

A Critical Review of the Jurisprudence of the African Commission on the Right to Development

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Abstract

This article critically examines the jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission) on the right to development (RTD). Notwithstanding the controversy over the RTD, it is binding in the African human rights system and has been the focus of a number of cases that have come before the African Commission. After briefly examining the historical and theoretical framework of the RTD, the article focuses on the meaning of the right and its duty bearers at the national and international levels. After analysing several cases decided by the African Commission, the article concludes that the RTD is an important composite right that can provide scope, at both an individual and a collective level, for marginalized groups in society to assert their human rights.

INTRODUCTION

The right to development (RTD) is an important, but controversial human right. It is expressly recognized as a right within the African human rights system.¹ As a result of this recognition, the African Commission on Human and Peoples' Rights (African Commission) began to develop a body of jurisprudence on this right.

This article attempts to review critically the jurisprudence of the African Commission on this matter. The objective is to find out to what extent it has helped to clarify the nature and scope of the RTD. The article starts by trying to locate the RTD in its historical context and explain how it has evolved. It then considers the meaning of the RTD and deals with the controversial issue of whether it really is a human right. Notwithstanding the right's controversial character, the emerging view is that, at national level, the state is the primary duty bearer and, at international level, the international community

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1 The "African human rights system" should be understood broadly. It includes the "regional", ie African Union based, system and "sub-regional" systems, such as the Southern African Development Community or the Economic Community of West Africa systems, and even national laws and case law.

should supplement what is done at national level. Furthermore, the RTD is both a collective and an individual right, as well a composite human right comprising civil and political rights, together with socio-economic rights.

After identifying the features of the RTD, the article examines the relevant jurisprudence of the African Commission. It finds that the cases of *SERAC and Another v Nigeria*² (SERAC), *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*³ (DRC) and *Kevin Mgwanga Gumne et al v Cameroon*⁴ (Gumne) did not advance the RTD in the way that *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois) v Kenya*⁵ (Endorois) did. The article concludes by showing that the RTD is critical at this stage of Africa's development and welcomes the African Commission's lead in promoting a better understanding of its role and relevance in human rights development on the continent.

SITUATING THE RIGHT TO DEVELOPMENT⁶

This section sets out a brief discussion of the historical background and evolution of the RTD, and then examines the nature of the concept.

Historical context

The idea of a RTD started with the call by developing countries for the establishment of a New International Economic Order (NIEO) to eliminate world injustice and allow Third World countries to enjoy their development. In 1974, this call led to the adoption of the UN Declaration and Program of Action of the NIEO (NIEO Declaration),⁷ which was followed the same year by the adoption of the Charter of Economic Rights and Duties of States.⁸ Although in principle these instruments were aimed at empowering the developing world, it did not have the economic power to enforce their implementation.⁹ Consequently, by the end of the 1970s, these documents had become irrelevant and the developing world was poorer. Poverty was further aggravated by neo-liberal policies such as the 1980 structural adjustment programmes,¹⁰ the Washington

2 Comm 155/96 of 2001 AHRLR 60 (ACHPR 2001).

3 Comm 227/99: 20th Annual Activity Report of the African Commission, annex IV, 111.

4 Comm 266/2003: 26th Annual Activity Report of the African Commission, annex IV.

5 Comm 276/2003: 27th Annual Activity Report of the African Commission, annex 5.

6 This section relies on the history and theory of the RTD as discussed by SAD Kamga "Human rights in Africa: Prospects for the realization of the right to development under the New Partnership for Africa's Development" (unpublished LLD thesis, University of Pretoria, 2011) at 73 and 76.

7 UN GA res 3201 (S-VI), 1 May 1974.

8 UN GA res 3281 (XXIX).

9 A Eide "Human rights-based development in the age of globalization: Background and prospects" in B Andreassen and S Marks (eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2006, Harvard School of Public Health, Francois Xavier Bagnoud Center For Health and Human Rights) 220 at 228.

10 See: <<http://www.who.int/trade/glossary/story084/en/>> (last accessed 30 April 2013).

Consensus¹¹ and several aspects of the World Trade Agreements on Intellectual Property Rights¹² and Agreement on Agriculture¹³ which hamper the development of Third World countries.

Today the claim of the RTD appears to be driven by three main factors: the impact on human rights caused by powerful actors, external to developing states, advancing rules governing world markets that are widely criticized for being inequitable; the pervasive influence of international economic organizations that continue to espouse neo-liberalism (or its more recent variant); and the corresponding reduction in domestic autonomy that limits the ability of states (particularly poor and less influential states) to decide independently their own economic and social policies.¹⁴

Theoretical framework

The RTD is grounded in the cosmopolitanism philosophy which believes in global justice without consideration of state boundaries because all human beings are assumed to have the same moral standards.¹⁵ “Cosmopolitanism” originates from the Greek words “cosmos” which means world and “polis” which stands for city, together forming “cosmopolis” or world city.¹⁶ The “world city” concept on the other hand, originates from the stoic idea that all human beings are born with a natural faculty of reason and are consequently citizens of the same community, despite their differences.¹⁷ Cosmopolitanism therefore revolves around the idea of world citizenship without consideration of race, gender and other status. Diogenes declared himself “a citizen of the world”¹⁸ and not of Sinope, his country of origin. Based on the cosmopolitan theory, the individual is the subject of moral attention (individualism) and the principle of equality applies to all human beings with regard to nationality and citizenship (universality) and the problems of all human beings should therefore be attended to wherever they reside (generality).¹⁹ While Singer is of the view

11 See: <<http://www.who.int/trade/glossary/story094/en/>> (last accessed 30 April 2013).

12 See: <http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> (last accessed 30 April 2013).

13 Available at: <http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm> (last accessed 30 April 2013).

14 M Salomon “Legal cosmopolitanism and the normative contribution of the right to development” in S Marks (ed) *Implementing the Right to Development - The Role of International Law* (2008, Friedrich Ebert Stiftung) 17 at 19.

