1 The Court shall appoint its own Registrar and other staff of the registry from among nationals of Member States of the OAU according to the Rules of Procedure.

2 The office and residence of the Registrar shall be at the place where the Court has its seat.

Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights available at <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> (accessed 24 November 2013).

Rule 25(1) of the court further stipulates that '[T]he Registrar shall assist the Court in the exercise of its judicial function and shall be in charge of the general administration of the Court's Registry. He or she shall be responsible for the supervision and coordination of all the operations and activities of the Registry. Rules of the Court' See http://www.african-court.org/en/images/documents/Court/Interim%20Rules%20of%20Court/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (accessed 24 November 2013).

In contrast, access for individuals and NGOs (with them having observer status only at the African Commission) is left to the discretion of the court which 'may entitle' them.¹²³

The first weakness of the African Court relates to the restricted access for the principal holders of the rights enshrined in the African Charter: individuals and peoples (very often represented by NGOs).¹²⁴ Access to the court by individuals and NGOs is subject to the requirement that a state party (to the Protocol) accepts the jurisdiction of the court by making the appropriate declaration under article 34(6) of the Protocol establishing the court which reads:

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.

In addition, and in accordance with provisions of the Vienna Convention on the Law of Treaties,¹²⁵ a state party to the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights ('the Protocol') may of withdraw its declaration (made under article 34(6)) at any time, or simply withdraw from the Protocol.¹²⁶ Hansungule argues that the primary function of a human rights court is to protect citizens against the state. For him, therefore, the limitation on access to the court by individuals and NGOs renders

¹²³ Article 5(3) provides: 'The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it'.

¹²⁴ The African Charter provides for the rights of individuals (articles 1-17) and groups of individuals (family or people) (articles 18-26). See http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed 1 October 2013).

¹²⁵ The Vienna Convention applies to treaties between states. It was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of Treaties. The Conference was convened pursuant to GA resolution 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967. The Conference held two sessions, both at the Neue Hofburg in Vienna. The first session from 26 March to 24 May 1968, and the second session from 9 April to 22 May 1969. In addition to the Convention, the Conference adopted the Final Act and certain declarations and resolutions, which are annexed to that Act. It entered into force on 27 January 1980, in accordance with article 84(1). The Vienna Convention on the Law of Treaties is available at 1155 UNTS 155 .331 <http://www.worldtradelaw.net/misc/viennaconvention.pdf> (accessed 1 October 2013).

¹²⁶ The Vienna Convention on the Law of Treaties states in article 62(3) that: 'If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty'.

it 'virtually meaningless unless it is interpreted broadly and liberally'.¹²⁷ I concur in this view for two reasons. First, the court has been established to supplement the Commission. The complementarity between the Commission and court will be effective if same requirements for access apply. Secondly, the court was established to strengthen the African human rights protection system. To strengthen human rights protection begins and runs hand-in-hand with easy access to the 'protector', and not the contrary. Article 34(6), therefore, defeats the dual purpose of complementarity and enhancing human rights protection.

The validity of this requirement for access to the court set by article 34(6) of the Protocol, has recently been challenged in at least two instances before the African Court: *Femi Falana and Atabong Denis Atemnkeng against the African Union*, respectively. In the first case, *Femi Falana*, the applicant (a national of Nigeria) pleaded that the provisions of article 34(6) be repealed and sued the African Union as a corporate community on behalf of its member states. Given that Nigeria – which ratified the Protocol in 2004¹²⁸ – had not made the declaration required by article 34(6), the intention was to ensure direct access to the court without this requirement. The court rejected this argument and ruled that the African Union has a legal personality separate from its member states.¹²⁹ In the second case¹³⁰ a similar line of defence was raised in relation to Cameroon which signed the Protocol in 2006.¹³¹ The court did not depart from its earlier position and again rejected the application. On both occasions, the court dismissed the applications because, in its opinion, the African Union under the auspices of which the Protocol was adopted cannot be sued on behalf of its member states; and because it is not a party to the Protocol.

¹²⁷ Hansungule M 'Towards a more effective African system of human rights: "Entebbe Proposals"' available at http://www.biicl.org/files/2309_hansungule_towards_more_effective.pdf (accessed 10 October 2013).

¹²⁸ Status of ratification of the Protocol on the establishment of an African Court on Human and Peoples' Rights available at <http://au.int/en/sites/default/files/achpr.pdf> (accessed 28 November 2013).

¹²⁹ *Femi Falana v The African Union* Application 1/2011 available at <http://www.african-court.org/en/images/documents/Court/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf> (accessed 1 October 2013)

¹³⁰ *Atabong Denis Atemnkeng v The African Union*: application 14/2011 available at http://www.african-court.org/en/images/documents/orders/JUDGMENT-_Atemnkeng_v_African_Union_ENGLISH.pdf (accessed 10 October 2013).

¹³¹ *Id* n 268.

3.5.1.2 Admissibility

In deciding on the admissibility of applications submitted by individuals and NGOs, the court is guided by the provisions of article 56 of the African Charter.¹³² This includes the prior exhaustion of local remedies (article 56(5)). The Protocol is silent on applications submitted by the Commission, a state party, and African inter-governmental organisations. It can be assumed that admissibility of their applications is not to be questioned.

3.5.1.3 Jurisdiction of the court

The court has jurisdiction over disputes arising in Africa under the Protocol and 'any other relevant human rights instruments ratified by the states concerned'.¹³³ In taking decisions, the court may draw inspiration from a multitude of sources of law, including the African Charter and any other human rights instrument ratified by the state.¹³⁴ This provision offers enormous possibilities for the court to draw inspiration from a variety of sources of law given that, generally, in Africa most states are party to the core international and African human rights instruments.¹³⁵ In accordance with the provisions of article 9 of the Protocol, the role played by the court in its

¹³² Article 56 provides:
Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:
1 Indicate their authors even if the latter request anonymity,
2 Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3 Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4 Are not based exclusively on news discriminated through the mass media,
5 Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6 Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7 Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

¹³³ Article 3(1) provides: 'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned'.

¹³⁴ Article 7.

¹³⁵ The Office of the United Nations High Commissioner for Human Rights keeps an update on state ratification and reporting on human rights obligations. See www.ohchr.org for the updates. The African Union makes public a status of ratification of all instruments, including those which are human rights related. See www.au.int (accessed 10 October 2013).

proceedings can be conciliatory (amicably settling disputes),¹³⁶ or adversarial. Finally, the court also has advisory jurisdiction.¹³⁷ It can provide an ‘advisory opinion’ on any legal matter that has not been brought to the attention of the African Commission.

3.5.1.4 Enforcement of decisions of the Court

As opposed to decisions of the African Commission, decisions of the African Court on Human and Peoples’ Rights are legally binding;¹³⁸ hence the court complements and reinforces the human rights protection mandate of the Commission. However, in the absence of genuine enforcement or a compliance mechanism and political will on the part of a state, the advent of the African Human Rights Court can only bring favourable conditions for state compliance without necessarily being a real guarantee for effective protection of fundamental rights. The measures provided by the Protocol to ensure compliance function on two levels. First, article 30 gives the task of monitoring compliance with decisions of the court to the Executive Council of Ministers of the African Union, an organ comprising Ministers of Foreign Affairs of the African Union member states. The Protocol does not specify how this monitoring can be done. The second measure is the listing, in other words ‘naming and shaming’ in its annual report to the Assembly of Heads of State and Government of the African Union of countries which have not complied with its decisions (article 31).¹³⁹ Several scholars have expressed scepticism over the ability of the African Court to achieve its desired purpose of supplementing the African Commission in strengthening the protection of the rights enshrined in the

¹³⁶ Article 9: ‘The Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter’.

¹³⁷ Article 4(1) states: ‘At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission’.

¹³⁸ Article 30 provides, in part, that states ‘undertake to comply with the judgment in any case in which they are parties within the time stipulated by the Court and to guarantee its execution’.

¹³⁹ Article 31 provides: ‘The Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court’s judgment.’

African Charter.¹⁴⁰ For example, for Mutua the measures in place to guarantee compliance are inadequate, and amount to replicating the weaknesses of the African Commission which therefore renders the court irrelevant and an unnecessary bureaucratic complication. He does not see how a weak and financial poor institution like the African Union will be able to coerce a state to comply with decisions of its court. This raises the issue of the financial autonomy of the African Union; an issue which is beyond the scope this study. The African Union, it is argued, largely depends on assessed contributions from its member states and from voluntary contributions from donor countries and institutions. Simon's analysis of the African Union's 2011 budget suffices as an illustration of the dependence of the AU on external donors or a handful of its member states:

A close reading of the 2011 budget of the African Union tells a few interesting stories. There's the astonishing fact that more than half of the \$257 million total is not African money, coming from a collection of ambiguously titled 'International Partners' – other, richer organisations like the European Union, or donations from NGOs. The European Union, incidentally, has a 2011 budget of \$141.9 billion. This might explain the vast gulf between the respective influence and international standing of the two organisations, but, given the EU's budget is 1,000 times bigger than the AU's, the AU is punching above its weight.

The money that's not from 'International Partners' is contributed by African countries and amounts to \$123 million. However, the load is not divided equally. Five countries put in more than their fair share. The Big Five – Algeria, Egypt, Libya, Nigeria and South Africa – each contribute 15% of the African portion of the budget, effectively subsidising everyone else. This means the other 49 countries in Africa only need to find around \$30 million between them.¹⁴¹

Mutua's scepticism should be more nuanced. In my opinion, the measures provided could serve as 'foundation blocks' upon which ensuring effective compliance and enforcement of court decisions could be achieved gradually. I propose that the Permanent Representatives Committee ((PRC) – ambassadors of AU member states)¹⁴² which prepares meetings of the Executive Council,

¹⁴⁰ See wa'Mutua Makau 'The African human rights system: A critical evaluation' 2-34 available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/MUTUA.pdf> (accessed 1 October 2013).

¹⁴¹ Allison Simon 'After Gaddafi who will fund the AU?' <http://www.dailymaverick.co.za/article/2011-09-29-after-gaddafi-who-will-fund-the-au#.UvrMSWyPPIU> (accessed 26 November 2013).

¹⁴² Article 21 provides:

1 There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.

establishes, in accordance with article 21(2) *in fine* of the Constitutive Act of the African Union, a sub-committee on 'compliance'. It is usual practice for the PRC to organise its works around sub-committees, for example, for administrative and budgetary matters or programmes and conferences.¹⁴³

Through the proposed sub-committee, the PRC would work closely with the Court on issues relating to the implementation of the court's decisions and submit draft reports on compliance for the consideration by the Executive Council. Obviously, it is difficult to establish how a sub-committee of state representatives would ensure compliance. This proposed collaboration will by no means prevent the court from complying with its obligation to list states that have not implemented its decisions in its annual report to the AU Assembly. On the contrary, such is the natural flow between articles 30 (execution of judgments) and 31 (report) of the Protocol on the court.

3.5.2 Ordering of provisional measures by the court

As indicated above, the African Commission can submit the case to the court on the basis of non-compliance with its own ruling pursuant to article 5(1)(a) of the Protocol.¹⁴⁴ Under rule 118 of the Rules of Procedures of the African Commission on Human and Peoples' Rights, at least three situations requiring referral to the court are envisaged: non-compliance with its recommendations; non-compliance with provisional measures; and serious or massive violations.¹⁴⁵

2 The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.
available at http://au.int/en/sites/default/files/ConstitutiveAct_EN.pdf (accessed 26 November 2013).

¹⁴³ See, for example, Report of the joint meeting of the advisory sub-committee on administrative and budgetary matters and sub-committee on programmes and conferences to the twenty-first ordinary session of the Executive Council held in Addis Ababa, Ethiopia from 9 to 13 July 2012 available at [http://webmail.africa-union.org/Lilongwe_July_2012/EX%20CL%20720%20\(XXI\)%20i%20_E.pdf](http://webmail.africa-union.org/Lilongwe_July_2012/EX%20CL%20720%20(XXI)%20i%20_E.pdf) (accessed 17 April 2013).

¹⁴⁴ Article 5(a) on 'access to the Court' provides: '1 The following are entitled to submit cases to the Court: (a) The Commission ...' See http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf (accessed 17 April 2013).

¹⁴⁵ Rule 118 ('Seizure of the Court') reads as follows:

1 If the Commission has taken a decision with respect to a communication submitted under Articles 48, 49 or 55 of the Charter and considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2), it may

The Commission has referred a number of cases to the court on the basis of non-compliance with provisional measures. Provisional measures are ordered by the African Court in order 'to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.¹⁴⁶ Such was, for example, the case in *African Commission (Ogiek) v Kenya*.¹⁴⁷ In a case similar to that of the Endorois, and once again involving eviction by Kenya, the African Commission referred the case to the African Court on Human and Peoples' Rights. In this case, the African Commission raised concerns over the implementation of the eviction notices of the government of Kenya which had far-reaching implications and constituted, amongst others, a violation of the right to development (RtD) of the Ogiek community. The African Commission was concerned that the lifting by Kenya of the restriction on land transactions in the Mau Forest complex, would lead to the Ogiek people being dispossessed of their ancestral lands.

The African Commission pleaded for a halt to the eviction of the Ogiek from the East Mau Forest and for Kenya to refrain from harassing, intimidating, or interfering with the community's traditional livelihood; revise domestic laws to accommodate communal ownership of property; and pay compensation to the Ogiek Community for all the losses suffered. The court heard the case which it considered to be one of extreme urgency, and ordered provisional measures to be taken by Kenya. The African Court took provisional measures and ordered Kenya immediately to rescind the restrictions it had imposed on the land transaction in the Mau Forest and refrain

submit the communication to the Court pursuant to Article 5(1)(a) of the Protocol and inform the parties accordingly.

2 If the Commission has made a request for Provisional Measures against a state party in accordance with Rule 98, and considers that the State has not complied with the Provisional Measures requested, the Commission may pursuant to Article 5(1)(a) of the Protocol, refer the communication to the Court and inform the Complainant and the State concerned.

3 The Commission may, pursuant to Rule 84(2) submit a communication before the Court against a state party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under Article 58 of the African Charter, has come to its attention

4 The Commission may seize the Court at any stage of the examination of a communication if it deems [it] necessary.

See http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf (accessed 17 April 2013).

¹⁴⁶ Rule 98(1) stipulates: 'At any time after the receipt of a Communication and before a determination on the merits, the Commission may, on its initiative or at the request of a party to the Communication, request that the State concerned adopt Provisional Measures to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.

¹⁴⁷ See Application 006/2012 http://www.african-court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf (accessed 1 July 2013)

from any act or thing that could prejudice the principal application pending before the court.¹⁴⁸ But as discussed, no steps to comply have as yet been taken by Kenya.

In the *Endorois* case, too, Kenya failed to comply with the recommendations of the African Commission. However, the Commission has not yet referred the matter to the African Court.

Beyond the court-based remedies, the Endorois Development Counsel availed itself of opportunities for engaging the Kenyan authorities on policy issues. They also engaged the Kenyan parliament and NGOs both in Kenya and internationally to raise public awareness of their plight and to win more support. In this, it is worth noting the positive steps that have been taken by Kenya to address some of the claims of the Endorois. For example, the 2010 Constitution of Kenya acknowledges the rights of indigenous communities recognised as 'marginalised groups'.¹⁴⁹ In my discussion of the situation in Côte d'Ivoire in Chapter 5 below, I will suggest that Ivorian NGOs

¹⁴⁸ See Application 006/2012 *African Commission v The Republic of Kenya* available at http://www.african-court.org/en/images/documents/Orders-Files/ORDER__of_Provisional_Measures__African_Union_v_Kenya.pdf (accessed 17 April 2013).

¹⁴⁹ Article 10 provides:

- 10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them
- (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include –
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

Article 260 further defines the concepts of 'indigenous community' and 'marginalised group': 'marginalised community' means –

- (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
- (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
- (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are –
 - (i) nomadic; or
 - (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

'Marginalised group' means: 'a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4)'. 'group' m legislation' means 'an Act of Parliament, or a law made under authority conferred by an Act of Parliament'. See the Constitution of Kenya, Revised edition 2010 available at <http://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf> (accessed 10 October 2013).

should also broaden the scope of their work along similar lines when pursuing the RtD).

3.6 Human rights litigation before the Court of Justice of the Economic Community of West African States

There are also a number of African ‘sub-regional’ courts with either express or implied human rights jurisdiction. Apart from the African Court on Human and Peoples’ Rights with its headquarters in Arusha, Tanzania, at the continental level, at the sub-regional level, there are the Economic Community of West African States Court of Justice (Community Court of Justice), the East African Court of Justice (EAC Court) and the Southern African Development Community Tribunal (SADC Tribunal).

Only the ECOWAS Court has express human rights jurisdiction by virtue of its 2005 Supplementary Protocol which amended the initial protocol establishing the Community Court of Justice.¹⁵⁰ The other regional courts deal with human rights as an implied jurisdiction in their mandate. Two examples suffice to illustrate the ‘implied’ jurisdiction over human rights issues. First, in the case of *Hon Sitenda Sebalu v the Secretary General of the East African Community and others*, the East African Court of Justice (EAC Court) ruled that:

... this Court wishes to draw attention to Article 6(d) of the East African Community Treaty which urges the Partner States, *inter alia*, to recognize, promote and protect human and people’s rights in accordance with the provisions of the African Charter on Human and People’s Rights. National courts have the primary obligation to promote and protect human rights. But supposing human rights abuses are perpetrated on citizens and the State in question shows reluctance, unwillingness or inability to redress the abuse, wouldn’t regional

¹⁵⁰ In essence, the Supplementary Protocol A/SP.1/01/05 materialises the inclusion of human rights in the jurisdiction of the Community Court by amending the preamble to include reference ‘obstacles to economic integration (which include human rights violations, and articles 1 (definitions), 2 (establishment of the Court), 9 (competence of the Court) and 30 (expenses of the Court) of the Protocol A/P.1/7/91 which relate to the Community Court of Justice, and article 4 paragraph 1 of the English version of the Protocol. The initial protocol can be found at http://www.courtecowas.org/site2012/pdf_files/protocol.pdf (accessed 12 February 2014). With regards the Supplementary Protocol A/SP.1/01/05, see in particular, article 6 (jurisdiction of the Court) and article 10 (access to the court) available at http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed 10 October 2013).

integration be threatened? We think it would. Wouldn't the wider interests of justice, therefore, demand that a window be created for aggrieved citizens in the Community Partner State concerned to access their own regional court, to wit, the EACJ, for redress? We think they would.¹⁵¹

In this case, although the EAC Court has no such power; it has dealt with human rights claims using its competence to interpret and apply community law, namely the East African Community Treaty's commitment to pursue development by respecting certain principles, including human rights, democracy, and the rule of law.

Secondly, the SADC Tribunal also has no human rights mandate but the Charter of Fundamental Social Rights in SADC includes specific rights.¹⁵² One of these rights relates to non-discrimination on the basis of race, which was applied by the SADC Tribunal in the case of *Campbell v Zimbabwe*.¹⁵³

The ECOWAS Court of Justice is therefore briefly touched upon from the twin stances of its explicit mandate on human rights, and its relevance to Côte d'Ivoire. This court is the judicial organ of the Economic Community of West African States (ECOWAS), and is competent to resolve disputes relating to the Community's treaty, protocols, and conventions.

¹⁵¹ *Hon Sitenda Sebalu v the Secretary-General of the East African Community and others* Reference 001 of 2010 available at http://www1.chr.up.ac.za/images/files/documents/african_cases/institution/eacoj/eacoj_judgment_ref1_2010_sebalu.pdf (accessed 10 October 2013).

¹⁵² Charter of Fundamental Social Rights in SADC available at <http://www.sadc.int/documents-publications/show/837> (accessed 1 July 2013). See also <http://www.sadc-tribunal.org/?instruments=charter-of-fundamental-social-rights-in-sadc> (accessed 1 July 2013).

¹⁵³ *Mike Campbell (Pvt) Limited and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008). On 11 October 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Southern African Development Community Tribunal (the Tribunal) challenging the acquisition by the respondent of agricultural land known as Mount Carmel in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of article 28 of the Protocol on the Tribunal (the Protocol), as read with rule 61(2)-(5) of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim measure restraining the respondent from removing or allowing the removal of the applicants from their land, pending the determination of the matter. For more details see <http://www.sadc-tribunal.org/?cases=mike-campbell-pvt-ltd-and-others-v-the-republic-of-zimbabwe> (accessed 28 November 2013). See also <http://www1.chr.up.ac.za/index.php/human-rights-news/509-zimbabwe-mike-campbell-pvt-limited-and-others-v-zimbabwe-2008-ahrlr-sadc-2008.html> (accessed 28 November 2013). See also a chronology of the *Campbell* case http://www.pbs.org/pov/mugabe/campbell_zimbabwe_case_documents.php (accessed 28 November 2013).

3.6.1 The establishment of the Economic Community of West African States Court of Justice

The Community Court of Justice was created under article 15 of the ECOWAS (revised) Treaty in furtherance of the objectives of the Community.¹⁵⁴ The ECOWAS Treaty was revised in July 1993 to replace the tribunal originally envisioned with a Community Court of Justice. While the revised treaty entered into force in 1995, the judges of the Community Court of Justice were not appointed until 30 January 2001. It was not until 2005 that a new protocol was adopted (in Accra, Ghana on 19 January 2005) giving an explicit human rights mandate to the Community Court.¹⁵⁵ In December 2001, ECOWAS adopted Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (the Protocol on Democracy and Good Governance), in which its members affirmed, *inter alia*, their adherence to the principles of recognition, promotion, and protection of human rights in accordance with the provisions of the African Charter on Human and Peoples Rights;¹⁵⁶ and the promotion of a peaceful environment as a prerequisite for economic development.¹⁵⁷ Article 1(h) provides:

The rights set out in the African Charter on Human and People's Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights.

Article 15(4) of the ECOWAS [revised] Treaty states that:

Judgements of the, Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.¹⁵⁸

¹⁵⁴ Treaty of ECOWAS available at <http://www.comm.ecowas.int/sec/index.php?id=treaty&lang=en> (accessed 28 November 2013).

¹⁵⁵ Supplementary Protocol A/SP.1/01/05 amending the preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of the Justice, and article 4 paragraph 1 of the English version of the Protocol available at http://caselaw.ihrda.org/doc/2005_prot_eco/view/ (accessed 26 November 2013).

¹⁵⁶ Article 4(g) of ECOWAS Treaty (revised) available at http://www.comm.ecowas.int/sec/fr/docs/traite_revise.pdf (accessed 3 October 2013).

¹⁵⁷ Article 4(1) of ECOWAS Treaty (revised).

¹⁵⁸ *Id* n 298.

In other words, they are final and not subject to appeal.

Article 39 of the Protocol on Democracy and Good Governance states further:

Protocol A/P 1/7/91 adopted in Abuja on 6 July 1991 relating to the community court of justice, shall be reviewed so as to give the court the power to hear, inter-alia, cases relating to violation of human rights, after all attempts to resolve the matter at national level have failed.

3.6.2 Expansion of the mandate to include human rights

The initial treaty establishing the court had certain shortcomings. First, the adjudicative jurisdiction of the ECOWAS Court was limited specifically to matters of interpretation and the application of the ECOWAS Treaty, Protocols, and Conventions.¹⁵⁹

With the adoption in January 2005 of a supplementary protocol, prior exhaustion of local remedies is no longer required of individuals and NGOs before gaining access to the court. Article 10 of the Supplementary Protocol of 2005 specifies the new mandate of the court and the conditions access to the jurisdiction of the court by individuals and or group as follows:

Access to the Court is open to the following:

- a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought for failure by a Member State to fulfil an obligation;
- b) Member States, the Council of Ministers and the Executive Secretary in proceeding for the determination of the legality of an action in relation to any Community text;
- c) Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
- d) Individuals on application for relief for violation of their human rights; the submission of application for which shall:

¹⁵⁹ Article 9 of that Protocol states that:

- (1) The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.
- (2) The Court shall also be competent to deal with disputes referred to it, in accordance with the provisions of Article 56 of the Treaty, by Member States or the Authority, when such disputes arise between the Member States or between one or more Member States and the Institutions of the Community on the interpretation or application of the provisions of the Treaty.

- i) not be anonymous; nor
- ii) be made whilst the same matter has been instituted before another International Court for adjudication;
- e) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;
- f) Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.

3.6.3 Opportunities and limitations for human rights litigation

As from June 2013, the ECOWAS Court has adjudicated a number of human rights cases since the expansion of its jurisdiction to include human rights. These cases are not reviewed here. Apart from the *SERAP* case¹⁶⁰ (in which the Community Court ruled that the RtD was a justiciable right in accordance with article 22 of the African Charter), the other cases so far decided by the court do not relate to the central inquiry of this study.

In the *SERAP* case, the Nigerian NGO, Socio Economic Rights and Accountability Project (SERAP) claimed that Nigeria had violated article 17 (the right to education); article 21 (the right of the people not to be dispossessed of their wealth and natural resources); and article 22 (the right of the people to economic and social development) of the African Charter following a controversial television announcement by former President Olusegun Obasanjo alleging that certain senior officials in government had taken bribes. The ECOWAS Court rendered the case admissible since no exhaustion of local remedies was required, but dismissed the case for lack of evidence.

Other cases relating to claims of violations of human rights also illustrate the jurisdiction of this court to hear human rights cases. Niger, for example, has paid compensation to Hadidjatou Mani Koraou in execution of the court's decision in a

¹⁶⁰ ECW/CCJ/JUD/07/10 *The Registered Trustees of the Socio-economic and Accountability Project (SERAP) v Nigeria and UBEC*. See <http://caselaw.ihrda.org/doc/ecw.ccj.jud.07.10/view/> (accessed 10 October 2013).

slavery case in which the defendant state was found in breach of human rights law.¹⁶¹

From the perspective of Ivorian NGOs which will be examined in Chapter 5, *de jure* access to the ECOWAS Court is easier than to the African Commission or the African Court on Human and Peoples' Rights. The former does not require exhaustion of local remedies as in the case of the African Commission,¹⁶² or a solemn declaration by the state at the time of ratification accepting the competence of the court to receive cases filed by NGOs and individuals.¹⁶³ *De facto*, and based on personal interviews I conducted with leaders of human rights NGOs in Côte d'Ivoire,¹⁶⁴ this direct access to the ECOWAS Court by NGOs and individuals is nonetheless rendered difficult by the court's location in Abuja, the political capital of Nigeria, which is too far and expensive to travel to, or to live in – even for a short period – for both a local NGO with limited funding, and an ordinary ECOWAS citizen. This geographic location argument, however, needs to be more nuanced when comparing the ECOWAS Court, with for instance, the African Court on Human and Peoples' Rights, located in Arusha, Tanzania, or even the African Commission on Human and Peoples' Rights based in Banjul, both of which are even less accessible in many respects, including in terms of cost, than the Abuja-based court. Other challenges faced by those wishing to use the court include lack of translation facilities in the three languages of the court (English, French and Portuguese), absence of witness protection mechanisms, assistance, or legal aid, and limited awareness of the existence and functioning of the court.¹⁶⁵

¹⁶¹ ECW/CCJ/JUD/06/08: *Hadijatou Mani Koraou v Niger* available at <http://caselaw.ihra.org/doc/ecw.ccj.jud.06.08/view/> (accessed 10 October 2013).

¹⁶² Article 56.5 of the African Charter on Human and Peoples' Rights requires that communications must be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

¹⁶³ Article 5.3 of the Protocol to the African Charter on Human and Peoples' Rights relating to the African Court on Human and Peoples' Rights reads: 'The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol'. Article 34.6 requires that 'at the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.'

¹⁶⁴ Listed in the annexure to this thesis.

¹⁶⁵ Challenges relating to access and functioning of the ECOWAS Court are highlighted in a study commissioned by the United Nations in preparation for the regional conference on 'Impunity, justice and human rights'. See Azimazi S 'Evaluation of the implementation of the ECOWAS

In summary, this overview of the avenues available to pursue the RtD clearly establish that NGOs in West Africa in general, and in Côte d'Ivoire in particular, do not only have a legal framework to operate within – both at home and regionally – they can also contribute to the development of the jurisprudence of domestic, sub-regional and continental courts tasked with the mandate of enforcing human rights. The practical obstacles relating to knowledge and capacity gaps confronting these human rights NGOs in the performance of their role, will be examined in greater detail in Chapter 5 below, along with a discussion of the concept of NGOs and their intended role and function in a democratic African state.

CHAPTER 4

THE INTENDED ROLE AND FUNCTION OF NON- GOVERNMENTAL ORGANISATIONS IN A DEMOCRATIC AFRICAN STATE

4.1 Introduction

Having discussed the Right to Development (RtD) in the previous two chapters, it is appropriate now to move to the next key concept in this research: non-governmental organisations (NGOs). This chapter analyses the concept of non-governmental organisations (NGOs) and their intended role and function in a democratic African state with emphasis on those with the protection of human rights as their principal mandate. The concept of NGOs has evolved over time and tends to reflect a different significance from one context to the other. This evolution will be highlighted by way of introduction to this chapter.

This chapter serves the principal purpose of exploring the added value of human rights NGOs in the process of democratisation of African states and in contributing to the realisation of the RtD in particular. The democratic state is understood here as the one that is capable of performing its core functions and more specifically, its triple human rights obligation to protect, respect, and fulfil human rights. A state is also democratic when it operates in a manner that is both participatory to the extent that the people of a country have a say in how they are governed; and respectful of the separation of powers between the legislature, the executive, and the judiciary. Included in this perception of a 'democratic African state' is a reference to a state that is peaceful, stable and prosperous.

The chapter opens with an account of the evolution of the concept of NGOs, especially from an historical perspective in the context of its origins within the so-called 'western world' from antiquity (the Greco-Roman era) to date. Within the context of the general evolution theme, reference is also made to the origin of NGOs in West Africa. The discussion then moves on to the framework for the establishment and operation of NGOs in West Africa. The choice of West Africa in selecting

countries for the review of the legal framework in which NGOs operate, is justified by the intention of focusing on the immediate environment within which NGOs in the Côte d'Ivoire operate. Next, the role and functions of African NGOs are reviewed from the perspective of the realisation of the RtD. Finally, the main challenges confronting these NGOs are examined.

4.2 Genesis and evolution of the concept, function and role of non-governmental organisation

4.2.1 The concept of non-governmental organisation (NGO)

Historically, the concept of *societas civilis* (civil society) is believed to have been introduced by Cicero¹ in the Roman Empire at the early stages of the political thought in Europe – a moment also referred to as 'classical antiquity'.² He promoted the concept of 'good society' without making any distinction between 'the state' and 'civil society'. Edwards further explained that a 'good society' was understood during classical antiquity to be the one in which people lived together in an orderly and peaceful manner.³ It was assumed that human beings are capable of voluntarily gathering for a common cause in peace, and that human beings are inherently rational and can collectively shape the nature of their society; a role played by contemporary NGOs.

Today, the 19th century French political scientist and historian, Alexis de Tocqueville (1805-1859), is arguably one of the early writers on the concept of civil society.⁴ In his book *[On] democracy in America*,⁵ while examining the functioning of

¹ Cicero was a constitutionalist and political scientist believed to have lived from 3 January 106 BC - 7 December 43 BC. See http://books.google.sn/books?id=eKNK1YwHcQ4C&pg=PA244&redir_esc=y#v=onepage&q&f=false (accessed 4 July 2013) and Jones H *Master Tully: Cicero in Tudor England* (1998) 244.

² The classical antiquity is a moment in history which broadly corresponds to the domination of the Greco-Roman society over Europe. It evolved from the 8th century BC through to the early Middle Ages (AD 600-1000). See Grinin LE 'Early state in the classical world: Statehood and ancient democracy' in Grinin LE *et al* (eds) *Hierarchy and power in the history of civilizations: Ancient and medieval cultures* (2008) 9 31-84.

³ Edwards M *Civil society* (2004) 6.

⁴ Zaleski PS 'Tocqueville on civilian society: A romantic vision of the dichotomic structure of social reality' 2008 *Archiv für Begriffsgeschichte* 50.

the American (political) society and various forms of political association, Tocqueville referred to the notion of 'civil' society, in comparison with the 'political' society that he was studying. He described the former as a sphere of private entrepreneurship and civilian affairs. He argued that the coming together of Americans for common interests was for the Americans, a means of overcoming their selfish desires for the common good of the American society. He then observed that both an active political society and a vibrant civil society, independent of the state, were instrumental to the making of a democratic society.⁶ The role of civil society in the promotion of a culture of democracy was further expanded during the 20th century by, amongst others, Almond and Verba⁷ who drew a correlation between citizen awareness of their civil and political rights on the one hand, and on the other, the quality of their vote and monitoring of government performance. Verba concluded that civil society organisations were instrumental in both public awareness and holding government accountable.⁸ In contemporary literature, Putnam supported the view that civil society organisations contribute extensively to the culture of democracy as they build shared values, social capital, and trust, all of which keep society together.⁹

Today, the notion of 'civil society organisations' faces fierce opposition, including within academic circles across the north¹⁰ and south divide.¹¹ For Zaleski a scholar from the north, for example, NGOs are not democratic as they are not representative of any given voting constituency.¹² Zaleski portrays 'civil society' as representing a neoliberal ideology, and set to legitimise an antidemocratic attack on state institutions through development of a third sector as its substitute.¹³ Zaleski's thesis fails to appreciate the well-documented role played by NGOs in the development of norms and standards which have shaped state institutions and regulate the relationship between them in a given democratic society. Also, through

⁵ Tocqueville reviewed the democratic revolution which according to him occurred in the United States of America over a period of seven hundred years. See Tocqueville *A Democracy in America* (published in two volumes in 1835 and 1840, respectively).

⁶ *Ibid.*

⁷ Almond G and Verba S (eds) *The civic culture: Political attitudes and democracy in five nations* (1989) 354.

⁸ *Passim.*

⁹ Putnam *et al Making democracy work: Civic traditions in modern Italy* (1994) 182.

¹⁰ The 'north' is understood here to include Europe and North America or the 'western world'.

¹¹ The 'south' refers to Africa, Asia, the Middle East, and Latin America.

¹² Zaleski PS *Neoliberalizm i społeczeństwo obywatelskie (Neoliberalism and civil society)* (2012) 254.

¹³ *Passim.*

their watchdog function NGOs have helped to improve state performance in such a democratic society. Jai Sen, a scholar from the south is critical of NGOs for a different reason. For her, NGOs act as promoters of a neo-colonial project driven by elites in their own interest.¹⁴ In other words, she suggests a battle aimed first at opposing the north (with its neo-colonial ambition), and secondly, the south that must make every effort to resist domination. In this struggle, she perceives NGOs as not fulfilling an endogenous agenda, but acting as accomplices of the north-domination agenda. Sen's opinion is bolstered by the fact that NGOs generally seek and receive funding from foreign sources, often from the north, and they tend to align themselves with the priorities set out by such donors. In the same vein, networking with international (western) NGOs often tends to serve as avenues for NGOs from the north to impose their priorities on NGOs in the south. This issue will be expanded on below when the challenges confronting NGOs in Africa are discussed. Suffice to argue here that Sen's opinion demands greater nuance. First, human rights as the subject matter of NGOs' work is universal in its understanding and application and cannot be said to be part of a selfish agenda or a pursuit of a neo-colonial agenda. Secondly, networking with NGOs from the north has helped NGOs in the south to build their capacity and to bring their concerns into the public domain and the international arena more effectively than they would have if left to their own devices in the face of states that are unwilling to uphold human rights.

As such, the notion of 'civil society' evolved over the ages from western antiquity,¹⁵ pre-modern history,¹⁶ modern history,¹⁷ to the post-modern era – the period beginning in the 1950s – from when this concept is today understood and discussed. Examining each of these steps in the evolution of 'civil society' is without doubt critical to the full understanding of the concept of 'civil society' generally, and

¹⁴ Jai Sen *Interrogating the civil: Engaging critically with the reality and concept of civil society*, (2010) available at <http://blog.p2pfoundation.net/are-civil-society-movements-oppressive-jai-sen-on-engaging-critically-with-the-reality-and-concept-of-civil-society/2010/12/03> (accessed 7 October 2013).

¹⁵ The period dated from approximately the 8th - 7th century BC through to the early Middle Ages.

¹⁶ This period spanned the 15th and 16th centuries.

¹⁷ 'Modern history' is indicated as the period dating from the 16th century to roughly the middle of the 20th century (and includes the first and second world wars).

could constitute a valid field of inquiry. However, it is beyond the scope of the present study.¹⁸

4.2.2 Evolution of the function and role of non-governmental organisations in society

Beyond the historic role of NGOs in the development of a culture of democracy, which can arguably be termed 'political', today, the role and functions of NGOs globally have branched out in at least three directions: economics, the environment, and globalisation (or more accurately, largely 'anti-globalisation'). NGOs play an increasing role in economic issues such as budget monitoring following the Buchanan concept of constitutional economics¹⁹ which implies premising state economic decision-making on constitutional norms. It opens avenues for NGOs to monitor budgets and embark on public interest litigation and initiate judicial review of a state's economic performance. Issues relating to environmental sustainability,²⁰ including climate change, have also attracted the interest of NGOs both locally and globally. They also mobilise and rally against the negative impact of globalisation on human rights. For example NGOs increasingly defend the right to privacy. Privacy International, for example, argues that:

The world is changing. Technology is transforming our lives and relationships. The threat of terrorism [and transnational organized crimes] is giving governments *carte blanche* to ramp up state surveillance and curtail civil liberties. We believe that technological development should strengthen, rather than undermine, the right to a private life, and that everyone's personal

¹⁸ Recourse to western references in relation to the general evolution of the concept of civil society is attributable to our limited knowledge of and access to information in this field with regard to other systems, and does not necessarily confirm (or denote absolute agreement with) the western origin of this concept.

¹⁹ Buchanan defines 'constitutional economics (CE)' as a field of study concerned with the influence of constitutional provisions, institutional procedures, and government decision-making on economics. See generally <http://www.constitutionaleconomics.org/> (accessed 5 July 2013).

²⁰ According to Hermann Daly, environmental sustainability encompasses three cardinal requirements. First, sustainable yield which means that the rate of harvest for renewable resources should not exceed the rate of regeneration. Second, regarding pollution, the rates of waste generation from projects should not exceed the assimilative capacity of the environment (sustainable waste disposal); and third, the depletion of the non-renewable resources should require comparable development of renewable substitutes for that resource. See Daly H 'Toward some operational principles of sustainable development' (1990) 4/3 *Gannett Center J* 113-118.

information and communication must be carefully safeguarded, regardless of nationality, religion, personal or economic status.²¹

In the African context, in addition to what obtains in the north,²² protection against the impact of globalisation on African cultural heritage, or using the gains of globalisation and technological development to preserve and further expand African cultural values, should in my view constitute elements of NGO priorities.