15 H Janér “Cosmopolitanism vs the political view: John Rawls and the debate on global justice”, as quoted by Kamga “Human rights in Africa”, above at note 6 at 76. For more on cosmopolitanism, see O Krieman “Dawn of the cosmopolitan: The hope of the global citizens movement” (2006) 15 *GTI Paper Series*, available at: <<http://www.gtinitiative.org/documents/PDF/FINALS/15Movements.pdf>> (last accessed 13 May 2012).

16 Kamga, *ibid.*

17 *Ibid.*

18 *Ibid.*

19 T Pogge *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2nd ed, 2008, Polity Press) at 178; also P Hayden *Cosmopolitan Global Politics* (2005, Ashgate) at 11.

that “neither race nor nation determines the values of a human being’s life and experience”,²⁰ Hayden argues that “human status has a global scope”²¹ and “cosmopolitan justice” rejects borders.²² In this context, being a citizen means thinking of the good of society in an abstract manner, forgetting about one’s personal interest, identity and culture, and just seeing the world as a single community.²³

According to this philosophy, justice is universal, knows no frontiers and all human beings have the responsibility to ensure justice to every other person on earth on the basis²⁴ of the *jus gentium* [law of the people applicable to all countries].²⁵ The idea of universal or global justice that underlies cosmopolitanism informs the claim for the RTD.

Distancing itself from the neo-liberal theory which stands for the supremacy of the individual,²⁶ the RTD rests on equity and fairness in the sharing of world resources, the main issue being centred around “redistribution, access and needs”.²⁷

MEANING OF THE CONCEPT: IS THE RTD REALLY A RIGHT?

Most of the debate around the meaning of the RTD has centred on the question of whether or not it is a human right. This article now examines some of the views on this and indicates what appears to be the emerging or dominant position today.

The RTD as a controversial human right²⁸

The first article of the UN Declaration on the Right to Development²⁹ (UNDRTD) defines the RTD as: “an inalienable human right by virtue of

20 P Singer *One World: The Ethics of Globalisation* (1st ed, 2002, Yale University Press) at 154.

21 Hayden *Cosmopolitan Global Politics*, above at note 19.

22 K-C Tan *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (2004, Cambridge University Press) at 1.

23 B Szerszynski and J Urry “Visuality, mobility and the cosmopolitan: Inhabiting the world from afar” (2006) 57/1 *The British Journal of Sociology* 113, available at: <<http://eprints.lancs.ac.uk/24061/>> (last accessed 30 April 2013).

24 CR Beitz *Political Theory and International Relations* (2nd ed, 1999, Princetown University Press); also T Pogge *Realising Rawls* (1989, Cornell University Press) at part III.

25 C Jones *Global Justice: Defending Cosmopolitanism* (1999, Oxford University Press) at 51.

26 V Morozov “Is cosmopolitan community possible? Liberalism, global solidarity and the political” (paper prepared for presentation at EU Standing Group on International Relations seventh pan-European conference, Stockholm, 9–12 September 2010) at 8, available at: <http://stockholm.sgir.eu/uploads/SGIR_September_2010.pdf> (last accessed 1 June 2012).

27 U Baxi “The New International Economic Order, basic needs and rights: Notes towards development of the right to development” (1978) *Indian Journal of International Law* 225 at 234.

28 The arguments in this section owe a great deal to the controversy on the RTD described by SAD Kamga “The right to development in the African human rights system: The Endorois case” (2011) 2 *De Jure* 381 at 383–85.

29 Adopted by the UN General Assembly in res 41/128 of 4 December 1986.

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”.

This definition has not made the debate on the RTD easy. It is 25 years since the UN General Assembly officially recognized the right in the UNDRTD, 18 years since governments reached a consensus on it,³⁰ 13 years since the open-ended working group was established and an independent expert on the right was appointed,³¹ and seven years since the UN high-level task force on implementing the RTD was established.³² However, the right remains controversial in scholarly debate and at the UN level.

The RTD is the subject of scholarly disagreements. Commenting on the book *Development as a Human Right: Legal, Political and Economic Dimensions*,³³ Whyte claims that the book is an intellectual disaster³⁴ for discussing a myth. In contrast, former UN High Commissioner for Human Rights Louise Arbour believes that it is “excellent scholarly writing” because it fits well in the global consensus for development highlighted in the 2000 Millennium Declaration.³⁵ Bedjaoui sees the RTD as the most important human right or “the alpha and omega of human rights, the first and the last human rights”.³⁶ Dimitrievic refers to it as a right to rights,³⁷ and Shue considers it as a “basic right”³⁸ or “enabling right”³⁹ according to Abi-Saab. Opposed to this is Alston, who asserts:

“The right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights [and] it also permits the Third World to ‘distort’ the issues of human rights by affirming the equal importance of economic, social and

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- 30 Vienna Declaration and Programme of Action, 14–25 June 1993: UN GA A/Conf.157/23 12 July 1993 (Vienna Declaration).
- 31 Commission on Human Rights res 1998/72, adopted without a vote on 22 April 1998, appointed Arjun Sengupta as the UN independent expert on the RTD.
- 32 The fifth session of the working group on the RTD recommended, among other things, the constitution of a high level task force to implement the RTD within the framework of the working group. This recommendation was adopted at the 60th session of the Commission for Human Rights (CHR) in its res 2004/7.
- 33 Above at note 9.
- 34 J Whyte “Review of development as a human right” as quoted by Kamga “The right to development in the African human rights system”, above at note 28 at 383.
- 35 L Arbour “Forward” in Andreassen and Marks (eds) *Development as a Human Right*, above at note 9 at iii.
- 36 M Bedjaoui “The right to development”, as quoted by HJ Steiner, P Alston and R Goodman *International Human Rights in Context: Law, Politics, Morals - Text and Materials* (2008, Oxford University Press) at 1447.
- 37 V Dimitrievic “Is there a right to development?” (paper presented at the annual convention of the International Studies Association, Cincinnati, March 1982).
- 38 H Shue *Basic Rights* (1980, Princeton University Press) at 19–20.
- 39 Salomon “Legal cosmopolitanism and the normative contribution”, above at note 14 at 17.

cultural rights and by linking human rights in general to its 'utopian' aspiration for a new international economic order."⁴⁰

This strong stand against the RTD is supported by Donnelly who sees no legal or even moral reason for a RTD,⁴¹ even though he believes that it is correct to link human rights and development.⁴² Also sharing Donnelly's view is Shivji, who distances himself from the cosmopolitan understanding of the world, and claims that the RTD is grounded "on an illusory model of co-operation and solidarity".⁴³

Reacting to Donnelly's claim that the RTD has no philosophical foundation, M'baye observes that any development enterprise has a human dimension that can be "moral, spiritual and [even] material",⁴⁴ and, to Shivji, he speaks as a cosmopolitan and locates the RTD in the realm of international "solidarity which must be at the centre of all conducts, of all human politics, [of] man himself".⁴⁵ Bello disagrees with Mbaye's contention and criticizes the RTD on the ground that it is:

"too woolly and does not easily invite the degree of commitment that one expects unequivocally in support of an inescapable conclusion; ... The right to development appears to be more like an idea or ideal couched in a spirit of adventure, a political ideology conceived to be all things to all men in a developing world, especially Africa; it lacks purposeful specificity; it is latent with ambiguity and highly controversial and 'directionless'; it strikes a cord of the advent of the good Samaritan."⁴⁶

Sharing this view, Rosas argues that "the precise meaning and status of the right is still in flux".⁴⁷ In support of this opinion, Alfredsson observes that it may be just to maintain that the RTD, at least as provided for by the UNDRTD, is not yet binding on states.⁴⁸ In this regard, one of the most radical

40 P Alston "Making space for new human rights: The case of the right to development" (1988) 3/1 *Harvard Human Rights Yearbook* 3 at 20.

41 J Donnelly "In search of the unicorn: The jurisprudence and politics of the right to development" (1985) 15 *California Western International Law Journal* 473.

42 Id at 477.

43 I Shivji *The Concept of Human Rights in Africa* (1989, Codesria Book Series) at 82.

44 K M'baye "Le droit au développement comme un droit de l'homme" ["The right to development as a human right"] (1972) 5/2-3 *Revue des Droits de l'Homme* 503 at 513.

45 Id at 523.

46 E Bello "Article 22 of the African Charter on Human and Peoples' Rights" in E Bello and B Adjibola (eds) *Essays in Honour of Judge Taslim Olawale Elias* (1992, Martinus Nijhoff) 462 at 462.

47 A Rosas "The right to development" in A Eide, K Krausus and A Rosas (eds) *Economic Social and Cultural Rights* (2001, M Nijhoff) 251 at 251.

48 G Alfredsson "The right to development: Perspective from human rights law" in LA Rehof and C Gulmann (eds) *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (1989, M Nijhoff) 84 at 84.

rejections of the RTD is from Ghai who argues that the right is dangerous for the human rights discourse because, as he puts it, the RTD “[w]ill divert attention from the pressing issues of human dignity and freedom, obfuscate the true nature of human rights and provide increasing resource and support for state manipulation (not to say repression) of civil society and social groups and [lead] the international community for many years in senseless and feigned combat on the urgency and parameters of the right”.⁴⁹

In spite of the strong opposition of scholars such as Ghai, Alston and Donnelly, the reality is that the law of development is “not only a new discipline but also ... a juridical technique for carrying on the struggle against underdevelopment”.⁵⁰ This is very much in line with Eleanor Roosevelt’s observations when, during the early days of the Universal Declaration of Human Rights (UDHR), she said: “[w]e are writing a Bill of Rights for the world, and ... one of the most important rights is the opportunity for development”.⁵¹ Relying on the UN Charter,⁵² the UDHR⁵³ and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁴ Chowdhury and De Waart show that the RTD is a human right in international law.⁵⁵

Nevertheless, it should be noted that the disagreement on the RTD goes beyond academic circles and reaches the UN, where the Non Aligned Movement⁵⁶ and most Third World countries have consistently been opposed by some advanced countries.⁵⁷ As a result of this divergence, the RTD is politicized, as illustrated by the voting pattern on relevant resolutions in the UN.⁵⁸

49 Y Ghai “Whose human rights to development” (Human Rights Unit occasional paper, 1989), as quoted by U Baxi *Human Rights in Post Human World: Critical Essays* (2007, Oxford University Press) at 124.