4.2.3 West African context

The genesis and evolution of the concept of African human rights NGOs is discussed here through three stages: the pre-independence era; the post-independence era; and finally, their evolution into the NGOs of today. Ghana and Côte d'Ivoire are used here for the purpose of illustration while admitting that a wider group of countries could have been studied.

4.2.3.1 *The pre-independence non-governmental organisations*

In the context of Ghana, Jonah argues that organised groupings through association and pressures groups were involved in shaping governance structures as far back as the eighteenth century²³ and included traditional rulers, the youth, and women's groups. These groups, which were not referred to as NGOs at this stage, challenged the British colonial rule and their efforts eventually led to the country's independence in 1957, reports Jonah. A similar situation was observed in neighbouring Côte d'Ivoire where women marched from Abidjan to the city of Grand Bassam on 24 December 1949 to free independence activists from the jails of the colonial administration.²⁴

²¹ Privacy International was founded in 1990 in the United Kingdom to defend the right to privacy across the world. It fights surveillance and other intrusions into private life by governments and corporation. See generally <https://www.privacyinternational.org/> (accessed 7 October 2013).

²² In the context of this study understood to refer to Europe and North America in particular.

²³ Jonah K 'Before we were called CSOs' keynote address at a regional seminar 'Reflecting on Civil Society's Evolution in Ghana over the last 50 years' Accra, Ghana 8-9 November 2007 in conference report by West African Civil Society Initiative (2008) 7-8.

²⁴ Diabaté H *La marche des femmes sur Grand-Bassam*(1975) *Nouvelles éditions africaines* page 10.

The Democratic Party of Côte d'Ivoire, which ruled the country for four decades after independence emerged out of an association of indigenous coffee and cocoa producers, the African Agricultural Union led by Felix Houphouët Boigny, who eventually became the first president of the country. Similarly, in Ghana in 1938, protests against a monopoly of the commodity market by an expatriate-controlled association of West African merchants is believed to have contributed to the independence movement. The Aba Women's riot of 1929 in present day eastern Nigeria, which was a protest by market women against the colonial government's policy on taxation, is another example of civil organisations in pre-independence West Africa.²⁵

Two issues are worth mentioning of pre-independence groupings. First, contrary to the modern understanding of civil society as discussed in Chapter 1, the fact that these groupings had no legally stipulated mandate had no impact on their legitimacy as forces for change and as vehicles for the articulation of societal concerns and aspirations. In fact, it was practically inconceivable that the colonial administration would facilitate the recognition of these groups unless they served its interests. Secondly, most of these groups became political parties during and after the independence period, and could no longer qualify as NGOs.

The legacy of pre-independence forms of association is worth noting, especially for understanding why notions of ethnicity and/or religion still have an impact on contemporary civil society organisations. Emerging from rural or semi-urban settings, these groups were formed along tribal lines for obvious reasons, such as the need to communicate in the same language, or a commonality of interests, or issues being fought for such as the preservation of cultural heritage as in the case of the Endorois community of Kenya in East Africa.²⁶ While questions of ethnicity and religion in relation to civil society are not canvassed comprehensively, it is worth mentioning that Masterson has noted that the 'ethnicisation' of civil society in many African

²⁵ Evans Marissa K *Aba Women's Riots (November-December 1929)* 'http://www.blackpast.org/gah/aba-womens-riots-november-december-1929 (accessed 12 February 2014).

²⁶ See Chapter 3 above.

states has created potential sources of conflict, which are not captured in the western-style conceptualisation of civil societies.²⁷

Indeed, in the African context cultural and ethnic base institutions present the dilemma of striking a balance between the need to preserve and to promote the cultural identity of groups, and the imperative of building modern African nations based on common values which cut across cultural specificities of the groups composing a given nation. In Côte d'Ivoire, for example, over sixty ethnic groups coexist. However, the 'instrumentalisation' of ethnicity and religion by the political actors has the potential for exacerbating social tensions in the context of the decade-long crisis. This has also impacted on the role and activities of human rights NGOs in areas such as human rights monitoring and reporting, and in selecting their areas of inquiry.

4.2.3.2 Post-independence non-governmental organisations

I could find no reports of local NGOs during the period ranging from independence to the end of the 'cold war' other than those existing during the pre-independence era as briefly presented above. This situation is to be seen in the context of the existence of a one-party system as well as military regimes a few years after independence as elaborated on above in the context of the establishment of an African human rights system. These regimes were not conducive to the creation of local NGOs as freedom of association and assembly were only allowed for the purposes of propaganda for the regime of the day. Other than professional associations such as lawyers' associations, for example, no local NGO would be allowed to champion human rights. The end of the 'cold war' coincided with the emergence of more 'formal' human rights NGOs in the 1980s, initially in English-speaking countries like Ghana, Kenya, and Nigeria, followed in the 1990s by French-speaking countries, notably Senegal, Burkina Faso, and Côte d'Ivoire. At the same time, international NGOs such as Amnesty International reached across Africa

²⁷ Masterson G 'Defining civil society in the context of the African Peer Review Mechanism' 5 available at http://www.eisa.org.za/aprm/pdf/Resources_Bibliography_Masterson3.pdf (accessed 19 April 2013).

through the establishment of national branches.²⁸ Equally, the, *Federation Internationale des Ligues des Droits de l'Homme* groomed the creation of local human rights NGOs mainly in French-speaking African countries. Networks of human rights NGOs were established along sub-regional and thematic lines. These are exemplified by, *inter alia*, the *Union interafricaine des droits des de l'homme*, and the African Women's Communication and Development Network.

Ndongo attributed the emergence of these 'formal' NGOs on the African scene to the woeful collapse of the first African states' institutions.²⁹ NGOs served as partners in the field of human rights. This translated in the promotion of human rights through public awareness programmes and protection through monitoring and public reporting – two functions which were arguably not adequately addressed by state institutions. This role, however, contributed to the perception of NGOs as puppets of foreign governments through the umbilical cord of donor funding.³⁰

4.2.3.3 West African non-governmental organisations of the early twenty-first century

While remaining characterised by social mobilisation and advocacy as their principal *modus operandi*, today the core functions of NGOs have evolved from being solely confrontational to the central authority, as was the case before, during and after independence, towards cooperation through rendering expert services on policy matters; as well as serving as think-tanks and research institutions. For example, during consultations on national development strategies and/or plans; performing service delivery in the field ranging from distributing food and non-food items, to running legal clinics, or a mass sensitisation campaign on issues such as social cohesion, voter education, HIV and AIDS, public hygiene, combating domestic violence, and child labour. These NGOs are also confronted with issues such as fighting for freedoms of assembly, association, and expression. Generally, NGOs are

²⁸ The author, for example, was appointed to lead Amnesty International membership development and advocacy programmes on the African continent between 1991 and 2000.

²⁹ Ndongo O 'Role of West African civil society in peace building' in Ibrahim J and Ndongo O (eds) *Resolving West African conflict, early warning early response*, WACSOF and CDD (2008) 176.

³⁰ Jonah n 23 above 7-8.

recognised and accepted in a multi-party setting. However, they are also confronted with new challenges such as those relating to governance (especially elections), terrorism, and transnational organised crime. These issues are discussed below.

In essence, fifty years after independence, and nearly three decades after the return to multiparty systems, NGOs have the potential, and in some cases the space, to consolidate democratic gains by engaging the state on policy issues aimed at promoting accountability and participation in public affairs, as well as instilling a culture of respect for and the promotion, fulfilment, and protection of human rights.

4.3 Framework for the establishment and functioning of non-governmental organisations in Africa in general and in West Africa specifically

In Chapter 1, a human rights NGO was defined as ‘an independent voluntary association of more than one individual acting together, on a continuous basis, for the realisation of human rights’. No human rights NGO works to achieve government office or to make a profit and it does not engage in illegal activities. The moment the NGO enters the governmental fray it is no longer a human rights NGO. This section will, therefore, examine the framework, including the legal requirements, for the establishment and functions of non-governmental organisations in West Africa.

This operational definition of an NGO needs to be supplemented by categorising NGOs for a better understanding of their dynamic nature in Africa generally, and in West Africa specifically. An examination of the legal regime under which they operate will then be considered. The situation in West Africa is used as a case study, with Nigeria, Ghana, and Senegal as examples in the study while the position in the Côte d’Ivoire is discussed in Chapter 5 below.

4.3.1 Different types of non-governmental organisation

NGOs can be categorised in a various ways. First, they may be registered or unregistered. Registration is achieved through compliance with the legal and

regulatory framework in place in a given country, and the issuing of a certificate of registration. Examples of registration processes in Anglophone and Francophone West African countries are discussed below. However, the fact that an organisation is not registered does not mean that it does not exist or is ineffective. There are several organisations, especially in rural and semi-urban settings, that operate and are recognised by their communities as driving forces for change, and which contribute to the general welfare without any formal registration. In Côte d'Ivoire, for example, local authorities work with such groups as *mutuelle de development* in disparate areas, including inter-community dispute resolution, sensitisation on public health, primary education, or child and maternal health. I submit that these unregistered groups should be considered as NGOs provided that they are not involved in 'illegal activities'. Registration serves as an administrative requirement which should by no means take precedent over the social responsibility and contribution made by these groups.

Secondly, there are government-friendly NGOs and those that are not. The former distinguish themselves by attributes such as speedy registration, public profile, are cited in government circles as 'success stories', and recommended by the government to its partners for financial support. In contrast, NGOs not perceived as government-friendly, that is those critical of governments' performance, often face long and bureaucratic procedures during the processing of their formal registration. This latter category often win public recognition through hard work over a relatively long period, their contribution to social change, resilience, and resistance to pressure from political and financial actors. The *ligue ivoirienne des droits de l'homme* is one such example in Côte d'Ivoire. In my view, recognition premised on any ties with government is unfortunate, and flies in the face of the original purpose of a civil society organisation, which in my understanding, should remain the mouthpiece of citizens and should exercise control over government performances. Strictly speaking, government-sponsored groups should not be called NGOs. However, this assertion can be challenged by the fact that in most cases there is no legal provision to prohibit government sponsorship of local NGOs.

Thirdly, there are NGOs that are pro-government and those who are pro-opposition. These NGOs operate as mouthpieces and defenders of either the government or the opposition of the day. During the Ivorian crisis, especially in the context of the presidential elections, the polarisation of human rights NGOs became very apparent and contributed to the post-electoral emergency. The polarisation of NGOs along political lines undermines the protection and promotion of human rights.

Fourthly, there are NGOs affiliated to 'international' NGOs such as Amnesty International and the International Federation of Human Rights Leagues, and those that are not. The former are more visible internationally without necessarily being more effective locally; while the others remain unknown outside their communities, and have limited or no access to external funding. Such is the case with countless NGOs mainly active in the provinces. It is desirable to combine local relevance with international exposure to optimise impact and to promote the exchange of best practices. This can be achieved through networking between international and national NGOs on the one hand, and urban and rural (or grassroots) NGOs on the other. It will also require deliberate effort on the part of urban-based NGOs to study and internalise indigenous methods of social mobilisation and share these through international networks. This will be expanded on in Chapter 6 below.

Fifth, there are NGOs formed by an individual or a group of individuals around a common ideal, and those formed by victims and/or families of victims either as registered NGOs or as spontaneous organisations with the principal aim of seeking justice and redress. Traditionally, international NGOs such as Amnesty International, WWF, and Oxfam were formed by individuals sharing the common ideal of human dignity, environmental sustainability, or equity without being direct victims or acting on behalf of their relatives. For these 'traditional' NGOs, *locus standi* could represent a challenge in seeking redress as will be discussed later in this work in the context of Côte d'Ivoire. In contrast, victim associations emerge on the landscape of human rights NGOs following acts or incidents that violated the human rights of a group or groups. The Endorois Council, for example, was established following the forceful displacement of the Endorois community in Kenya.

It is often difficult to distinguish clearly between NGOs belonging exclusively to either of the categories, or to have an NGO with only one of the above attributes. The dynamics of NGOs in the African context is captured through the combination of several attributes, including those used above, in an attempt to differentiate between them. It is also worth noting that African NGOs shift between categories over time.

4.3.2 The legal regime governing the establishment and functioning of non-governmental organisations in West Africa: The cases of Nigeria, Ghana and Senegal

4.3.2.1 Nigeria

NGOs are formed and operated primarily within the general framework of the 1999 Constitution of the Federal Republic of Nigeria. Section 40 recognises the 'right to peaceful assembly and association'. Section 40 states that:

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.³¹

There is no legal definition of an NGO in the Nigerian Constitution or domestic laws. The same legal regime is applicable to a wide range of groups including friendly societies, professional associations, community-based organisations, social clubs, women's groups, youth clubs, religious organisations, cultural associations, trade unions, political parties, NGOs, and cooperative societies. It is worth noting that in this context, some groupings are established either by people living in the same geographical area, such as a village or a housing estate, or by those who trace their origin to a particular village, town or district. Generally, the first category is concerned with the maintenance of security and basic infrastructure in its area, while the second category aims at maintaining ancestral ties and ensuring that the welfare of their place of origin is promoted.³²

³¹ Constitution of the Federal Republic of Nigeria available at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (accessed 1 July 2013).

³² Emeka I 'Country report for Nigeria: NGOs laws and regulations' available at <http://www.usig.org/countryinfo/laws/Nigeria/International%20Reporter%20-%20NIGERIA.pdf> (accessed 1 July 2013).

The Companies and Allied Matters Act (CAMA) of 1990 provides the legal framework for NGOs in terms of section 26(1) as follows:

Where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee.³³

In other words, NGOs have the option of registering either as company limited by guarantee – in which case the status of a body corporate is conferred on the NGO itself – or as an incorporation of trustees. In the latter case, it is through the trustees that the NGO obtains the status of a body corporate. In reality and owing to the heavy bureaucracy associated with the former, most registered NGOs in Nigeria operate as incorporated trustees.³⁴

In Nigeria, it is the Corporate Affairs Commission that acts as the regulator of NGOs, and maintains a database on registered NGOs. The Companies and Allied Matters Act (1990) places no restriction on the kind of human rights that NGOs can include in their mandate. As such, nothing legally prevents Nigerian NGOs from working on the RtD. For example, the Socio Economic Rights and Accountability Project (SERAP) is one of the local NGOs that works on the RtD, and even filed a communication before the African Commission on Human and Peoples' Rights on, inter alia, the ground of the violation of the RtD by the Federal Republic of Nigeria. The African Commission declared the communication inadmissible on account of non-exhaustion of local (internal) remedies.³⁵

³³ Companies and Allied Matters Act available at <http://www.nigeria-law.org/CompaniesAndAlliedMattersAct.htm> (accessed 1 July 2013).

³⁴ Emeka n 336 above.

³⁵ Communication 300/05: *Socio Economic Rights and Accountability Project [SERAP] / Nigeria* available at http://www.achpr.org/files/sessions/5th-eo/comunications/300.05/achpreo5_300_05_eng.pdf (accessed 3 October 2013). See the discussion of this case in Chapter 3 above.

4.3.2.2 Ghana

In Ghana, constitutional provisions recognising, restricting freedoms of association and assembly, are stipulated under Chapter 5 of the Constitution, in particular article 21(1). This section provides:

All persons shall have the right to – ... freedom of association, which shall include freedom to form or join trade unions or other associations, national or international, for the protection of their interest;³⁶

NGO registration is governed in Ghana by section 14 of the Companies Act 179 of 1963. It requires that the following steps be observed:

- (a) there shall be delivered to the Registrar for registration a copy of the proposed Regulations of the company complying with sections 16 to 18 of this Code;
- (b) unless, in the opinion of the Registrar,
 - (i) the Regulations do not comply with this Code;
 - (ii) the objects for which the company is being formed or the business which it is to carry on, or any of them are unlawful;
 - (iii) any of the subscribers to the Regulations is an infant or of unsound mind; or
 - (iv) any of the directors named in the Regulations is under section 182 of this Code, incompetent to be appointed a director,the Registrar shall register the said Regulations;
- (c) upon registration of the Regulations, the Registrar shall certify under his seal that the company is incorporated and, in the case of a limited company, that the liability of its members is limited;
- (d) from the date of registration mentioned in the certificate of incorporation, the company shall be a body corporate by the name contained in the Regulations and, subject as provided in sections 27 and 28 of this Code, be capable forthwith of exercising all the functions of an incorporated company;
- (e) the Registrar shall insert a notice in the *Gazette* stating the issue of such certificate and the terms thereof;
- (f) the certificate of incorporation, or a copy thereof, certified as correct under the hand of the Registrar, or the *Gazette* containing the notice referred to in paragraph (e) of this section, shall be conclusive evidence that the company has been duly registered and incorporated under this Code and no proceedings shall be brought in any Court to cancel or annul such registration: Provided that nothing in this paragraph contained shall

³⁶ The Constitution of the Republic of Ghana (1992) available at http://www.judicial.gov.gh/constitution/chapter/chap_5.htm (accessed 1 July 2013).

prejudice the institution of proceedings to wind up the company in accordance with section 247 of this Code.³⁷

An NGO can register through a simple procedure which involves obtaining a Certificate to Commence Business and Incorporation from the Registrar-General's Department at the Ministry of Justice at a fee. After obtaining the certificate, NGOs are required to submit it to the Department of Social Welfare under the Ministry of Employment and Social Welfare. At the time of registration, NGOs are expected to submit, four copies of each of their constitution and by-laws, as well as sets of the Department of Social Welfare's investigation forms for NGOs and benevolent societies. The Ghanaian laws impose the same requirements on local and international NGOs. However, the founders of the NGOs must specify whether they are registering a local or an international NGO. This requirement is justified by the fact that NGOs seeking registration as an international group must also provide five copies of their Charity/Non-profit Certificate; Articles of Incorporation (from the state where the headquarters is registered); By-laws/Constitution; Memorandum of Understanding between NGO/government of Ghana; and, Format (designated form) for International/Foreign NGOs.

4.3.2.3 Senegal

Freedom of association is recognised as a fundamental right in articles 8 and 12 of the 2001 Constitution of Senegal.³⁸

Article 8 provides:

The Republic of Senegal guarantees all citizens basic freedoms, economic and social and collective rights. These rights and freedoms include: Civil and political liberties: freedom of opinion, freedom of expression, freedom of the press, freedom of association, freedom of assembly, freedom of movement, freedom of expression.³⁹

³⁷ The Ghana Companies Act of 1963 (Act 179) available at <http://ghanalegal.com/?id=3&law=17&t=ghana-laws> (accessed 1 July 2013).

³⁸ *Constitution de la République du Sénégal* <http://www.gouv.sn/IMG/pdf/Constitution.pdf> (accessed 1 July 2013).

³⁹ Translated from the original French by the author.

Article 12 adds that:

All citizens have the right to freely form associations, economic groups, cultural and social as well as companies, subject to compliance with the formalities prescribed by the laws and regulations.

Groups whose purpose or activity constitutes a violation of criminal laws or is directed against public order, are prohibited.⁴⁰

Historically, NGOs were first governed by the French *loi relative au contrat d'association* ('Law relating to the contract of association') of 1 July 1901.⁴¹ In 1966 however, this was replaced by the *Code des Obligations Civiles et Commerciales* ('Code of Civil and Commercial Obligations'),⁴² articles 811 to 826 in particular. NGOs are referred to under Senegalese law as an 'association' – a term borrowed from the French Association Act of 1901. Article 811 defines the association as:

A contract by which two or more people assemble their knowledge and skills, and if necessary part of their assets for a purpose other than profit sharing.⁴³

With regard to registration, the Senegalese legislature draws three distinctions: ordinary association; sport and education association; and foreign association. Ordinary associations (where human rights NGOs belong) are formed freely by more than two individuals (article 811). Registration is done by submitting two copies of the by-laws to the Ministry of Interior against delivery of a receipt (article 812). NGOs are required to have a clearly defined mandate (article 812), and refrain from political activism or seeking economic gain (article 814). The law does not indicate what constitutes a 'political activity', leaving room for interpretation by a court of law that can declare an association illegal on account of its political activities (article 816). NGOs must also not be seditious. A law was passed as early as 1965 to define what

⁴⁰ Translated from the original French by the author.

⁴¹ *Loi du 1er Juillet relative au contrat d'association* available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069570&dateTexte=20090506> (accessed 3 October 2013).

⁴² *Code des Obligations Civiles et Commerciales* ('The Code of Civil and Commercial Obligations') is a body of three laws, namely the Law 63-62 of July 10th, 1963 relating generally to commercial and civilian obligations; the law 66-70 of 13 July 1966 relating to commercial obligations; and the law 65-51 of July 1965 being the code of administrative obligations. See <http://www.justice.gouv.sn/droitp/COCC.PDF> (accessed 3 October 2013).

⁴³ Translated from the original French by the author.

constitutes a seditious organisation – an institution which calls for armed demonstration, an organisation that has paramilitary features, or one whose activities could endanger the functioning of a constitutional regime.⁴⁴

Sport and education associations are governed by a specific law passed in 1961 and are subject to similar requirements as ordinary associations. Finally, article 824 of the Code of Civil and Commercial Obligations imposes on ‘foreign associations’ the obligation to obtain formal authorisation before operating. This authorisation can be withdrawn at any time (article 824). The same article defines foreign associations as those headquartered outside of Senegal or those, although headquartered in Senegal, which have more than three-quarters of non-Senegalese nationals as their members. The difference between local and foreign associations is the legal regime; while the former is required only to declare its existence, the latter is obliged to be authorised by the Ministry of Interior. In other words, the legal regime for local NGOs is ‘declaratory’; they can freely operate after registration except if the authorities decide otherwise within one month after completion of the registration formalities (article 812). In contrast, foreign NGOs are governed by a regime of ‘prior authorisation’. They cannot operate until they have been issued a formal licence to do so (article 824). Discussing the merit of this distinction is beyond the scope of this work. The legal regime in Senegal is similar to the one in force in Côte d’Ivoire to be examined in Chapter 5 below.

4.4 The intended role and function of non-governmental organisations

4.4.1 General

As discussed in Chapter 1, an NGO/CSO is understood as a voluntary and independent association of at least two people acting together on a continuous basis, for a common purpose, other than achieving government office, making money, or illegal activity. Generally, therefore, NGOs perform the role and functions of mouthpiece for citizens by articulating their views and advocating for constructive

⁴⁴ *Loi 65-40 of 22 Mar 1965 relative aux associations in Journal Officiel no 3747 du 5 Juin 1965 5.*

social change. NGOs perform their duties through tools such as advocacy, social mobilisation through public sensitisation, public reporting, capacity building, and legal assistance, to mention the principal ones.

Of late, in some limited cases NGOs have championed causes that coincide with the aspirations of opposition political parties, such as opposing constitutional amendments for an extended stay in office as witnessed in Niger under Mahamadou Tanja in 2010, or in Senegal under President Abdoulaye Wade in 2012. In these two countries, local human rights NGOs such as *Rencontre africaine pour la defense des droits de l'homme* and *Ligue nigérienne des droits de l'homme*, were instrumental in the return to constitutional order. However, the line of distinction between human rights and political activism is thin and difficult for NGOs to maintain in some cases, especially when they lack financial resources, or their leaders aspire to political office.

4.4.2 Watchdog functions

Here, the point of discussion is the NGO's function of ensuring government compliance with human rights obligations to protect, respect, and fulfil the rights.⁴⁵ The state – through its three branches (the executive, the legislature, and the judiciary), is the principal duty-bearer of human rights obligations, while other non-state actors and individuals also have some human rights obligations. For example, under the Convention on the Rights of Child⁴⁶ and the African Charter on the Rights and Welfare of the Child,⁴⁷ parents have obligations with regard to providing education, protection, and care to the child. The discharge of the human rights obligation is to be done in such a way that human rights principles are respected. It

⁴⁵ Generally, under international human rights law there are three obligations: to respect, to protect and to fulfil. The duty-bearer, and in the present context the state, assumes obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that state must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires the state to protect individuals and groups against human rights abuses. The obligation to fulfil means that the state must take positive action to facilitate the enjoyment of basic human rights. See <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 5 July 2013).

⁴⁶ Convention on the Rights of the Child available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 5 July 2013).

⁴⁷ See African Charter on the Rights and Welfare of the Child available at <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/> (accessed 5 July 2013).

follows that the watchdog function of the human rights NGOs entails monitoring and reporting on violations of human rights and formulating recommendations to address breaches of human rights law and prevent a recurrence. This is the function perhaps most often performed by human rights NGOs in Africa, and globally by organisations like Amnesty International, International Federation of Human Rights Leagues, and Human Rights Watch. It is common to read reports of field research and fact-finding missions undertaken by local and international NGOs in diverse forms and formats, as stand-alone, country-specific, thematic, shadow, or alternative reports to those presented by the state in performing its treaty-reporting obligations.

Human rights NGO reporting must also cover the process, that is, the manner in which the duty-bearer discharges a particular human rights obligation. As stated above in Chapter 2 in relation to 'the human rights based approach to development', the fulfilment of a human rights obligation is expected to ensue in a manner that complies with *accountability*, *indivisibility*, *participation*, and *contribution* (my emphasis) of individuals and groups, as well as *non-discrimination* and *inclusiveness* (my emphasis). *Accountability* is addressed through public reporting on steps taken to meet a particular obligation. *Indivisibility* speaks to the holistic realisation of rights (economic, social, cultural, political, and civil); and *participation* and *contribution* relate to individuals and groups in decision-making, as well as their enjoyment of the full range of benefits associated with the development process. Finally, *non-discrimination* and *inclusiveness*, imply that all have the same rights, and that no one should be left out of the enjoyment of rights. Arguably, process monitoring requires openness of the duty and, on the part of NGOs, a fair command of tools used by development practitioners such as 'baselines' (point of reference), 'benchmarks' (standards by which implementation can be measured), and 'indicators' for measuring the compliance with the above principles as well as an engagement over a relatively long period. In contrast, reporting on police brutality, sexual violence, or the destruction of houses and forced eviction, can be done by observation over a relatively shorter period, and does not require the skills necessary for process

monitoring. The watchdog function of NGOs applied to the RtD will therefore impose the obligation to cultivate new skills to match the nature of this right.⁴⁸

4.4.3 Advocacy and campaigning

Advocacy and campaigning by NGOs are premised on their representational function. However, that representational function can be challenged on the basis that they are not elected or appointed by a specific group, like members of parliament or leaders of trade unions. In line with my working definition of NGOs, they advocate and campaign on behalf of rights-holders whose views, concerns, and expectations they articulate. Within the NGO sector, terms such as the ‘voiceless’ or ‘victims of human rights violations’ are often used to qualify (and identify) the constituency on behalf of which NGOs campaign and advocate. In such instances, reference is often made to ‘marginalised’ groups, which include children, women, the aged, persons with disabilities, and persons living with HIV and AIDS, to mention but a few, on the understanding that by virtue of their marginalisation or vulnerability, they do not have the capacity or the capability of claiming their rights from the duty-bearer. Through advocacy and campaigning, NGOs contribute to the development of a culture of popular participation in decision-making, and to the management of public affairs, which are critical ingredients of democratic governance.

4.4.4 Social mobilisation as a universal principle of shared social values

While monitoring, advocacy, and campaigning often aim at ensuring that those who bear the responsibility and have the capacity to meet a given human rights obligation, take necessary action, NGOs also raise awareness in their capacity as custodians of universal principles and shared values. At the international level, the Universal Declaration of Human Rights (UDHR 1948) sets out principles such as *universalism* – which implies that rights are inherent to human nature and as such applicable to or to be enjoyed by all, regardless of identity, race, origin, sex, age, opinion, religion, or belief, or any other distinguishing attribute. Other principles laid

⁴⁸ Generally, the right to development is a novel area for human rights NGOs. As will be shown in the case of Côte d’Ivoire, there is barely any experience of working on this right.

by the UDHR include *indivisibility* and *non-discrimination*, highlighted above. At the regional level, in Africa, in addition to reflecting universal principles, the African Human Rights Charter, for example, makes the concept of *ubuntu* a shared value to the extent that individual rights and duties are linked, the notion of peoples' rights is emphasised; and civil, economic, cultural, political, and social rights are presented in a single instrument. It is a social responsibility for human rights NGOs to inform, and to raise awareness on core human rights issues so that they can impact positively on individuals and societies. The source of this responsibility is the mandate, an instrument of registration or the by-law in which NGOs state their objectives and purposes. It is common among human rights NGOs to undertake human rights education programmes ranging from role-playing, street drama, audio-visual productions, cartoons, to public lectures, rallies, music concerts, and sports events. Programmes also vary in accordance with the age, location, and social background of the audience. Awareness-raising activities by human rights NGOs are often perceived in the African context as 'harmless' and 'supportive' of government efforts, and, as such, are resisted less vigorously by the state than the monitoring and reporting activities discussed above. This said, a fine distinction should be introduced when it comes to raising public awareness against issues viewed in some communities as part of their cultural heritage. For example, the campaign against female genital mutilation (FGM) (also referred to as 'female genital cutting' (FGC)) is often resisted, especially in rural areas, on cultural grounds. A report commissioned by the World Health Organisation in West Africa on the eradication of FGM/FGC shows how sensitive and complex campaigning against practices that are deeply entrenched in African traditions can be. The report concluded that:

[A]lthough action against FGC must be tempered with an understanding of the deeply rooted traditions that have allowed this practice to continue for so many generations, effective approaches for reducing FGC are critical. Despite widespread efforts, prevalence remains high in many countries, putting millions of girls at risk every year. Successful strategies for eliminating FGC are likely to require multi-pronged approaches in which political, legal and cultural elements are choreographed to effect large-scale change. Such concerted societal commitments are necessary for the benefit of future generations of women and girls.⁴⁹

⁴⁹ See 'Female genital cutting: Current practices and beliefs in western Africa' (2012) November *Bulletin of the World Health Organisation* 90:120-127F. doi:10.2471/BLT.11.090886 available at <http://www.who.int/bulletin/volumes/90/2/11-090886/en/> (accessed 7 October 2013).

In a democratic setting all functions performed by NGOs should be managed holistically and be seen as contributing to the embodiment of a culture of good governance and respect for human rights. It is important for a democracy to have checks-and-balances – mechanisms for continuing reassessment, ensuring non-violent conflict transformation.⁵⁰ The constitutional meaning of checks-and-balances translates into the regulatory functions of the judiciary and the legislature. The watchdog function of human rights NGOs discussed above is, in this context, a very important aid to the governance of a country. NGOs bring to the fore the key gaps in meeting human rights obligations that can otherwise escalate into violent social crisis. Advocacy and campaigning supplement monitoring and reporting by suggesting ways in which gaps in respect for human rights can be addressed, and by winning popular support for the changes and reforms proposed by the NGOs to the duty-bearers. Finally, sensitisation and awareness-raising aim at changing attitudes, increasing understanding, and participating in enforcing specific policies and human rights standards by the targeted group. This function also leads to a medium-to-long-term change in attitude on the part of the rights-holders. In the African context of limited literacy and numeracy, the awareness-raising function of NGOs is of particular relevance.⁵¹

4.4.5 Engaging cross-border and transnational issues

The rise in cross-border and transnational threats to peace, stability, and human rights requires domestic NGOs to shift their thinking and operations from the local to the regional and even a more global focus. Examples of such a shift in focus are concerns about the impact of the emergence of terrorist activities in Northern Mali and in the entire West Africa sub-region; the management of natural resources; and the impact of climate change. The advent of piracy in the Gulf of Guinea and the presence of militia groups in the ‘Guinea Forestiere’ (a virtually inaccessible area in

⁵⁰ It is generally accepted that, a conflict is an unavoidable social factor for change. Change can be either peaceful or violent, depending on how its structure, immediacy, and manifestation are addressed. See Conflict Sensitivity Consortium ‘Applying conflict sensitive approach to development, humanitarian assistance and peacebuilding’ (2004) at page 1 to 9 <http://www.conflictsensitivity.org/sites/default/files/Conflictsensitive%20Approaches%20to%20Development,%20Humanitarian%20Assistance%20and%20Peacebuilding%20Resource%20Pack.pdf> (accessed 8 October 2013).

⁵¹ Opinion expressed by Gle Bouadjike, in an interview with the author 15 July 2012 in Péhé, Côte d’Ivoire. (See annexure for particulars regarding the position of the interviewee).

deep forest between Liberia, Côte d'Ivoire and Guinea) are also worth mentioning. The cross-border and transnational issues are complex and involve a multiplicity of actors and interests. Addressing them entails African NGOs making a deliberate effort to understand them; developing innovative ways of approaching conflict prevention, management and resolution; as well as networking with other national, regional, and international NGOs. It also involves targeting not only national duty-bearers, that is the state, but also regional and international actors to ensure that the collective response to these threats incorporates human rights. This particular aspect relating to cross-border and transnational issues will be discussed below when reviewing the challenges facing NGOs.

4.4.6 Consultancy and policy advice to duty-bearers

In Africa and elsewhere, NGOs usually attract quality and committed staff and volunteers with diverse expertise in areas of national, sub-regional, continental, and international interest and dimensions. Some local NGOs are established by skilled Africans who have studied and/or worked abroad. International institutions, including the World Bank and the United Nations as well as regional bodies such the AU, regularly draw on such expertise for studies and advisory opinions, and to deliver capacity development training and support to government officials and local communities. They can also undertake in-depth studies on specific issues and publish their findings that can serve as basis for policy formulation at national, sub-regional, and regional levels. This is particularly the case in the area of the RtD where the knowledge gap of both the right-holders and duty-bearers needs to be addressed. However, even though they may have established expertise, access to such consultancies, especially with regional and international organisations including the United Nations, can prove difficult for some local NGOs who may not have the necessary credentials, connections and exposure as international NGOs.

4.4.7 Assistance and support to rights-holders

Areas such as access to court and compliance with legal and regulatory requirements often present a challenge to the ordinary African for a multiplicity of

reasons, including lack of financial means and ignorance. NGOs can play a key role in closing these capacity gaps confronting rights-holders through a variety of intervention programmes, including legal counselling and representation for both individuals and groups. The *Association Ivoirienne des femmes juristes* and the *Action pour la promotion des droits de l'homme* are among local NGOs providing *pro-bono* legal aid in Côte d'Ivoire, while the *Association des femmes juristes du senegal*, and the Gambian Association of Female Lawyers provide the same in Senegal and the Gambia, respectively. They can also serve as community mediators in matters such as land disputes and ethnic and/or tribal clashes. Finally, NGOs can provide social welfare services to right-holders including rehabilitation, shelter, medical aid, provision of food, and clothing.

Why must African NGOs perform the above roles and functions? The answer is to be found in the challenges facing them (and their 'clients' – the rights-holders) in modern Africa.

4.5 Challenges faced by African non-governmental organisations

In performing the key roles and functions highlighted above, African NGOs are confronted with a number of challenges. These are grouped in two sets. The first set comprises the institutional challenges which relate to the way these NGOs are organised to perform their roles and functions. The second set relates to contextual challenges and refers to the contemporary issues affecting Africa and for which NGOs are expected to play either of the abovementioned roles.

4.5.1 Institutional challenges

4.5.1.1 The 'founding member syndrome'

Founding members are those with the vision and perhaps commitment to see the organisation achieve substantive change. They are the ones who often perform the registration formalities as briefly outlined above. Founding members invest their time, money, and everything that matters to them, including sometimes their lives.

The first challenge facing them is the membership drive. In a typical African context (and perhaps elsewhere in the world), founding members recruit among their relations, friends, and relatives. The affiliation to the NGO can be based on inner personal conviction, the relationship to the individual carrying the vision of the NGO, or both. It is, however, obvious that conviction and relationship are two subjective values that evolve over time – they grow, erode or result in conflict. When relationships and convictions lead to conflict, it becomes difficult for the NGO to retain its members.

Linked to the issue of membership retention, is ensuring continuity or passing the torch to successors. Some NGOs collapse because they fail the transition test. Should founding members ever leave? When they are gone, how much, if any, oversight should they retain over the organisation they set up? How much space should they allow new leaders to impact their vision or run the organisation differently?

The third dimension of the ‘founding member syndrome’ is the lack of flexibility and the inability to anticipate (or plan for) changing circumstances, which prevents some organisations from responding/adapting to new and/or changed circumstances while adhering to their core founding principles. The organisation is therefore perceived and operated on the basis of sole proprietorship, populated by friends and relations who may not share the same values as the founder. At its core this deficiency relates to the incapacity to plan strategically.

In my opinion, complying with democratic principles and allowing for adaptation to change and innovation, and continuity are the key ingredients for the sustainability of an NGO. Change in leadership should be done through regular, free, and fair elections rather than being at the will of the ‘founding members’. Innovation here refers to the ability of the NGO to try new ways of doing business and a means of adapting to a continuously changing environment. Often, this is not the case, especially when founding members resist change and reject innovation. At the same time, innovation should be carefully examined to guard the NGOs against expensive yet ineffective innovations.

4.5.1.2 Compliance with democratic and governance principles

Compliance with democratic and governance principles relates to a particular NGO's failure to internalise and apply standards of accountability, gender equality, participation, and respect for human dignity. NGOs that do not comply with these principles are run as family/personal businesses with little or no consideration for the requirement of transparency and accountability. In this context election of officials, appointment and promotion of staff are likely to come about on the basis of considerations other than merit rather representing factors such as tribal affiliation, regional origin, or nationality. Harassment (both sexual and psychological), corruption, degrading and inhuman treatment of staff and members occupying lower positions, also occur within such human rights organisations. Unless NGOs show by word and deed that they are willing to do what they demand from others, they will not only fail to grow strong but will also fail to be regarded by society as reputable organisations.

4.5.1.3 Financial management and accountability

Financial stability is not merely an operational necessity for NGOs. In African countries confronted with high unemployment rates⁵² in general, and youth unemployment in particular,⁵³ NGOs appear as a suitable avenue for self-employment and in most cases the first port of call for graduates. There is generally no requirement imposed on founding members to show evidence of their ability to deliver their mandate at the time of registration. Generally, rules for the engagement of staff are more flexible, since NGOs are in essence voluntary. Given their potential in Africa, ensuring that NGOs are financially sustainable is the key to resolving unemployment. Regrettably, fundraising and financial management remain a central

⁵² See the 2012 International Labour Organisation's report on global employment trends which shows that Africa still faces high unemployment rates available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_171571.pdf (accessed 13 October 2013).

⁵³ A study commissioned by the United Nations Office for West Africa established that youth unemployment – and its corollary, underemployment – has become a central political-security issue in West Africa, in addition to being a socio-economic one. See United Nations Office for West Africa 'Youth unemployment and regional insecurity in West Africa' (2005) 8. Also available at http://www.iydd.org/documents/iydd_docs/unemployment-insecurity%5B1%5D.pdf (accessed 15 October 2013).

point of disappointment for many NGOs. Organisations collapse or their projects are suspended owing to lack of funding or poor governance on the part of the central participants.