50 G Espiell “The right to development” (1972) 5 *Revue des Droits de l’Homme* 190 at 190.

51 MG Johnson “The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights” (1987) 9 *Human Rights Quarterly* 19 at 48.

52 Arts 55 and 56.

53 Art 28.

54 Art 2.

55 SR Chowdhury and PJIM De Waart Significance of the right to development in international law: An introductory view” in SR Chowdhury, EMG Denters and PJIM De Waart (eds) *The Right to Development in International Law* (1992, Martinus Nijhoff) 7 at 10.

56 A group comprising Algeria, Bangladesh, Bhutan, China, Cuba, Egypt, India, Indonesia, Iran, Malaysia, Myanmar, Nepal, Pakistan, the Philippines, Sri Lanka, Sudan and Vietnam.

57 The USA, Denmark, Israel and Australia are some of the outsiders.

58 In 1998, res E/CN.4/RES/1998/72 was adopted at the CHR without a vote, whereas, at the General Assembly, 125 votes in favour, one vote against and 42 abstentions were recorded for res A/RES/53/155. In 1999, res E/CN.4/RES/1999/79 was adopted at the CHR without a vote; at the General Assembly, 119 votes for, ten against and 38 abstentions were recorded for res A/RES/54/175. In 2000, res E/CN.4/RES/2000/5 was adopted without a vote at the CHR; res A/RES/55/108 was also adopted without a vote at the General Assembly. At the CHR in 2001, the EU (except the UK) was in favour of the RTD; three abstentions (UK, Canada and the Republic of Korea) were recorded, and Japan and the USA voted against; see CHR res 9, UN ESCOR, 57th sess, at 68: UN doc

The emerging position

The emerging position on the RTD can be examined from four perspectives: the national dimension; the international dimension; its individual or collective character; and its stand alone or composite character.

National dimension

In line with the traditional approach to human rights, the RTD's national dimension vests in the state the primary responsibility to promote, protect and fulfil the right. In other words, states have the primary responsibility to ensure the realisation of the RTD through an adequate constitutionalism, characterized by a strong separation of powers and respect for both the rule of law and human rights. Constitutionalism should be supplemented by appropriate national policies and development strategies conducive to the realisation of the RTD. These policies should lead to the enjoyment of "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".⁵⁹

International dimension

As a result of the interconnectedness of national economies due to globalization and regionalization, the RTD discourse must ensure that international or global policies do not hinder the realization of this right. In this regard, national action should be complemented by international actions revolving around the adoption of fair trade policies on the global market, solving the debt burden of developing countries, ensuring that wealthy countries respect their development assistance pledges and ensuring real global partnership for development in general.⁶⁰ Ensuring an enabling international environment for the realization of the RTD entails focusing "on the important role of the global economic system, and the structure of this system as constraints to national development, and advocate[ing] reforms in global economic governance".⁶¹

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E/CN.4/2001/167 (2001). Also in 2001, at the 56th session of the General Assembly (September – December), 123 votes in favour and four against (Denmark, Israel, Japan and the USA) were recorded, with 44 abstentions; see GA res 150, UN GAOR, 56th sess, supp no 49, at 341: UN doc A/2890 (2001). At its 57th session in December 2002, where the General Assembly adopted the conclusions of the open-ended working group on the RTD, 133 votes were recorded in favour, four votes against (United States, Australia, the Marshall Islands and Palau), and 47 abstentions; see GA res 556, UN GAOR, 57th sess, supp no 49: UN doc A/57/49 (2002).

59 UNDRITD, art 8.

60 For more on international co-operation, see Human Rights Council "Consolidation of findings of the high-level task force on the implementation of the right to development" (11th session of the high-level task force on the implementation of the right to development): UN doc A/HRC/15/WG.2/TF/2/Add.1.

61 S Fukuda-Parr "25 years of the right to development: Achievements and challenges" (statement at the Global Partnerships for Development Conference, Friedrich Ebert Foundation, Berlin, 24–25 February 2011).

The RTD's individual or collective nature

The RTD is an individual as well as a collective right. It is a process which aims to enhance “the well-being of the entire population and of all individuals”.⁶² It is therefore an empowering right which targets individuals and groups. When it is claimed on behalf of a group or a specific community, the beneficiaries are individuals: members of the community. As a rights-based approach to development, the RTD seeks to enhance the development of individual persons and people on a national and an international scale.⁶³

A stand alone or composite human right?

In many respects the RTD underscores the principles of indivisibility and interdependence of all human rights as well as exposing the interconnectedness of all human rights. As a composite human right, it comprises civil, political and socio-economic rights. It comprises the human rights principles of equality, non-discrimination, participation, transparency and accountability as well as international co-operation. It provides a framework to address contemporary challenges to human well-being through the human rights standards addressed in their interconnectedness.

THE AFRICAN APPROACH AND THE JURISPRUDENCE OF THE AFRICAN COMMISSION

The African approach

The African Charter on Human and Peoples' Rights⁶⁴ (African Charter) is the only human rights framework in which the RTD is legally binding. Article 22 states: “(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”

The African Charter thus sets obligatory standards that states cannot bargain or negotiate away. Within the African human rights framework, the RTD is a legal right which should be fulfilled through national policies by state parties. As Baldwin and Morel rightly observe, “the African Charter is unique in codifying a legally binding right to development upon states”.⁶⁵ Baxi sees this

62 UNDRTD, para 2.

63 F Kirchmeier “The right to development – Where do we stand? State of the debate on the right to development” (*Dialogue on Globalization*, occasional paper, 23 July 2006) at 10.

64 Adopted by the Organization of African Unity in Nairobi, Kenya on 27 June 1981 and entered into force on 21 December 1986.

65 C Baldwin and C Morel “Group rights” in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights – The System in Practice, 1986–2006* (2008, Cambridge University Press) 244 at 270. The RTD is binding in the African Charter (art 22) as well as in its protocol on the rights of women in Africa (art 19 provides for the right to sustainable development for women).

inclusion in the African Charter as “the development of the right to development”⁶⁶ by Africa. In doing this, the African Charter laid the foundation on which the African Commission has been trying to develop the concept of RTD in some of the matters that have come before it. It is to these matters that this article now turns.

The right to development in the African Commission jurisprudence

On five separate occasions, the African Commission has received and dealt with communications where the issue of the RTD was raised.⁶⁷ These are discussed below.

Bakweri

In *Bakweri*,⁶⁸ the complainants submitted a communication to the African Commission to claim their historic lands which were being held by non-native people. They grounded their communication on the violation of the right to have their cause heard,⁶⁹ their rights to property,⁷⁰ wealth and natural resources⁷¹ as well as the violation of their RTD. Unfortunately, this case did not go beyond the admissibility phase because the commission came to the conclusion that the applicants had not exhausted local remedies.⁷² Nevertheless, the significance of this case lies in the fact that it showed for the first time that an action could be based on a violation of the RTD.

DRC

Unlike *Bakweri*, *DRC*⁷³ was the first case in which the African Commission had to deal with the merits of a claim raising the issue of the RTD. On 9 March 1999, the DRC lodged a complaint against Burundi, Rwanda and Uganda. The DRC alleged that it was the victim of a military assault by Burundi, Rwanda and Uganda that had invaded its eastern border provinces and committed mass violations of human rights and international law. These violations comprised the mass killing of civilians and the occupation of a hydroelectric dam. The attack on the hydroelectric dam resulted in the interruption of the electricity supply to homes, schools and hospitals, which resulted in the death of patients relying on life support systems.

66 Baxi *Human Rights in Post Human World*, above at note 49 at 124.

67 For more insights on the communications discussed in this section, see Kamga “Human rights in Africa”, above at note 6 at 217–37.

68 Comm no 260/2002, AHRLR (2004) 43.

69 African Charter, art 7(1)(a).

70 *Id.*, art 14.

71 *Id.*, art 21.

72 Art 50 of the African Charter reads: “The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.”

73 Above at note 3.

The DRC also claimed that the respondent states were responsible for human rights violations such as rape, mass looting of civilian property and natural resources as well as the forced movement of populations from the region into “concentration camps” in Rwanda in order to create a Tutsi land. The DRC also alleged violations of numerous provisions of the African Charter. In addition it claimed that the actions encroached upon international law, specifically the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949⁷⁴ and its Additional Protocol 1,⁷⁵ the UN Charter and the UN declaration on friendly relations between nations.⁷⁶ Burundi refused to take part in the proceedings; Rwanda said it would not be involved beyond the admissibility stage and, although Uganda denied the allegations against it, the African Commission found for the applicant. In fact, in reaching its decision, the African Commission followed articles 61 and 62 of the African Charter which empower it to draw inspiration from international law. The respondents were therefore found guilty of the violations of alleged provisions of international law and the African Charter.

More importantly on the RTD, the African Commission found for the applicant on two grounds. First, it found the dumping and mass burial of victims of massacres and killings orchestrated against the people of the Eastern Province of the DRC particularly appalling and made the following pronouncement on the RTD: “[t]he Commission further finds these acts barbaric and in reckless violation of Congolese peoples’ rights to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African tradition and values enunciated in the preamble to the African Charter.”⁷⁷

Here, the African Commission equated the killings and barbaric acts against the Congolese people to a violation of their right to cultural development. Although there is indeed a violation of human rights and the right to life, the African Commission did not explain clearly how the killings and barbaric acts affect the right to cultural development.

Secondly, the African Commission saw a direct link between the right to wealth and national resources and the RTD. It also linked the right to wealth and natural resources to states’ ability to fulfil their individual and collective obligations⁷⁸ to achieve the RTD. In this regard, the Commission said:

74 Available at: <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b36d2>> (last accessed 30 April 2013).

75 Available at: <<http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>> (last accessed 30 April 2013).

76 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, adopted at the 25th session of the GA, 1970, available at: <<http://www.un-documents.net/a25r2625.htm>> (last accessed 30 April 2013).