4.5.1.4 Detachment from indigenous methods of social mobilisation

NGOs strive to inform, educate, and draw attention to human rights through activities such as, for example, workshops with PowerPoint and other high-tech presentations; street demonstrations; press conferences; and reporting which, in my opinion, are best suited to urban or semi-urban audiences. In contrast, when an NGO's audience (the rights-holders) is largely rural-based, illiterate, and has little or no access to information technology, such practices are not viable.⁵⁴ While the usefulness of modern tools and technology are not necessarily in question, particularly in relation to the segment of society that has easy access to these tools, there must be a correlation between the tools and methods for social mobilisation and the targeted audience. This is not the case when indigenous tools and methods are not used. It is largely accepted by NGOs that social mobilisation; raising awareness; and advocacy through art, story-telling, drama, poetry, indigenous music and dance; and the use of local languages have a far greater impact than workshops, street demonstrations, and press conferences. I submit that the reason for the detachment from indigenous methods has to be found in the concept of the NGO as discussed in the context of post-colonial Africa as a predominantly urban phenomenon. The leaders and members of NGOs are trained within a Western paradigm, which they tend to replicate in their daily work with little or no effort to adapt to domestic realities. Appropriate use should be made of the Internet and other newly acquired technologies to promote African indigenous knowledge systems and to enhance their efficacy. It is suggested that practices pertaining to indigenous knowledge which are proven to belittle the human being (such as ritual murder, FGM, torture) should be replaced with imported alternatives through acquired knowledge, where this exists and where its suitability has been established. On the

⁵⁴ In 2011, the urban population of Côte d'Ivoire was estimated at 45% of the total population. This percentage is believed to have been far lower before the start of the civil war in 2002. It still shows a predominantly rural population. See www.statistiques-mondiales.com/cote_divoire.htm (accessed 15 October 2013).

contrary, values such as *ubuntu* which promote humanity, communal life, and cohesion should be actively promoted. Unless African human rights organisations effect a merger of tools and methods, and integrate the indigenous perspective into their advocacy and social mobilisation, they will most certainly fail to make any real impact at home.

4.5.2 Political interference

Politics interferes negatively in human rights activism in at least two different ways. First, the oppression of human rights NGOs. Political oppression ranges from intimidation; unlawful dismissal of NGO members from public or private office; labelling (as enemy of the state/nation or traitor); and destruction of property including the burning of premises, to mention but a few.⁵⁵ The scale of the problems facing NGOs across Africa led the African Commission on Human and Peoples' Rights to appoint at its 35th session held in Banjul, the Gambia in 2004, a special *rapporteur* on human rights defenders in Africa. The mandate given to the special *rapporteur* borrows freely from that of the UN special representative and reads as follows:

- a To seek, receive, examine, and to act upon information on the situation of human rights defenders in Africa
- b To submit reports at every Ordinary Session of the African Commission
- c To cooperate and engage in dialogue with member states, national human rights institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders, and other stakeholders
- d To develop and recommend effective strategies to better protect human rights defenders and to follow up on his or her recommendations
- e To raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa⁵⁶

⁵⁵ The harassment faced by human rights defenders globally led the United Nations General Assembly to adopt resolution GA/RES/53/144 – the 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms' See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement> (accessed 7 October 2013).

⁵⁶ See <http://www.achpr.org> (accessed 7 October 2013).

Discrediting human rights NGOs is the second type of political challenge they face. Often this occurs when former human rights defenders who have joined political parties and now occupy positions of authority, advocate for the adoption of repressive measures against their former colleagues. It is not the shift from human rights activism to political activism that should raise concern. Both forms of activism are often very closely linked, and when they reinforce each other, the outcome is laudable. It is to be expected that human rights defenders who retain their belief in human rights and apply it to their political life, can make good leaders. The threat, however, is that sometimes new political converts find no other avenue than to discredit their previous groups for personal interest such as economic survival and to gain a social status they could not enjoy while defending human rights. As insiders, they know the weaknesses of NGOs and can capitalise on those to undermine their credibility and destabilise them. They can incite members to quit NGOs in return for financial or other benefits. Obviously, exposing and documenting such reprehensible practices is a challenge in itself as the actors pay particular attention to confidentiality and destroying any evidence.

4.5.3 Capacity development

The life and efficacy of an NGO largely depends on its organisational strength as is generally also the case in other institutions. Few NGOs have access to, or have a leadership which has attended training courses on institutional development, sustainability, or strategic planning. In West Africa, for example, the realisation of this deficit in knowledge led the Open Society Initiative for West Africa⁵⁷ to establish the West African Civil Society Institute (WACSI).⁵⁸ WACSI aims at catering for the capacity development needs of civil society organisations in West Africa. In spite of this, most NGO leaders learn on the job and copy or adapt what appear to them as 'best practices'. The long-term impact of the combination of a focus on civil and political rights and of a lack of systematic training programmes that address the institutional growth and sustainability of NGOs, is the production of front-line human

⁵⁷ Generally, the Open Society for West Africa (part of the Open Society Foundations) works to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people. See <http://www.opensocietyfoundations.org/about/mission-values> (accessed 15 October 2013).

⁵⁸ See [www. http://wacsi.org/](http://wacsi.org/) (accessed 15 October 2013).

rights activists who are equipped to gather very 'raw' information on alleged human rights violations, but who are incapable of analysing that information over a relatively long period of time in order to identify trends which may benefit their communities. Such NGOs are unable to plan strategically and to have the desired impact on communities and individuals. The fact that local human rights defenders simply parrot priorities determined by their western counterparts, seriously undermines the African struggle for human rights reform.

4.6 Addressing African challenges

At the dawn of the new century, Africa's position in the world was summarised by former South African President, Thabo Mbeki, as economically marginalised; confronted by rampant poverty; most vulnerable to the Human Immunodeficiency Syndrome (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) pandemics; dealing with continuous conflicts; and struggling with low literacy and numeracy levels.⁵⁹ For example, according to the Joint United Nations Program on HIV/AIDS (UNAIDS), Sub-Saharan Africa remains the region most heavily affected by HIV. In 2010, about 68 per cent of all people living with HIV resided in sub-Saharan Africa, a region with only 12% of the global population.⁶⁰

Gutto summarised the reasons advanced by many, including Africans, to explain Africa's precarious position through notions such as the legacy of colonialism; Africa's weak and inconsistent approach to development; the active investment of developed countries in maintaining Africa in its position of vulnerability;⁶¹ and the fact that Africans themselves, more often than not, work against each other and against the interest of Africa.⁶² Mbeki illustrated this when he commented:

⁵⁹ See Mbeki T 'The African Renaissance, South Africa and the World' speech delivered at the United Nations University 9 April 1998. <http://www.unu.edu/unupress/mbeki.html> (accessed 27 June 2012).

⁶⁰ See UNAIDS 2011 Report http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/jc2216_worldaidsday_report_2011_en.pdf (accessed 17 January 2013).

⁶¹ According to Gutto, development aid and north-south cooperation generally aim at maintaining the south in a position of vulnerability. In other words, the south is the perpetual loser in this type of cooperation. Notes from inaugural lecture on the African Renaissance paradigm, Centre for African Renaissance Studies (CARS) Unisa July 2004.

⁶² *Ibid.*

Those who had risked death in Guinea Bissau as they fought as comrades to evict the Portuguese colonialists today stand behind opposing ramparts speaking to one another in the deadly language of bazooka and mortar shells and the fearsome rhythm of the beat of machine-gun fire.⁶³

Today, the types of conflict and the nature of threats to peace and stability have drastically changed in Africa and globally, requiring a paradigm shift in attending to them. For example, traditional methods of mediation and military intervention in situations of armed conflict are questionable in the era of the rise in terrorist activities, hostage-taking, religious fundamentalism, or maritime piracy, as observed in the Sahel Band, Mali, the Horn of Africa, and the Gulf of Guinea. These threats add to existing problems such as youth unemployment, economic injustice (both those relating to unfair distribution of resources in the nation between different social strata and to the trade imbalances between 'rich' and 'poor' countries), impunity, and the rejection of the other in the form of exclusion, violence, and discrimination based on identity.

While traditional conflicts relating to political governance leading to *coups d'état*, unconstitutional changes, and electoral disputes, fall within the architecture of early warning and conflict prevention mechanisms established by the AU and regional economic communities to prevent, manage, and resolve conflicts, these mechanisms seem inadequate to accommodate the new threats indicated above. These new threats are complex: the theatre of war is undefined and akin to guerrilla warfare and could, in the case of terrorism, include taxicabs, public and private offices, *et cetera*, and involve diverse actors. These new conflicts and threats are distinguished by their trans-nationality and their sub-regional, continental, or international nature. Besides, they spread fast resulting in disorganisation, and the acceleration of the decay of the state.⁶⁴

⁶³ See 'The African Renaissance Statement of Deputy President Thabo Mbeki' SABC Gallagher Estate 13 August 1998 available at <http://www.dfa.gov.za/docs/speeches/1998/mbek0813.htm> (accessed 16 April 2013).

⁶⁴ In Mali, for example, groups claiming to be Islam fundamentalists occupied the northern part of the country in January 2012 and, in less than a month, overthrew the democratically elected President. This was followed months later by an unprecedented armed conflict involving international forces beginning in January 2013. This conflict is on-going at the time of this writing.

The African Renaissance paradigm, promoted in the early 2000s by former South African President Thabo Mbeki, emerged in this context as an attempt to reverse this negative trend with a view to repositioning Africa in a more dignified place in the world. In summary, the Renaissance manifests in at least three different ways: politically, economically, and intellectually. Politically, the establishment of the African Union has coincided with the rekindling of Pan-Africanism, taking the form of an integrationist agenda propelled by the African Union (AU) and by some post-Cold-War African leaders such as Thabo Mbeki with his 'African Renaissance', and Abdoulaye Wade with his Omega Plan.⁶⁵ The AU is, through its peace and security agenda, reclaiming its leadership role in finding durable solutions to Africa's conflicts. As part of its peace and security architecture provided for in the Protocol on the establishment of the Peace and Security Council, the AU has established the Peace and Security Council;⁶⁶ the Panel of the Wise (article 11 of the Protocol on Peace and Security);⁶⁷ the continental early warning system (article 12 of the Protocol on Peace and Security); and the African Stand-by Force (article 13).

Economically, the New Partnership for Africa's Development (NEPAD)⁶⁸ has revived the notion of an African ownership of its development as initially articulated

⁶⁵ See Wade Abdoulaye *Le Plan Omega pour l'Afrique* available at <http://www.sarpn.org/NEPAD/Omega.pdf> (accessed 18 December 2013).

⁶⁶ Article 2 of the Protocol on the establishment of the Peace and Security Council provides:
There is hereby established, pursuant to Article 5(2) of the Constitutive Act, a Peace and Security Council within the Union, as a standing decision-making organ for the prevention, management and resolution of conflicts. The Peace and Security Council shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa. (2) The Peace and Security Council shall be supported by the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund.
See http://au.int/en/sites/default/files/Protocol_peace_and_security.pdf (accessed 18 December 2013).

⁶⁷ The Panel of the Wise was established by the African Union in accordance with article 11 of the Protocol establishing the Peace and Security Council. This panel comprises five highly respected African personalities from various segments of the society who have made outstanding contributions to the cause of peace, security, and development on the continent. The Panel of the Wise supports the efforts of the Peace and Security Council and those of the chairperson of the African Union Commission. See <http://www.peaceau.org/en/page/29-panel-of-the-wise-pow> (accessed 18 December 2013).

⁶⁸ The New Partnership for Africa's Development (NEPAD) is an African Union strategic framework for pan-African socio-economic development. NEPAD is both a vision and a policy framework for Africa in the twenty-first century. NEPAD is a radically new intervention, spearheaded by African leaders, to address critical challenges facing the continent: poverty, development, and Africa's marginalisation internationally. For more see <http://www.nepad.org> (accessed 15 October 2013).

by the Lagos Plan of Action.⁶⁹ The Millennium Summit (2000), followed by the World Summit on Sustainable Development (2002), and the World Summit (2005) all placed emphasis on supporting Africa's economic agenda through its NEPAD program.

Intellectually, there seems to be a convergence among scholars that education and knowledge production, in general, are the key elements of the African Renaissance. Education has helped internalise and perpetuate what Africa is. In some cases, it has led to accepting Western values as most important, and looking down upon African value systems, including its belief systems, and regarding them as backward, anti-development, of no historical value and relevance to modernity.⁷⁰ In such cases, it has disempowered Africans and led them into a state of resignation and passivity.⁷¹ In other cases, education has helped Africans become more aware of the continent's challenges and opportunities. Through education, some Africans have come to realise that doing business as usual will simply keep Africa in the same position: at the bottom. As such, education can be a motivator for change.

NGOs have a key role to play in this regard. They must integrate African value systems in their human rights education and public awareness programmes, and make extensive use of traditional African methods of social mobilisation and advocacy through, amongst others, drama, story-telling, 'talking drums', role play, and community dialogue.

In keeping with the momentum of the making of the 'new Africa', the African Union held its 20th ordinary summit of Heads of States and Government from 23 to 28 January 2013 in Addis Ababa, Ethiopia, on the theme 'Panafrikanism and African

⁶⁹ The Lagos Plan of Action was adopted by the Organisation of African Unity in 1980 to enhance Africa's economic self-reliance through a regionally integrated approach to development geared towards the development of the African human capital, science and technology, infrastructure (transport and communications), trade and finance, environmental sustainability, and the promotion of the role of women in development available at http://www.nepadst.org/doclibrary/pdfs/lagos_plan.pdf (accessed 15 October 2013).

⁷⁰ The Senegalese historian, Cheick Anta Diop, wrote extensively on the value of the 'African civilisation' in response to the disempowering effect of 'education' in Africa. See for example his *Civilisation ou barbarie (Présence africaine)* (1981) where he demonstrates that the African civilisation predated the western; a fact which colonisation attempted to deny by trying to bring civilisation to Africa.

⁷¹ See Mugo MG 'African culture in education for sustainable development' in Maleggapuru WM (ed) *African Renaissance: The new struggle* (1999) 201-232.

Renaissance'. From the perspective of governance, which in the understanding of the AU includes human rights, the African Governance Platform⁷² offers a space for the promotion of the culture of human rights. The space for NGO engagement in the process is offered by institutional frameworks such as the ECOSOCC,⁷³ an advisory organ of the African Union that serves as a bridge between NGOs and governments at the continental level. As discussed in Chapter 3, NGOs with observer status at the African Commission contribute tremendously to the work of ECOSOCC.

From the perspective of NGOs, these conflicts represent a new set of challenges for which traditional modes of activism may well prove inappropriate.

⁷² In 2010, the Commission of the African Union launched the African Governance Architecture (AGA) as the overall political and institutional framework to promote and strengthen coordination amongst organs of the African Union, with a formal mandate in governance, democracy, and human rights. The AGA institutes an African Governance Platform (AGP) comprising a number of key stakeholders including the African Union Commission (AUC); African Court on Human and Peoples' Rights (AfCHPR); African Commission on Human and Peoples' Rights (ACHPR); Pan-African Parliament (PAP); African Peer Review Mechanism (APRM); Economic, Social and Cultural Council (ECOSOCC); African Union Advisory Board on Corruption; Regional Economic Communities (RECs); and related institutions, such as the African Committee of Experts on the Rights and Welfare of the Child; the African Union Peace and Security Council (PSC); Permanent Representatives Committee; African Development Bank Group (AfDB); and any organ or institution of the African Union which can be established, or to whom the African Union has given a formal mandate to promote governance, democracy, and human rights. See http://au.int/en/sites/default/files/ASSEMBLY_EN_30_31_JANUARY_2011_AUC_ASSEMBLY_AFRICA.pdf (accessed 15 February 2013).

⁷³ Established under the provisions of articles 5 and 22 of the African Union's Constitutive Act, ECOSOCC is the vehicle for building a strong partnership between governments and all segments of African civil society. The Statute of ECOSOCC, adopted by the Heads of State and Government at the Third Ordinary Session of the Assembly in July 2004, defines it as an advisory organ of the African Union composed of different social and professional groups from the member states of the African Union [Assembly/AU/Dec.42 (III)]. See <http://au.int/en/organs/ecosocc> (accessed 7 October 2013). ECOSOCC promotes networking through sectoral cluster committees in the areas of: *Peace and Security* (which includes organisations working on conflict prevention, management, and resolution; post-conflict reconstruction and peace building; prevention and combating of terrorism; use of child soldiers; drug trafficking; illicit proliferation of small arms and light weapons; security reforms; etc); *Political Affairs* (human rights; rule of law; good governance; elections; humanitarian issues); *Infrastructure and Energy* (energy; transport; communications; infrastructure and tourism); *Social Affairs and Health*; (migration; labour and employment; family; aging; the physically challenged; sports; culture; youth and protection and social integration); *Human Resources, Science, and Technology* (education; illiteracy information technology; communication); *Trade and Industry* (trade; industry; handicrafts; customs; and immigration matters); *Rural Economy and Agriculture* (rural economy; agriculture; food security; livestock; environment; water; and natural resources and desertification); *Economic Affairs* (economic integration; monetary and financial affairs); *Private sector development* including the informal sector and resource mobilization; *Women and Gender*; as well as other issues grouped under 'cross-cutting programmes including HIV and AIDS, international cooperation and coordination with organs of the African Union and other institutions such as the United Nations. See also Statute of ECOSOCC <http://www.africa-union.org/ECOSOC/STATUTES-En.pdf> (accessed 11 February 2014).

By way of a general concluding observation, it is submitted that the performance of the above-mentioned roles and functions of NGOs will impact on the envisaged change in Africa and will also impact on the challenges they face. However, certain conditions prevail. First, NGOs themselves set the example for their claims. In other words, NGOs should be knowledgeable of the human rights issues they claim to pursue or be open to learn new methods and techniques to enhance their work or agenda/mission. It is easier to champion a cause that one knows and understands. Building an understanding of a human rights normative framework and mechanisms should, therefore, be an on-going undertaking in the institutional development of human rights NGOs.

Secondly, as a mouthpiece of the rights-holders, human rights NGOs should be credible in order to be listened to and respected by both rights-holders and duty-bearers. This credibility is without doubt premised on the mastery of the cause being pursued by the particular NGO, and is exemplified by, for example, its public reports and statements, its attitude, and its public image. An NGO should publicly display evidence of its adherence to internal governance principles, in particular, accountability, transparency, inclusiveness, and democratic decision-making, and its independence from political, religious, racial or ethnic influences. This, I admit, is easier said than done. I will, however, argue that the role and functions performed by NGOs have the desired impact to the extent that they address these operational issues. In Chapter 5 below I will apply these general considerations to the specific context of Ivorian human rights NGOs.

CHAPTER 5

CÔTE D'IVOIRE: THE SOCIO-POLITICAL AND ECONOMIC SITUATION, EVOLUTION AND LEGAL REGIME FOR HUMAN RIGHTS NON-OVERNMENTAL ORGANISATIONS AND THEIR ROLE IN THE REALISATION OF THE RIGHT TO DEVELOPMENT

5.1 Introduction

Having discussed the concepts of the 'right to development' (RtD) and 'non-governmental organisations' (NGOs) in earlier chapters, in this penultimate chapter these concepts will be examined within the specific context of Côte d'Ivoire. In the final chapter (Chapter 6), I shall present recommendations on how to advance the evolution of human rights generally, and the RtD in particular in that country.

Côte d'Ivoire's early economic policy following its political independence from France in 1960, revealed the downside of economic-growth-driven interventions (such as the structural adjustment programs promoted by the Bretton Woods Institutions)¹ that fall short of human rights standards and principles. The neglect of human rights in economic development will be elaborated upon below, together with an historical overview of Côte d'Ivoire's socio-political and economic situation. The country's acclaimed economic performance in the early stages of its political independence was compromised by two decades of socio-political crises. In this chapter, I establish the significance of the realisation of the right to development (RtD) to human rights NGOs in Côte d'Ivoire. The chapter concentrates on three

¹ According to the International Monetary Fund (IMF), structural adjustment facilities (or programs) were put in place from the mid-1970s to assist poor countries by responding to the challenges they faced with balance of payments difficulties. The IMF provided concessional financing through what was known as the Trust Fund. In March 1986, the IMF created a new concessional loan program called the Structural Adjustment Facility (SAF). The SAF was succeeded by the Enhanced Structural Adjustment Facility in December 1987. See generally <http://www.imf.org/external/about/histend.htm>. The socio-political downside of structural adjustment programmes has been widely debated. Citing the examples of Guinea and Nigeria, Ibhawoh, for example, argues that with the conditions imposed on receiving countries, SAPs have not only violated socio-economic and cultural rights, they have also created suitable environments for authoritarian regimes to prosper in Africa. Bonny Ibhawoh 'Structural adjustment, authoritarianism and Human Rights in Africa' (1999) XIX/1 *Comparative Studies of South Asia, Africa and the Middle East* 158-167 available at http://www.cssaame.com/issues/19_1/12ibhawoh.pdf (accessed 11 January 2014).

focus areas. First it provides a background highlighting Côte d'Ivoire's geography, ethnography, economy, and political history as a suitable context for the realisation of the RtD in the country. Under this heading, the main economic steps taken by Côte d'Ivoire are highlighted to establish the extent to which they have impacted on the realisation of the RtD. Secondly, it examines the history, evolution, and impact of human rights NGOs in the country with the purpose of exploring the issues preventing them from working on the RtD. The normative and empirical frameworks for the realisation of human rights in the country are also examined through an analysis of the source of the laws governing NGOs and the RtD in Côte d'Ivoire. The third objective is to establish the link between human rights NGOs and the RtD, through an analysis of the role NGOs can play in the realisation of the RtD in the context of Côte d'Ivoire – the third focus area of this research.

5.2 Background to Côte d'Ivoire's geography, ethnography, economy, and political history

Côte d'Ivoire is located in a part of Africa richly endowed with natural resources.² The large majority of its population lives in rural areas where these resources are exploited by multinationals and wealthy farmers.³ The geography and ethnography therefore constitute central elements in understanding the relevance of the struggle of human rights NGOs for the realisation of the RtD. An understanding of the historical evolution of the socio-political life of the country will assist in placing this research in proper context. The most recent history of the country is 'revisited' with reference to three stages: first the pre-colonial and colonial eras combined; then the post-independence era; and finally, the contemporary era (since the 1980s to the present) characterised by political upheaval. The narrative focuses on events that are considered relevant to demonstrating the work of NGOs on the RtD.

² Bonn International Center for Conversion 'The Cocoa, Diamond, Gold and Oil Sectors' in *Natural resources in Côte d'Ivoire: Fostering crisis or peace?* 7 available at http://www.bicc.de/uploads/tx_bicctools/brief40.pdf (accessed 27 January 2014).

³ *Id* 40-62.

5.2.1 The geography and ethnography of the country

Côte d'Ivoire is located in West Africa, in the Gulf of Guinea of the Atlantic Ocean. It occupies an area of 124 503 miles² (322,462 km²). It is bordered by Liberia and Guinea in the west, Mali and Burkina Faso in the north, and by Ghana in the east. The political capital is Yamoussoukro. The largest city – commercial centre and economic capital – is Abidjan.



Source: Ministry of Local Administration⁴

⁴ See <http://news.abidjan.net/p/88212.html> (accessed 15 January 2013).

Côte d'Ivoire consists of coastal lowlands in the south, a densely forested plateau in the interior, and a region of upland savannahs in the north. Rainfall is heavy, especially along the coast.

5.2.2 The country's people

There are four main ethnic groupings: the Akan, the Mande (also known as the Malinke), the Kru, and the Gur (also referred to as the Voltaic) subdivided into seventy ethnic groups. The major groupings are the Baoulé (in the central part of the country), Bete (in the west), Senoufo (in the north), Malinke (in the north), Agny (in the east), Dan (in the northwest), and We (in the far west). There are also a significant number of immigrants, especially from neighbouring countries – Burkina Faso, Mali, and Guinea – as well as many persons of French and Arab descent.

5.2.2.1 Basic demographic and administrative data

Figures obtained are from 2013 and represent an average of data from various sources.⁵

Item	Data
Total Population	22 000 000
Population density	69.4 per km ²
Urban population	52%
Rural population	48%
School enrolment ratio	56,1 % (40% are female)
Active population	38,5%
Unemployment in urban zones	27,4%
Unemployment in rural zones	8,7%
Population growth rate	3,3%
Main ethnic groupings	4
Ethnic sub-groups	70
Religious groups	Muslim (38,6%), Catholic (22%), other religions (17%), Protestant (5,5%).

⁵ Information on the country's demographics and administration come from a comparative study of data provided by the State House (www.cotedivoirepr.ci), the National Institute of Statistics (www.ins.ci), United Nations Development Program (www.ci.undp.org) and the *Bureau National des Etudes* 'National bureau of studies' (websites accessed a number of times during 2013).

Administrative organisation	19 regions 2 districts (Abidjan and Yamoussoukro) 58 <i>prefectures</i> (divisions) 224 <i>sub-prefectures</i> (sub-divisions)
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Table 1: Demographic and Administrative Data

At this juncture, a few clarifications are needed better to understand the ethnic, economic, religious, and political factors which played a significant role in the most serious and longest crisis experienced by the country since independence. First, the geographical spread of the membership and supporters of the three main political parties of the country is as follows: *Rassemblement des Republicains (RDR)* in the north; *Parti Democractic de Côte d'Ivoire – Rassemblement Democratic Africain (PDCI-RDA)* in the central region and the east; and the *Front Populaire Ivoirien (FPI)* in the west and the south. This is reflected in the result of the much contested presidential elections in 2010,⁶ as will be elaborated upon below. Secondly, the fertile agricultural land is located principally in the west and the south.⁷ The movement of migrant workers from other regions into these zones of agricultural production is one of the root causes of land disputes and violent conflicts between migrant and host communities. In short, host communities often accuse migrant workers of exploiting their lands. Despite the existence of a law on land tenure,⁸ these conflicts have been addressed differently by successive regimes depending on their dominant configurations.

Third, the religious factor adds to the ethnic aspect referred to above in that the Muslims who are mainly from the north, are sympathetic to RDR while PDCI-RDA and FPI are supported by Christians from the south. The religious divide reached its

⁶ *Resultats provisoires du second tour des présidentiels de novembre 2010* 'provisional results of second round of presidential elections of November 2010' proclaimed by the independent electoral commission See http://www.ceici.org/elections/docs/EPR2010_2T_RESULTATS_VALEURS_02122010.pdf (accessed 21 January 2014).

Resultats provisoires du premier tour des présidentiels d'octobre 2010 available at http://www.ceici.org/elections/docs/EPR_31102010_RESUL_PROVI_CEI_03112010_A4.pdf (accessed 21 January 2014).

⁷ Côte d'Ivoire's economy is heavily dependent on agriculture. The country is the world's largest coffee producer and the second largest cocoa producer.

⁸ The law on land tenure was adopted in 1998 to settle repetitive land disputes. In essence, this law recognises land ownership in accordance with customary law to Ivorian citizens provided the land is registered within a period of ten years from the adoption of the law. An additional period of ten years was granted by the parliament in June 2013 when it amended the Law on Rural Land Tenure. See *Loi n° 98750 du 23 décembre 1998 relative au domaine du foncier rural* in *Journal Officiel de la République de Côte d'Ivoire* du 14 janvier 1999.

zenith during the 2010 elections and its impact is still felt. It is submitted that religious intolerance is a pretext for not respecting individuals' and groups' right to development in the case of Côte d'Ivoire. In other words, I submit that Ivorians do not view each other along ethnic or religious lines, provided that there is no economic hardship, and the proceeds of the exploitation of natural resources and agriculture benefit the population equally. During the period of economic prosperity (from the mid-sixties to the early eighties) there was no sign of an ethnic or religious divide.

Fourth, whereas unemployment is insignificant in the rural areas (less than eight per cent) compared to urban zones (almost 30 per cent), there is an on-going rural exodus resulting in an increase in the urban population⁹ for two reasons. First, the armed conflicts forced rural populations to flee, especially those in areas where agriculture flourished (the west and the south), or where minerals are exploited (the north-west). The second factor is that although land/agriculture supports the economy of the country, farmers remain the poorest in the sector of Ivorian society.¹⁰ In this way, the problem of unemployment is compounded by a mismatch between the skills of these rural workers (farming and fishing skills only), and the employment offers in urban areas where there are no farms and fishing has been industrialised. Creating an environment in which people participate in and benefit from local development – in other words observing the RtD in rural areas – will without doubt assist in addressing the contradictions in the employment landscape of the country by which job seekers flee the biggest employer and thus raise the unemployment rate generally. I submit that the observance of the RtD will effectively contribute to sustainable solution to these land crises. This point will be elaborated upon below in the discussion of the post-1980 political upheavals. It is also argued that these social tensions find an historical explanation in the pre-colonial and colonial experiences of the country.

⁹ According to the United Nations Development Program in Côte d'Ivoire, the poverty rate in the rural areas amounts to 62.5% against 29.5% in urban areas. See http://www.ci.undp.org/content/cote_divoire/fr/home/countryinfo/ (accessed 16 January 2014).

¹⁰ *Ibid.*

5.2.3 Pre-colonial and colonial history

Reference to pre- and colonial history is made here mainly to explain that movement of populations from one place to another predates the recent trends, and has been dictated by economic factors rather than ethnic or religious as is generally perceived. This brief reference also supports the argument that the economic choices of the country were influenced by colonialism and may not necessarily reflect the will of local populations.¹¹ The historical background presented here is mainly based on the studies of Jean Noel Loucou.¹² The humid climate prevailing in Côte d'Ivoire made the preservation of bones difficult. Consequently, establishing the beginning of human presence in the country scientifically is almost impossible. According to Loucou, pygmies moved to this part of Africa from the north east as the forest disappeared from the Sahara. Several Ivorian beliefs attest to the pre-existence of small humans of fair skin colour living in trees and using arrows for hunting. This description is very close to that of the pygmies of East and Central Africa.

The Portuguese were the first Europeans to arrive in Côte d'Ivoire during the 15th century. The Portuguese also started the slave trade in the country, which was continued by the French during the 17th and 18th centuries. Soon after the abolition of slavery at the beginning of 1830, the French Admiral Bouët signed trade agreements with tribal heads.¹³ These agreements granted French companies a monopoly in trade in gold, ivory, rubber, and palm oil. French traders then established themselves in large numbers along the coast until the British drove them out in 1870.¹⁴ However, Arthur Verdier (1835-1898), a French merchant, mariner, and ship-owner resisted

¹¹ Upon independence, four former French colonies (Benin formerly Dahomey), Côte d'Ivoire, Niger, and Burkina Faso (formerly Upper Volta) regrouped under the '*Conseil de l'entente*' (council of understanding) with the purpose of consolidating economic ties with France. See in this regard 'Co-operation agreements between France and Dahomey, Ivory Coast, Niger, and Voltaic Republic – Internal developments in Conseil Member-countries' in (1961) 7/June *Keesing's Record of World Events* (formerly *Keesing's Contemporary Archives*) France 18132. [http://0-www.keesings.com.oasis.unisa.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&kssp_time_start_value\[m\]=1&kssp_time_start_value\[y\]=1931&kssp_time_stop_value\[m\]=1&kssp_time_stop_value\[y\]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fad46fd&kssp_a_id=18132n01fra&kssp_v_id=7&kssp_rspn=1](http://0-www.keesings.com.oasis.unisa.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&kssp_time_start_value[m]=1&kssp_time_start_value[y]=1931&kssp_time_stop_value[m]=1&kssp_time_stop_value[y]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fad46fd&kssp_a_id=18132n01fra&kssp_v_id=7&kssp_rspn=1) (accessed 12 February 2014).

¹² Loucou JN '*La formation des peuples*' (1984) *Histoire de la Côte d'Ivoire* 145-170.

¹³ *Ibid* 148.

¹⁴ *Ibid*.

the British pressure and settled in Grand-Bassam and Assinie (in the south east of the country) where he was appointed the French Resident (governor or mayor in contemporary understanding) by the French President. Faced with constant attacks on his ships by British pirates, Verdier gave up maritime trade for coffee growing in the south eastern region of Assinie. Coffee would later become Côte d'Ivoire's main crop. He was succeeded by Louis Gustave Binger (1856–1936) a French officer and explorer.

Appointed by the French President as the French Resident (governor) to the *Etablissement de Côte d'Ivoire*, Louis Binger in 1878 renovated the French military installations in the country to protect French business interests against the British. In 1882, Binger created the *Compagnie de Kong*, which managed a coffee plantation. Further trade agreements were signed between this French company and tribal heads across the territory of Côte d'Ivoire. On 10 March 1893, a decree creating the Colony of Côte d'Ivoire was signed by Sady Carnot, President of France.¹⁵ In 1899, Grand-Bassam faced a severe yellow fever pandemic, and the French abandoned it for Bingerville where the air seemed purer. This they established as the second capital of the colony. In 1934, the capital was transferred to Abidjan for imperatives of economic development. From the mid-1950s, social protests from farmers' associations, in particular the *Syndicat Agricole Africain* (African Agricultural Trade Union) of Felix Houphouët Boigny who led the country to independence. In 1956, the French national assembly (parliament), adopted the *Loi cadre* which paved the way for the granting of independence to French colonies.¹⁶

Côte d'Ivoire became independent on 7 August 1960, with Abidjan as the capital and Felix Houphouët Boigny as its first President.¹⁷ Yamoussoukro became

¹⁵ See *Décret portant création de la Colonie de Cote d'Ivoire* available at <http://www.rezoivoire.net/cotedivoire/patrimoine/183/le-traite-de-kong-et-le-decret-portant-creation-de-la-colonie-cote-d-ivoire.html#.UrFob9JdVWo> (accessed 17 December 2013).

¹⁶ See 'The *Loi Cadre*' in (1957) XX *Keesing's record of world events* (formerly *Keesing's contemporary archives*) France 15585 available at [http://0-www.keesings.com.oasis.unis.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&&kssp_time_start_value\[m\]=1&kssp_time_start_value\[y\]=1931&&kssp_time_stop_value\[m\]=1&kssp_time_stop_value\[y\]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fa9357e&kssp_a_id=15585n01atf&kssp_v_id=xi&kssp_rspn=1](http://0-www.keesings.com.oasis.unis.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&&kssp_time_start_value[m]=1&kssp_time_start_value[y]=1931&&kssp_time_stop_value[m]=1&kssp_time_stop_value[y]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fa9357e&kssp_a_id=15585n01atf&kssp_v_id=xi&kssp_rspn=1) (accessed 16 January 2014).

¹⁷ (1960) 6/August *Keesing's record of world events* (formerly *Keesing's contemporary archives*), France 17569 available at http://0-www.keesings.com.oasis.unisa.ac.za/search?kssp_search_

the political capital in 1987, although Abidjan remains the economic hub of the country.

5.2.4 The post-independence era

The newly independent Côte d'Ivoire adopted very ambitious economic objectives driven by the *Party Democratic de Côte d'Ivoire, Rassemblement Démocratique Africain (PDCI-RDA)*, a one-party political system lead by Felix Houphouët-Boigny. It should be noted that article 7 of the 1960 Constitution of Côte d'Ivoire provided for a multiparty system.¹⁸ Therefore, *de iure*, in terms of the law the political regime was a multiparty system, but this was not followed as *de facto* it was a one-party system and remained so until 1990 when the country changed to the multiparty system. No party other than PDCI-RDA was registered and so permitted to operate. In fact under the 1960 Constitution, there was no specific regulation governing political parties. They were requested to register and operate in the same way as NGOs.¹⁹

The concept of the 'Ivorian miracle', promoted by President Felix Houphouët-Boigny, was used to describe the country's visible economic and social achievements such as excellent road networks, modern medical facilities, high educational standards, and affordable public schools.²⁰

phrase=ivory+coast&kssp_sortby=Relevance&&kssp_time_start_value[m]=1&kssp_time_start_value[y]=1931&&kssp_time_stop_value[m]=1&kssp_time_stop_value[y]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458531066d5cd&kssp_a_id=17569n01fra&kssp_v_id=6&_apn=2 (accessed 16 January 2014). See too *Declaration d'indépendance de la Côte d'Ivoire* <http://perspective.usherbrooke.ca/bilan/servlet/BMDictionnaire?iddictionnaire=1999> (accessed 15 January 2014). See also a summary of the history and geography of the country from the web page of the Ivorian government http://www.gouv.ci/ci_histogeo_1.php (accessed 16 January 2014).

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Article 7 states:

Les partis et groupements politiques concourent à l'expression du suffrage. Ils se forment et exercent leur activité librement sous la condition de respecter les principes de la souveraineté nationale et de la démocratie, et les lois de la République.

'Political parties and groups shall contribute to the expression of the suffrage. They are established and undertake their activities in that they respect the principle of national sovereignty [meaning in this context that they do not ask for secession], democracy and the laws of the land' [author's translation']. See *Constitution du 3 novembre 1960* <http://mjp.univ-perp.fr/constit/ci1960.htm> (accessed 16 January 2014).

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The legal framework for NGOs will be discussed below.

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Fonds d'archives Baulin 'La politique intérieure d'Houphouët Boigny' available at <http://www.fonds-baulin.org/ouvrages/la-politique-interieure-d/article/le-miracle-ivoirien?artsuite=1> (accessed 15 January 2014).

Côte d'Ivoire experienced impressive economic prosperity and President Houphouët-Boigny decided to proceed with the implementation of an important industrialisation and infrastructural development plan between 1970 and 1980. Factories were established in different parts of the country for the processing of agricultural produce and to create employment in the various regions of the country. Regional development nodes were created with a view to promoting regional and geographic balance. A deliberate effort was made to develop strategic economic regions such as San Pedro (in the south west), which hosts the country's second seaport and specialises in processing agricultural and forestry products, and the V-Belt, which crosses the country from east to west as the main agricultural production zone. Sugar and rice factories, as well as cotton processing, were developed in the northern part of the country.

Despite the steady industrialisation of the 1970s, the country remains predominantly agricultural. The industrial sector contributes only twenty per cent of the country's gross domestic product (GDP).²¹ Côte d'Ivoire is among the world's largest producers and exporters of cocoa beans, coffee, and palm-kernel oil. Cotton, bananas, and pineapples are also grown for export. Mahogany and other hardwoods provide timber, another valuable export, and the production of rubber has increased substantially in recent years. Livestock is raised in the savannah areas, and fishing is also significant.²² Among the country's industries are the production of food such as rice, banana, mango, pineapple and palm oil. Petroleum and natural gas (offshore production began in the early 1980s), textiles, construction materials and fertiliser, tuna canning, and car and bicycle assembly are on the rise. Some mining takes place, including gold, diamonds, and nickel, mainly in the northern part of the country. The private sector (including the formal, informal, and NGOs sectors) absorbs up to ninety per cent of the country's work force, with ten per cent being employed in the public sector.²³

Generally therefore, the country was cited as a model of economic success, political stability, and social cohesion especially during the first three decades of

²¹ See http://www.cotedivoire-pr.ci/?action=show_page&id_page=41 (accessed 26 September 2012).