77 DRC, para 87.

78 African Charter, art 22(2).

"The deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation - their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter."⁷⁹

The realization of the RTD is linked to the achievement of the right to wealth and natural resources. This approach underscores the interconnectedness of human rights generally and more specifically shows that the RTD is a multifaceted human right that should be addressed as such.

SERAC

In *SERAC*,⁸⁰ two non-governmental organizations brought before the African Commission a communication on behalf of the Ogoni people against Nigeria, concerning contracts for oil exploitation on their land by Shell. They alleged, inter alia, the violation of the right not to be discriminated against,⁸¹ and violation of the rights to life,⁸² property,⁸³ health,⁸⁴ a family,⁸⁵ wealth and natural resources,⁸⁶ and a satisfactory environment.⁸⁷ They argued that the Ogoni people did not participate in the conclusion of the contracts (depriving them of their land and natural resources) between the Nigerian government and the Shell Company, nor were they given a share of the profits from the exploitation of their land, that they had been displaced from their ancestral land without compensation and that, as a result, their right to wealth and natural resources had been violated.

The African Commission simply agreed with the complainants that the various rights they alleged had indeed been violated. Although the commission found the violation of the RTD, it was not contained in its ruling. The commission merely mentioned the RTD while considering the violation of the right to food.⁸⁸ Nevertheless, this case can be considered to be another example of the recognition of the scope of the RTD in the African human rights system.

Gumne

In *Gumne*,⁸⁹ the complainants, comprising 14 individuals, brought the communication on their own behalf and on behalf of the people of Southern Cameroon against the Republic of Cameroon. They alleged, inter alia, the

79 DRC, para 95.

80 Above at note 2.

81 African Charter, art 2.

82 Id, art 4.

83 Id, art 14.

84 Id, art 16.

85 Id, art 18.

86 Id, art 21.

87 Id, art 24.

88 *SERAC*, above at note 2, para 64.

89 Above at note 4.

violation of numerous rights including their rights to self-determination, wealth and natural resources as well as the RTD. According to the complainants, their “economic marginalization, and lack of economic infrastructure”⁹⁰ constituted a violation of their RTD.

The African Commission concluded that there was no violation of the RTD because natural resources are scarce in Cameroon as in any other developing country and the government of Cameroon provided “explanations and statistical data showing its allocation of development resources in various socio-economic sectors [in Southern Cameroon]”.⁹¹ In this case, the RTD was considered to include not merely natural resources and economic infrastructure, but also their equitable sharing. The African Commission once again emphasized the composite character of the right, but also added the notion of the “progressive realization of the right to development, and other economic, social and cultural rights”⁹² by the state depending on the availability of resources.

Endorois

At its 46th ordinary session,⁹³ the African Commission delivered an historic decision in *Endorois*.⁹⁴ This communication is important and unique, because, for the first time, the African Commission was able to define the substantive nature of the RTD and what its violation entails. On 22 May 2003, the Centre for Minority Rights Development lodged the complaint with the assistance of Minority Rights Group International and the Centre on Housing Rights and Evictions on behalf of the Endorois community. The complaint concerned the eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s so that a national game reserve and tourist facilities could be established. The communication alleged human rights violations of the Endorois community. According to the complainants, the eviction was a violation of the Endorois people’s human rights resulting from their displacement from their ancestral lands (upon which their sustainable way of life was based) without adequate compensation. In addition, they claimed that the loss of their land interrupted their pastoral activity and infringed their rights to practise their religions and culture as well as their “overall process of development”.⁹⁵ Furthermore, the complainants alleged that the Endorois people were dispossessed from their land and their property without having a say and that all decisions affecting their land were taken without their effective participation; they complained that this violated their RTD.

90 *Id.*, para 205.

91 *Id.*, para 206.

92 *Ibid.*

93 Held in Banjul, The Gambia from 11–25 November 2009.

94 Above at note 5. This section relies on Kamga “The right to development in the African human rights system”, above at note 28 at 386–91.

95 *Endorois*, above at note 5, para 1.

The case reached the African Commission after the Kenyan courts failed to remedy the injustice. It was alleged⁹⁶ that the acts of the Kenyan government violated several rights recognized and protected by the African Charter, such as freedom of conscience and religion,⁹⁷ and the rights to property,⁹⁸ culture,⁹⁹ and free disposition of natural resources and development.¹⁰⁰ As regards the RTD, which is the main focus of this article, the complainants based their arguments on two main grounds: the violation of their right to participation in decisions affecting their land and development; and their right to self-determination and natural resources.¹⁰¹

On the first point, the complainants claimed that they did not take part or participate in the development process and that the well-being of their community was neglected by the Kenyan government.¹⁰² They argued that their consent was not obtained and clearly indicated that an appropriate consent “requires at [sic] minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process with an effective opportunity to participate individually or as a collective”.¹⁰³ In other words, the Endorois people stressed the violation of their right to participation in issues affecting their communities and even their life because they had no say when their land was taken away from them.

In response, the Kenyan government rejected the allegations and argued that the right to participation of all is ensured through a democratic process informed by free and fair elections involving representatives of the Endorois people.¹⁰⁴ The African Commission was called upon to make a decision on the right to participation and its impact on the realization of the RTD.

The right to participation or the right not to be excluded is secured in several human rights instruments.¹⁰⁵ The International Covenant on Civil and Political Rights (ICCPR) caters for the right to participation in these terms:

96 Id, para 22.

97 African Charter, art 8.

98 Id, art 14.

99 Id, art 17.

100 Id, art 21.

101 It is important to note the rights to participation and self-determination are core elements of the RTD as defined by art 1 of the UNDRTD.

102 *Endorois*, above at note 5, para 125.

103 Id, para 133. See also *Mary and Carrie Dann v USA* case 11.140, report no 75/02, InterAmerican CHR, doc 5 rev 1 860 (2002), para 136.

104 Id, para 270.

105 UN GA res A/RES/41/128, December 1986. See also paras 21 and 22 of the Rio Declaration (adopted at the Rio Conference on Environment and Development in Rio de Janeiro, Brazil, 3–4 June 1992) which clearly underline the right of indigenous people to participate in development; the 1990 African Charter for Popular Participation in Development and Transformation (adopted at the International Conference on Popular Participation in Development and Transformation, Arusha, Tanzania, 12–16 February 1990); UN doc E/ECA/CM.16/11,1990; the African Charter, art 13; arts 11 and 12 (for example) of the Declaration on the Rights of Indigenous People: UN res GA/10612 of 13 September 2007.

“[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁰⁶

It could be argued that this provision caters for the right for indigenous people to participate under the concept of ethnic or linguistic minorities. The right to participation is also included in the UNDRTD which sees the human being at the centre of development and therefore the “participant and beneficiary”¹⁰⁷ or rather the alpha and omega of development. Furthermore, not only should individuals and groups participate in development,¹⁰⁸ their participation should “be active, free and meaningful” and they should also benefit from the results of development.¹⁰⁹

In *Endorois*, the African Commission found that the consultations undertaken with the community were inadequate and could not be considered to be effective participation. The conditions of the consultation failed to fulfil the commission’s benchmark of consultations in a form appropriate to the circumstances. The commission observed that “community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve”,¹¹⁰ hence its decision to urge the state to facilitate the right to effective participation of the Endorois in development issues. The commission felt this had to be done in order to protect the community’s RTD.

In calling upon the state to ensure an “active, free and meaningful participation in development”,¹¹¹ by the beneficiaries of development, it could be argued that the African Commission made it clear that, even if the beneficiaries ignore their right to participate, they should be educated and kept informed to ensure their inclusion in development projects that are directly linked to achieving the RTD.

On the second point, in claiming their RTD, the complainants alleged that their eviction from their land deprived them of their right to self-determination over their land and natural resources. In other terms, their territorial and economic self-determination was violated.¹¹² In this instance, the complainants combined the right to self-determination¹¹³ and the right to natural resources¹¹⁴ to claim the RTD. They also argued that encroachment upon these two rights compromised their choices and capabilities in terms of “liberty

106 ICCPR, art 27.

107 UNDRTD, art 2(1).

108 *Id.*, art 2(2).

109 *Id.*, art 2(3).

110 *Endorois*, above at note 5, para 281.

111 UNDRTD, art 2(3).

112 *Endorois*, para 129.

113 African Charter, art 20.

114 *Id.*, art 21.

in their action”,¹¹⁵ and therefore interfered with their RTD. They also contended that the eviction destroyed their way of life and sources of income.¹¹⁶

In resolving this question, the African Commission had to address the right to territorial and economic self-determination as an important element of the RTD. Apart from being incorporated in the African Charter,¹¹⁷ the right to self-determination is also recognized in numerous international instruments.¹¹⁸ The African Commission accepted that freedom of choice is a core element of the RTD and in doing so agreed with the view expressed by Sengupta, the independent expert on the RTD.¹¹⁹ The commission felt that people should be given the choice to develop their potential and this cannot be done without territorial and economic self-determination. It held that the eviction of the Endorois people hindered their right to self-determination and reduced their freedom to empower themselves.

Development should be understood in terms of freedom where people are free to choose their way of life. In this context, “freedom is the primary end and the principal means of development”.¹²⁰ Therefore, without freedom and development, the RTD becomes a pipe dream, hence the correctness of the African Commission’s decision in this case. It can also be argued that the commission’s decision was a good move towards the “legal empowerment of the poor”.¹²¹ The decision in many respects sets a precedent that will inspire and allow the poor to claim their human rights.

In reaching its decision, the African Commission was not only guided by the report produced by the UN Working Group on Indigenous Populations requiring that “indigenous peoples are not coerced, pressured or intimidated in their choices of development”,¹²² but also by the decision of the Inter American Court of Human Rights in *Indigenous Community Yakye Axa v*

115 *Endorois*, para 128.

116 *Id.*, para 126.

117 African Charter, art 20.

118 Art 1(1) of both the ICESCR and ICCPR; the Vienna Declaration part 1, para 2. Also NIEO Declaration, art 4; arts 26(k) and 14(e) of the Report of the World Summit for Social Development, Copenhagen, 6–12 March 1995: UN doc A/CONF.166/9 of 19 April 1995; art 2 of the Charter of Economic Rights and Duties of States, 29th session of the UN General Assembly: UN doc, A/RES/29/328; the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art 2(2); and the September 2007 UN Declaration on the Rights of Indigenous Peoples, art 3.

119 *Endorois*, above at note 5, para 278.