²² *Ibid.*

²³ Loucou n 389 above 145-170.

political independence from France. However, as illustrated below, the economic growth agenda propelled by the leaders of the country was at the expense of any respect for the fundamental rights of individuals and groups. For example, notwithstanding that the country's economy is driven by agriculture – the agricultural sector represents forty per cent of the country's GDP, accounts for two-thirds of its export, and employs about seventy per cent of the country's labour force²⁴ – the rural areas and the agricultural sector (which sustain the economy of the country), are nevertheless also where the poorest are to be found. This situation will be examined presently as I conclude this historical overview of the socio-political evolution of Côte d'Ivoire.

The country faced its first economic crisis in 1982 due to drought and a fall in the prices of coffee and cocoa. This crisis triggered social protests between 1980 and 1983 led by university lecturers and students. The former were demanding salary increases and better conditions of service, while the latter complained of the frequent closure of schools and universities.²⁵ The situation deteriorated when, in 1987, President Houphouët-Boigny decided to halt the cocoa export in an attempt to stop its falling prices. This measure was not effectively applied and did not produce the intended result. The economic situation worsened. In 1989, the World Bank and the IMF imposed a structural adjustment program (SAP), which included a reduction in public spending – especially in the social sector, salary cuts in the public sector, and a solidarity tax in the private sector, the withholding of scholarships for many students, and the introduction of paid residence permits for non-citizens.²⁶ Allassane

²⁴ See the 2009 'Poverty Reduction Strategy' of Côte d'Ivoire' available at http://www.ci.undp.org/publication/DSRP%20FINAL%20RCI_janvier%2009.pdf (accessed 16 February 2013). See also the 2010 'MDG Report' available at http://www.ci.undp.org/publication/Deuxieme_Rapport_National_OMD_2010.pdf (accessed 16 February 2013).

²⁵ 'Aug 1983 – Demonstrations and strikes – Economic developments – Decision to transfer capital to Yamoussoukro' in (1983) 29/August *Keesing's Record of World Events* (formerly *Keesing's Contemporary Archives*) 32298 available at [http://0-www.keesings.com.oasis.unisa.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&&kssp_time_start_value\[m\]=1&kssp_time_start_value\[y\]=1931&&kssp_time_stop_value\[m\]=1&kssp_time_stop_value\[y\]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fe20390&kssp_a_id=32298n01civ&kssp_v_id=29&_apn=0](http://0-www.keesings.com.oasis.unisa.ac.za/search?kssp_search_phrase=ivory+coast&kssp_sortby=Relevance&&kssp_time_start_value[m]=1&kssp_time_start_value[y]=1931&&kssp_time_stop_value[m]=1&kssp_time_stop_value[y]=2014&kssp_date_range_type=publication&x=8&y=5&kssp_selected_tab=article&kssp_tp_id=id458530fe20390&kssp_a_id=32298n01civ&kssp_v_id=29&_apn=0) (accessed 16 January 2014).

²⁶ *Afrique Plurielle 'Economie de la Cote d'Ivoire'* available at <http://afriquepluriel.ruwenzori.net/cote%20d%27ivoire-f.htm> (accessed 16 January 2014). See also *Banque africaine de développement 'Rapport d'achèvement du programme d'ajustement macro-economique et structurel (PAMES) 1994-1996'* Côte d'Ivoire 8 and 9 available at [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2006-37-FR-COTE-DIVOIRE-RAP-](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2006-37-FR-COTE-DIVOIRE-RAP-164)

Dramane Ouattara, then Deputy Director of the IMF, was appointed Prime Minister. The SAP was implemented in March 1990, leading to massive protests throughout the country. The World Bank-IMF-sponsored plan was dropped a month later, following a demonstration organised by university lecturers headed by Laurent Gbagbo, then leader of the opposition against Houphouët-Boigny's regime.

This demonstration resulted in political changes in the country. In May 1990, the country returned to a multiparty system when Houphouët-Boigny allowed registration and functioning of political parties in accordance with the provisions of article 7 of the 1960 Constitution of the country. Twenty-five political parties were established between May and September 1990. Elections were held in November 1990 and confirmed President Houphouët-Boigny as president for a seventh consecutive term. In 1993 a specific law regulating registration and functioning of political parties was adopted by the parliament ('the Law on Political Parties').²⁷ Article 1 of this law defines a 'political party' as:

[a]n association of individuals who adhere to the same political ideals, are committed to triumph of their ideals by the implementation of a program to conquer and to exercise power in accordance with democratic principles enshrined in the Constitution.²⁸

The Law on Political Parties specifies the conditions for registration (articles 11 to 16), functioning of political parties (articles 17 to 20), and a sanctions regime (articles 21 to 25). Dissolution of the party can occur following a decision of its members (article 26), or through judicial means in the event of breach of the Constitution or the Law on Political Parties (article 26 *in fine*).

President Houphouët-Boigny, the country's first President, died on 7 December 1993 and was succeeded by Henri Konan Bédié, then the Speaker of Parliament, in accordance with article 11 of the 1960 Constitution. The death of the country's first President led to political upheaval which lingers even today.

PROGRAMME-DAJUSTEMENT-MACRO-ECONOMIQUE-ET-STRUCTUREL.PDF (accessed 16 January 2014).

²⁷ *Loi n° 93-668 du 9 août 1993 relative aux partis et groupement politiques* ('Law relating to Political Parties and Groupings') available at <http://www.cndj.ci/PARTIS%20%20POLITIQUES.htm> (accessed 16 January 2014).

²⁸ Translation from French by the author.

5.2.5 The contemporary era characterised by political upheaval

In 1999, Bédié's government disqualified Allassane Ouattara from standing for the 2000 presidential election. A warrant was issued for Ouattara's arrest, claiming he had forged citizenship documents. These steps provoked opposition demonstrations. In December 1999, Bédié was ousted in a military *coup* led by General Robert Gueï – the first successful *coup* in the nation's history. In the October 2000 elections, Gbagbo of the socialist Ivorian Popular Front (FPI) won the presidency, but the army halted the vote count and Gueï claimed victory. Street protests and the desertion of police and military units forced Gueï from power and Gbagbo took office. On 19 September 2002, a rebellion led by Guillaume Soro²⁹ attempted to oust Gbagbo and plunged the country into its first and longest political crisis. The international community's reaction to the rebellion was to back mediation efforts by both ECOWAS and the AU, and to establish a peacekeeping mission under the auspices of the UN and with the support of French armed forces.

Several mediation meetings were held in France as well as in Togo, Ghana, South Africa, and Burkina Faso with various African Heads of State acting as mediators. The last was a 'direct dialogue' held in March 2007 between President Gbagbo and Guillaume Soro, leader of the rebel group known as the New Forces in a mediation effort led by President Blaise Compaoré of Burkina Faso.³⁰ This effort culminated in the Ouagadougou Political Accords (four in total)³¹ which paved the way for presidential elections in October 2010, with a run-off in November, eight years after the 2002 failed rebellion (*coup*) attempt.

The Electoral Commission declared Ouattara winner over Gbagbo in the second round of the November 2010 elections, while the Constitutional Court ruled in

²⁹ At the time of this writing, Guillaume Soro is the Speaker of the Ivorian parliament.

³⁰ *Accord politique de Ouagadougou (4 mars 2007)* available at <http://www.onuci.org/spip.php?rubrique13> (accessed 16 January 2014).

³¹ *Accord politique inter-ivoirien de Ouagadougou* <http://www.onuci.org/pdf/ouagaaccord.pdf> (accessed 16 January 2014) available at *Deuxieme accord complementaire a l'accord politique de Ouagadougou* available at <http://www.onuci.org/pdf/ouagaaccord2.pdf> (accessed 16 January 2014). *Troisieme accord complementaire a l'accord politique de Ouagadougou* available at <http://www.onuci.org/pdf/ouagaaccord3.pdf> (accessed 16 January 2014). *Quatrieme accord complementaire a l'accord politique de Ouagadougou* available at <http://www.onuci.org/pdf/ouagaaccord4.pdf> (accessed 16 January 2014).

favour of Gbagbo and swore him in as president. A period of large-scale violent confrontation followed the announcement of these developments and culminated in open armed conflict between pro-Ouattara and pro-Gbagbo militants. Gbagbo was eventually arrested at the presidential palace through military intervention backed by the international community and the support of French and United Nations troops.³² He was subsequently transferred to and detained in the northern town of Korhogo, and later transferred to the International Criminal Court (ICC) in The Hague, the Netherlands, to face trial for crimes against humanity. At the time of writing, his trial has commenced and is at the pre-trial stage.³³

The presidential elections of 2010 were marred by unprecedented violent confrontation officially claiming at least 3 000 lives, destruction, and dispossession of property, massive forced displacement especially in rural settings, and increased poverty, according to UN reports.³⁴ In essence, the elections failed to lead the country to peace and stability. Nonetheless, some of the stated priorities of Alassane Ouattara (the newly elected President) include: transitional justice mechanisms, including the establishment of a truth and reconciliation commission; the fight against corruption; and the prosecution of those who with impunity committed gross violations of human rights.³⁵ However, there is a perception of 'justice of the winner' as illustrated by judicial actions and economic sanctions exclusively aimed at suspected pro-Gbagbo individuals and entities.³⁶ According to Gaëtan Mootoo, Amnesty International's West Africa researcher:

³² An account of Gbagbo's arrest is offered in UNOCI's twenty-ninth report available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/387 at 2 paras 9-10 (accessed 18 June 2013). The United Nations Mission in Côte d'Ivoire reports periodically to the Security Council on the socio-political and security situation prevailing in Côte d'Ivoire. See <http://www.un.org/en/peacekeeping/missions/unoci/reports.html> (accessed 18 June 2013).

³³ See *Prosecutor v Laurent Gbagbo* ICC-02/11-01/11 available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0211/related%20cases/icc02110111/Pages/icc02110111.aspx (accessed 17 January 2014).

³⁴ Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Côte d'Ivoire available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.49_en.pdf (accessed 18 June 2013).

³⁵ *Plan National de Développement 2012-2015* 52 available at http://www.ci.undp.org/publication/TOME%20I%20RESUME_ANALYTIQUE_DEF.PDF (accessed 18 June 2013).

³⁶ Human Rights Watch 'Turning rhetoric into reality: Accountability for serious international crimes in Côte d'Ivoire' 29 available at http://www.hrw.org/sites/default/files/reports/CDI0413_ForUpload.pdf (accessed 18 June 2013).

Côte d'Ivoire needs to break the cycle of abuse and impunity. Not a single member of the national army or any other supporter of President Alassane Ouattara has been held to account for their actions, representing an absolute failure to establish the rule of law and severely undermining the reconciliation process set up in July 2011.³⁷

As of December 2013, sporadic attacks on the civilian population and security personnel continued to sustain a climate of socio-political tension.³⁸

5.2.6. Failure to mainstream the right to development, the socio-economic impact and structural causes of the political conflict

Côte d'Ivoire has preferred the monetary definition of poverty to other approaches such as the caloric, relative deprivation, or property-related poverty definitions. In terms of the monetary approach, a poor person is one incapable of spending 600 CFA (approx \$1) per day on basic needs. In 1984, only ten per cent of the population (1 in 10) was poor. This figure rose to 33.8% in 1998 (1 in 3).³⁹ By 2008, they represented 48.9% of the population. As of June 2013, 1 in 2 Ivorian is poor.⁴⁰

Official sources established that the rural population is more affected by poverty than the urban. Some 62.45% of the rural population is poor compared to 29.45% in urban settings.⁴¹ It is also worth noting that according to the same sources, poverty is more pronounced in the northern and western parts of the country. While climate change, in particular drought, is a major contributor to poverty in the north, the western part of the country has historically remained devoid of basic infrastructure for economic productivity, especially roads. The failure on the part of various regimes to uphold the RtD is, in my opinion, a major contributing factor to the socio-political

³⁷ Amnesty International 'Côte d'Ivoire "Revenge and repression under the pretence of ensuring security"' available at <http://www.amnesty.org/en/news/c-te-d-ivoire-revenge-and-repression-under-pretence-ensuring-security-2013-02-25> (accessed 18 June 2013).

³⁸ See <http://www.un.org/en/peacekeeping/missions/unoci/reports.shtml> (accessed 19 June 2013).

³⁹ See the 2009 Poverty Reduction Strategy Paper of Côte d'Ivoire available at http://www.ci.undp.org/publication/DSRP%20FINAL%20RCI_janvier%2009.pdf (accessed 16 February 2013). See also the 2010 MDG Report available at http://www.ci.undp.org/publication/Deuxieme_Rapport_National_OMD_2010_.pdf (accessed 16 February 2013).

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

and economic crises affecting the country to date. The root of these crises goes back to the early independence era, and to the economic option of reliance on agricultural exports without affording the rural population the right fully to participate in and benefits from the proceeds of development. In upholding the RtD, rural communities would have been permitted to participate in decision-making regarding the use of the land. Participation in decision-making would have enabled (and ensured) agricultural diversification, job creation, environmental sustainability, improved living conditions in rural areas, and ultimately would have assisted in the reduction of the rural exodus, unemployment, and poverty. Regrettably, the government's growth-led economic model did not allow the government to mainstream the RtD during the period of the 'Ivorian miracle'.

This brief account of the socio-political and economic evolution of Côte d'Ivoire illustrates the relevance and importance of integrating the realisation of the RtD in the solution to the crisis confronting the country. Indeed, the on-going post-electoral crisis has deepened the social fracture along ethnic and religious lines, rendering social cohesion and post-conflict reconstruction difficult to achieve in the immediate future. The drastic increase in poverty in the country over the past two decades is a major catalyst for social tensions. Issues such as the absence of the proper management and redistribution of the proceeds of natural resources, as well as the exclusion of some from participation in the economic and political governance of the country, youth unemployment, a declining rural economy, and injustice lie at the heart of this cycle of conflict. Côte d'Ivoire is a perfect example of a country requiring NGO involvement to contribute to finding a lasting solution to the root causes of conflict by ensuring that groups and individuals participate in, and benefit from development activities.

Below, I will present an account of the history and evolution of NGOs in general, before proceeding, finally, to substantiate the role Ivorian NGOs should and could play in the realisation of the RtD.

5.3 The evolution of and challenges to human rights activism

The development of the human rights movement in Côte d'Ivoire is relatively recent. It can nonetheless be divided into three main phases, which are also closely aligned to the political history of the country: (1) political liberation; (2) the role of trade unions; and (3) the return to multipartyism and the rise of NGOs. This division of the evolution of NGOs could have been supplemented with an analysis of NGOs in the post-electoral crisis era, but it is argued that this period is still unfolding and does not offer sufficient evidence for a trend analysis. It is for this reason not investigated in this work.

The notion of human rights NGOs as discussed earlier (Chapters 1, 3, and 4 above) is a new phenomenon which emerged only in the early 1990s. However, from the early 1930s, the key purpose of the struggle was political – liberation from French colonial rule. Human rights activism occurred through associations such as Houphouët-Boigny's *Syndicat Agricole Africain* (African Agricultural Union) and house workers' groupings which started with claims such as the abolition of forced labour.⁴² Their struggle contributed to the adoption of the *Loi Cadre* which paved the way for the abolition of forced labour in French colonies in 1956 (as discussed above).

Soon after independence in 1960, the country opted for a market economy with a strong one-party system that provided no space for open human rights activism. Trade unions became the only local avenue for the articulation of human rights claims (whether related to political or socio-economic rights).

⁴² Convention 105 (1957) of the International Labour Organisation prohibits forced labour and lists the circumstances leading to it as follows:

Article 1: Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

- (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) As a method of mobilising and using labour for purposes of economic development;
- (c) As a means of labour discipline;
- (d) As a punishment for having participated in strikes; (e) As a means of racial, social, national or religious discrimination.

Article 2: Each Member of the International Labour Organisation which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in article 1 of this Convention.

In the aftermath of the country's return to a multiparty system, the scene was set for the emergence of domestic human rights NGOs, but only a few, such as the *Ligue Ivoirienne des Droits de l'Homme*, have survived. These few NGOs could survive thanks to their organisational strength, an issue that will be addressed below. The political crisis that erupted a decade after the country's return to a multiparty system in 1990, prompted the creation of many NGOs, some of them claiming to be seeking the protection and promotion of human rights.

I will now elaborate on each of the three phases in the evolution of human rights NGOs in Côte d'Ivoire, and highlight some of the main challenges they faced.

5.3.1 The history of Ivorian non-governmental organisations

5.3.1.1 *The first phase: Human rights activism for political liberation and freedom (1930-1959)*

The focus of human rights activism during the colonial era was on achieving political liberation from French colonial rule. Strictly speaking, there were no structured human rights groups during the colonial period. This can be understood in the global context of the universal recognition of human rights from the inception of the United Nations after the Second World War (WWII) in 1948. Before WWII, the campaign for social and political change in Côte d'Ivoire was carried out through social movements of various kinds. For example, there were groups of intellectuals defending sectoral interests (religious, ethnic, regional), and social pressure groups.

Ekanza has estimated that 114 social movements were authorised by the colonial administration between 1930 and 1939.⁴³ They consisted of 42 sport associations; 10 solidarity groups; 21 art and literature groups; 37 friendship and brotherhood groups, and 4 'others'.

⁴³ Ekanza PS 'La Côte d'Ivoire moderne: de la conquête à la gestion du pouvoir' (2002) 1 *Revue Ivoirienne d'Histoire* 46-47.

As such, sport, literature and ethnic-based groupings were the core channels through which indigenous populations could assemble and articulate their claims. The attitude of the colonial administration towards these groups varied according to their stated or anticipated mandate. Those perceived as hostile to the colonial administration – with the exception of trade unions formed by Europeans – were banned. The colonial administration helped in the formation of indigenous groups to fight these trade unions. The following table is a summary of the relationship that existed between the colonial administration and the Ivorian civil society organisations.⁴⁴

NATURE/GROUPING/PURPOSE	RELATIONSHIP WITH COLONIAL ADMINISTRATION
1 Cultural and Solidarity Groups	
<i>Union Fraternelle des Originaires de Côte d'Ivoire</i> (Fraternal Union of Ivorians) created in 1929	Tolerated by the colonial administration
<i>Association pour la Défense des Interets des Autochtones de la Côte d'Ivoire-ADIACI</i> . ('Association for the Defence of the Interest Ivorian Autochthons'). Hostile to non- <i>Sénégalais</i> Ivorians, especially the Dahomeens known for being highly educated and skilled among Africans, and therefore guaranteed the best employment.	Tolerated by the colonial administration
<i>Syndicat des Fonctionnaires Indigènes</i> (Union of Indigenous Civil Servants) created in 1937 with 250 members. Headed by Jean-Baptiste Mokey who would later become a key member of PDCI-RDA	Not tolerated by the colonial administration
<i>Syndicat des Boys et Cuisiniers</i> (Union of House Staff and Cooks) created in 1937	The colonial administration was very hostile to this group and banned it a few months later
2 Les Evolués (the Advanced) – Intellectual groups	
<i>L'Eclaireur de la Côte d'Ivoire</i> a monthly newsletter created in 1935 by the intellectuals to 'combat the lethargy of Ivorian intellectuals and bring hope to hearts regarding the ideals of truth, justice and progress, in order to make the voice of the country heard'	Critical of colonial administration and co-operating traditional leaders. Banned in 1936
<i>L'Impartial de Côte d'Ivoire</i> a newsletter created by the Sénégalaise Hamet Sow in 1936	Banned the same year
3 Trade Unions	
<i>Syndicat des Colons de Côte d'Ivoire</i> (Union Colonial Masters of Côte d'Ivoire) was a federation of 22 unions of colonial employers from various sectors of economic production and largely dominated by Europeans.	The colonial administration responded to their growing demands by encouraging the formation of the <i>Syndicat Agricole Africain</i> (African Agricultural Union) of Houphouët Boigny on 10 July 1944

⁴⁴ Information in this table is obtained from a study by Ekanza (2002) on the political history of Côte d'Ivoire.

4 Political Parties

The common denominators in the political parties created after WWII and authorised by the colonial administration were:

- to achieve the political liberation of the country while keeping ties with France
- to show commitment to France and its institutions
- to struggle for emancipation with, and not against or from France
- not to envisage either independence, or breaking off relations with France

The liberation of Côte d'Ivoire from French colonial rule was mainly championed by the African Agricultural Congress and other farmers' associations. Their claims included decent working conditions and human dignity, as well as civil and political freedoms, including the right to participate in the public affairs of the country, and the opposition to forced labour. This struggle, if sustained, could have served the pursuit of the RtD during the post-colonial era. Unfortunately, the African Agricultural Congress, which led the country to independence, abandoned the pursuit of the RtD as it opted to comply with the exigencies of France in relation to safeguarding its economic interests. The newly independent country maintained strong economic ties with France, leading to French control of the economy of Côte d'Ivoire for nearly five decades after independence. The African Agricultural Congress later (in 1946) changed its name to the *Parti Démocratique de la Côte d'Ivoire* (PDCI) (the 'Democratic Party of Côte d'Ivoire').

5.3.1.2 Trade unionists as frontline human rights defenders (1960-1990)

The momentum of the political struggle for the recognition of socio-economic and cultural rights, which contributed to the independence of Côte d'Ivoire, was disrupted by the *Parti Démocratique de la Côte d'Ivoire* (PDCI), a political party that arose out of this struggle. As indicated above, the African Agricultural Union which later became a political party – the Democratic Party of Côte d'Ivoire – and began by struggling for the rights of indigenous people who were victims of forced labour. Upon accession to independence, PDCI, the ruling party of Felix Houphouët-Boigny, imposed its own authority as a one-party system contrary to the constitutional provisions (article 7 of the 1960 Constitution) by denying other groups the right to register and function as political parties.

However, this did not stop the defence of human rights. In response to the ban on political parties, human rights defenders regrouped under the guise of trade unions. Their claims – sectoral at first (in that they represented worker demands in the various trades, industries, and professions) – transformed gradually into demands for broader political and social change, and ultimately demands for a return to multipartyism. The most active unions were two teachers' unions, the *Syndicat national pour la recherche et l'éducation supérieure* ('National Union for Research and Higher Education' (*Synares*)), and the *Syndicat national des enseignants du secondaire de Côte d'Ivoire* ('National Union for Secondary Education' (*Synesci*)), as well as the *Union Générale des Travailleurs de Côte d'Ivoire* ('General Workers Union in Côte d'Ivoire' (UGTCI)). Most of those participating in the country's then current politics were active in these unions. For example, Laurent Gbagbo, the then President of the country; Henriette Diabaté, second in command in the current ruling party, the Rally of the Republicans; Angele Gnonsuah, former Minister of the Environment (under Laurent Gbagbo's presidency); and Francis Wodié (current President of the Constitutional Court), both from the Ivorian Labour Party, were all members of the *Synares*.

These teachers, university researchers, and lecturers sponsored the creation of the *Fédération Estudiantine et Scolaire de Côte d'Ivoire* (FESCI), a student union aimed at intensifying the pressures and accelerating the decline of the former one-party system. However, this student union also brought about violence in schools, universities, and in politics generally. Former FESCI leaders then emerged as an alternative political force, taking part in the violence and challenging the rule of law, either as a rebel movement known as the *Mouvement Patriotique de Côte d'Ivoire* (MPCI), or as a self-defence force and militia known as the 'Young Patriots'.⁴⁵

5.3.1.3 The return to multiparty democracy and the rise of domestic human rights organisations (1990-2000)

The struggle of trade unionists led to the return to a multiparty system and paved the way for the emergence of domestic human rights organisations; the *Ligue*

⁴⁵ Banegas and Marshall-Fratani 'Côte d'Ivoire, un conflit régional?' (2000) 78 *Politique Africaine* 10.

Ivoirienne des Droits de l'Homme ('Ivorian League of Human Rights' (LIDHO)) being the most prominent. However, the close ties between these unions and human rights NGOs became problematic for the NGOs as the unions served as 'backbone' of parties opposed to the one-party system. Human rights activism was perceived by the ruling party as a cover for political activities. Indeed, some of the founding members of the LIDHO were also active of either *Synares* or *Synesci* and at the same time held leadership positions in the newly formed opposition parties – in particular the *Front Populaire Ivoirien* ('Ivorian Popular Front') and the *Parti Ivoirien des Travailleurs* ('Ivorian Labour Party').⁴⁶

Amnesty International was the only independent human rights organisation allowed to operate in the country. The reason for the pioneering role of Amnesty International will be explained below. As will also be seen below, the links between NGOs and unions/political parties resulted in a polarisation of NGOs along political and ethnic lines, especially in the context of the decade-long political crisis highlighted above.

5.3.1.4 The pioneering role of Amnesty International – Côte d'Ivoire

London-based Amnesty International (AI) established its local branch in Côte d'Ivoire in 1979. A review of the files of the organisation shows that two factors contributed to the recognition of AI-Côte d'Ivoire as an NGO even before the country's return to multipartyism. The first factor is the French connection. Although Adam Camille, the organisation's first chairperson, was Ivorian, the majority of founding members were French expatriates and refugees from two French-speaking West African countries – Togo and Benin – who were working in the country as 'French expatriates'. AI-Côte d'Ivoire and AI-France also established the practice of exchanging goods and joint fundraising. The link-up with AI-France was in itself a form of protection in the context of the cordial relation between the ruling party in Côte d'Ivoire and France.

⁴⁶ *Connaître la LIDHO* 'About the LIDHO' available at http://www.lidho.org/connaître_la_lidho.html (accessed 20 January 2014).

The second factor is the mode of operation of AI.⁴⁷ Globally the organisation has two main functions. The research function is undertaken by professionals who are not a national of the country on which they work. For example, the organisation's local members were expected to act on behalf of 'prisoners of conscience'⁴⁸ all over the world except in their own country, and strictly to refrain from conducting any form of fact-finding or investigation involving domestic potential human rights violations. This rule, known as the 'work on own country' rule, was justified by the imperatives of impartiality and objectivity, and operated as a safety net for local activists. It certainly assisted in building AI's reputation in Côte d'Ivoire as an organisation with credible information, and developed a sense of universalism in the fight against human rights violations. At the same time, however, it kept the local branch removed from domestic realities. It also failed to create avenues for the integration of socio-economic, cultural rights in general, and the RtD in particular, into the human rights struggle until the early 2000s. The AI's perspective on human rights arose from the narrow mandate of a western organisation, a mandate that prioritised the concerns of western foreign policies in the field of human rights, and neglected to take cognisance of the link between western countries' actions and poverty and cultural imperialism. The advocacy, public awareness, and fundraising is done by volunteers and professionals active both locally in their own country, and internationally in fora such as the UN Human Rights Council or sessions of the African Commission on Human and Peoples' Rights. The distribution of roles between local members and professional staff was intended to protect local members against repressive regimes and to guarantee the objectivity of the research supporting AI's campaigning.

5.3.1.5 *The Ligue Ivoirienne des Droits de l'Homme (LIDHO) (the 'Ivorian League of Human Rights')*

The Ivorian League of Human Rights (the LIDHO) is arguably the oldest and strongest human rights NGO. Established on 21 March 1987, it was officially

⁴⁷ Statute of Amnesty International available at <http://www.amnesty.org/en/who-we-are/accountability/statute-of-amnesty-international> (accessed 21 January 2014).

⁴⁸ Article 1(a) of Amnesty International's Statutes adopted in Boston, USA in 1993 defines a 'prisoner of conscience' as: 'any person by reason of his or her political, religious or other conscientiously held beliefs or by reason of his or her ethnic origin, sex, colour or language, provided that he or she has not used or advocated violence'. See <http://www.uib.no/isf/people/amnesty/whatis.htm> (accessed 21 January 2014).

recognised by the government on 14 June 1990 (with the issue of a certificate of registration) with the broad mandate of defending, promoting, and protecting human rights and democracy. The LIDHO remains the most vocal NGO, judging from its presence in the field (500 members and 35 branches), its visibility, and its networking with the wider human rights NGO community inside and outside of Africa. Its founding members were drawn from academic circles. The LIDHO was instrumental in the political fight that eventually led to the return to a multiparty system. Several of its members faced brutal repression, arrest, detention, torture, and professional intimidation, especially between 1990 and 1993 – a period of political agitation in Côte d’Ivoire (discussed above). According to Patrick N’gouan, former chairperson of LIDHO, the focus of this NGO on civil and political rights in the 1990s was justified by the prevailing situation of the day, and he agreed that the time has come for shifting towards other categories of rights including the RtD. According to him, it was difficult (if not impossible) to embrace socio-economic and cultural rights and the right to development in the face of large-scale repression and the violation of basic freedoms. He is of the view that it is now appropriate to work on the RtD as part of reverting to normality after the country’s return to multipartyism; and as way of consolidating both socio-economic, cultural and political rights.⁴⁹

5.3.1.6 The fate of the early post-one-party era NGOs

The table below present results of interviews conducted in 2012 with leaders of core registered NGOs that were known to be active after the return to a multiparty system, but which became dormant a few years later.

Organisation	Mandate and Date of Establishment	Comment on Current Status
<i>Association des Femmes Juristes de Côte d’Ivoire</i> (AFJCI)	AFJCI fights discrimination against women. It was established and officially recognised in 1984.	AFJCI was active between 1984 and 1993. It was revived in 2003 in the context of the 2002 civil war.
<i>Association Chrétienne pour l’Abolition de la Torture et pour le Respect des Droits de l’Homme</i> (ACATDH)	ACATDH combats torture. It was established in 1990 and formally recognised in 1992.	ACATDH was active up to 1995, after which it became dormant and has remained so.

⁴⁹ Interview with the author 1 October 2012 in Abidjan.

<i>Association Ivoirienne pour la Promotion des Droits de l'Homme</i> (AIPDH)	AIPDH specialises in human rights promotion and capacity-building. It does not undertake human rights protection. It was formally recognised in 1990.	AIPDH was very active for only two years and has been dormant ever since. According to Landry Bagui, its last chairperson, its current situation is attributed to the departure of its founding members from the country to take up international appointments.
<i>Mouvement Ivoirien des Droits de l'Homme</i> (MIDH)	MIDH was established in 2000 to promote and protect human rights throughout the country.	MIDH was very vocal until 2003 when its leader fled Côte d'Ivoire for political and security reasons. It has since experienced a leadership crisis and become dormant.
<i>Action pour les Droits de l'Homme</i> (APDH)	Established in 2000, APDH aims for the promotion and protection of human rights.	APDH was active until 2002. Its leaders argue that the political tension in the country is largely responsible for the lack of interest displayed by its members.

Table 6: The status of NGOs in the early stages of the return to multipartyism.

The reasons advanced to explain the state of stagnation and disappearance of the early 1990s NGOs vary and are not fully elaborated on here. However, they all point to a series of issues including organisational capacity and the impact of the political environment. I address these issues in greater detail below.

5.3.1.7 The numerical expansion prompted by the political crises from 1999 onwards

Nearly two decades after the return of Côte d'Ivoire to a multiparty system, the landscape of human rights organisation has changed fundamentally. Numerically, there are no less than 85 registered NGOs claiming to be seeking the protection and promotion of human rights. Qualitatively, the scene remains dominated by international NGOs such as AI and by the 'local' LIDHO, the most solid and prominent among the domestic organisations. As of January 2012, the United Nations Mission in Côte d'Ivoire had grouped the NGOs and social movements into a number of categories:⁵⁰ Eleven human rights NGOs; sixteen women and children NGOs; four democracy and development NGOs; four faith-based organisations; and one federation of traditional leaders. The Ivorian government estimated in 2009 that there are over 200 human rights NGOs operating in Côte d'Ivoire.⁵¹ According to

⁵⁰ ONUCI *Liste des ONG nationales et internationales en Côte d'Ivoire* January 2008 (on file with the author).

⁵¹ See http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/CI/A_HRC_WG.6_6_CIV_1_Cote_dIvoire_F.pdf (accessed 27 December 2012).

Sylla,⁵² the NGO movement in Côte d'Ivoire has evolved numerically over the past twenty years as follows: 6% created between 1980 and 1990, 39% created between 1990 and 1999, and 55% created since 1999 (see Table 7 below). From all indications, these figures are indicative of the numerical growth of the civil society movement in Côte d'Ivoire. The actual number is believed to be far greater.⁵³ Representatives of 23 NGOs were interviewed in 2012 for this study.

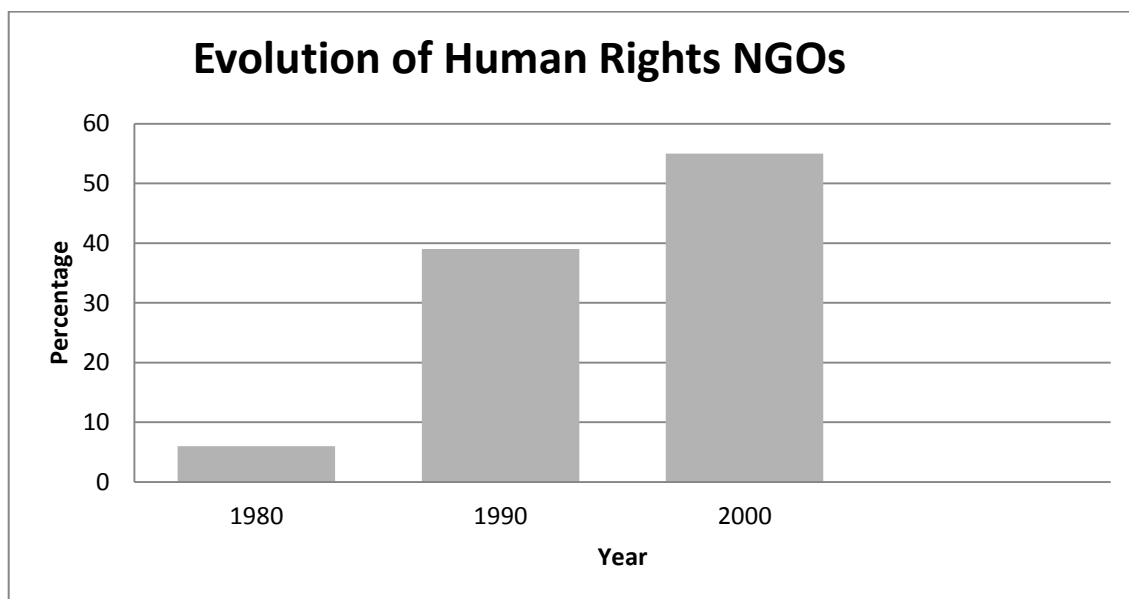


Table 7: Numerical evolution of human rights NGOs

5.3.1.8 The emergence of networks of NGOs

The numerical expansion of NGOs has also led to the creation of several networks as a way of promoting synergy and increased efficacy:

- *Le Collectif des confessions religieuses pour la paix* ('Network of Religious Groups for Peace').
- *Coalition des femmes leaders* ('Coalition of Female Leaders')

⁵² Sylla K 'Cooperation between NGOs and the private sector to finance development in Africa' *Globalisation Context* (2004) 5.

⁵³ According to the Government of Côte d'Ivoire, at least 200 human rights NGOs operate in the country. See [http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/ CI/A_HRC_WG.6_6_CIV_1_CotedIvoire_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/CI/A_HRC_WG.6_6_CIV_1_CotedIvoire_E.pdf) at page 13 (accessed 16 January 2013).

- *Forum des ONG et associations d'aide à l'enfance et adultes en difficulté* ('Forum of NGOs and Associations for Assistance to Children and Adults in Need')
- *Réseau ivoirien des organisations féminines* ('Ivorian Network of Female Organisations')
- *Union des ONG de Côte d'Ivoire* ('Union of NGOs in Côte d'Ivoire')
- *Convention de la société civile ivoirienne* ('Convention of Ivorian Civil Society')

These networks are thematic and are generally created following a training or common interest workshop. For example, the 'Convention of the Ivorian Civil Society' was established in January 2003 at the initiative of LIDHO to create a united front in civil society in response to the crisis which erupted in the country following the failed *coup* attempt in September 2002. Networks do not require any formal registration to begin operating. They are driven by fully registered NGOs until such time that it becomes necessary for them to have a legal identity different from that of their members. In the case of the 'Convention of the Ivorian Civil Society', the network was formalised in 2005 when its membership grew significantly to involve not only human rights NGOs, but also faith- and community-based organisations, as well as trade unions. It then registered as an NGO.⁵⁴ In the context of Côte d'Ivoire, the NGO networks operate as an umbrella of pressure groups which undertake joint activities ranging from analysis of the socio-political situation in the country, to public statements, lobbying, and holding of public rallies and conferences.

Networking has many benefits for NGOs in a country like Côte d'Ivoire, which has very few well-established CSOs. Networking has the potential to strengthen the institutional capacity of participating groups. For example, the *Convention de la société civile ivoirienne* serves as a platform for interaction between religious groups, the private sector, traditional leaders, trade unions, and NGOs from various fields of

⁵⁴ In 2005, a charter was adopted by the NGO members of the Convention and Patrick N'Gouan, then president of the LIDHO, was elected as leader of the network. See <http://societecivile-csci1.org/index.php/presentation-27/historique-de-la-csci> (accessed 21 January 2014).

interest.⁵⁵ Networking can also raise their credibility, visibility, and profile; and it can compel them to have a clear focus on issues that matter for the masses, as opposed to being driven by the exigencies of external fundraising. However, the main challenge remains ensuring that participation is meaningful and informed and not purely numerical or for the self-promotion of a few influential leaders in search of legitimacy.

5.3.1.9 The impact of human NGOs earlier (in times of upheaval) and at present

This research did not include any formal impact assessment of human rights NGOs. However, it is worth taking note of a few pointers highlighting the real or potential impact of these social movements. For example, as discussed above, most political parties, especially opposition parties, recruit their leadership from NGOs, particularly human rights groups. This attests to the quality of the human resources available in the sector.

Second, the drafting of the 2000 Constitution was greatly influenced by human rights NGOs through some members of parliament who were prominent activists before entering politics.

Also those with a broad membership base like the *Association des Femmes Juristes* ('Association of Female Lawyers'), and the LIDHO claim several hundred members and have self-sustaining branches in remote locations.

Throughout the decade-long conflict in the country, NGOs remained vocal and represented an alternative voice alongside religious and traditional leaders. Moreover, the acceptance of the jurisdiction of the ICC was largely as a result of consistent campaign by the 'Ivorian Coalition for the ICC' led by Ali Ouattara, a former president of AI in Côte d'Ivoire.

Women groups were amongst the first to undertake mediation efforts at the peak of the crisis in 2002 by crossing battle lines to engage rebel groups. They also provided expertise in the development of the country's national action on the

⁵⁵ N'gouan '*Les dynamiques de la société civile en Afrique de l'Ouest*' *l'Afrique de l'Ouest et la tradition universelle des droits de l'homme* (2006) 226.

implementation of the United Nations resolution 1325 on Women, Peace and Security.⁵⁶

NGOs were also actively involved in general elections through voter awareness campaigns and monitoring human rights before, during, and after the 2010 presidential elections.⁵⁷ All these indicators point to the growing importance of NGOs in Côte d'Ivoire. However, none of them has any experience in working on the RtD. A number of reasons have been advanced to justify this lack of relevant experience – ignorance of this right being the primary one.

5.3.2 The present legal framework for the recognition and operation of non-governmental organisations in Côte d'Ivoire

Sources of law here means where the law originates from and where it can be located.⁵⁸ The Constitution of Côte d'Ivoire of 2000 (2000 Constitution)⁵⁹ and the *Loi sur les Associations* ('the Association Law') of 1961, are considered the legal bases for any NGO recognition (registration) and operation in Côte d'Ivoire. The 2000 Constitution recognises the fundamental rights to freedom of association, assembly, and expression, both in its preamble and under article 11.⁶⁰

⁵⁶ Resolution 1325 (2000) adopted by the Security Council at its 4213th meeting, on 31 October 2000 on Women, Peace and Security available at [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1325\(2000\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1325(2000)) (accessed 18 June 2013).

⁵⁷ See report of the European Union on the 2010 presidential elections in Côte d'Ivoire highlighting the role of NGOs during the process, available at http://www.eueom.eu/files/press_releases/english/rapport-final-25012011_fr.pdf (accessed 27 December 2012).

⁵⁸ Squelch JM 'Private education in South Africa: The legal status and management of private schools' unpublished LLD thesis (Unisa) (1997) 7.

⁵⁹ *Loi n°2000-513 du 1er AOÛT 2000 portant constitution de la Côte d'Ivoire (adoptée par referendum le 23 juillet 2000)* ('Constitution of Côte d'Ivoire of 2000') available at http://www.gouv.ci/ci_texte_1.php (accessed 21 January 2014).

⁶⁰ See http://democratie.francophonie.org/IMG/pdf/Cote_d_Ivoire.pdf (accessed 16 February 2013).

The legal regime for NGOs is examined within the broader discussion of the constitutional framework within which NGOs have to operate, especially in the new post-2000 constitutional paradigm of Côte d'Ivoire. Thereafter follows a discussion of the international law angle of human rights which is approached through reference to the lack of a human rights protection framework before the late 1990s. Next I examine the normative and empirical framework for human rights, followed by a discussion of the domestication of international human rights instruments as provided for in the 2000 Constitution; as well as the adjudication and litigation of human rights cases. The chapter concludes with an overview of the obstacles to the use of human rights instruments encountered by NGOs in Côte d'Ivoire.

5.3.2.1 *The lack of a human rights protection framework before the late 1990s*

Until the late 1990s, there was no clear normative framework for the protection, promotion, and enforcement of human rights in Côte d'Ivoire. Historically, the country had two Constitutions before 2000, but neither provided for human rights encapsulated in a bill of rights. The first Constitution was developed and adopted in 1959, in the context of the French Community of Autonomous States, a stage that preceded full political independence from France.⁶¹ The preamble to this Constitution proclaimed the attachment of the people of Côte d'Ivoire to the principles of democracy and human rights as spelled out in the French 1789 Declaration on the Rights of Man and the Citizen and the 1948 Universal Declaration of Human Rights.

Wodié explained that as a member of the French community, Côte d'Ivoire was not a fully-fledged independent state at the time. It follows, therefore, that it could only act on certain matters within the framework of the Constitution of France.⁶² For example, the Constitution, though stating that the presidential system was the form of political governance, made no provision for the position of a president. It limited

⁶¹ *Loi n° 59-1 du 26 mars 1959 portant Constitution de la République de Côte d'Ivoire* ('1959 Constitution of Côte d'Ivoire') in Wodié F *Institutions politiques et droits constitutionnel en Côte d'Ivoire* (1996).

⁶² Wodié n 61 above 44.

itself to the functionary of a prime minister and the mandate for his government.⁶³ The understanding was that the Ivorian prime minister would be answerable to the presidency of the French Community, who is also the President of France. In other words, the absence of an explicit reference to human rights provision in the 1959 Constitution is understandable in the context of the country's quasi-political independence. On 3 November 1960, three months after Côte d'Ivoire proclaimed its political independence from France, it adopted its first Constitution as a sovereign state by referendum. Human rights were mentioned in the preamble in the same terms as in the 1959 Constitution. The 1960 Constitution was amended ten times between 1963 and 1995; none of these amendments dealt with human rights. The absence of a normative framework for human rights before the advent of the 2000 Constitution was not a mere oversight. The one-party system in place carried forward the colonial legacy of providing little or no space for human rights and human rights activism.

5.3.2.2 The legal regime for non-governmental organisations

Generally, the 2000 Constitution⁶⁴ guarantees fundamental freedoms in articles 9 to 11 which include the right to freedom of peaceful assembly and the freedom of demonstration.⁶⁵ The Constitution therefore allows NGOs the freedom to operate provided they adhere to the legal requirements stipulated under the law. Côte d'Ivoire has similar requirements for NGOs as in Senegal, and generally in Francophone African countries, as discussed in Chapter 4 above. NGOs are governed by the Association Law no 60-315 of 21 September 1960,⁶⁶ which replaced the 1901 French law on association but did not bring about any substantive changes. The Association Law distinguishes between local and foreign NGOs mainly with

⁶³ *Ibid.*

⁶⁴ The content of the Constitution and thus the constitutional context of the 'legal regime for NGOs' will be discussed below

⁶⁵ Article 11 recognises explicitly the rights to freedom of assembly and demonstration. Although the right to freedom of association is not expressly mentioned in the Cote d'Ivoire Constitution, I understand it to be implicit in the recognition of the right to freedom of assembly and demonstration.

⁶⁶ See <http://www.centif.ci/documents/lois/e4e562a1c6a41e4ec988a99c77fbc27d.pdf> (accessed 27 December 2012).

regard to the requirements for registration and operation.⁶⁷ Local NGOs are freely constituted and can operate two months after submitting their by-laws to the Ministry of the Interior in accordance with the principle of 'prior declaration' (article 7). In terms of this principle, the Ministry of the Interior has two months from the date of registration to object to the functioning of the NGO on the ground of its non-compliance with the laws of the land. During those two months, the ministry undertakes an investigation to establish whether the founding members are of good moral character and have a clean criminal record. As such, a local NGO is deemed legal and can operate if the authorities have not expressly objected to its creation within two months from the time of declaration (article 9). Foreign organisations – those headquartered outside the Côte d'Ivoire or with three-quarters of the members made up of non-nationals (article 28) – are subject to the requirement of prior authorisation (article 24). This means that they can only operate legally in the country after express authorisation from the Ministry of the Interior.

In terms of article 4 of the Association Act, both local and foreign NGOs are rendered illegal, and therefore prevented from operating, if they pursue a goal that is illicit or illegal; promotes ethnic hatred; represents a threat to public order, national security or the constitutional order; or is immoral.

Article 5 provides for deregistration of NGOs through administrative means on account of breaches of provisions of articles 3 and 4, and generally any provision of the Association Act. Further, articles 34 and 35 impose judicial sanctions (payment of a fine and/or imprisonment) for defaulting members of an NGO who regroup or resume activities after it has been deregistered.

5.3.2.3 *The constitutional framework in which non-governmental organisations must operate after 2000*

The 2000 Constitution is the country's latest fundamental law. It was adopted in the context of the first change of regime (through a *coup d'état*) that the country

⁶⁷ *Loi sur les associations* n°60-315 of 21 September 1960 available at <http://www.centif.ci/documents/lois/e4e562a1c6a41e4ec988a99c77fbc27d.pdf> (accessed 27 December 2012)

experienced after gaining independence from France in 1960. It was drafted under the military regime of General Robert Guéï (who deposed Henri Konan Bédié as set out above) and adopted by referendum on 23 July 2000.⁶⁸ The Constitution comprises a preamble and 133 articles grouped under a number of chapters. Chapters are in turn categorised under main titles as set out in the following table:

TITLE	CONTENT
Title One	Freedoms, rights and duties (articles 1-28)
Title Two	The state and sovereignty (articles 29-33)
Title Three	The President of the Republic and the government (articles 34-57)
Title Four	The Parliament (article 58-70)
Title Five	Relationship between the executive power and the legislative power (articles 71-83)
Title Six	Treaties and international agreements (articles 82-87)
Title Seven	The Constitutional Council (articles 88-100) is the equivalent of the South African Constitutional Court. The Ivorian Constitutional Council can pronounce on the conformity of domestic laws with the Constitution. It also pronounces the final results of presidential elections. Its decisions are final.
Title Eight	The judicial powers (articles 101-106).
Title Nine	The High Court of Justice (articles 107-112). The High Court of Justice is competent to try the President of the Republic and members of the government. It is presided over by the President of the Court of Cassation and comprises members of parliament elected by their peers.
Title Ten	The Economic and Social Council (articles 113-114) is an advisory body to the government which can pronounce itself, inter alia, on draft laws relating to economic and social issues.
Title Eleven	The Mediator of the Republic (articles 115-118) is the equivalent of the ombudsman.
Title Twelve	Local councils and municipalities (articles 119-121)
Title Thirteen	Association and co-operation between states (in the context of international relations) (articles 122-123).
Title Fourteen	Constitutional review (articles 124-127).

⁶⁸ *Loi n°2000-513 du 1er AOÛT 2000 portant constitution de la Cote d'Ivoire (adoptée par referendum le 23 juillet 2000)* available at http://www.gouv.ci/ci_texte_1.php (accessed 21 January 2014).

Title Fifteen	Transitional and final measures (articles 128-133).
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Table 9: Table of contents of the Constitution of Côte d'Ivoire of 2000

The 2000 Constitution proclaims, in its preamble, the country's adherence to the principle of separation and balance of powers (the *trias politica* doctrine) between the executive, the legislature, and the judiciary. This is a reaffirmation of the principle established in the 1960 Constitution. In other words, the executive, the legislative, and the judicial powers are separate and need to be balanced. Whether this reflects reality is beyond the scope of this research. However, the increasing interference of one branch (especially the executive) in the jurisdiction of the others has complicated the fragile situation of the country over the past decade. It is also striking to note that while a whole title (Title five) and thirteen articles (articles 71-83) elaborate on the relationship between the executive and legislative powers, only one article (article 101) proclaims the independence of the judicial power from the executive and the legislature.

5.3.2.4 Human rights in the 2000 Constitution

The 2000 Constitution contains detailed human rights provisions. The entire first Title ('Freedoms, rights and duties' – articles 1-28) is devoted to setting out rights, rights to certain freedoms, and duties. Articles 1 to 22 list the rights and rights to freedoms, while duties are spelled out in articles 23 to 28. Perhaps influenced by the legal opinion that prevailed at the time of drafting of the African Charter on Human and People's Rights, the 2000 Constitution recognises the rights of both individuals and groups. It also places duties on them and balances rights and duties.

The RtD is implicitly recognised by the 2000 Constitution in two articles. Article 7 articulates the right of the individual to development,⁶⁹ while article 8 refers to collective rights in relation to the youth, placing obligations on the state and local

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Article 7(1) provides:

Tout être humain a droit au développement et au plein épanouissement de sa personnalité dans ses dimensions matérielle, intellectuelle et spirituelle.

('Every human being has the right to the development and full growth of his personality in its material, intellectual and spiritual dimensions' (author's translation).)

councils to ensure their right to development.⁷⁰ These two references are in various respects an inadequate reflection of the substance of the RtD as defined by the UN Declaration and as used in this research. First, article 7 narrows the individual rights to social and physical development and fails to include a notion such as participation in political, cultural, and economic development which the UN Declaration does take into consideration. Secondly, with regard to ‘groups’ (‘collectives’) article 8 is very specific in its reference to the youth and not to ‘people’ generally – an understanding which extends beyond the ‘youth’. Thirdly, even in relation to the youth, article 8 is silent on their participation in any social, economic and political processes of their communities, and the enjoyment of the benefits of these processes. Finally, article 8 makes local communities the sole bearers of the obligation to realise the youth’s right to development, and is silent on the State’s responsibility.

A number of African Constitutions with clearer articulation of the RtD could have inspired the drafters of the 2000 Ivorian Constitution. The 1994 Ethiopian Constitution is perhaps the most articulate African Constitution in this field. While article 43 of Chapter 3 of that Constitution is devoted to fundamental rights, the RtD is described in the following terms:

- 1 The peoples of Ethiopia as a whole, and each nation, nationality, and people have the right to improved living standard and to sustainable development.
- 2 All persons have the right to participate in national development and, in particular, to be consulted in respect to projects affecting their community.
- 3 All international agreements to which Ethiopia is a party or relations that Ethiopia establishes and conducts with foreign countries shall ensure the country’s right to sustainable development.
- 4 The aim of development policies and programs shall be to enhance the capacity of citizens for development and to meet their basic need.⁷¹

⁷⁰ Article 8 states:

L’État et les Collectivités publiques ont le devoir de veiller au développement de la jeunesse. Ils créent les conditions favorables à son éducation civique et morale et lui assurent la protection contre l’exploitation et l’abandon moral.

(‘The State and local councils have the duty of ensuring the development of the youth. They create favourable conditions for civic and moral education and protect the youth against exploitation and moral neglect’ (author’s translation)).

⁷¹ See http://www.eueom.eu/files/dmfile/ethiopian-constitution-1994_en.pdf (accessed 17 November 2012).

The 1995 Constitution of Malawi runs along the same lines as it stipulates in Chapter 4, section 30:

- 1 All persons and peoples have a right to development and therefore to the 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 realization 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 a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.⁷²

The 1996 Cameroon Constitution in paragraph 3 of its preamble, clearly articulates the RtD in the following terms:

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.⁷³

This said, I submit that the express incorporation of the RtD in these constitutions can be explained by the fact that, contrary to Côte d'Ivoire which applies 'legal monism', Ethiopia, Cameroon, and Malawi operate under 'legal dualism'. The distinction between legal dualism and monism arises in the context of the relationship between international law and municipal laws.⁷⁴ Generally, legal dualism recognises an international legal rule as a [national] law only after the former has been translated into the latter by an Act of Parliament, hereby incorporating it in the law of the land. Legal monism to the other hand, accepts that international and domestic legal systems form a unity and as such both a ratified treaty, and a national

⁷² See [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/\\$FILE/Constitution%20Malawi%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/4953f2286ef1f7c2c1257129003696f4/$FILE/Constitution%20Malawi%20-%20EN.pdf) (accessed 16 November 2012).

⁷³ See <http://confinder.richmond.edu/admin/docs/Cameroon.pdf> (accessed 16 November 2012).

⁷⁴ Human rights and international law (6): international human rights law and its national effects available at <http://filipsagnoli.wordpress.com/2008/06/02/human-rights-facts-26-international-human-rights-law-and-its-national-effects/> (accessed 27 January 2014).

legal rule are considered to be the law of the land.⁷⁵ It is therefore argued that the insufficient explicit reference to RtD in articles 7 and 8 is resolved by an implied recognition in the Constitution in two ways. First, the Ivorian legal system is monist and accordingly the African Charter on Human and Peoples' Rights (ACHPR) is part of municipal law once ratified and properly gazetted by the state of Côte d'Ivoire (see the discussion on the 'domestication of international human rights instruments' as provided for in the 2000 Constitution' below). Secondly, two core international instruments are part of the *corpus* of human rights in the 2000 Ivorian Constitution: the Universal Declaration of Human Rights (UDHR), and the ACHPR. The preamble explicitly lists these instruments as sources of law, and in accordance with the *Condamnés du 07 juin 1957* and *Société Eky* cases, they have legal authority like other constitutional provisions and therefore take supremacy over domestic laws.⁷⁶ As such, they are not subject to the requirements of article 87 of the Constitution (discussed below), which requires a regular publication of a ratified human rights treaty before it becomes part of the domestic law. The preamble to the 2000 Constitution explicitly proclaims adherence to the rights and freedoms as defined in the UDHR of 1948 and in the ACHPR of 1981. This is also a major departure from the 1960 Constitution, which merely referred to the principles contained in the UDHR without any specific reference to the rights therein.

The legal implications of the constitutional recognition of the UDHR and the ACHPR, are far-reaching. The Constitutional Council (the Ivorian Constitutional Court) can declare a treaty or a law unconstitutional on the grounds of its inconsistency with either the UDHR or the ACHPR. Article 96 of the 2000 Constitution recognises the right to raise the unconstitutionality of any law before any court of law. The matter is then submitted to the Constitutional Council, whose decision is final. According to article 20 of Law 003-2001⁷⁷ relating to the

⁷⁵ *Ibid.*

⁷⁶ In France, the *Conseil d'État* (Council of State) recognised the constitutional value of the UDHR included in the preamble to the 1946 and 1958 French Constitutions. See *Arrêt des Condamnés du 07 juin 1957 et Arrêt Société Eky du 12 février 1960* in *Revue Dalloz* (1960) 263. Since these two historic decisions, the constitutional value of human rights instruments mentioned in the preamble to the Constitution has to my knowledge never been questioned.

⁷⁷ *Loi n° 2001-303 du 5 juin 2001 portant organisation et fonctionnement du Conseil constitutionnel de la République de Côte d'Ivoire* ('Law relating to the organisation and functioning of the Constitutional Council') available at http://www.gouv.ci/doc/textes_fondamen

organisation and functioning of the Constitutional Council, legally constituted human rights associations can petition the unconstitutionality of a law relating to civil liberties before the Constitutional Council. Furthermore, the *Code de Procédure Civile, Commerciale et administrative* ('Civil, Criminal and Commercial Code of Procedure')⁷⁸ recognises *locus standi*⁷⁹ for NGOs under specific conditions. In terms of article 3 of the Code of Procedure, the plaintiff must show a direct, personal, and actual injury in order to have the necessary *locus standi*.

5.3.2.5 Normative and empirical framework for human rights

Côte d'Ivoire, like the majority of African countries, is party to most international human rights treaties and/or legal instruments. In its first report to the African Commission on Human and Peoples' Rights, the state listed 56 international human rights instruments to which it is party, including various International Labour Organisation (ILO) Conventions. It is worth noting the efforts made by the country to close the gaps in its reporting obligations. Between 2008 and 2012, the number of overdue periodic reports relating to international human rights instruments and obligations under these instruments, declined from 22 to 14. Table 8 gives a summary of the country's status on ratification and reporting.⁸⁰

TREATIES	RECORD
Treaties ratified	8 – CERD, CRC, ACHPR, CESC, CCPR, CAT, CEDAW, CRC OP.SC
Treaties reported on at least once	4 – ACHPR, CEDAW, CERD, CRC-
Treaties never reported on	3 – CESC, CCPR, CAT

taux/ORGANISATION%20ET%20FONCTIONNEMENT%20DU%20CONSEIL%20CONSTITUT IONNEL.pdf (accessed 1 July 2013).

⁷⁸ *Loi n° 72-833 du 21 décembre 1972 portant Code de procédure civile, commerciale et administrative* available at <http://www.loidici.com/codeproccivilecentral/codeproccivile.php> (accessed 1 July 2013).

⁷⁹ *Locus standi* refers to the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

⁸⁰ This table is based on information obtained from the websites of OHCHR, ACHPR, and AU (cited in the annexure) as of 1 November 2012. The information corresponds to information provided in the combined report of the Republic of Côte d'Ivoire submitted to the African Commission on Human and Peoples' Rights at its 52nd session in Yamoussoukro 9-22 October 2012. See http://www.achpr.org/files/sessions/52nd/state-reports/1-1994-2012/initial_combined_periodic_report_194_2012_eng.pdf (accessed 15 January 2013).

Reports submitted	24 - ACHPR (6), CERD (14), CRC (1), CEDAW(3)
Reports overdue	14 - CERD (3), CRC(2), CESC(3). CCPR(3), CAT(3)

Table 8: Status of ratification and compliance with reporting obligation⁸¹

5.3.2.6 *Domestication of human rights instruments*

The concept of ‘domestication’ is understood here as the process through which an international instrument becomes part of the domestic law in a given country. ‘Domestication’ also relates to the relation between international and municipal law (which can follow either ‘legal dualism’ or ‘legal monism’). In this context, it is recalled that the Ivorian system is one of ‘legal monism’. Article 84 in Title VI (‘Treaties and international agreements’) of the 2000 Constitution authorises the President to ratify international agreements. In accordance with article 87, once ratified and gazetted, a treaty becomes an integral part of the domestic law. It follows, therefore, that ratification by the President and publication are the only constitutional requirements for a human rights treaty to become applicable nationally. Article 87 further states that international instruments have superior authority over domestic laws once regular ratification has been completed and they have been gazetted. Their authority is nonetheless lower than that of the Constitution; they

⁸¹ African Charter on Human and Peoples’ Rights (ACHPR); African Charter of the Rights and Welfare of the Child (ACRWC); Convention against Torture and Other Forms of Inhuman and Degrading Treatment or Punishment (CAT); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); African Union Convention on the Prevention and Fight against Corruption (CPFAC); Convention on the Rights of the Child (CRC); International Covenant on Civil and Political Rights (ICCPR); and Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1); Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (ICCPR-OP2); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT); Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OP-CRC-AC); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP-CRC-SC); Protocol on the Statute of the African Court of Justice and Human Rights (P-ACJHR); and the Protocol Relating to the Amendment of the Constitutive Act of the African Union (P-CAAU).

occupy an intermediate position – between the provisions of the Constitution and domestic laws. The practical problem, and consequently the challenge in the case of Côte d’Ivoire, is that none of the international human rights instruments ratified by the President has been regularly published to date. This renders their enforcement questionable.

The exception to legal monism applies to inter-state peace treaties, to agreements relating to international organisations, and to treaties that modify the internal laws of the state. These treaties and international agreements require a process of domestication, which involves a law authorising the ratification of the treaty and a ratification decree by the President. The instrument ratified becomes part of positive domestic law only after the decree ratifying it has been gazetted.

5.3.2.7 Adjudication and litigation of human rights cases

My research into Ivorian court decisions did not uncover a single court decision in which reference has been explicitly made to human rights as provided for in the 2000 Constitution, or in international or African instruments ratified by Côte d’Ivoire. Even the decisions of the Constitutional Council that relate to electoral disputes and include the phrase ‘civil and political rights’ in their headings, make no reference to human rights provisions in their *corpus*.⁸²

Notwithstanding the absence of any court decision on human rights an observation on the role of the courts is nonetheless warranted. It is submitted that the alignment of domestic laws with international human rights standards and principles is essential to the effective protection of rights locally. The alignment can be done through a review of existing law with the aim of repealing those that have become obsolete or are not in conformity with a given international human rights instrument; amending some existing laws; or enacting new ones. A typical example

⁸² Claims of alleged electoral fraud were brought before the Constitutional Council by unsuccessful presidential and parliamentary candidates in 2000. The council categorised them under fundamental rights, civil and political rights but made no reference to any of the human rights instruments. The plaintiffs too did not refer to these instruments. See *Conseil Constitutionnel* Decision E 005-95, E0023-95, E0027-95 and E003-95 (copy on file with the author).

is the efforts deployed by Côte d'Ivoire to bring its family law, in particular the Law on Marriage, into conformity with the Convention on the Elimination of all Forms of Discriminations against Women (CEDAW).⁸³ Marriage is regulated in Côte d'Ivoire by the Law on Marriage (N° 64-375 of 7 October 1964). In 1983, the 1964 Law on Marriage was amended to allow women the right to work without the prior and express consent of their husbands.⁸⁴ Furthermore, in 2012, Parliament repealed article 53 and amended articles 58, 59, 60 and 67 of the Law on Marriage (N° 64-375 of 7 October). The main purpose of the second amendment of this law was to introduce equality between the husband and the wife in the management of the household and the education of their children.⁸⁵

The explicit reference to international human rights treaties in litigation in these amendments would allow the court to draw from the jurisprudence and practices of international bodies in monitoring their implementation. In essence, both the alignment of domestic laws with international human rights treaties, and their explicit mention or utilisation in court cases is needed. Adjolohoun and Tanoh after investigating international law and human rights in Côte d'Ivoire and Benin, reached the same conclusion with regard to the absence of human rights litigation in Côte d'Ivoire. They also established that one of the limitations that must be addressed in order to guarantee human rights protection through judicial means, is the fact that the Constitutional Council has no explicit mandate on human rights. In contrast, in Benin the Constitutional Court has an explicit mandate to decide on cases relating to human rights violations though this mandate is seriously constrained by the court's inability to order restorative and/or remedial measures in favour of victims.⁸⁶ On 23 July 2008, France reviewed its Constitution to introduce the notion of '*question prioritaire de constitutionnalité*' (priority preliminary ruling on the issue of constitutionality) as a mechanism through which the French Constitutional Council

⁸³ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed 27 January 2014).

⁸⁴ *Loi n° 83-800 du 2 août 1983, modifiant et complétant les dispositions de la loi n° 64-375 du 7 Octobre 1964, relative au mariage* available at <http://www.loidici.com/Mariage/mariage/modif83800.php> (accessed 27 January 2014).

⁸⁵ *Les effets de la nouvelle loi sur le mariage* available at <http://kanigui.blogspot.com/2012/11/effets-de-la-nouvelle-loi-sur-le-mariage.html> (accessed 26 January 2014).

⁸⁶ See Tanoh and Adjolohoun 'International law and human rights litigation in Côte d'Ivoire and Benin' in Killander (ed) *International law and domestic human rights litigation in Africa* PULP (2010) 3-23.

reviews the conformity of domestic laws with international human rights instruments on petition by individuals.⁸⁷ Since 1 March 2010, any defendant may, during a trial, invoke the unconstitutionality of a law applicable to either procedural matters or the merits of the pending case, through the priority preliminary ruling on the issue of constitutionality mechanism. The organic law on the Ivorian Constitutional Court⁸⁸ is very similar to that of France.⁸⁹ It follows, therefore, that the introduction of such a mechanism in the practice of the Ivorian Constitutional Council is desirable as it will advance human rights litigation.

5.3.3 Obstacles to the use of human rights instruments

The first and main reason for the lack of adjudication of human rights issues is a lack of capacity and knowledge. The barristers (advocates) and judges interviewed for this study admitted their ignorance of the human rights instruments in general. Yet there are at least four institutions of learning where human rights are taught as a compulsory subject: the Law Faculty; the School of Law, which trains prospective barristers; the National School of Public Administration, where judges and prosecutors are recruited and trained; and the Police Academy. However, existing human rights programmes are limited to the bare minimum of basic concepts, and they are rarely linked to the future working reality of the trainees.⁹⁰

Ignorance about human rights litigation in general is a major hurdle to overcome if international human rights are to be adjudicated by Ivorian domestic courts. For example, the Ivorian Movement for Human Rights (*Mouvement ivoirien*

⁸⁷ The laws applicable to the 'priority preliminary ruling on the issue of constitutionality' can be accessed at http://www.courdecassation.fr/jurisprudence_2/questions_prioritaires_constitutionnalite_3396/. A review of its implementation in France is offered at <http://www.annoncesdelaseine.fr/index.php/2010/07/23/question-prioritaire-de-constitutionnalite/> (accessed 26 June 2013).

⁸⁸ *Loi organique du 5 Juin 2001 determinant l'organisation et le fonctionnement du Conseil Constitutionnel de la Republique de Côte d'Ivoire* available at <http://www.conseilconstitutionnel.ci/index.php?y=organis> (accessed 26 June 2013).

⁸⁹ *Ordonnance n° 58-1067 du 7 Novembre 1958 portant loi organique sur le Conseil Constitutionnel* available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069199&dateTexte=20121123> (accessed 26 June 2013).

⁹⁰ In order to address this deficiency, the government of the Republic of Côte d'Ivoire decided to introduce human rights education at all levels of the education system, from primary to tertiary education. During the course of my field work, I was informed by the human rights division of the United Nations Mission in Côte d'Ivoire that they were providing *pro bono* human rights tuition at the main universities and the police academy in a bid to close the knowledge gap.

des droits de l'homme (MIDH)) is the only human rights NGO about to initiate a case on behalf of alleged victims of human rights violations before an Ivorian court of justice in the context of the post-2010 presidential elections which, as discussed above, claimed at least 3 000 lives. Yacouba Doumbia,⁹¹ the president of this NGO, explained that the case was still in the preliminary investigation stage. MIDH has also filed communications with the African Commission on Human and Peoples' Rights,⁹² and is preparing to file a case on behalf of victims of toxic waste⁹³ before the ECOWAS Community Court of Justice (ECCJ). Toxic waste was dumped in the capital city of Abidjan in August 2006 and it claimed at least seven lives and led to thousands of people being admitted to medical facilities for treatment for contamination.

The second obstacle relates to the reluctance on the part of the lawyers and judges to use human rights instruments. There is no single case where a human rights instrument has been invoked before an Ivorian court. Legal practitioners attribute this to their lack of technical expertise. The lack of adjudication of human rights cases is arguably more prominent in French-speaking African countries applying the Roman law system, than in those applying the common law system, for example. Although the accuracy of this assertion is not discussed here, it suffices to indicate that the International Association of Francophone Judges have acknowledged this deficiency and held several international conferences and training workshops on the topic to address the issue and the knowledge gaps which prevent the adjudication of human rights cases in French-speaking African countries.⁹⁴

⁹¹ Interview conducted on 17 November 2012 in Abidjan.

⁹² In 2002 the *Mouvement ivoirien des droits de l'homme* filed a communication against Côte d'Ivoire claiming that the 2000 Constitution adopted by referendum had some discriminatory provisions which prevent some citizens from standing for elections. It also alleged that 'the provisions granting immunities to some persons, particularly the members of the National Committee for Public Security (CNSP) the military executive organ which ruled the country during the military transition period (from 24 December 1999 to 24 October 2000), as well as the leaders of the *coup d'état* of 24 December 1999, were discriminatory'. The African Commission heard the case on its merits and found Côte d'Ivoire in violation of articles 1, 2, 3(2), 7 and 13 of the African Charter and therefore requested that appropriate measures be taken to remedy the situation. See Case 246/02: *Mouvement ivoirien des droits humains (MIDH) / Côte d'Ivoire* available at http://www.achpr.org/files/sessions/5th-eo/comunications/246.02/achpreo5_246_02_eng.pdf (accessed 26 June 2013).

⁹³ See Amnesty International and Greenpeace joint report 'The dumping of toxic waste in Côte d'Ivoire' available at <http://www.amnesty.org/en/region/cote-divoire?page=2> (accessed 22 January 2014).

⁹⁴ See www.juricaf.org (accessed 15 September 2012).

A good example of human rights litigation in a French-speaking country and an apparent exception to the prevailing rule, is the trial of former Chadian President Hissen Habré in Senegal for crimes against humanity, war crimes, and torture committed during his 1982-90 regime.⁹⁵ In this case, the ECOWAS Court ruled in 2010 that Senegal should stop all measures to try Habré; and respect *res judicata* of its domestic courts.⁹⁶ However in July 2012, the International Court of Justice ruled that Senegal must immediately extradite or prosecute Habre.⁹⁷ Senegal opted for the latter and launched the African Extraordinary Chambers⁹⁸ in February 2013 to try Habré.⁹⁹ They are four (4) in total:

Article 1 of the Statutes of these chambers stipulates their purpose as to:

⁹⁵ Habré was first indicted in Senegal in 2000 before courts ruled that he could not be tried there. His victims then turned to Belgium and, after a four-year investigation, a Belgian judge in September 2005 issued an international arrest warrant charging Habré with crimes against humanity, war crimes, and torture committed during his 1982-90 rule, and requested his extradition. Senegal then asked the African Union to recommend a course of action. On 2 July 2006, the African Union called on Senegal to prosecute Habré 'on behalf of Africa', and President Abdoulaye Wade declared that Senegal would do so. In 2007-2008, Senegal amended its Constitution and laws to permit the prosecution of genocide, crimes against humanity, war crimes, and torture no matter when and where the acts occurred. On 16 September 2008, fourteen victims filed complaints with a Senegalese prosecutor accusing Habré of crimes against humanity and torture. Senegal has said, however, that it will not process the complaints until it receives €27 million from the international community to cover all the costs of the trial. President Wade said in October 2008 that if Senegal did not receive the funding, he would make Habré 'leave Senegal'. Faced with Senegal's inaction, Belgium asked the International Court of Justice (ICJ) on 19 February 2009 to order Senegal to prosecute or extradite Habré. Belgium also asked the ICJ to order Senegal immediately not to allow Habré to leave Senegal pending the court's judgment on the merits. On 28 May the court accepted Senegal's formal pledge not to allow Habré to leave Senegal pending its final judgment. See <http://www.hrw.org/en/habre-case> (accessed 2 July 2012).

⁹⁶ See <http://www.hrw.org/fr/news/2010/11/18/arr-t-cedeaoecowas-ruling-hissein-habr-c-r-publique-du-s-n-gal> (accessed 27 June 2013).

⁹⁷ International Court of Justice 'Question relating to the obligation to prosecute or extradite' (*Belgium v Senegal*) (2012) 39 available at <http://www.icj-cij.org/docket/files/144/17064.pdf> (accessed 27 June 2013)

⁹⁸ *Statut des Chambres africaines extraordinaires au sein des juridictions sénégalaises pour la poursuite des crimes internationaux commis au Tchad durant la période du 7 juin 1982 au 1er décembre 1990 Statut des chambres extraordinaires africaines* available at <http://www.hrw.org/fr/news/2013/01/30/statut-des-chambres-africaines-extraordinaires> (accessed 27 June 2013). 'Statute of the Extraordinary African Chambers within the courts of Senegal created to prosecute international crimes committed in Chad between 7 June 1982 and 1 December 1990' (unofficial translation by Human Rights Watch) available at <http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers> (accessed 1 October 2013).

⁹⁹ See <http://www.hrw.org/news/2013/02/08/senegal-hissene-habre-court-opens> (accessed 27 June 2013).

[I]mplement the decision of the African Union concerning the Republic of Senegal's prosecution of international crimes committed in Chad between 7 June 1982 and 1 December 1990, in accordance with Senegal's international commitments.

There are four chambers: one Investigative Chamber within the *Tribunal Régional Hors Classe de Dakar*, one Indicting Chamber within the Dakar Court of Appeals; one Trial Chamber within the Dakar Court of Appeals; and one Appeals Chamber attached to the Dakar Court of Appeals (article 2). These chambers have jurisdiction over the following crimes: the crime of genocide; crimes against humanity; war crimes; and torture (articles 4 to 9).

The third obstacle relates to the existing procedural law, especially with regard to *locus standi*. My research uncovered no record of public litigation or litigation brought by NGOs on behalf of a victim of the violation of human rights in Côte d'Ivoire. While the 2000 Constitution recognises equal access to justice (article 20), the enjoyment of this right is restricted by procedural laws. In terms of article 3(1) of the Ivorian *Code de procédure civile, commerciale et administrative*, ('Civil, commercial and administrative Code of Procedure'), a case is admissible only if the plaintiff can prove a direct, personal, and actual prejudice.¹⁰⁰ An interpretation would imply that NGOs can therefore not file a case before a domestic court on behalf of victims of alleged violations of human rights. However, because NGOs have also not attempted to litigate, even in a popular case¹⁰¹ such as the dumping of toxic waste in the capital city of Abidjan mentioned above, it cannot be assumed that Ivorian courts would entertain or deny claims by human rights NGOs.

Fourth, and finally, self-censorship constitutes an additional obstacle to adjudication. Some of the Ivorian human rights defenders interviewed for this study were of the cynical opinion that any litigation before domestic courts is not worth pursuing because those courts are perceived as not easily accessible, corrupt, and subject to political influence. However, the independence of the judiciary and the

¹⁰⁰ See <http://www.loidici.com/codeprocecivilcentral/codeprocivileaction.php> (accessed 27 June 2013).

¹⁰¹ The dumping of highly toxic waste by the *Probo Koala* vessel in Abidjan in August 2006 led to the resignation of the Minister of Environment two months later. None of the domestic human rights organisations could petition the state or any other duty-bearer on the ground of any human rights abuse.

existence of alleged corrupt court practices, were not examined here as factors militating against the use of judicial mechanisms for human rights enforcement.

Having set out the obstacles to the use of human rights instruments I conclude this chapter with an examination of the role NGOs can play in the realisation of the RtD. The analysis is introduced by a discussion of the factors preventing NGOs from working on the RtD. The factors highlighted are the outcome of a questionnaire I formulated and presented to a sample group of twenty NGOs. I then elaborate on these findings through an assessment of the strengths, weaknesses, opportunities, and threats (a SWOT analysis) of Ivorian human rights NGOs.

5.3.4 An analysis of the role non-governmental organisations can play in the realisation of the right to development in Côte d'Ivoire

As indicated in Chapter 1, a questionnaire¹⁰² was distributed electronically and used as a basis for structured face-to-face discussions and telephone interviews with human rights NGOs. The questionnaire was purposely designed for the substantiation of the hypothesis that few Ivorian NGOs had prior experience in working on the RtD; and to identify and understand the factors that prevented them from working on this particular right. It was drafted in three main parts:

- an introduction in which the researcher explained the context of the study;
- part 2 devoted to the mandate and area of focus of the NGOs surveyed – follow-up questions were asked as and when necessary to further establish the structural reasons for the preference given to certain categories of rights as opposed to others, and emphasis was also laid on the work on the RtD;
- part 3 related in the main to the general functioning of NGOs and the related organisational issues. Here the purpose was to establish the

¹⁰² See annexure 2 for the questionnaire.

challenges and opportunities as well as the weaknesses of NGOs generally, and their level of preparedness to embrace the RtD.

5.3.4.1 Factors preventing non-governmental organisations from working on the right to development

A sample of twenty human rights NGOs¹⁰³ was used as basis for the purpose of illustrating the key factors which prevent NGOs from working on the RtD. The review revealed seven key features. These are: (1) Establishment is linked to political developments in the country; (2) A limited number of organisation are working effectively on human rights; (3) Monitoring, reporting and raising awareness are the main working methods; (4) Priorities are dictated by funding; (5) Many NGOs are ignorant of the recognition of the right to development; (6) A lack of application of indigenous methods of social mobilisation and advocacy; and finally, (7) The NGOs are relatively newly established.

What follows is a brief explanation (and elaboration, when necessary) of the content of each of these key factors preventing Ivorian NGOs from working on the RtD.

1 Establishment is linked to political developments in the country

The respondents indicated that in most cases, the NGOs were established in the context of the number of political crises facing the country since the death of its first President, Houphouët-Boigny.

2 A limited number of organisations are working effectively on human rights

Out of eleven NGOs whose mandate included working on human rights, only four had a strong articulation of this mandate through existing programmes including public statements, fact-finding, reporting, and awareness. None of them had an explicit focus on the RtD.

¹⁰³ A full list of the sampled NGOs appears in annexure 3

3 Monitoring, reporting and raising awareness are the main working methods

All NGOs working on human rights listed public reporting, mainly through newspapers, as their main channel of monitoring – in the main through ‘naming and shaming’. They could not establish the real impact of this approach or the expected changes this kind of monitoring could bring about in the Ivorian society. They also occasionally conducted public awareness-raising programmes during general campaigns and programmes on human rights issues. Only LIDHO and the local branch of Amnesty International, have evidence-based records of well-planned awareness programmes in several parts of the country. Most activities are conducted through urban-based workshops in hotels.

Community-based dialogue, drama and role-play performances, music and art competitions which are better suited to rural and illiterate audiences, are rarely used by local NGOs. (I will elaborate on this particular point below when discussing the organisational challenges confronting Ivorian human rights NGOs.)

4 Priorities are dictated by funding

The priorities of the sample NGOs are set in accordance with the following order of precedence:

- First, is the issue most likely to attract foreign donor support?¹⁰⁴
- Second, politically sensitive issues and issues that retain media focus. During the political crisis, for example, issues relating to alleged mass killings and ethnic and xenophobic reaction to the violence were high on the agenda, as opposed to issues related to socio-economic problems such as poverty-related concerns.
- Victims’ expectations and concerns are last on the agenda, and are often considered only to the extent that they meet the donor’s requirements and attract public attention. In summary it can

¹⁰⁴ Areas of interest are often found in the activity reports and ‘call for proposals’ posted on the internet pages of donor agencies

therefore be stated that NGOs' approach is largely opportunistic and aimed at fundraising rather than at compliance with their expected roles and functions discussed in Chapter 4 above.

5 Many NGOs are ignorant of the right to development

Few respondents had even heard of the RtD and thus regarded its pursuit irrelevant

6 The lack of application of any indigenous methods to realise social mobilisation and advocacy

Because most NGOs are based in urban areas, none of them could internalise indigenous methods of social mobilisation and advocacy. LIDHO, the only one with known country branches, has instituted some initiatives in this direction by promoting concepts such as alliances and *plaisanterie* relationships¹⁰⁵ as traditional forms of conflict prevention, management, and resolution. The concept of 'alliance and *plaisanterie* relationships' is widely used in West Africa as an effective means of conflict prevention and inter-community cohesion. It is built on the understanding that alliances forged through marriage or friendship between individuals from different tribes and clans take precedent in any form of dispute, including murder and land disputes. It is a conciliatory form of justice which, it is argued, promotes social cohesion within and between groups just as is the aim of *ubuntu* discussed in chapters 2 and 4 above. The extent to which alliance and *plaisanterie* relationships promotes or combat impunity in the African context, is worth exploring as a means of reconciling customary law and practice with international human rights norms and standards. In my opinion, settling disputes using alliances and *plaisanterie* does not necessarily condone impunity since this form of dispute resolution is premised on truth seeking and justice. It seeks to strike a balance between justice for the individual victim and social peace and cohesion. In the specific context of Côte d'Ivoire, efforts at promoting alliance and *plaisanterie* have not yet reached the level

¹⁰⁵ Sissao AJ *Alliances et parentés à plaisanterie au Burkina Faso* in Sankofa and Gurli (eds) *Mécanisme de fonctionnement et avenir* (2002) 186.

of analysing the human rights tenets of the various Ivorian cultural systems. Discussions on this issue can therefore be the subject of further research.

7 The NGOs are relatively new

In terms of an institutional basis, most of the groups are in their infancy and confronted with issues such as the founding-member syndrome (discussed in Chapter 4 above); financial accountability, and relationship-based appointments.

5.3.5 An assessment of the strengths, weaknesses, opportunities of and threats to Ivorian human rights non-governmental organisations (a SWOT analysis)

The analysis of the strengths, weaknesses, opportunities, and threats has been in practice since the mid-sixties,¹⁰⁶ and is used mainly by corporate businesses to anticipate causes of failure, stay in business, and to enhance performance. The SWOT analysis helps determine the internal strength and weaknesses on the one hand, and to examine the external environment (changes that can impact the activities of the organisation) with a view to identifying (current) opportunities and threats (on the horizon), on the other. Decisions are then made, based on the outcome of the SWOT analysis, to develop and/or consolidate the strength, address the weaknesses, optimise the opportunities, and mitigate the threats. The rationale of the SWOT analysis in the context of the present study is to help formulate recommendations (in Chapter 6) for NGOs to work effectively on the RtD. It is accepted that the analysis follows the sequence of the strength/weaknesses

¹⁰⁶ The Stanford Research Institute team lead by Albert Humphrey (1926-2005), is generally recognised in academic and business circles as the author of the concept of 'SWOT analysis'. The Research Team included Marion Doshier, Dr Otis Benepe, Albert Humphrey, Robert Stewart, and Birger Lie. The goal of the research was to identify why corporate planning failed and what could be done about the failure. The research was funded by the Fortune 500 companies in the USA. The Humphrey Team identified a number of key areas and the tool used to explore each of the critical areas was called 'SOFT analysis'. For them, 'What is good in the present is Satisfactory, good in the future is an Opportunity; bad in the present is a Fault and bad in the future is a Threat'. The 'F' (for fault), was later on replaced with 'W' (for weakness) by Urick and Orr in 1964 at a conference. Henceforth, we now have SWOT instead of SOFT analysis. For more information on the SWOT analysis, see <http://www.businessballs.com/swotanalysisfreetemplate.htm> (accessed 23 January 2014). See also <http://rapidbi.com/swotanalysis/> (accessed 23 January 2014).

/opportunities/threats, or weaknesses/threats/strength/opportunities. The latter is the sequencing used in the present study.

In the next few paragraphs I will therefore first concentrate on the weaknesses and threats faced by Ivorian NGOs before concluding this chapter with an exploration of the strengths of and the opportunities on offer by Ivorian NGOs. Under this heading I will examine NGOs' potential to realise the right to development

5.3.5.1 *The weaknesses of and threats faced by Ivorian non-governmental organisations*

5.3.5.1.1 Mandates exclusively devoted to the right to development

Few, if any, of the NGOs interviewed in Côte d'Ivoire had the pursuit of the RtD or development as a clearly stated mandate. The primary focus was on civil and political rights. The leaders of human rights NGOs in the early stages of Côte d'Ivoire's return to a multiparty system, attributed their focus on the civil and political rights to the exigencies of the time. N'gouan linked the focus on civil and political rights in the early 1990s with the struggle for pluralist democracy or multipartyism.¹⁰⁷ Alioune Tine, then head of a Dakar-based regional NGO 'African Rally for Human Rights', was of the same view.¹⁰⁸

A similar *rationale* explains the emergence of civil and political rights NGOs in Nigeria to expose and oppose the evils of a military dictatorship. In Liberia and Sierra Leone, the emphasis was on war-related civil and political human rights issues, even though deprivation was a root cause and a catalyst in these conflicts. In addition to the knowledge gap indicated above, the focus on civil and political rights is attributed to the nature and relationship between local NGOs operating in African countries and their counterparts in the west. The latter tend to set a pace that is followed by the former. In recent years, the growing interest among African NGOs on issues relating to poverty and HIV/AIDS, coincide with the shift in focus of western NGOs such as

¹⁰⁷ N'gouan P 'Les dynamiques de la société civile en Afrique de l'Ouest' Edicerap l'Afrique de l'Ouest et la tradition universelle des droits de l'homme (2006) 224.

¹⁰⁸ Via an interview in July 2012 with the researcher in Dakar, Senegal.

Human Rights Watch, Amnesty International (AI), and the International Federation of Human Rights Leagues to these issues in Africa. Tine admitted that African NGOs follow the trend of western NGOs, including Amnesty International and the International Federation of Human Rights Leagues. They rallied against the negative impact of globalisation and IMF-World Bank-sponsored measures. Some NGOs attended the World Social Forum and increasingly work with the UN Educational, Scientific and Cultural Organisation (UNESCO) on socio-economic and cultural rights.

N'gouan agreed that a shift in mandate on the part of Ivorian human rights NGOs towards the RtD as well as economic, social, and cultural rights, is a positive development. However, such a shift must be gradual as local NGOs lack the capacity to engage in these categories of right.¹⁰⁹

5.3.5.1.2 Training and institutional development: Focus on civil and political rights

Courses available to Ivorian human rights defenders through distance learning, seminar series, or specialised programmes focus on civil and political rights to the detriment of other rights, including socio-economic and cultural rights and so the RtD. Blanche Pango of Amnesty International – Côte d'Ivoire, and a leading women's rights activist in the country, admitted ignorance of the RtD, while Pamela Okille, an independent organisational consultant based in Uganda, noted that an increasing number of local human rights organisations work on social and economic issues. Until early 2000, human rights training modules were offered to Ivorian human rights defenders by institutions in the west, such as the Strasbourg Centre and the Canadian Centre for Human Rights. While training on the basics of fact-finding and advocacy relating to civil and political rights are commonplace, those relating to other rights were said to be in the making, underdeveloped, or simply non-existent.

¹⁰⁹ N'gouan n 107 above 6.

The Centre for Human Rights at the University of Pretoria and other African universities and training centres which look at human rights learning from a more holistic angle, have emerged only recently. It is therefore to be expected that until the trainees from these centres of learning apply their knowledge to the practice of human rights, the emphasis on civil and political rights and the neglect of economic, social, and cultural rights, and the RtD, will persist in almost all African countries, and in Côte d'Ivoire in particular. It follows that the first challenge confronting the pursuit of the RtD by Ivorian human rights NGOs is the knowledge gap, and a related institutional resistance to change.

5.3.5.1.3 Absence of training on institutional development

The other dimension of training has to do with addressing the institutional bases of Ivorian human rights organisations. The NGO leaders interviewed had never taken a course on institutional development, sustainability, or strategic positioning within their respective communities. Most NGO leaders have in-house training and emulate or adapt what appears to them the 'best practices'. Due to the focus on civil and political rights and the absence of systematic training programmes that address the institutional growth and sustainability of NGOs, front-line human rights activists are equipped to gather very 'raw' information on alleged human rights violations, but lack the ability to analyse that information over time in order to draw trends from it in the interest of their communities. The fact that local human rights defenders simply echo priorities determined by their western counterparts or funders, undermines the global chain of the struggle for human rights reform.

5.3.1.1.4 Organisational challenges

The ability to set up a strong and lasting organisation is perhaps one of the most important challenges confronting Ivorian NGOs. In Chapter 4, I examined human rights NGOs and identified those that were unable to stand the test of time and that had collapsed within a year or two. Quite often they were confronted with a number of organisational challenges, which I describe as follows:

- The founder-member syndrome
- Compliance with democratic and governance principles
- Fundraising, financial management and accountability
- Detachment from indigenous methods of social mobilisation (domestic knowledge)

a The founding-member syndrome

This research defines 'founding members' as those with the vision, and perhaps the commitment, to see the organisation achieve substantive change. They invest their time, money, and in some cases have even given their lives for the organisation. In my opinion, the first challenge facing them is the membership drive. Founding members more often than not recruit from among their relations and friends. In such a scenario, institutional affiliation is based less on inner conviction, than on the relationship. Conviction and relationship are two subjective values that may sometimes conflict. When this happens within an NGO, retaining members or not retaining them can be a loss to the organisation.¹¹⁰

The second problem involves ensuring continuity or passing the baton to others. Many NGOs have collapsed because they failed the transition test. Should founding members ever leave? When they are gone, how much, if any, oversight should they retain over the organisation they set up? How much space should they allow new leaders? These are among the recurring questions facing NGOs today. I call these questions the 'democracy and governance' issues and shall elaborate on them below.

The third dimension of the founding member syndrome is the lack of flexibility and the inability to anticipate, which prevents some organisations from responding/adapting to new circumstances while adhering to their core founding principles. The organisation is therefore perceived and operated as a sole proprietorship, populated by friends and relations who may not share the same

¹¹⁰ The *Association Ivoirienne pour la Promotion des Droits de l'Homme* (APDH) falls within this category. The organisation was established in 1993 by young lawyers and stopped operating as founding members left the country for international postings.

values as the founder. This deficiency is ascribed to the incapacity of the NGO to plan strategically.

b Compliance with democratic and governance principles

One of the major criticisms is a failure to internalise and apply standards of accountability, gender equality, participation, and respect for human dignity. During the course of this research, I observed that several organisations are literally run as family businesses with little or no consideration for the requirement of transparency. As a consequence, several NGOs suffer from tribalism or regionalism. In the same context of disrespect of the governance principles, it is possible (though not substantiated here) that sexual harassment, some modern forms of slavery, psychological torture, corruption, and degrading and inhuman treatment occur within some human rights organisations. NGOs tend to benefit from *de facto* immunity when it comes to accounting for their performance and standards of operation, as very often, attempts to question them are quickly equated with harassment and undue interference.

The problem of governance is global and not peculiar to NGOs in Côte d'Ivoire. For example, in a report of findings on case studies of 20 NGOs in Canada, Gill reveals that:

Public attention, over the past two decades, has been repeatedly drawn to failures in corporate governance. The United Way of America, the Canadian Red Cross, the National Arts Centre, the International Olympic Committee, and the B.C. Ferries Corporation, among others, have all experienced high-profile crises in recent years. These events have resulted in an erosion of public confidence in non-profit institutions in general, and a call for greater transparency and public accountability in a sector that makes such a major contribution to the Gross Domestic Product of Canada and the United States.¹¹¹

In view of the governance challenges facing some NGOs in Canada the government established a 'Panel on Accountability and Governance in Canada's

¹¹¹ Mel Gill Governance *DO'S & DON'TS: Lessons from case studies on twenty Canadian non-profits, final report* Institute on governance (2001) 6. Report accessible at <http://dspace.cigilibrary.org/jspui/bitstream/123456789/11235/1/Governance%20Dos%20and%20Donts.pdf?1> (accessed 12 February 2014).

Voluntary Sector'. The Panel issued its report in which it formulated a series of recommendations to improve governance in the NGO sector.¹¹²

I submit that unless NGOs show by word and deed that they are willing to do themselves what they demand from others, they will fail to grow strong and will not be regarded as reputable organisations.

c Fundraising, financial management and accountability

Financial stability is an operational necessity for NGOs. The situation in Côte d'Ivoire in the aftermath of a civil war was characterised above as widespread poverty and unemployment. In such a context, NGOs are a readily available and suitable avenue for self-employment, and in most cases are the first port of call for school graduates. Regrettably, fundraising and financial management remain the central point of disappointment for many Ivorian NGOs. The first reason derives from the fact that many of them do not have the know-how/expertise to develop and submit appealing project proposals. Another explanation for the financial fragility of Ivorian NGOs relates to their inability properly to manage and account for funds received. Funding is consequently discontinued and in the worst case scenario, reclaimed by donors on account of poor management. The challenge posed by fundraising and financial management is not peculiar to Ivorian NGOs and is the subject of several publications and courses administered by different organisations in Africa and elsewhere.¹¹³

¹¹² Garton J *The regulation of organized civil society* (2009) 11.

¹¹³ In the case of Iran, Ali Akbar Bromideh analyses the growth and challenges confronting Iranian NGOs and identifies financial management as one of the main problem to be addressed. See 'The widespread challenges of NGOs in developing countries: Case studies from Iran' available at https://www.academia.edu/1001704/The_widespread_challenges_of_NGOs_in_developing_countries_Case_studies_from_Iran (accessed 17 December 2013). International organisations with country branches such as Amnesty International and the International Federation of Human Rights Leagues, organise regular training sessions for their branches in Africa and elsewhere on financial management and fundraising. In the context of Côte d'Ivoire, one such training sessions was organised in 2009 by the West Africa Civil Society Institute (WACSI) in collaboration with the *Coalition de la Société Civile pour la Paix et le Développement Démocratique en Côte d'Ivoire (COSOPCI)* and *La Convention de la Société Civile Ivoirienne (CSCI)* with funding from the Open Society Initiative for West Africa (OSIWA) under the title 'Fundraising and Monitoring and Evaluation'. The workshop aimed at providing participants with knowledge and strengthening their skills in planning, strategising and implementing fundraising approaches; identifying funding sources and appropriate techniques to secure funds from donors and philanthropists; addressing challenges civil society faces in fundraising; and understanding the fundamentals of designing and implementing a monitoring and evaluation (M&E) system for a project or an organisation. See <http://www.scribd.com/doc/80090243/Fund>

d Detachment from indigenous methods of social mobilisation (domestic knowledge)

Ivorian NGOs strive to articulate human rights issues through workshops with PowerPoint™ presentations and other ‘high-tech gadgets’, street demonstrations, press conferences, and publication of reports as the sole form of social mobilisation and advocacy. In contrast, their target beneficiaries, the rights-holders, are in the main based in rural areas, are often illiterate, and have little or no access to advanced information technology.¹¹⁴ While the usefulness of modern tools is not necessarily in question, especially in relation to the segment of society that has easy access to those tools, there must be an alignment of the tools and methods for social mobilisation and the target audience. This is not the case in Côte d’Ivoire where through the use of modern techniques a large majority is left behind when indigenous tools and methods are not applied in the effort to claim rights. It is only now that NGOs coming generally to acknowledge that social mobilisation; awareness-raising; and advocacy through art, story-telling, drama, poetry, indigenous music and dance; and the use of local languages have a much wider impact than the traditional workshops, street demonstrations, and press conferences. Yet the NGOs interviewed for this work admitted that these indigenous forms of advocacy are either insufficiently used or not used at all. In my opinion, the reason for the detachment from indigenous methods is more likely attributable to the concept of the NGO system being a recent and an urban phenomenon in Côte d’Ivoire. The promoters of NGOs are trained within a western paradigm, which they replicate in their daily work with little or no effort to adapt to domestic realities. It is submitted that appropriate use should be made of the Internet and other newly acquired knowledge sources to promote African indigenous knowledge systems and enhance their efficacy. Only those practices and tools that have been proven to affect human dignity should be replaced with more suitable alternatives, where possible. To counter the risk of having little or no real ‘home’ impact, NGOs must

raising-and-Monitoring-and-Evaluation-M-E-Post-Assessment-Training-Report-Cote-D-Ivoire-Sept-2009 (accessed 17 December 2013).

¹¹⁴ In 2005, the urban population of Côte d’Ivoire was estimated at 45% of the total population. This percentage is believed to have been far lower before the start of the civil war in 2002. It still shows a predominantly rural population. See www.statistiques-mondiales.com/cote_divoire.htm (Accessed 26 September 2012).

ensure a merger of tools and methods and integrate the indigenous knowledge perspective into their advocacy and social mobilisation.

5.3.5.1.5 *Domestic politics*

a Facing the negative impact of politics

Politics interferes negatively with human rights activism in at least two ways. First, according to Amnesty International, the oppression of human rights defenders in general ranges from intimidation, unlawful dismissal, labelling, burning of offices and properties, administrative harassment and torture, to summary execution.¹¹⁵ As indicated in Chapter 2, several leaders of LIDHO were arrested and detained for several months in connection with political protests in 1992. In 2007, the headquarters of LIDHO and APDH were torched by a group of youths close to FESCI, the student union, allegedly for having supported a trade union hostile to the regime of former President Laurent Gbagbo. As a result of the post-electoral crisis explained above, several human rights actors suspected of being close to former President Gbagbo fled the country for fear of reprisal by law enforcement agents.¹¹⁶

It is not the shift from human rights activism to political activism that should raise concern. Both forms of activism are often closely linked, and when they reinforce each other, the outcome is more often than not laudable. It is therefore submitted that human rights defenders who retain their human rights beliefs and

¹¹⁵ <http://www.amnesty.org/en/human-rights-defenders/background> (accessed 2 July 2012).

¹¹⁶ The magnitude of the problems facing NGOs across Africa led the ACHPR to appoint a Special Rapporteur on Human Rights Defenders in Africa. The mandate given to the special rapporteur borrows largely from that of the UN Special Representative on Human Rights Defenders and reads as follows:

- a To seek, receive, examine, and to act upon information on the situation of human rights defenders in Africa;
- b To submit reports at every Ordinary Session of the African Commission;
- c To cooperate and engage in dialogue with member states, national human rights institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders, and other stakeholders;
- d To develop and recommend effective strategies to better protect human rights defenders and to follow up on his or her recommendations;
- e To raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa'.

At the time of this writing, Commissioner Reine Alapini-Gansu is the holder of the 'Human Rights Defenders' portfolio in the African Commission. See www.achpr.org (accessed 4 February 2013).

apply them to their political life can make good leaders. The threat, however, is that occasionally new political converts find no other avenue than to discredit their previous groups in order to please their new 'masters'. During the interviews with human rights actors as part of this research, some stated that they do so for economic survival and to gain a social status they could not enjoy while defending human rights. It appears that sooner rather than later, human rights defenders surrender their ideals and are 'assimilated' by veteran politicians to undermine the relative gains of the early 1990s.

b Affiliation to political parties

Closely linked to political interference is the existence of close ties between existing human rights NGOs and political parties in Côte d'Ivoire. The historical explanation for this relationship must be found in the repression of political activism by the one-party system, which compelled opposition parties to use human rights NGOs as a vehicle to achieve change on the political front. However, after political liberation from the one-party system, newly formed political parties maintained close ties with human rights NGOs. The following three categories illustrate the trend in Côte d'Ivoire:

First, the LIDHO is believed to be an offspring of the opposition to Houphouët-Boigny led by Laurent Gbagbo and teacher unionists. The first two presidents of LIDHO were law professors close to the Ivorian Labour Party of Professor Francis Wodié, former dean of the Law Faculty, and past president of Amnesty International – Côte d'Ivoire until the return of the country to a multiparty system. Mention can also be made of Professor René Dégni Ségui, the first president who served on the Constitutional Court, and Professor Martin Bléou who later on served as Minister of Security (under Laurent Gbagbo's presidency). Dr Patrick N'gouan, the fourth president of the organisation, was the director of the Cabinet of Professor Wodié when he was a minister (under Laurent Gbagbo's presidency).

Secondly, the *Mouvement Ivoirien des Droits de l'Homme* (MIDH – Ivorian Movement for Human Rights) is close to Ouattara's *Rassemblement des Republicains* (RDR). MIDH was established by Magistrate Epiphane Zoro Bi Balo,

who resigned from the judiciary after granting Ouattara a controversial certificate of nationality to allow him to run for office during the 1995 presidential elections.

Thirdly, organisations such as the *Association Ivoirienne des Femmes Juristes* (Women Lawyers' Association), and the *Association Ivoirienne pour la Promotion des Droits de l'Homme* (Ivorian Association for the Promotion of Human Rights), which had no stated political affiliation, were unable to attract sufficient members and are currently dormant. Seen as exocentric and non-political, the Ivorian section of Amnesty International falls within this third category and has lost its strength. Most active members have either joined local politics or left the country. According to Stephane Odrekou, executive secretary of Amnesty International – Côte d'Ivoire, the membership dropped from 300 to about 75 active members between 1995 and 2005. In four years, the branch has organised no more than two major public events since the start of the armed conflict in 2002, in comparison to an average five annually between 1985 and 1995.

5.3.5.1.6 Opportunistic approach to fundraising: The pursuit of donor and media interest

In Côte d'Ivoire NGOs have two main sources of funding: political parties (national actors) and foreign donors (external actors). According to Stephane Odrekou of the local branch of Amnesty International, internal funding such as membership fees, the sale of merchandise, and consultancy fees, represent no more than 5-7 per cent of their annual budgets.¹¹⁷ In most cases, there is no contribution from members at all. In this context, NGOs have no option but to seek to accommodate the interests of prospective donors in developing funding proposals. I have strong reservations about this opportunistic approach to fundraising. As explained above, the interference of political parties undermines the credibility of human rights work, while that of external donors often distances the NGO from domestic reality. Moreover, the fact that NGOs need to modify financial proposals to accommodate donor interests, exposes them to the risk of losing focus or credibility.

¹¹⁷ Interview conducted on 28 July 2012 in Abidjan.

So long as NGOs instinctively look outside for solutions to their domestic challenges, the donor agenda will remain a stumbling block, especially in issues of high political and social sensitivity such as human rights. The international politics of the RtD highlighted in Chapter 3, clearly show that most donors will find it difficult to accommodate programmes related to the RtD until such time as the validity of this right has been established by their respective countries. A solution is to develop and implement strategies for local fundraising including approaches to African corporates.

As persuasive as the donor-driven thesis may be, I submit that the real reason why human rights NGOs in Africa have to turn to foreign donors for financial assistance has less to do with the popular appreciation of human rights at home. I am of the opinion that it has to do with the failure of NGOs to accommodate the priorities and expectations of their communities, and to use the tools associated with their communities to resolve conflicts and to protect, promote, and respect human rights. Domestic fundraising will remain largely untapped for so long as the paradigm for human rights promotion and protection is set by external factors as is generally the case in Côte d'Ivoire. NGOs must internalise indigenous methods and pursue domestic priorities in order to attract support from within their communities, outside of political parties, and in so doing influence the funding agenda so that it can match domestic realities. For example, social mobilisation and advocacy towards the actualisation of the RtD are appropriate areas of focus. Whatever the source, NGOs that succeeded in securing stable funding over a relatively long period, are those with sound internal organisation and a clear vision of having a domestic impact. The LIDHO is an example of an NGO with stable finances. In contrast, poorly organised NGOs suffer from lack of funding or are rapidly swamped by internal disputes over misappropriation of donor funds. Such was the case with APDH which went into 'hibernation' until a recent revitalisation with a total change in leadership.

5.3.5.1.7 Ethnicity and religion as potential threats

In the context of the electoral crisis discussed above, the Ivorian society as a whole seems to be confronted by deep social fragmentation along ethnic and

religious lines. Although this aspect was not researched as part of this study, I could gather, both during personal interviews with leaders of NGOs and from reviewing documents relating to their boards, staffing, fact-finding reports, and public pronouncements, that ethnicity and religion constitute major factors with the potential to affect the NGOs negatively. Organisations headed by Muslim northerners tend to highlight violations perpetrated by elements believed to be close to former President Laurent Gbagbo, while those led by Christian southerners stressed atrocities allegedly attributed to forces close to President Alassane Ouattara. Although this issue is not explored in-depth here, it represents a potential threat to the consolidation of the NGO movement in Côte d'Ivoire. It also constitutes a source of concern to the extent that it undermines the impartiality of NGOs and discredits human rights work in general in that it can be perceived as biased. Further, operating on tribal or religious lines flies in the face of the 'universality' of human rights – a principle that all NGOs must champion, including those in Côte d'Ivoire.

5.3.5.2 *The strengths of and the opportunities on offer by Ivorian NGOs*

What follows is a list of activities undertaken by Ivorian NGOs or which are within their reach; and which could contribute to the realisation of the RtD. They are based on examples given by NGOs interviewed in the course of this research. They thus represent the strengths of and the opportunities on offer by Ivorian NGOs.

5.3.5.2.1 *Influencing a national development process*

The RtD was defined in Chapter 3 as including a right to participate in development. NGOs can claim and exercise this right in the context of national consultations towards the formulation of development priorities. For example, on 4 July 2008 the UN agencies operating in Côte d'Ivoire signed a four-year United Nations Development Assistance Framework (UNDAF) with the Ivorian government for the period 2009 to 2013.¹¹⁸ This plan focuses on economic growth, basic social

¹¹⁸ *Plan Cadre des Nations Unies pour l'Aide au Développement UNDAF 2009-2013* available at <http://www.undg.org/docs/9313/UNDAF-Cote-d'Ivoire-2009-2013.pdf> (accessed 6 September 2012).

services, environmental protection, and the consolidation of peace.¹¹⁹ The 2009-2013 UNDAF is described as proceeding from broad-based consultations with the view to ensuring that concerns expressed at grassroots level inform State priorities. Consulting a variety of stakeholders on issues of national interest is, in Côte d'Ivoire, effected through different channels including the Economic and Social Council, national conferences, and consultations with interest groups. However, none of the human rights NGOs that I interviewed took part in these consultations.

In the process of identifying development priorities and formulating the national budget, the Ivorian Economic and Social Council should address the government and the parliament on the concerns and suggestions originating from the Ivorian NGOs. This avenue is open to human rights NGOs. By introducing the human rights-based approach to development, human rights NGOs could contribute significantly to re-orientating the trend of development in Côte d'Ivoire towards a greater focus on the realisation of all rights.

5.3.5.2.2 Monitoring compliance and reporting on the implementation of the right to development

Non-governmental organisations in Côte d'Ivoire have limited exposure to the African and international human rights mechanisms. This *lacuna* can be attributed to the lack of resources to travel to Geneva (where the United Nations Human Rights Council¹²⁰ and the monitoring bodies established under various international human rights treaties and other treaty bodies hold their sessions) or any other city, for that matter. For the same reason, only a few Ivorian NGOs attend sessions of the African Commission on Human and Peoples' Rights (discussed in Chapter 3). Yet, NGOs

¹¹⁹ See www.undp.org (accessed 28 September 2012).

¹²⁰ The United Nations Human Rights Council is a subsidiary body of the United Nations General Assembly. It was established on 15 March 2006 by resolution (A/RES/60/251) in order to replace and to succeed to the United Nations Commission on Human Rights. On 18 June 2007, the Human Rights Council adopted the 'Institution-building package' to serve as a guide for its activities. Three main tools used by the HRC are: the Universal Periodic Review through which the HRC assesses the human rights records of 193 member states of the United Nations; the Advisory Committee which serves as think tank to the Council; and the Complaint Procedure allowing individuals and organisations to bring complaints of human rights violations to the attention of the Council. Resolution adopted by the General Assembly available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf (accessed 28 September 2012).

can use the resources publicly and readily available via the internet, such as reports of the open-ended working group on the RtD; the proceedings and decisions of the Human Rights Council; and the jurisprudence of the regional control mechanisms. Cases relating to the RtD examined in Chapter 3 could guide Ivorian NGOs in pursuing the promotion of the RtD locally.

5.3.5.2.3 *Advocacy*

The RtD speaks to issues of direct interest to the masses, in particular the most vulnerable segments of the Ivorian population. In the aftermath of the political crisis, Ivorians suffered increased impoverishment resulting from the combined consequences of the armed conflict, inflation, and the global increases in the cost of basic commodities. According to the United Nations Development Program, Human Development Index (HDI), the first Human Development Report (1990) introduced a new way of measuring development by combining indicators of life expectancy, education levels, and income into a vector human development index. As reported above, Côte d'Ivoire was ranked 32nd on the United Nations Development Program's (UNDP) Human Development Index (HDI) in 1990. In 2008, six years after the failed *coup d'état*, it was ranked 166th.¹²¹ In 2012, a year after the violent post-electoral crisis, the country ranked 170th.¹²²

In Côte d'Ivoire trade unions and consumer associations organise strikes to communicate their grievances. However, the RtD offers human rights NGOs a point of entry to a popular struggle. In this context, Cheru's concept of the common-sense approach to Africa's economic renaissance offers an interesting set of advocacy opportunities. Cheru suggests as prerequisites to the African economic renaissance, political stability and a rules-based political order mediated by an impartial and independent judiciary, with particular emphasis on transparency, accountability, and greater citizen participation in decision-making.¹²³ These principles apply to the RtD in Côte d'Ivoire context, and constitute a strong basis for scrutiny and advocacy. This

¹²¹ See http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_CIV.html (accessed 15 May 2012).

¹²² See <http://hdrstats.undp.org/images/explanations/CIV.pdf> (accessed 27 December 2012).

¹²³ Cheru F *African Renaissance: Roadmaps to the challenge of globalisation* (2002) 2.

approach would allow the linking of domestic efforts for change to the global and continental network for human rights activism. NGOs could investigate, monitor, report, and make recommendations for state compliance with its obligations with regard to the RtD as stipulated in the UN Declaration on the RtD and the ACHPR. This connection would shape the legitimacy of the domestic struggle.

To date, debate surrounding the RtD has been largely theoretical and has in the main been restricted to states. NGOs have the potential to transpose the debate to an operational level. As long as they remain silent about the RtD, however, the debate will remain rhetorical (and theoretical). Through advocacy and networking locally and globally, NGOs can raise the RtD to the same level as other national, regional, continental, and international human rights priorities.

5.3.5.2.4 *Litigation*

As indicated in Chapter 4, human rights NGOs can opt for litigation of their claims to sub-regional and regional bodies in Africa. In fact, in recent years, Ivorian NGOs and individuals have sued the state of Côte d'Ivoire before regional¹²⁴ and international courts for alleged violations of human rights. They have also submitted communications to the African Commission on Human and Peoples' Rights. However, of five NGOs with observer status at the African Commission, only the *Mouvement ivoirien des droits de l'homme* (MIDH) has lodged a complaint with the African Commission.¹²⁵ From analysing the questionnaires distributed (see Annexure

¹²⁴ *Amouzou Henry v Côte d'Ivoire Côte d'Ivoire* Judgment of ECOWAS Court ECW/CCJ/APP /0808 of 27 October 2009. This case was filed by Amouzou and others in the context of allegations of embezzlement of funds in the cocoa and coffee sectors. The applicants claimed violation by the state of Côte d'Ivoire of their right to the presumption of innocence, infringement of honour and reputation, arbitrary detention, violation of the rights of a pregnant woman (in detention) and of the infant. The court declared the case admissible but did not find the facts provided by the applicants in support of their claim tantamount to violation of their rights. The case was dismissed. See <http://caselaw.ihrda.org/doc/ecw.ccj.jug.04.09/view/> (accessed 27 January 2014).

¹²⁵ Communications 246/02 and 246/02 *Mouvement Ivoirien des Droits de l'Homme v Côte d'Ivoire*. In this case, the complainant alleged that the 2000 Constitution of Côte d'Ivoire, was adopted by a minority of citizens during the Constitutional Referendum which took place on 23 July 2000. The complainant further claimed the Constitution contained provisions (in particular article 35) which are discriminatory to some citizens of Côte d'Ivoire prohibiting them from performing political functions. This case was referring to Allassane Ouattara who, as narrated above, was banned from running for the presidency. The African Commission found the state of Côte d'Ivoire in violation of articles 1, 2 (enjoyment of rights without discrimination), 3(2) (right

2 for examples of the questionnaires I designed for the purpose of this research) and personal interviews conducted, I was able to discern that ignorance and absence of litigation capacity are the principal reasons for Ivorian NGOs not bringing more human rights cases before domestic, sub-regional, regional, or international adjudicative bodies. First, some of the NGOs interviewed in Côte d'Ivoire argued that human rights NGOs often have no *locus standi* to bring action against the state. This claim has been refuted in several instances where human rights NGOs have filed cases before domestic and regional courts. For example, according to the president of the MIDH, his organisation has a case pending before a domestic court on behalf of victims of human rights violations in the context of the socio-political crisis in Côte d'Ivoire examined above.¹²⁶

5.3.5.2.5 *Legal and policy advice*

The NGOs assessed during the course of this research provide free legal and policy advice on a variety of human rights issues. The Association of Female Lawyers which was long dormant as a result of the socio-political crisis, has recently resumed its activities and runs legal clinics throughout the country and has published brochures and policy briefs on issues ranging from inheritance and women and children's rights, to domestic violence.

The Ivorian League of Human Rights also offers public awareness programmes on land rights, voters' rights, and human rights in general. Equally, the local branch of Amnesty International and the *Action pour la promotion des droits de l'homme* embark on human rights education programmes in various forms. The adoption of legal and policy measures is part of the process that the state is expected to follow in order to realise the RtD. In this process, NGOs can contribute baseline studies and thematic reports on the RtD to assist law-makers and the implementers of policy in their endeavours. For example, the Ivorian parliament has two committees on social and legal matters, respectively. The two committees can receive communication

to equal protection by the law), 7 (right to fair trial), and 13 (right to participate in the government of one's country) of the African Charter, and requested it to take appropriate measures to remedy the situation. See <http://caselaw.ihnda.org/doc/246.02/view/> (accessed 27 January 2014).

¹²⁶ The interviewee could not provide me with more factual information on the case.

from NGOs on pertinent aspects of their work. The Economic and Social Council is also an official platform through which NGOs can influence the work of both parliament and government.

Finally, in accordance with its mandate elaborated above, the newly established National Human Rights Commission can address the government, parliament, and other state institutions on key human rights issues. The Commission can provide advisory opinions to these institutions based on advocacy and recommendations from local NGOs.

5.3.5.2.6 Public awareness sensitisation

Human rights awareness programmes such as formal human rights education schemes, drama, promotional materials, TV and radio programmes, as well as articles in the press, are all essential tools towards building a culture of human rights. The focus on civil and political rights has traditionally been reflected in the presentation of human rights by NGOs – especially at their early stages of formation in Côte d'Ivoire (the early 1990s). This has continued, especially in the context of the socio-political crisis which has been a reality since 2002 with a focus on documenting and publicising cases of loss of life, torture, rape, intimidation, to mention but a few of the civil and political rights infringed. It is submitted that while raising awareness on these rights remains relevant, doing the same for other rights is of equal importance to the situation in Côte d'Ivoire. By developing public awareness tools on the RtD, NGOs can also significantly contribute to changing public perception of human rights, and thus gain greater relevance.

5.3.5.2.7 Impact of networking with regional and international non-governmental organisations: The case of Amnesty International

Regional and international NGOs are understood here as those with an international reach and/or with branches in more than one country. The case of Amnesty International is cited as an illustration from the perspective of its nature as a membership-based organisation with global representation and an established

reputation in research and advocacy. Over the years, the mandate/mission of Amnesty International evolved along the lines of development of human rights globally; from a focus on civil and political rights, through to embracing socio-economic and cultural rights including the RtD. This mandate evolution has been guided by priorities set by AI members and local branches, and endorsed by its International Council Meeting. Members from Africa, Latin America, and Asia were largely instrumental in the mandate-shift towards economic, social and cultural rights in the mid-1990s. The organisation then devoted its research expertise to this aspect, and now offers tools for NGOs to engage in a wide range of activities aimed at the realisation of these rights. Networking with Amnesty International, therefore, offers local NGOs the opportunity to close their knowledge gap in the pursuit of the RtD. The same suggestion could apply to the International Federation of Human Rights Leagues which has branches in several African countries, including Côte d'Ivoire; as well as to the West African Civil Society Forum (WACSOF). WACSOF was set up in the mid-nineties to galvanise the emerging 'civic' powers and facilitate constructive partnerships with state authorities, political parties, and the Economic Community of West African States (ECOWAS). With local representations in almost all West African countries, WACSOF provides an umbrella structure for NGOs by partnering with ECOWAS to promote socio-economic integration as well as peace and security in West Africa.¹²⁷

5.3.5.2.8 Use of indigenous knowledge

The use of indigenous knowledge is not a recent phenomenon. Over the past thirty years, the Ivorian authorities have offered and maintained cultural competitions to promote core values such as nation-building, use of local languages, and cultural diversity (food, dress, dance, music, and so on) through a series of radio and television programs.¹²⁸ These programs use creative methods of indigenous knowledge production – such as story-telling, the teaching of proverbs, street theatre, dance, and music. A theme is selected annually for each of them. The

¹²⁷ Ndongo O 'Role of West African Civil Society in Peace building' in Ibrahim and Ndongo (eds) *Resolving West African conflict, early warning, early response* (2001) 201.

¹²⁸ Core values are promoted nationwide through Podium, a music competition introduced in 1977, *Varietoscope* (traditional music and dance) for the youth launched in 1990, and *Wozo vacances* (games, music and dance) for younger children (under 10) launched in 1992.

popularity of these activities and methods of communication can be attributed to their relevance to their audience. Human rights activists in Côte d'Ivoire have failed to use these traditional knowledge production media to their fullest extent.

In conclusion, human rights NGOs in Côte d'Ivoire can overcome the challenges confronting them in the realisation of the right to development. Exactly how they can achieve this challenge is the subject of the final chapter (Chapter 6). The presentation of the intended goal will be by way of recommendations which will be rounded off by a brief conclusion.

CHAPTER 6

CONCLUSION: SYNTHESIS AND RECOMMENDATIONS

6.1 Introduction

At the time of concluding this work, West Africa, the region within which Côte d'Ivoire is positioned, is confronted with new threats such as terrorist activities in Northern Mali, religious fundamentalism in parts of Nigeria, and piracy in the Gulf of Guinea. Added to these are examples of election-related violence, as in the case of Côte d'Ivoire, and attempts to amend constitutions to extend mandates.¹ Generally, these threats are the result of either the denial of rights encompassed in the right to development (the RtD), or the persistent violation of the RtD itself. This thesis is built on three pillars and seeks to contribute to an understanding of the RtD from the perspective of human rights organisations in particular.

First, the right to development, arguably one of the most recent rights in the structural design of international human rights, shapes the development paradigm so as to integrate civil, political, cultural, economic, social, and environmental rights of both individuals and groups without distinction. Secondly, as elaborated in Chapter 4, NGOs play a critical role in any given democratic society as agents of change. Africa, and within it Côte d'Ivoire, is no exception. Thirdly, Côte d'Ivoire – an African country once heralded as a success scenario – has been confronted with internal conflict resulting in increased poverty and insecurity. In 2013, two years after an unprecedented post-electoral crisis, the country is struggling to resume peace, development, and stability but does not seem to have reached the end of the tunnel. The issues confronting the country are similar to those identified by former South African President, Thabo Mbeki, and others to justify the promotion of the African Renaissance as the vision to follow. Human rights NGOs in Côte d'Ivoire can gainfully contribute to addressing the challenges facing the country through the pursuit of the RtD. The research indicates how this can conceivably be achieved.

¹ For example, in the case of Burkina-Faso the political opposition suspects the government of trying to modify the Constitution, in particular, article 37, to allow President Blaise Compaoré to contest the 2014 presidential elections. In Benin, too, the opposition accuses President BoniYayi of attempting to review the Constitution in order to seek a new mandate in 2016.

This research establishes that no human rights NGO in Côte d'Ivoire has experience in working on the RtD. This raises two cardinal issues. First, in the current socio-political context of the Côte d'Ivoire, it is possible, yet also crucial, for human rights NGOs to include the RtD in their mandate and actively engage in its pursuit. Secondly, in order for these NGOs to work beneficially on the RtD, they must address two groups of issues impacting on them: organisational and operational. These will be considered further below.

6.2 Findings

6.2.1 The right to development in the socio-political context of Côte d'Ivoire

As stated in Chapter 5, Côte d'Ivoire was confronted with an unprecedented socio-political crisis rooted in the gradual denial of the fundamental rights of its people when, notwithstanding a growing economy, many were 'left behind' in poverty. I submit that although it cannot be stated with absolute certainty, poverty and underdevelopment were the principal contributors to this crisis and served as the catalysts of violence. A dependency on natural resources and the proceeds of raw agricultural produce, allows limited opportunities for wealth-generation for locals or employment for the youth. Over the years, these factors served as the medium for violent conflict, all the more so when political battles were fought along tribal and religious lines. This situation occurred while globally many countries – but particularly those in Africa – were confronted with violent conflicts resulting from disputed elections and/or the unequal distribution of the benefits of national wealth. The study establishes that most of the claims regularly advanced as the root causes of the conflict in Côte d'Ivoire, relate to exclusion, land rights, unequal access to wealth, and a lack of political participation. These issues are partly addressed by the RtD, even though, as explained in Chapter 2, this right is not a substitute for the economic, environmental, civil, cultural, social, and political rights it encapsulates.

6.2.2 Enforcement and justiciability of the right to development in Côte d'Ivoire

As discussed in Chapter 2, a right must be enforceable if it is to translate into reality for the rights-holders, and be justiciable in order that it can be remedied by a court of law or the appropriate judicial mechanism, should it not be respected, protected, or fulfilled. At the domestic level, enforcement of the RtD has been examined from the angle of the duties of the state as principal duty-bearer. The pursuit of the RtD also entails a number of legal and policy steps highlighted in Chapter 2. With regard to referral to courts, as discussed in Chapter 5, both the 2000 Constitution of Côte d'Ivoire and the African Charter on Human and Peoples' Rights recognise the RtD. Based on this reality it has been argued above that the 'non-justiciability argument' of this right is flawed. However, in practice the lack of appropriate domestic legislation and remedial institutions renders compliance and enforcement ineffective or hypothetical.

6.2.3 Role and impact of non-governmental organisations in building a democratic Ivorian society

Focusing on the role human rights NGOs play at present and their impact in this context, this work has found that though of relatively recent origin, human rights NGOs have the potential of contributing to the building of a democratic Ivorian society. First, the activities they are undertaking (and have undertaken) in a consistent and coherent manner, have a significant impact nationally. Their contribution to the drafting of the 2000 Constitution – the first to explicitly recognise human rights and NGOs in the country, and the campaign which led to the ratification of the Rome Statute of the International Criminal Court and the subsequent amendment of the Constitution in 2012² to accommodate this ratification, constitute but a two examples illustrating their advocacy and advisory role and functions. Secondly, the pressure exerted by political groups on NGOs (manifested in physical threats and intimidation of some NGOs and the funding of the activities of other selected NGOs), can be interpreted as evidence of the

² *Loi n° 98750 du 23 décembre 1998 relative au domaine du foncier rural* ('Law of rural land tenure') in *Journal Officiel de la République de Côte d'Ivoire* du 14 janvier 1999.

strategic importance of these groups in the entrenchment of a democratic culture. NGOs have also been involved in a wide range of activities from human rights monitoring and reporting; voter education; and legal counselling to running human rights education and sensitisation programmes aimed at a diverse audience. Their contribution to the democratisation process is therefore not in question.

However, the study also establishes that the ‘politicisation’ and ‘ethnisation’ of NGOs have weakened them and made them part of the social rupture that characterises the post-2010 presidential election crisis. It follows that human rights NGOs need to address organisational challenges confronting them in order to stand firm on human rights principles such as universalism, non-discrimination, equality, participation, and accountability discussed in Chapter 2; and to continue to play a constructive role in the democratisation process.

6.2.4 Contribution of human rights non-governmental organisations to the realisation of the right to development in Côte d’Ivoire

While this research establishes that no human rights NGO in Côte d’Ivoire has any experience in working on the RtD, the prospect for closing this gap is nonetheless unquestionable. *Prima facie*, it is all very well to call for a paradigm shift to the RtD. In reality, such a shift requires addressing at least three levels of operational challenge. These involve the understanding, acceptance, and implementation of the RtD.

6.2.4.1 *The first challenge – understanding the right to development*

In order to be effective, it is essential that human rights actors internalise the connection between their understanding of human rights in general, and the RtD in particular and the end result of their genuine engagement with the notion of fundamental rights. Most human rights activists in Côte d’Ivoire are ignorant of the nature, scope, and content of the RtD. They must appreciate how the RtD could enable them to play a more meaningful role in their community and advance human rights as such. The challenge in addressing this issue is further constrained by the

fact that most information and literature that are readily available in French only, pay scant attention to the RtD. By reason of its coverage of rights issues relating to, inter alia, ownership of land and the management of natural resources, the RtD clearly requires of NGOs some basic knowledge of these topics. In Côte d'Ivoire, land rights operate within the ambit of legal pluralism (ie the existence of multiple legal systems within one geographic area) to the extent that both living customary law and statutory law (Law N° 98750 of 23 December 1998)³ apply.⁴ NGOs must therefore research and build their understanding of both legal systems as a prerequisite for effective contribution to the realisation of the RtD in Côte d'Ivoire. Understanding is, however, no more than the first step in the actualisation of the RtD. Once that step has been taken, human rights actors must be ready shift their focus to the realisation of the RtD.

6.2.4.2 The second challenge – accepting a shift to the right to development

As discussed in Chapter 2, for a long time, in particular during the cold war era, human rights advocacy (focussing on civil and political rights) and development promotion (addressing economic, social and cultural rights) were perceived by many as incompatible. This perception is still dominant among human rights NGOs in Côte d'Ivoire. The division is grounded in the fact that human rights NGOs view their work as aiming at exposing abuse of authority and power, while developmental work and/or support is directed at working in partnership with the authorities to provide goods and services to people in need. In terms of this perception, while human rights mainly address freedoms, development deals with various sets of existential needs.

³ *Ibid.*

⁴ According to a joint report released in 2009 by Internal Displacement Monitoring Centre and the Norwegian Refugee Council: 'Prior to the promulgation of a 1998 law on rural land, the legislation deprived customary land transactions of any form of legal weight and only recognized transactions carried out in the presence of a notary. The 1998 law breaks new ground by recognising customary rights on a transitional basis, before entirely transforming these into formal individual and private rights.' See Internal Displacement Monitoring Centre and Norwegian Refugee Council 'Whose land is this? Land disputes and forced displacement in the western forest area of Côte d'Ivoire' (2009) 13 available at http://www.internal-displacement.org/countries/cotedivoire/reports/CDI_SCR_Nov09.pdf (accessed 16 Novembre 2013). See also Chauveau JP *The land tenure question in Côte d'Ivoire: A lesson in history 3* available at http://www.hubrural.org/IMG/pdf/iied_dry_ip95english.pdf (accessed 16 November 2013).

Furthermore, while *de jure* the mutual reinforcement of ‘development’ and ‘human rights’ is no longer questioned, at least not since the 1993 World Conference on Human Rights held in Vienna, the reality in Côte d’Ivoire suggests that a concerted effort is required to reflect this certainty in the work of NGOs. Some human rights NGOs believe that their strength lies in exposing abuses of various freedoms (ie the infringement of civil and political rights) and so resist venturing into the sphere of socio-economic and cultural issues. However, this argument simply cannot relate to the RtD, which in any event encompasses civil and political rights – rights which they have no problem championing.

6.2.4.3 The third challenge – implementing the right to development

6.2.4.3.1 Absence of a favourable enforcement framework

Article 22(2) of the ACHPR imposes a duty on the state to ensure the exercise of the RtD.⁵ This obligation includes the enactment of legislation and other policy measures to facilitate putting the RtD into effect. This researcher could find no such law and/or policy in Côte d’Ivoire. One of the areas of pursuit, therefore, is for NGOs to advocate for the realisation of such a normative framework (legislation and/or other policy measures) capable of ensuring compliance with and implementation of the RtD.

6.2.4.3.2 Breaking the foreign donor bondage

As discussed in Chapter 4 generally, and in the context of Côte d’Ivoire in Chapter 5, most Ivorian NGOs rely entirely on foreign donors to operate. Reconciling donor interest with local needs is for some human rights NGOs often either a luxury or simply not an available option. While civil and political rights are still high on the agenda of most (western) donor countries, socio-economic and cultural rights are

⁵ According to article 22(2) ‘States shall have the duty, individually or collectively, to ensure the exercise of the right to development’. African Charter on Human and Peoples’ Rights <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (accessed 15 September 2012).

barely mentioned. Judging from the on-going controversy surrounding its universal recognition as elaborated in Chapter 2, the RtD is unlikely to attract donor support. I submit that total reliance on foreign donors results in a perpetuation of a colonial or a beggar-bowl mentality that African NGOs must actively walk away from. First, this attitude keeps NGOs in bondage to the donor whose interests and motives often differ from those of local individuals and groups whose rights NGOs are set to defend. Accepting to remain in such bondage reduces the NGOs to no more than a tool by which foreign donors impose their views on local African communities. A more cautious approach to seeking support from external donors should be explored so that human rights can be experienced everywhere without any form of cultural alienation. As it stands, doing human rights work using foreign funding conveys the message that human rights are alien and an imposition from donors. In my opinion, there is simply no way the African concept of human rights – such as those embedded in *ubuntu* (highlighted in Chapter 3) can be promoted while relying on a western donor to whom this concept is foreign.

And ultimately, domestic fundraising is preferable to reliance on an external donor, even one sympathetic to the RtD. The notion of domestic fundraising could be expanded to include the African private sector. I hold the view that if well explained and promoted, the realisation of the RtD can constitute a point of convergence for several actors engaged in the economic, environmental, cultural, and political development of African countries in general, and Côte d'Ivoire in particular. The role of the private sector in advancing a culture of democracy and human rights specifically, falls outside of the scope of this work, but is worth studying in the context of the African Renaissance.

6.3 Recommendations

Recommendations are mainly addressed to NGOs although it is acknowledged that the ultimate realisation of the RtD is beyond their scope of responsibility. This research needs to be supplemented by discussions on the various methodologies available to the state to uphold the RtD fully. One such method could, for example,

be through an in-depth investigation into the interchange between Ivorian, regional, and international human rights mechanisms.

Ivorian human rights NGOs need to operate within a bi-dimensional framework in order effectively to contribute to the realisation of the RtD in their country. First, in the context of the indivisibility of fundamental rights, they need to shift their focus on civil and political rights (as they have done during the first 20 years since the return of Côte d'Ivoire to a multi-party democratic governance), to include work on the RtD among their priorities. The shift from civil and political rights to economic, social, and cultural rights is not factored in the present research, as in reality the realisation of each right rests in its interconnection with all others.⁶ The RtD in this context stands as the most appropriate articulation of how all rights can be pursued concurrently. Secondly, working on the RtD can be complex as this right is composite and requires some knowledge/understanding of law, political science, economics, and sociology, to mention but a few fields relevant to the rights involved in the RtD. In addition, in the context of Côte d'Ivoire, working on the RtD requires an understanding of the traditions and customs of the various rural communities who are most likely to be affected by violations of this right. For this reason, Ivorian NGOs need to combine imported/acquired ('western') methods as highlighted in Chapter 3, and indigenous methods of advocacy and social mobilisation (including the use of multi-, inter-, and transdisciplinarity methodologies). The use of indigenous methods would inevitably include/entail studying and mainstreaming African customary law in the work of NGOs. Bekker defines customary law as:

[a]n established system of immemorial rules [...] evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his councillors, their sons and

⁶ Paragraph 5 of the Vienna Declaration on Human Rights reads thus:

[A]ll 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.

See [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En) (accessed 27 January 2014).

their sons' sons until forgotten, or until they became part of the immemorial rules.⁷

6.3.1 Application of imported and acquired methods

Putting the RtD into practice can effectively be accomplished through activities such as:

- Fostering the capacity and skills (knowledge and understanding) of NGOs in litigation and policy advice on the RtD – as happened with the Endorois Welfare Council in Kenya and the Socio-Economic Rights and Accountability Project in Nigeria.
- Networking globally with other NGOs (such as minority rights groups) towards the realisation of the RtD as happened with the Endorois Welfare Council discussed in Chapter 4.
- Undertaking thematic research on the RtD in Côte d'Ivoire to build the understanding of this right in the Ivorian context, and in comparison with other African countries.
- Developing learning materials on the RtD based on concrete domestic examples (the example of the Endorois being the most obvious).
- Monitoring state compliance with the realisation of the RtD, and reporting to the African Commission on Human and Peoples' Rights and through the issuing of public reports.
- Advocating for the inclusion of the RtD in formal training/teaching curricula at all levels, as well as through informal means including drama, role play, and music.

⁷ Bekker JC *Seymour's Customary law in southern Africa* (1989) 11.

6.3.2 Applying multi-, inter- and trans disciplinarity and mainstreaming African living customary law.

Working on the RtD requires new skills on the part of human rights NGOs. It will for example not be sufficient to monitor human rights violations purely based on death tolls, or the number of rape and torture cases. NGOs need to be more open-minded and receptive to knowledge traditionally remote from their spheres of expertise. This includes some understanding of other fields of knowledge and expertise such as economics, sociology, and anthropology. For example, as in the *Endorois* case reviewed under Chapter 3, working on the RtD, requires an understanding of the legal regime applicable to rural communities, especially in relation to land tenure. This can be achieved through increased education in the pertinent fields of knowledge alongside the application of living customary law.⁸ I agree with Ndulo when she maintains that:

The sources of law in most African countries are customary law, the common law and legislation both colonial and post-independence. In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law.⁹

I propose recourse to the multi-, inter- and trans-disciplinary (MIT) approach. This approach is a multi-faceted knowledge system, and insists on the complementarity and comparative advantage of various knowledge systems. It invites specialists in various fields of knowledge to appreciate the limitations of their own scientific field and become receptive to other knowledge systems. The yield is to have knowledgeable Africans whose knowledge is useful to Africa. MIT will be able to bridge the knowledge gap confronting Ivorian human rights NGOs in relation to the RtD.

⁸ *Id* note 6. Drucilla Cornell adds that: 'The living customary law has a different notion of living law and thus of custom than the one that dominates, certainly in English and American notions of the common law'. See Cornell 'The significance of the living customary law for understanding of law: does custom allow for a woman to be Hosi?' 396 available at http://www.pulp.up.ac.za/pdf/2011_03/2011_03_I_sec3_3.pdf (accessed 14 November 2013).

⁹ Ndulo Muna 'African customary law, customs, and women's rights' (2011) *Cornell Law Faculty Publications Paper 187* at 87 available at <http://scholarship.law.cornell.edu/facpub/187> (accessed 16 November 2013).

Applying the MIT approach to human rights will allow synergies between a number of disciplines, including law, mathematics, statistics, sociology, biology, physics, history, indigenous knowledge systems, as well as information and communication technologies. Opening their minds to other knowledge systems will enable human rights NGOs to appreciate the bigger picture of the issue they want and need to address. For example, the MIT will enable them to capture the cultural and historical flow of social events and find connectivity between past and present struggles. Within Africa, it will allow the appreciation of cultural realities across borders. Within the framework of MIT, the use of indigenous knowledge systems (IKS) allows the review of the constitutive elements of the RtD through a domestic lens, including the critical examination of traditional African ways of ensuring popular participation, decision-making, gender equality, and guaranteeing the rights of children, people with disabilities, the aged and the vulnerable, refugees, internally displaced persons, and victims of natural disaster. The use of IKS enables us to explore the extent to which traditional African societies respond to the challenges of sustainable development, the preservation of a clean and healthy environment, and taking care of the spiritual and emotional health of individuals and communities. Knowledge of these core social issues is the key to the effective promotion of the rights that make up the RtD.

Finally, the MIT approach takes the human rights-based approach (discussed in Chapter 2) further by suggesting that in all respects, no knowledge is irrelevant to the process of realising human rights. The MIT approach completes this process by providing a method for achieving pertinent human rights targets using diverse systems of knowledge; including the way the traditional African would have done it. While the human rights-based approach focuses on human rights norms and standards, the MIT approach opens minds to other sciences, thus making them all relevant and complementary.

6.4 Summary and conclusion

In summary, the following recommendations will assist human rights NGOs in Côte d'Ivoire to contribute effectively to the realisation of the RtD:

- 1 As a point of departure they should initiate a process of acquiring relevant knowledge and closing their individual capacity gaps. This could be done through, for example, undertaking their own research in fields such as living customary law and the realisation of human rights; networking (and exchanging ideas) with other and, most importantly, more experienced NGOs; and by enrolling in courses organised by funding agencies, on-line and classroom learning centres, and the UN system at the national or regional levels. They should also reach out to development organisations, at home within the West African region, and beyond. Through an open-minded approach, human rights NGOs will enhance their capacity to engage in national development processes including consultations on the development of Poverty Reduction Strategy Papers (PRSP).¹⁰ All these endeavours will be of assistance in the realisation of a suitable understanding of social development, as well as the other features of the traditional understanding of development. They will also be better positioned to network more effectively with other actors, and to adequately mainstream the rights-based approach to development. Such a pursuit of the RtD can empower NGOs to scrutinise the delivery of basic social services (relating to, for example, health, education, water, HIV/AIDS prevention, and land matters, to mention but a few) by both the state/organs of state and non-state actors.

- 2 They should network and share best practices and experiences with human rights NGOs working on the RtD as widely as possible, and across language, political, and territorial boundaries/barriers, including with NGOs in Asia, the Middle East, and Latin America.

- 3 Monitoring and reporting on state compliance with human rights obligations, often referred to as the adversarial archetype approach of 'naming and shaming', should be supplemented by new forms of engagement, including cooperation with state institutions through the provision of expert opinions,

¹⁰ Generally, Poverty Reduction Strategy Papers were introduced in the mid-eighties by the Bretton Wood institutions (International Monetary Fund and World Bank) as a framework for cooperation in the field of economic development to replace structural adjustment programs.

consultancies, advice and capacity building within the RtD area. It is further my view that NGOs should go beyond exposing a state's failure to uphold human rights. They should be ready and willing to give informed guidance on how violations can be prevented and recurrence addressed.

- 4 It is also vital to tear down the walls of separation embodied in ignorance that exist between city-based NGOs and rural social movements. NGOs must be able to reach out to the most remote locations, not only to raise human rights awareness, but also to learn alternative forms of social mobilisation and advocacy from African indigenous knowledge systems found in traditional communities. Again, the use of IKS and an understanding of living customary law will assist them better to internalise the social dynamics of rural communities and in the process to advance the promotion of the RtD.

Should human rights NGOs in Côte d'Ivoire be in the position to realise and to apply the above recommendations in full, or even only in part, they will not only contribute towards the provision of empirical evidence in support of the universal recognition of the RtD; they will also have contributed to the attainment of a more democratic and stable Ivorian society. Renaissance in the African context is viable in the Côte d'Ivoire; and human rights NGOs will in the pursuit of the RtD, find a point of entry which will allow them to become key players in this process.

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ANNEXURES

1 THE UNITED NATIONS GENERAL ASSEMBLY DECLARATION ON THE RIGHT TO DEVELOPMENT

Adopted by General Assembly Resolution 41/128 of 4 December 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

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

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development,

Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be

devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

Article 1

- 1 The right to development is 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.

Article 2

- 1 The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
- 2 All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

- 3 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.

Article 3

- 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.

Article 4

- 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.

Article 5

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

Article 6

- 1 All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
- 2 All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
- 3 States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic social and cultural rights.

Article 7

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

Article 8

- 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.

Article 9

- 1 All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
- 2 Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation

of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

2 QUESTIONNAIRE AND OUTLINE FOR STRUCTURED INTERVIEW

[Author's translation of letter, questionnaire and outline in the original French as used in chapter 5 (para 5.3.4 from p 199 and further)]

ACADEMIC RESEARCH

UNDERTAKEN BY

PATRICE E VAHARD¹

AS PART OF A DOCTORAL RESEARCH PROGRAMME AT THE UNIVERSITY OF SOUTH AFRICA, PRETORIA

Context

The present research is part of the requirement for a LLD thesis in human rights at the University of South Africa (UNISA). It seeks to establish whether or not African human rights organisations will reinforce their relevance and make meaningful contribution to the African Renaissance if they shift priority towards the realisation of the Right to Development.

The study will examine the theories of development, the evolution of human rights and situate human rights activism in Côte d'Ivoire within its historical perspective. It will also review the strength, weaknesses, opportunities and threats facing human rights organisations in Côte d'Ivoire today. It will finally interrogate African traditional knowledge systems with a view to exploring methods that could inform human rights activism in today's Africa.

This study is part of the African Renaissance paradigm. It aims at contributing to the positioning of African civil society organisations in the process of Africa's rise from her

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present position to regain her lost dignity and contribute to her sustainable peace and development.

Côte d'Ivoire was selected as case study for a number of strategic reasons, some of which are related to the country's history and socio-economic position within the West Africa sub-region.

As part of this research, I am contacting a number of UN and AU officials, government officials in Côte d'Ivoire, NGOs, scholars and independent experts. I am approaching you on the basis of your expertise and capability to enrich this unique experience. Your input could be in either one or the other of the following formats:

- 1 Granting a 30 to 60 minute interview or any amount of time at the convenience of the interviewee
- 2 Completion of the attached questionnaire (those applicable to you).
- 3 Suggest publication(s) that could assist me in deepening my knowledge of the subject
- 4 Refer me to other resource person(s) who might be of assistance.

Confidentiality

The information that will be collected from you as a result of the interview or the questionnaire will be analysed and kept in strict confidentiality. You may also choose to remain anonymous.

Follow-Up

I shall endeavour to keep in touch with you and update you on the progress of our research. Depending on your availability, I would like contact you from time to time to obtain additional information

Thank you for your kind attention.

Patrice Vahard

E-mail: vahard@un.org or patricevahard@gmail.com

Telephone: Abidjan (225) 07 48 74 17

Addis Ababa (251-1) 44 34 15

QUESTIONNAIRE
(Plus an outline for structured interview)

Surname:..... Name:.....
Position:..... Institution:.....
Address:..... Telephone:.....
E-mail:..... Fax:

Date (Interview/Questionnaire):..... Place:.....

1 About your organisation

- 1.1 What are the objectives of your organisation?

- 1.2 What factors determined the choice of these objectives?

- 1.3 What is your assessment of your organisation's performances?

- 1.4 What are the main challenges confronting your organisation (both internal and external to your organisation)?

- 1.5 How would you explain these obstacles?

- 1.6 How can these obstacles be overcome?

2 About civil, economic, social, political and cultural rights

- 2.1 In your opinion, on what category of human rights are the African/Ivorian human rights NGOs you know working?

- 2.2 What justifies this preference?

- 2.3 What are the advantages and disadvantage of this choice?

3 *About the right to development*

3.1 How would you define the right to development?

3.2 Does your organisation work on the right to development?

3.3 Why?

3.4 Do you think that Ivorian civil society, and in particular those working on human rights should focus on the right to development?

3.5 Why?

4 *About working method and techniques*

4.1 What are the working methods and techniques used by human rights NGOs implementing their mandate?

4.2 What are the merits and demerits of these methods and techniques?

4.3 What, in your views, has been the impact of these techniques?

5 *African indigenous knowledge system(s)*

5.1 What traditional methods used for the promotion and protection of human rights in today's Africa

5.2. Are these methods applicable to the human rights context in Côte d'Ivoire?

5.3. Why?

5.4. Do you work with or engage traditional leaders, community based organisations in rural and urban area?

5.5. Why?

6 *About the African Renaissance*

6.1. How would you define the African Renaissance?

6.2. Is the African Renaissance relevant to Africa today? Why?

6.3. How could your organisation contribute to its materialisation?

Thank you for your contribution. You will be kept informed of the outcome of this research.

[Author's note: The original French text.]

LE ROLE DES ORGANISATIONS DES DROITS DE L'HOMME A LA REALISATION DU DROIT AU DEVELOPPEMENT EN CÔTE D'IVOIRE

RECHERCHE ACADEMIQUE

CONDUITE PAR
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DANS LE CADRE D'UNE ETUDE DOCTORALE
A L'UNIVERSITE UNIVERSITE DE L'AFRIQUE DU SUD
(University of South Africa (UNISA))
PRETORIA

INTERVIEW ET QUESTIONNAIRE

Contexte

La présente étude fait partie d'un programme de recherche visant à établir si oui ou non les organisations de la société civile africaine, et plus particulièrement celles dites organisations des droits de l'homme, seraient plus efficaces et plus utiles à leurs communautés respectives et à l'Afrique si elles orientaient leurs actions vers le droits au développement.

Cette recherche envisage commencer par l'historiologie du développement, en passant en revue les différentes théories du développement. Elle explorera l'évolution des droits de l'homme et essaiera de situer le militantisme des droits de l'homme en Côte d'Ivoire dans sa perspective historique, pré-, coloniale et post-coloniale et évoquera les forces, faiblesses, opportunités et défis contemporains des organisations ivoiriennes des droits de l'homme. L'étude interrogera les items culturels ivoiriens afin de voir comment les violations des droits de l'homme étaient traites dans le passe et le sont dans les communautés rurales et semi urbaines.

² Patrice Vahard est Chef de la Section Droits de l'Homme et Genre au bureau des Nations Unies pour l'Afrique de l'Ouest. Il fut précédemment, conseiller Régional auprès de la Commission l'Union Africaine (Addis Abeba) et Fonctionnaire du Haut Commissaire des Nations Unies pour les Droits de l'Homme, Coordinateur de la Section Droits de l'Homme au sein de la Mission des Nations Unies en Sierra Leone et premier Directeur du Bureau Régional d'Amnesty International pour l'Afrique. Patrice Vahard est aussi membre fondateur du réseau Awana spécialisé dans le renforcement des capacités de la société civile africaine et dont le siège régional est à Dakar, au Sénégal. Il fait partie du premier groupe de chercheurs affiliés au a l'Institut de Recherche sur la Renaissance Africaine - Université de l'Afrique du Sud, Pretoria. Patrice Vahard est de nationalité ivoirienne et vit à Dakar, Sénégal avec sa famille.

Cette étude a été conduite pour la première fois entre 2004 et 2006 dans un contexte devenu désormais différent. Elle a pour but de voir comment positionner la société civile africaine dans le processus de revalorisation de l'Afrique afin de lui permettre de surmonter ses défis contemporains, retrouver sa dignité et réaliser un développement et une paix durables.

Le choix de la Côte d'Ivoire répond à une série de facteurs historiques et stratégiques prenant source dans sa position politique, économique, culturelle et sociale en Afrique Occidentale.

Nous vous approchons dans le cadre de cette recherche en raison de vos connaissances et de votre expertise. Votre contribution peut revêtir l'une ou plusieurs des formes suivantes:

- 1 Entretien de 30 à 60 minutes à un moment de votre convenance
- 2 Réponse au questionnaire ci-joint (du moins les questions qui vous sont pertinentes)
- 3 Revue littéraire, si vous avez connaissance de publications à recommander pour l'enrichissement de notre compréhension du sujet
- 4 Recommandations de personnes à contacter, si vous avez connaissance d'autres personnes qui pourraient contribuer à la recherche, nous vous serions gré d'avoir leurs contacts.

Confidentialité

Des exigences déontologiques nous imposent la stricte confidentialité des informations que vous fournirez lors des entretiens ou dans le cadre du questionnaire. Il vous est également loisible de garder l'anonymat.

Suivi

Nous sommes disposés à vous tenir informer des suites de notre recherche et de vous reprendre contact avec vous de temps à autres pour avoir des compléments d'information dans la mesure de votre disponibilité.

Nous vous remercions de votre estime attention.

Patrice Vahard

E-mail: patricevahard@pehe.org ou vahardpatrice@gmail.com

QUESTIONNAIRE (et guide d'entretien)

Nom:..... Prénoms:.....
Fonction:..... Organisation:.....
Adresse:..... Téléphone:.....
Courriel:..... Fax:.....
Date:..... Lieu:.....

1 *A propos de votre organisation*

- 1.1 Quels sont les objectifs poursuivis par votre organisation?
- 1.2 Quels facteurs ont influencés le choix de vos objectifs?
- 1.3 Comment jugez-vous les performances de votre organisation?
- 1.4 Quels sont selon vous les défis et obstacles majeurs (aussi bien au plan interne à votre organisation qu'externe)?
- 1.5 Que ce qui explique ces défis et obstacles?
- 1.6 Comment peut-on les surmonter?

2 *A propos des droits civils, politiques, socio-économiques et culturels*

- 2.1 Quelle est selon vous la catégorie des droits sur laquelle les ONG ivoiriennes travaillent le plus?

2.2 Que justifie cette préférence?

2.3 Quels sont les avantages et inconvénients du travail exclusif sur une catégorie donnée des droits de l'homme ?

3 *A propos du droit au développement*

3.1 Comment définissez-vous le droit au développement ?

3.2. Votre organisation travaille-t-elle sur le droit au développement ?

3.3. Motivez votre réponse

3.4 Pensez-vous que la société civile ivoirienne, et plus particulièrement les ONG des droits de l'homme devraient mettre l'accent sur le droit au développement?

3.5 Motivez votre réponse

4 *A propos de la méthode et des techniques de travail*

a Quelles sont méthodes et techniques de travail (plaidoyer, recherche, sensibilisation...)?

b Quels les insuffisances et mérites de vos méthodes de travail?

c Quel est l'impact de vos méthodes de travail sur le terrain?

5 *A propos des méthodes indigènes et traditionnelles de promotion et de protection des droits de l'homme*

5.1 Quelles sont les principales méthodes traditionnelles de promotion et de protection des droits de l'homme ?

5.2 Ces méthodes peuvent-elles s'appliquer à la situation présente des droits de l'homme en Côte d'Ivoire ?

5.3 Pourquoi?

5.4 Dans quel cadre travaillez-vous avec les chefs traditionnels, les associations populaires rurales et urbaines ?

5.5 Pourquoi?

6 *A propos de la Renaissance Africaine*

6.1 Comment définissez-vous la renaissance africaine ?

6.2 Comment votre organisation peut-elle y contribuer ?

Merci de votre temps et de vos contributions. Nous vous rendrons compte des suites de cette recherche.

3 LIST OF HUMAN RIGHTS NGOs WITH WHOM THE AUTHOR INTERACTED

3.1 Leaders, Volunteers and Staff of NGOs with whom the author interacted in the preparation of this work in Côte d'Ivoire

INSTITUTION	PERSON CONTACTED	MANDATE	COVERAGE
<i>Action Pour Tous (APT)</i>	Dr Serge Tchimou ADJE Donatien Djava BEUGRE	To contribute to the improvement of public health in rural areas	Nationwide
<i>Action pour la Protection des Droits de l'Homme (APDH)</i>	Me AMON N'Guessan Severin	Promotion and protection of human rights with a focus on civil and political rights	
<i>Alliance Internationale pour les Droits Humains et les Libertés Publiques (AIDHLP)</i>	ALOCO Kouassi Arthur	Promotion and protection of human rights with a focus on civil and political rights	
Amnesty International Section Côte d'Ivoire	Stephane Odrekou, Country Director Yao Kouakou Nathalie Women Coordinator	Promotion and protection of all human rights	Nationwide
<i>Association des Electeurs de Côte d'Ivoire</i>	BOYOU Boniface	Voter education	Nationwide
<i>Association des Femmes Juristes de Côte D'ivoire (AFJCI)</i>	Me Viviane Kouao-Sombo Chairperson	- Promotion of women's rights - Fighting sexual and gender-based violence - Legal clinics	Nationwide
<i>Association Ivoirienne pour la Promotion des Droits de l'homme(AIPDH)</i>	Me Landry Baguy	Research on indigenous tools for the promotion and protection of human rights.	National
<i>Association Syndicale de la Magistrature (ASM)</i>	PALE Bi Boka Paul Chairperson	Defence of the corporate interest of judges and magistrates	Nationale
<i>Bureau International Chrétien pour l'Enfance (BICE Côte d'ivoire)</i>	Désiré Gilbert KOUKOU	Child rights protection and promotion	Nationwide
<i>Club Union Africaine Côte d'Ivoire (CUACI)</i>	Wodjo Traore	Election observation, human rights promotion and protection, transitional justice	Nationwide
<i>Ligue Ivoirienne des Droits de l'homme (LIDHO)</i>	Micheline Kabran M Gilbert	Promotion and protection of all human rights	Nationwide
<i>Mouvement Ivoirien des Droits de l'Homme (MIDH)</i>	Me Yacouba DOUMBIA Chairperson	Promotion and protection of all human rights	Nationwide
<i>REPSFECO Réseau Paix et Sécurité des Femmes</i>	Salimata PORQUET	Prevention and fight against violence and sexual exploitation against women	Nationwide and subregional

<i>dans l'espace CEDEAO</i>		Promotion of women's participation in peace and security initiatives in West Africa	
<i>Coalition Ivoirienne pour la CPI</i>	Ali Ouattara: Président	Fight against impunity and promotion of the activities of the International Criminal Court in Côte d'Ivoire	
<i>WANEP Section Côte d'Ivoire</i>	Mamadou FOFANA	Peace and security	National and subregional (West Africa)
<i>FOSCAO-CI</i>	M Kouadio KONAN	NGO network	National and subregional (West Africa)
<i>Convention de la Société Civile Ivoirienne</i>	Jean Kouadio BOSSON	NGO network	National
<i>ONG PÉHÉ</i>	BOHI Nazère	Rural development	Local, Toulépleu
<i>COFEMCI Coordination des femmes de Cote d'Ivoire pour les Elections et la Reconstruction Post-Crise</i>	Dr Marie-Paule KODJO	Post conflict reconstruction	Nationwide

3.2 Human Rights Experts with whom the author interacted in the preparation of this work in Côte d'Ivoire and elsewhere in Africa between 2009 and 2013

Name/Function	Country
Augustin Some Human Rights Officer, Civil Society Desk United Nations Mission in Côte d'Ivoire	Burkina Faso
Sore Mahamadou Sociologist and Human Rights Expert Formerly, President of Amnesty International, Burkina Faso	Burkina Faso
Patrick Ngouan Formerly President of the Ivorian League of Human Rights and the Convention of Ivorian Civil Society (the largest network in the country)	Côte d'Ivoire
Blanche Pango Professor of Civil Engineering and formerly coordinator of the Women Network for Amnesty International Côte d'Ivoire	Côte d'Ivoire
Edmond Djama Judge of the Court of Appeal Formerly Director of Protection in Ministry of Human Rights	Côte d'Ivoire
Bakary Gbane Human Rights Education Project Manager Formerly member of the Ivorian human Rights Commission	Côte d'Ivoire
Gle Bouadjike Traditional communicator	Côte d'Ivoire
Guillaume Ngefa Formerly President of Azadho Deputy Director, Human Rights Division United Nations Mission in Côte d'Ivoire	Democratic Republic of the Congo
Alfa Fall (deceased) Formerly director of the Institute for Development and Human Rights Studies	The Gambia
Kwame Karikari Executive Director Media Foundation for West Africa	Ghana
Edward Amuzu Human Rights Lawyer	Ghana
Samuel Zan Akologo Former member of the International Executive Council of Amnesty International	Ghana
Eke Ubiji Former Director Amnesty International Nigeria	Nigeria
Saka Azimazi Coordinator West African Network of National Human Rights Institutions	Nigeria
Sidiki Kaba Honorary President International Federation of Human Rights	Senegal
Isma Daddis Sagna President Awana, civil society capacity building organization	Senegal
Sadikh Niass Human Rights Consultant, Executive Staff of the Rencontre africaine pour la defense des droits de l'Homme	Senegal

<p>Norah Matovu-Winyi Human Rights Consultant Formerly Executive Director of Ugandan Human Rights Network</p>	<p>Uganda</p>
<p>Pamela Okille Executive Director Akijul Consulting Capacity Development Consultant</p>	<p>Uganda</p>

4 FORMER PRESIDENT MBEKI'S LECTURE ON THE AFRICAN RENAISSANCE

South African Deputy President Thabo Mbeki speaks at the United Nations University

9 April 1998

Source



THE AFRICAN RENAISSANCE, SOUTH AFRICA AND THE WORLD¹

We must assume that the Roman, Pliny the Elder, was familiar with the Latin saying, 'Ex Africa semper aliquid novi!' (Something new always comes out of Africa). Writing during the first century of the present millennium, Pliny gave his fellow Romans some startlingly interesting and supposedly new information about Africans. He wrote: 'Of the Ethiopians there are diverse forms and kinds of men. Some there are toward the east that have neither nose nor nostrils, but the face all full. Others that have no upper lip, they are without tongues, and they speak by signs, and they have but a little hole to take their breath at, by the which they drink with an oaten straw ... In a part of Afrikke be people called Pteomphane, for their King they have a dog, at whose fancy they are governed ... And the people called Anthropomphagi which we call cannibals, live with human flesh. The Cinamolgi, their heads are almost like to heads of dogs ... Blemmyis a people so called, they have no heads, but hide their mouth and their eyes in their breasts.' (Cited in John Reader *Africa: A biography of the continent* Hamish Hamilton, London, 1997.)

These images must have frightened many a Roman child to scurry to bed whenever their parents said, 'The Africans are coming! The strange creatures out of Africa are coming!'

Happily, fifteen centuries later, Europe had a somewhat different view of the Africans. At the beginning of the 16th century, Leo Africanus, a Spaniard resident in Morocco, visited West Africa and wrote the following about the royal court in Timbuktu, Mali:

The rich king of Timbuktu ... keeps a magnificent and well-furnished court ... Here are great store of doctors, judges, priests, and other learned men, that are bountifully maintained at the king's cost and charges. And hither are brought diverse manuscripts or written books out of Barbarie, which are sold for more money than any other merchandise (Reader, *op cit*).

¹ 'The African Renaissance, South Africa and the World' at <http://www.unu.edu/unupress/mbeki.html> (accessed 19 June 2010).

Clearly, this was not the Dog King of which Pliny had written at the beginning of the millennium, but a being as human as any other and more cultured and educated than most in the world of his day. And yet five centuries later, at the close of our millennium, we read in a book published last year:

I am an American, but a black man, a descendant of slaves brought from Africa ... If things had been different, I might have been one of them (the Africans) – or might have met some ... anonymous fate in one of the countless ongoing civil wars or tribal clashes on this brutal continent. And so I thank God my ancestor survived that voyage (to slavery) ... Talk to me about Africa and my black roots and my kinship with my African brothers and I'll throw it back into your face, and then I'll rub your nose in the images of the rotting flesh (of the victims of the genocide of the Tutsis or Rwanda) ... Sorry, but I've been there. I've had an AK-47 (automatic rifle) rammed up my nose, I've talked to machete-wielding Hutu militiamen with the blood of their latest victims splattered across their T-shirts. I've seen a cholera epidemic in Zaire, a famine in Somalia, a civil war in Liberia. I've seen cities bombed to near rubble, and other cities reduced to rubble, because their leaders let them rot and decay while they spirited away billions of dollars – yes, billions – into overseas bank accounts ... Thank God my ancestor got out, because, now, I am not one of them (Keith B Richburg *Out of America: A black man confronts Africa*. Basic Books, New York, 1997).

And this time, in the place of the Roman child, it is the American child who will not hesitate to go to bed when he or she is told, 'The Africans are coming! The barbarians are coming!'

In a few paragraphs, quoted from books that others have written, we have traversed a millennium. But the truth is that we have not travelled very far with regard to the projection of frightening images of savagery that attend the continent of Africa.

Images of hope and despair

And so it may come about that some who harbour the view that as Africans we are a peculiar species of humanity pose the challenge: How dare they speak of an African Renaissance? After all, in the context of the evolution of the European peoples, when we speak of the Renaissance, we speak of advances in science and technology, voyages of discovery across the oceans, a revolution in printing and an attendant spread, development and flowering of knowledge and a blossoming of the arts.

And so the question must arise about how we who, – in a millennium, only managed to advance from cannibalism to a 'blood-dimmed tide' of savages who still slaughter countless innocents with machetes, and on whom another, as black as I, has turned his back, grateful that his ancestors were slaves – how do we hope to emulate the great human achievements of the earlier Renaissance of the Europe of the 15th and 16th centuries?

One of our answers to this question is that, as Africans, we recall the fact that as the European Renaissance burst into history in the 15th and 16th centuries, there was a royal

court in the African city of Timbuktu which, in the same centuries, was as learned as its European counterparts.

What this tells me is that my people are not a peculiar species of humanity! I say this here today both because it is true, but also because I know that you, the citizens of this ancient land, will understand its true significance. And as we speak of an African Renaissance, we project into both the past and the future. I speak here of a glorious past of the emergence of *homo sapiens* on the African continent.

I speak of African works of art in South Africa that are a thousand years old. I speak of the continuum in the fine arts that encompasses the varied artistic creations of the Nubians and the Egyptians, the Benin bronzes of Nigeria and the intricate sculptures of the Makonde of Tanzania and Mozambique. I speak of the centuries-old contributions to the evolution of religious thought made by the Christians of Ethiopia and the Muslims of Nigeria.

I refer also to the architectural monuments represented by the giant sculptured stones of Aksum in Ethiopia, the Egyptian sphinxes and pyramids, the Tunisian city of Carthage, and the Zimbabwe ruins, as well as the legacy of the ancient universities of Alexandria of Egypt, Fez of Morocco and, once more, Timbuktu of Mali. When I survey all this and much more besides, I find nothing to sustain the long-held dogma of African exceptionalism, according to which the colour black becomes a symbol of fear, evil and death.

I speak of this long-held dogma because it continues still to weigh down the African mind and spirit, like the ton of lead that the African slave carries on her own shoulders, producing in her and the rest a condition which, in itself, contests any assertion that she is capable of initiative, creativity, individuality, and entrepreneurship. Its weight dictates that she will never straighten her back and thus discover that she is as tall as the slave master who carries the whip. Neither will she have the opportunity to question why the master has legal title both to the commodity she transports on her back and the labour she must make available to ensure that the burden on her shoulders translates into dollars and yen.

An essential and necessary element of the African Renaissance is that we all must take it as our task to encourage she, who carries this leaden weight, to rebel, to assert the principality of her humanity – the fact that she, in the first instance, is not a beast of burden, but a human and African being.

But in our own voyage of discovery, we have come to Japan and discovered that a mere 130 years ago, the Meiji Restoration occurred, which enabled your own forebears to project both into their past and their future. And as we seek to draw lessons and inspiration from what you have done for yourselves, and integrate the Meiji Restoration into these universal things that make us dare speak of an African Renaissance, we too see an African continent which is not 'wandering between two worlds, one dead, the other unable to be born'.

‘A rediscovery of ourselves’

But whence and whither this confidence? I would dare say that that confidence, in part, derives from a rediscovery of ourselves, from the fact that, perforce, as one who is critical of oneself, we have had to undertake a voyage of discovery into our own antecedents, our own past, as Africans. And when archaeology presents daily evidence of an African primacy in the historical evolution to the emergence of the human person described in science as *homo sapiens*, how can we be but confident that we are capable of effecting Africa’s rebirth?

When the world of fine arts speaks to us of the creativity of the Nubians of Sudan and its decisive impact on the revered and everlasting imaginative creations of the African land of the Pharaohs – how can we be but confident that we will succeed to be the midwives of our continent’s rebirth? And when we recall that African armies at Omduraman in the Sudan and Isandhlwana in South Africa out-generalled, out-soldiered and defeated the mighty armies of the mighty and arrogant British Empire in the seventies of the last century, how can we be but confident that through our efforts, Africa will regain her place among the continents of our universe?

And in the end, an entire epoch in human history, the epoch of colonialism and white foreign rule, progressed to its ultimate historical burial grounds because, from Morocco and Algeria to Guinea Bissau and Senegal, from Ghana and Nigeria to Tanzania and Kenya, from the Congo and Angola to Zimbabwe and South Africa, the Africans dared to stand up to say the new must be born, whatever the sacrifice we have to make – Africa must be free!

We are convinced that such a people has a legitimate right to expect of itself that it has the capacity to set itself free from the oppressive historical legacy of poverty, hunger, backwardness and marginalisation in the struggle to order world affairs, so that all human civilisation puts as the principal objective of its existence the humane existence of all that is human!

And again we come back to the point that we, who are our own liberators from imperial domination, cannot but be confident that our project to ensure the restoration not of empires, but the other conditions in the 16th century described by Leo Africanus: of peace, stability, prosperity, and intellectual creativity, will and must succeed! The simple phrase ‘We are our own liberators!’ is the epitaph on the gravestone of every African who dared to carry the vision in his or her heart of Africa reborn.

The conviction therefore that our past tells us that the time for Africa’s Renaissance has come, is fundamental to the very conceptualization of this Renaissance and the answer to the question: Whence this confidence? Unless we are able to answer the question ‘Who were we?’ we will not be able to answer the question ‘What shall we be?’ This complex exercise, which can be stated in simple terms, links the past to the future and speaks to the

interconnection between an empowering process of restoration and the consequences or the response to the acquisition of that newly restored power to create something new.

Learning from Japan

If, at this point, you asked me whether I was making a reference to the Meiji Restoration and its impact on the history and evolution of this country, my answer would be, Yes! However, I would also plead that you should not question me too closely on this matter, to avoid me exposing my ignorance.

But this I would like you to know that in the depth of my ignorance, I am moved by the conviction that this particular period in the evolution of Japan, to the point, today, when her economic problems are those of a surfeit rather than the poverty of resources, has a multiplicity of lessons for us as Africans, which we cannot afford to ignore or, worse still, not to know. And if we as students are badly informed, you have a responsibility to be our teachers. We are ready to learn and to become our own teachers as a result.

We would also like you to know that our determination to learn is exemplified by the willingness we have demonstrated to learn on our own from our experiences. I refer here, in particular, to the period since the independence of many of our countries. Among many Africans, this has been referred to as the neo-colonial period.

This constitutes an honest admission of the fact that an important feature of African independence at that stage was that the development of these independent states was determined by the reality that the fundamental, structural relationship between the independent states and the former colonial powers did not change. As a consequence of the acquisition of independence, new state symbols had been adopted and were displayed daily. New state institutions were created. Political and other decision-making processes commenced which represented and signified the formation of new nation-states. At last, Africans were governing themselves.

However, reality, including the purposes of the Cold War, dictated that the former colonial powers continued to hold in their hands the power to determine what would happen to the African people over whom, in terms of international and municipal law, they no longer had any jurisdiction. The mere recognition that this signified a neo-colonial relationship, rather than genuine independence, affirmed the point that the peoples of our continent had not abandoned the determination to be their own liberators!

Much of what you see reported in your own media today, represented, for instance, by the exit from the African stage of a personality such as General Mobutu Sese Seko of the former Zaire, represents the death of neo-colonialism on our continent. And so we must return to the question, 'Whence the confidence that we, as Africans, can speak of an African Renaissance?'

What we have said so far is that both our ancient and modern history as well as our own practical and conscious deeds convey the same message: that genuine liberation, in the context of the modern world, is what drives the Africans of today as they seek to confront the problems which for them constitute a daily challenge.

Defining liberation

The question must therefore arise: What is it which makes up that genuine liberation?

The first of these (elements) is that we must bring to an end the practices as a result of which many throughout the world have the view that as Africans, we are incapable of establishing and maintaining systems of good governance. Our own practical experiences tell us that military governments do not represent the system of good governance which we seek.

Accordingly, the continent has made the point clear that it is opposed to military coups and has taken practical steps, as exemplified by the restoration to power of the elected government of Sierra Leone, to demonstrate its intent to meet this challenge when it arises. Similarly, many governments throughout the continent, including our continental organisation, the OAU, have sought to encourage the Nigerian government and people to return as speedily as possible to a democratic system of government.

Furthermore, our experience has taught us that one-party states also do not represent the correct route to take towards the objective of a stable system of governance, which serves the interests of the people. One of the principal demands in our liberation struggle, as we sought to end the system of apartheid was: 'The people shall govern!' It is this same vision which has inspired the African peoples so that, during the present decade, we have seen at least 25 countries establish multi-party democracies and hold elections so that the people can decide on governments of their choice.

The new South Africa is itself an expression and part of this African movement towards the transfer of power to the people. At the same time, we are conscious of the fact that each country has its particular characteristics to which it must respond as it establishes its democratic system of government.

Accordingly, none of us seek to impose any supposedly standard models of democracy on any country, but want to see systems of government in which the people are empowered to determine their destiny and to resolve any disputes among themselves by peaceful political means.

In our own country, conscious of the need to properly handle the contradictions and conflicts that might arise among different ethnic and national groups, aware also of the fact that such conflicts have been an important element of instability on the continent, we have

made it a constitutional requirement to establish a Commission for the Promotion of Cultural, Language and Religious Rights.

In this context, we must also mention two initiatives which the continent as a whole has taken through the agency of the Organisation of African Unity. We refer here to the establishment of the inter-state Central Organ for the Prevention and Resolution of Conflicts which is empowered to intervene to resolve conflicts on the continent and which is currently working on the design of an instrument for peace-keeping to increase our collective capacity to intervene quickly, to ensure that we have no more Rwandas, Liberias or Somalias.

The second initiative to which we refer is the adoption of the African Charter of Human and People's Rights, which sets norms according to which we ourselves can judge both ourselves and our sister countries as to whether we are conducting ourselves in a manner consistent with the defence and promotion of human and people's rights. Like others throughout the world, we too are engaged in the struggle to give real meaning to such concepts as transparency and accountability in governance, as part of the offensive directed against corruption and the abuse of power.

Popular rule and political rebirth

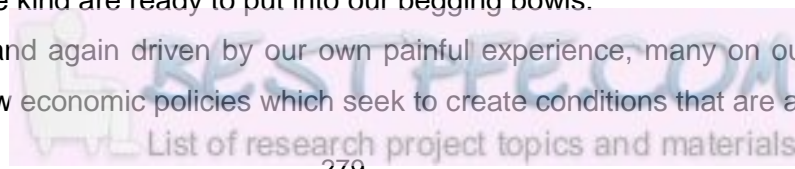
What we are arguing therefore is that in the political sphere, the African Renaissance has begun. Our history demands that we do everything in our power to defend the gains that have already been achieved, to encourage all other countries on our continent to move in the same direction, according to which the people shall govern, and to enhance the capacity of the OAU to act as an effective instrument for peace and the promotion of human and people's rights, to which it is committed.

Such are the political imperatives of the African Renaissance which are inspired both by our painful history of recent decades and the recognition of the fact that none of our countries is an island which can isolate itself from the rest, and that none of us can truly succeed if the rest fail.

The second of the elements of what we have described as the genuine liberation of the peoples of Africa is, of course, an end to the tragic sight of the emaciated child who dies because of hunger or is ravaged by curable diseases because their malnourished bodies do not have the strength to resist any illness.

What we have spoken of before, of the restoration of the dignity of the peoples of Africa itself, demands that we deal as decisively and as quickly as possible with the perception that as a continent we are condemned forever to depend on the merciful charity which those who are kind are ready to put into our begging bowls.

Accordingly, and again driven by our own painful experience, many on our continent have introduced new economic policies which seek to create conditions that are attractive for



domestic and foreign investors, encourage the growth of the private sector, reduce the participation of the state in the ownership of the economy and, in other ways, seek to build modern economies.

Simultaneously, we are also working to overcome the disadvantages created by small markets represented by the relatively small numbers of people in many of our nation states. Regional economic associations have therefore been formed aimed at achieving regional economic integration, which in many instances would provide the necessary condition for any significant and sustained economic growth and development to take place.

In our own region, we have the Southern African Development Community, which brings together a population of well over 100 million people. The community has already taken the decision to work towards transforming itself into a free-trade area and is currently involved in detailed discussions about such issues as the timetable for the reduction of tariffs, to encourage trade among the member states and thus to take the necessary steps leading to the creation of the free trade area to which we have referred.

We are also engaged in other initiatives aimed at the development of infrastructure throughout the region, both as an expression of development and to create the basis for further development and therefore a sustained improvement in the standard of living of the people.

Cooperation against violence

As part of the determined offensive to achieve integrated and mutually beneficial regional development, we have taken other initiatives to deal with common regional problems, going beyond the directly economic. I refer here to the establishment of a regional instrument to address questions of regional security, peace and stability, including the building of regional peace-making and peacekeeping capacity. I refer also to the development of a regional system of cooperation to combat crime, including trade in narcotics and illegal firearms, as well as the evolution of common programmes and legislative frameworks to deal with such challenges as violence against women and children.

We are therefore determined to ensure that we end the situation according to which, for many years, Africa recorded the slowest rates of economic growth and, in many instances, actually experienced economic decline. Already, a significant number of countries have shown relatively high rates of growth as a direct consequence of changes in economic policy and, of course, the achievement of stability within our countries, as a result of the establishment of democratic systems of government.

These economic objectives, which must result in the elimination of poverty, the establishment of modern multi-sector economies, and the growth of Africa's share of world economic activity, are an essential part of the African Renaissance. We are certain that the

movement towards their achievement will also be sustained precisely because this movement represents an indigenous impulse which derives from our knowledge of the mistakes we have made in the past and our determination to put those mistakes behind us.

I say this to emphasize the point that necessarily the African Renaissance, in all its parts, can only succeed if its aims and objectives are defined by the Africans themselves, if its programmes are designed by ourselves and if we take responsibility for the success or failure of our policies.

As South Africans, we owe our emancipation from apartheid in no small measure to the support and solidarity extended to us by all the peoples of Africa. In that sense our victory over the system of white minority domination is an African victory. This, I believe, imposes an obligation on us to use this gift of freedom, which is itself an important contribution to Africa's Renaissance, to advance the cause of the peoples of our continent.

Building on successes

The first thing we must do, clearly, is to succeed. We must succeed to strengthen and further entrench democracy in our country and inculcate a culture of human rights among all our people, which is, indeed, happening.

We must succeed to rebuild and reconstruct our economies, achieve high and sustained rates of growth, reduce unemployment, and provide a better life for the people, a path on which we have embarked.

We must succeed to meet the needs of the people so as to end poverty and improve the quality of life by ensuring access to good education, adequate health care, decent homes, clean water and modern sanitation, and so on, again a process on which we have embarked.

We must take decisive steps to challenge the spread of HIV/AIDS, of which Africa accounts for two-thirds of the world total of those infected. Our government has taken the necessary decisions directed at launching and sustaining a big campaign to confront this scourge.

We must discharge our responsibilities to ourselves, future generations and the world with regard to the protection of the environment, cooperating with all nations to meet what is, after all, a common challenge.

We must rise to the critical challenge of creating a non-racial and non-sexist society, both of which objectives are also contained within our constitution. I believe that we, who were exposed to the most pernicious racism represented by the system of apartheid, have the historic possibility and responsibility indeed to create a non-racial society, both in our own interest and as our contribution to the continuing struggle throughout the world to fight racism, which remains an unfortunate feature of many societies.

Similarly, we have a real possibility to make real advances in the struggle for the genuine and all-round emancipation of women and have, with this objective in mind, established a constitutional commission for gender equality, which will help our society as a whole to measure the progress we are making to secure gender equality.

Many African peoples throughout Southern Africa sacrificed their lives to help us secure our freedom. Others further afield ignored the fact of their own poverty to contribute resources to guarantee our emancipation. I am convinced that this immense contribution was made not only so that we end the apartheid crime against humanity, but also so that we build a society of which all Africa would be proud because it would address also the wrong and negative view of an Africa that is historically destined to fail.

Similarly, the peoples of Africa entertain the legitimate expectation that the new South Africa, which they helped to bring into being, will not only be an expression of the African Renaissance by the manner in which it conducts its affairs, but will also be an active participant with other Africans in the struggle for the victory of that Renaissance throughout our continent.

Necessarily, therefore we are engaged and will continue to be engaged in Africa's efforts to guarantee peace for her children, to feed and clothe them, to educate them and to bring them up as human beings as human as any other in the world, their dignity restored and their equal worth recognized and valued throughout our universe.

Interdependence means global action

We would like you to join us in the noble struggle to achieve these objectives. The process of globalization emphasizes the fact that no person is an island, sufficient to himself or herself. Rather, all humanity is an interdependent whole in which none can be truly free unless all are free, in which none can be truly prosperous unless none elsewhere in the world goes hungry, and in which none of us can be guaranteed a good quality of life unless we act together to protect the environment.

By so saying, we are trying to convey the message that African underdevelopment must be a matter of concern to everybody else in the world, that the victory of the African Renaissance addresses not only the improvement of the conditions of life of the peoples of Africa but also the extension of the frontiers of human dignity to all humanity. Accordingly, we believe that it is important that the international community should agree that Africa constitutes the principal development challenge in the world. Having made this determination, we believe that we should then all join forces to ensure that we elaborate and implement practical programmes of action to respond to this principal development challenge.

Urgent steps are required to bring about debt relief to the many countries on our continent which suffer from an unsustainable debt burden. Measures must be taken to encourage larger inflows of capital into the continent, taking advantage of the fact of changed economic policies and improved political circumstances which have brought many of our countries into the mainstream of world developments with regard to the creation of circumstances which make for high and sustained economic growth.

The developed world has to follow more generous trade policies, which should ensure easier access of African products into their markets. Further, we still require substantial flows of well-directed development assistance. Accordingly, we believe that steps should be taken to reverse the decline in such assistance which has occurred in many countries of the developed world.

Similarly, as the process of globalization develops apace, enhancing the need for a multilateral process of decision making affecting both governments and the non-governmental sector, it is necessary that, acting together, we ensure that Africa, like other regions of the developing world, occupies her due place within the councils of the world, including the various organs of the United Nations.

It is our hope and conviction that this important member of the world community of nations, Japan, will see itself as our partner in the practical promotion of the vision of an African Renaissance. By acting on the variety of matters we have mentioned and others besides, we trust that Japan will continue to place herself among the front ranks of those who are driven to act not only within the context of a narrowly defined national interest, but with the generosity of spirit which recognizes the fact that our own humanity is enriched by identifying ourselves especially with those who suffer.

When once more the saying is recalled, *Ex Africa semper aliquid novi!* (something new always comes out of Africa!), this must be so, because out of Africa reborn must come modern products of human economic activity, significant contributions to the world of knowledge, in the arts, science and technology, new images of an Africa of peace and prosperity.

Thus shall we, together and at last, by bringing about the African Renaissance depart from a centuries-old past which sought to perpetuate the notion of an Africa condemned to remain a curiosity slowly grinding to a halt on the periphery of the world. Surely those who are the offspring of the good that sprang from the Meiji Restoration would not want to stay away from the accomplishment of so historic a human victory!

Thank you.

Question-and-answer session following the speech

Rector van Ginkel, United Nations University:

Thank you very much, Mr Mbeki.

I think we all understood well your invitation to join you in the promotion of the 'African Renaissance', because it has become clear that no single person nor one single country can ever achieve this aim.

Achieving this is not just the interest of African countries and the African people, but it is in the interest of the whole world. This is an opportunity at the moment, now that this strong force in fact has been unleashed all over the continent and the concept is becoming more and more known and supported around the world.

Well, you are so kind to say that you are prepared to take on questions. You will be supported in answering the questions by some other experts here on stage, so no one in the audience should be afraid to pose even the most difficult questions, because there is a lot of thinking power from Africa in fact assembled here.

Q: Would you give some further details on some of the most important challenges for an African Renaissance?

Mr Mbeki: We are saying, for instance, an important element which needs to be addressed with regard to meeting this challenge of African development is the debt problem. The debt problem has to be dealt with.

You know about the highly indebted programme concerning the poor countries and the slowness in the movement with regard to the implementation of that programme. The periods that are required by the multilateral institutions for countries to prove themselves that they would not act in the manner that will result in the measures of new debt ... are long. The burden continues to weigh down. You have continuous greater outflows of resources out of Africa as result of this servicing of that debt.

Now I do not know if you want us to go into more detail with regard to this question, but the need to address the matter of the debt burden is important, and we're hoping for instance that this matter will be dealt with again.

When President Clinton was in South Africa, we raised it with him. And he undertook that indeed when the G-8 (group of eight industrialized countries) meets he would seek to raise this question. We are hoping that the same position – well, the same position has been taken by the Prime Minister of Japan.

But as I said earlier, the issue of easier access of African products into the markets of the developed world is important. Again, I don't think we have time to discuss this matter in any particular detail. But you see, for instance, a part of what we think is that when we are

dealing with the least-developed countries, I am talking particularly about the World Trade Organization, we might start from the position that the products of the least-developed countries should have duty-free access to all of the economies of the developed world.

So that indeed the possibility for the least-developed countries to trade freely with the developed world then becomes one of the ways by which the least-developed become less least-developed.

The third point we are making is that it is necessary to take whatever measures we can take to encourage larger inflows of foreign capital into Africa. I am sure you would be familiar with the figures about this, that when you compare Africa with other regions of the world, Africa will be at the bottom in terms of the regions of the world that attract foreign capital.

I think in part the problem is the persistence of particular images in people's minds about the negative things about the continent. I think, in part, it is to do with a tendency to look at Africa as one whole. So that if something goes wrong in South Africa, people further afield do not say; 'Something has gone wrong in South Africa'; they say, 'Something has gone wrong in Africa'.

So I am saying that one of the things which I think very important is a better communication of what the African people themselves are doing to change their conditions.

The gentleman just has spoken who has been in Kenya and Uganda and Tanzania, and you can see in those countries the great efforts that people have made to move away from one-party states, to address matters of economic policy, to open up these economies in all sorts of ways.

It may well be that that kind of information is not reaching people sufficiently. I am taking in particular here about people who might be interested to invest in the African continent. That's something that needs to be addressed.

I was saying also that the matter of development assistance needs to be addressed, because it is in itself not necessarily bad. It is true that in the past few years private capital inflows into Africa and other developing countries have superseded significantly official development assistance into these countries.

If it was merely a relative matter, it might not be so bad, but you have had arguments that there was a need to reduce development assistance in an absolute way. We don't think this is correct. And we have said that we don't believe the contrasting of development assistance and trade is a correct approach. So, as I was saying, again we could get into the detail of this, (but) I am not sure that would have the time.

We are saying that 'Let's all make common determination that Africa constitutes the principal development challenge in the world'.

We had a discussion two and a half months ago with the president of the World Bank to discuss precisely this question. To say that if you look at the expenditures of the World Bank group, of the five regions in the world which the World Bank deals with, in all instances, Africa is at the bottom. Whether you are talking about development finance or you are talking about international finance cooperation, talking about concessional money, talking about trade promotion – it does not matter what you talk about.

In all the various expenditure items of the World Bank, Africa will be at the bottom.

So we were saying, and he agreed fortunately, that why don't we all agree that if you look at the rates of economic growth and restructuring of economies, integration of the world economy, all of these questions. If you look at that, it is clear that the biggest of the development challenges among these five regions with which World Bank deals is Africa. But the figures don't reflect this. So it is necessary, having said this is the principal development challenge for reasons that are obvious, that then we try and move not only the multilateral institutions, but I think also countries which have got some capacity to move in a way which responds to a determination which says 'Africa is our principal development challenge'.

The impact of the process of globalization on the sovereignty of countries is an important factor of today's world. The weaker, the smaller you are, the more decisive that impact of globalization is on this matter of sovereignty.

Decisions are taken by the World Trade Organization which we may not be able to influence about tariffs and about the rates at which they must be reduced and so on. Our decisions are taken out of the hands of individual countries; they become multilateral agreements which are enforceable across the globe.

And we believe that one of the correct responses to that process of globalization is to make sure that the smaller countries of the world therefore have a proper place in the decision-making processes of these institutions which take decisions which have a universal impact. And again one we can go into the detail of that, but these are some of the points that we are raising.

Q: What sort of role is South Africa ready to play for the development of the entire continent of sub-Saharan Africa?

Mr Mbeki: One of the things that is happening with regard to countries of southern Africa that have been mentioned is that you have had some noticeable movement of capital from South Africa into some of the economies in the region.

For instance you might have seen this in Uganda, that part of the process of the development of the telecommunication infrastructure there is partly as a result of new investment that has been put into that sector by South African companies, as does indeed

another telecommunication license I think that is coming in Uganda on which, again, South African companies are bidding.

You would also have seen these things in Tanzania, of an involvement by South African corporations in the privatization processes of Tanzania and in some interesting areas that have already had an impact in terms of improvement of quality, growth of exports in Tanzania, and recovery of production facilities that have collapsed.

You would also see in Tanzania a number of South African mining companies that have come into mining in Tanzania to create new capacities and to expand existing capacity. Or, I do not know which airline you might have used while you were in the region. If you used Alliance Airline, it is a consortium of South African Airways and other airways in the region of East Africa.

So I am saying that you have that whole process of investment from South Africa in the economies of the region, and that would include tourism, so I think that's part of what will happen.

And as I was saying, as the southern African development community we've taken the decision to constitute ourselves into a free-trade area and we are involved in discussions about this. And it would seem to us that one of the things that we need to do, as South Africa, is to perhaps move ahead of the rest of the countries of the region because of the relative strength of South African economy to speed up the process of arriving at that free trade area so that we lower tariffs into the South African economy faster than everybody else. So that indeed countries like Tanzania, which are part of the development community, can then gain that easier and better access into what is after all a larger market.

So there are a whole variety of matters like this which point to, I think, a fairly rapid process of regional economic integration taking place.

Q: As immediate post-independence leaders in Africa are now beginning gradually to leave the stage – the generation that a Nigerian Nobel laureate often referred to as a 'wasted generation' – and your new generation of African leaders are beginning to move centre stage in African affairs, can we say for sure that the problem of leadership that has held down African so long is about to come to an end?

Mr Mbeki: I think, personally, that the matter is not really so much a matter of leaders as a matter of the peoples of our continent. I think that the experience that we've had as Africans, which has meant, as I was saying, military coups, one-party states, meant corruption and so on – I think (this) has taught the masses of our people ... that some things are no longer permissible.

I think we have the fortunate situation in which we live in the post-Cold War world. And you know the instances on the African continent when people (who) were bad for Africa were

maintained in power by various powers because they were useful in the context of that Cold War contest.

I think there are better possibilities now to ensure that we don't have the images of some of the kind of leaders we had in the past, who progressed from being a master sergeant in charge of a platoon and ended up proclaiming themselves emperors. I think that time has passed.

Q: There is a requirement, where you have this scheme, that employment of a certain percentage point go to women and to minorities in South Africa. Do you think the competitiveness of corporations would go hand-in-hand with this?

Mr Mbeki: No, there is no legislation in South Africa which requires that companies must meet particular quotas. It doesn't exist. What we've done is to say that there are some basic challenges in South African society, such as what I was trying to indicate in what I said earlier.

One of these challenges, and it is a very important challenge, is the creation of a non-racial society. You know what apartheid means. You know what legacy it has left.

Fact of the matter is that if you look at South Africa today, four years after liberation, in terms of the socioeconomic setting of South Africa, it's still essentially an apartheid setting. So racism, we believe it is fundamentally important that that matter be addressed. We also believe, again as I was trying to indicate earlier, that the matter of gender equality, the emancipation of women, is very important if we are going to say this is a genuinely democratic society. But the matter needs to be addressed in a very consistent way.

We have a significant proportion of the South African population who are disabled, who I suppose as in many other countries would in the past have been dealt with as welfare cases. But clearly, our orientation, certainly as far as government and the disabled themselves are concerned, is that they don't want to be dealt with as welfare cases, but they want to be treated as normal human beings. And then things need to be done to ensure that despite their disability they are able to participate as fully as they can in the activities that any other human being would be involved in. And therefore, we are discussing draft legislation which says, these matters need to be addressed: racial discrimination, gender discrimination, discrimination against the disabled.

There's nothing in the legislation which speaks about quotas, which prescribes numbers. Rather, the legislation says that the enterprises, economic institutions, business institutions should themselves work out their own plans as to what they will do to address these issues. So there is no legislative compulsion; therefore, what you might have been told about 'You are therefore obliged to take a person who happens to be black, or a woman, or disabled, despite the fact that they are incompetent' – there is no such legislation, and there would not be such legislation either.

But I must make the point that in our society, it is not possible to leave the matter of the racial disparities, the racial differences, to leave those matters unaddressed.

Because if you did, you would indeed be asking for a very big explosion in that society tomorrow, because the majority of this population which continues to suffer from that apartheid legacy surely will not say, 'It was enough for us to be able to get the vote, but it is perfectly all right to continue with a society which continues to discriminate' against them in other ways.

I must say that in reality, many of the foreign investors who have come into the South African economy have been very conscious of these particular matters. I know, for instance, of corporations that didn't require any persuading, did not require any legislation – as soon as they took decisions that they wanted to invest in the South African economy and so on, who actually went out of their way to ensure that they themselves recruited and trained people from among black society, so that they could bring them into positions of management and so on. Because they did not want to reproduce within their companies the South Africa of old, where you would walk into a South African boardroom and you would not think you were in Africa, you would think you are in Europe.

So I'm saying there are companies that have decided on their own, without any persuasion from anybody, to address this matter because they understood the challenge of the creation of this non-racial society themselves, and the importance to themselves as corporate citizens, in terms of ensuring stability in the country.

Q: What are the preferable sectors in South Africa in which people might be interested to investing?

(Mr. Moss Ngoasheng, economic advisor to Mr. Mbeki): The question really will take us the whole afternoon if we're going to deal with it in detail. But I mean just to make a few general points on this matter:

One: The reintegration of the South African economy into the world economy itself offers a whole range of opportunities in terms of modernization. So you are required to do quite a bit of work in terms of identifying those sectors. That's a general point.

And I think that one of the great opportunities that we have in the country is to grow and develop the infrastructure within the country, to service the broad range of requirements and needs that we have in the various areas of our people.

So infrastructure development in its general form is an area for investment: water, electrification, housing, municipal infrastructure and so on. That's an area where as a government we are quite active, the Development Bank of Southern Africa, which is the development arm of the state, is a very active player. We have the (Bank's) CO here; if you have some interest in that regard, you can speak to him. They're piloting a lot of public-private sector partnerships in that area.

We recognize that mining remains the main sector in the South African economy, and therefore mineral processing and mineral beneficiation is an area where we are seeking greater involvement, and in fact, we are happy that there is a lot of interest from Japanese corporations in that area.

The other area which we think offers a lot of opportunities in South Africa is the area of furniture manufacturing and processing of the forest resources that we have.

The general electronics and IT sector is a very fast-growing sector in the South African economy that I think offers again a whole range of possibilities, and we are quite happy to see that a lot of Japanese corporations are back in the economy and making a lot of products from South Africa.

We have a substantial auto component and auto-producing sector, and we probably are one of the largest, fastest-growing after-market producers of components that go into various international markets. We were in Brazil last year and we were surprised to find that some of the auto manufacturers in Brazil actually order all their seats and other components from Port Elizabeth in South Africa. They produce the car in Brazil but the seats are produced in South Africa ...

So there are a number of areas that we can talk about for the rest of the afternoon, but I think those are just the highlights.

The reality of the matter is that the South African economy is bubbling, and there is a whole range of opportunities, and at a distance sometimes you are unlikely to see those. So we invite you to come down and look at those opportunities: the Development Bank of Southern Africa, the Industrial Development Corporation, the Ministry of Trade and Industry, the Investment in South Africa organizations will be able to assist all investors interested in coming down.

Q: Do you have an explanation for this kind of extraordinary response by the leaders and people of South Africa to their long years of oppression?

Mr. Mbeki: And so to the last question. I think that the people of South Africa recognize the fact that all of them are South African. I think that is a matter that is fundamental to the willingness and the capacity to accommodate one another. South Africa belongs to all who live in it. I'm saying that I believe, that indeed all of us believe, that South Africa belongs to all of us.

And secondly, I think that the manner in which the country developed historically produced a mutual dependence among South Africans regardless of colour, which the system of apartheid tried to undermine, but couldn't succeed. And therefore I think that there's a recognition that 'If I want to succeed, I can only achieve that success with the assistance of my neighbour'.

That mutual dependence, which developed as a history of the evolution of our country, makes the South Africans know that it is better that they cooperate among themselves in order to achieve success rather than they fight against one another.

I think also that in the course of the struggle to end apartheid, we arrived at a point where the apartheid regime saw that it could not really defeat the liberation movement, and we ourselves in the liberation movement would not give up, but it might very well take us a bit of time to get to the result of ending the system of apartheid. Therefore, by the time we entered into negotiations, both sides knew that they had not defeated each other, and that both of them were capable of a lot of destruction, and that in the end if you had a lot of destruction, as I was saying, both (sides) will lose something. So in a situation like that, I think it became obvious to everybody that the only way out was not to seek victory one over the other, but rather to find a settlement that would be acceptable to both.

One other thing that happened was that we did in fact spend very many years talking among ourselves as South Africans about the future of South Africa. Many people think that the process of negotiations began in 1990. In fact the process of negotiations to bring about change began five or six years earlier.

And that had to do with a lot of interaction among people who were in the leadership of the society, in various points of leadership in the society: in business, academic world, the religious leadership, sporting people, all sorts of people, the regime itself.

And that particular process was in reality focused on seeing whether we could together elaborate a common vision about the kind of South Africa we want. So as I say, for five or six years we were talking among ourselves to say, 'When we say we want a democratic society, what are we talking about? When we talk about an economy that addresses the interests of all the people rather than a small minority that is white, what are we talking about?' All of these questions ... And indeed, by the time the formal negotiations started, the formal open negotiations started with the government in 1990, they had developed a common vision about what kind of South Africa we wanted. As a consequence of which, one of the things that we agreed was that we need to put into the constitution a set of constitutional principles which would be agreed by everybody, so that all of the various political formations in the country would participate in the process of drawing up and agreeing (on) those constitutional principles.

So that those principles then became the framework within which the new constitution could be drawn by an elected board. The advantage of that was that even the smallest political player in South African society could make an input into drafting that framework of constitutional principles, so that even if they didn't get elected in the elections that then took place afterward, they didn't feel threatened, because they knew that the new constitution that

would be drafted would be drafted in the context of these constitutional principles, which really constituted a consensus about which direction South Africa should go.

And I'm saying that's a consensus which many people worked at, from five or six years before 1990. And I think it's a total of these two issues, the totality of these things, which in the end I think continue to say to South Africans, 'There is no benefit to be gained from any policies which seek to discriminate against another South African'.

There is no benefit to be gained by anybody in the pursuit of policies that might seek revenge for things that were done in the past. Because in the end, if you took that route, what you would in fact be saying is that we must reopen the conflict. And as I was saying, in the end as South Africans we came to the conclusion that the continuation of our conflict would benefit nobody.

Thank you.