120 A Sen *Development as Freedom* (1999, Knopf) at 35; also Steiner, Alston and Goodman *International Human Rights in Context*, above at note 36 at 1434.

121 D Banik “Introduction” in Banik (ed) *Rights and Legal Empowerment in Eradicating Poverty* (2008, Ashgate) 1 at 1.

122 A-I Motoc and the Tebtebba Foundation “Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the working group on this concept”: UN doc E/CN.4/Sub.2/AC.4/2004/4 (2004), para 14(a).

Paraguay¹²³ where it said the “displacement of the members of the community from [their] lands has caused special and grave difficulties [for them] to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or [for them] to practice their traditional subsistence activities, such as hunting, fishing, and gathering”.¹²⁴

As seen above, the African Commission’s ruling is consistent with developments in Latin America but, perhaps more importantly, is in line with the UN Declaration on the Rights of Indigenous Peoples which appears to be a beacon of hope for the protection of every group’s right to self-determination and is another step towards achieving the RTD.

A CRITIQUE OF THE AFRICAN COMMISSION APPROACH

In spite of minor differences in some of the cases, such as *DRC*, *Gumme* and *Endorois*, they all follow a common trend. These decisions not only emphasize the role of the state as the primary driver of the RTD, but also highlight the holistic character of the RTD which encompasses elements of equitability, non-discrimination, participation, accountability and transparency, equity and freedom of choice. This approach, underlining the indivisibility and interdependency of human rights elements of the RTD, is consistent with the theory and practice of development law.

Nevertheless, although under the African Charter human rights are submitted to the principle of immediate realization, the African Commission through *Gumme* and *SERAC* submits socio-economic rights (elements of the RTD) to progressive realization based on the availability of resources. It could, however, be argued that the African Commission is enabled¹²⁵ to use international law, including the general comments of the Committee on Economic Social and Cultural Rights, in reaching its decision. Nevertheless, this approach was acceptable because Cameroon in *Gumme* and Nigeria in *SERAC* are parties to the ICESCR. As correctly questioned by Olowu, “would there have been [sic] credible and justifiable basis for the Commission to apply the same approach were it to involve a state that is not party to ICESCR?”¹²⁶ Such an approach would not have been used for countries like Botswana, Mozambique, Comoros or other countries that are not parties to the ICESCR. Hence the correctness of the view that “the Commission will have to reconsider its approach” in order to set a common standard on economic, social and cultural rights on the continent.¹²⁷

123 17 June 2005, InterAmerican CHR.

124 *Id.*, para 164.

125 African Charter, art 61.

126 D Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009, PULP) at 154. Also Kamga “The right to development in the African human rights system”, above at note 28 at 391.

127 *Ibid.*

In SERAC, the rights alleged to have been violated are all building blocks of the RTD. Nevertheless the African Commission did not find a violation of the RTD itself, but found the violation of the right to food inferred in the RTD.¹²⁸ This is disquieting because the commission then missed a golden opportunity to provide a dynamic reading of the law to protect the RTD. In fact, in this case, the commission found the violation of the right to shelter (which is not provided for in the African Charter) through the combination of the protection of the rights to health, property and family.¹²⁹ The same approach could have been used to find a violation of the RTD and not the right to food.

Furthermore, the African Commission argues in SERAC that article 21 of the African Charter was intended to provide for “cooperative economic development” on the continent. In other words, under article 21, the African Commission clearly endorsed the “participatory development imperative”¹³⁰ which could have been read under article 22 as well. A better reading of the African Charter could have been useful in protecting the RTD, particularly if one is to consider Okafor’s advice that, in addressing the RTD, “one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter”.¹³¹ Nonetheless, the African Commission clearly avoided making a pronouncement on the RTD, which was violated and was the basis for the violation of the right to food.

The other problem with the SERAC decision is the African Commission’s silence on the question of “peoples” in article 21 of the African Charter.¹³² The RTD is a group or people’s right, but no clarification of the concept is given. In fact, on this issue, the African Commission seems to follow the trend set in its precedent where it avoided pronouncing on the right of people to self-determination.¹³³ This has led Olowu to argue that the African Commission “chose to play the ostrich game” on the issue of “peoples”.¹³⁴ In avoiding the concept of “peoples”, the African Commission mistakenly considered the Niger Delta to be “Ogoniland” and failed to investigate whether the “Ogoni communities” could qualify as a peculiar group to be identified as a “people”¹³⁵ who could be right holders of the RTD.

The African Commission however, corrected its mistake in the *Endorois* decision. It clearly highlighted the interconnectedness of the composite (rights) elements of the RTD. More importantly, it elaborated extensively and

128 SERAC, above at note 2, para 64.

129 *Id.*, para 60.

130 OC Okafor “Righting’ the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples’ Rights” in Marks (ed) *Implementing the Right to Development*, above at note 14, 52 at 55.

131 *Ibid.*

132 Olowu *An Integrative Rights-Based Approach*, above at note 126 at 155.

133 See *Katangese Peoples’ Congress v Zaire* (2000), AHLR 72 (ACHPR 1995).

134 Olowu *An Integrative Rights-Based Approach*, above at note 126.

135 *Ibid.*

clearly defined “peoples”,¹³⁶ and identified the Endorois as a specific group in these words:

“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 institution and religious systems. The African Commission therefore accepts that self-identification for the Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.”¹³⁷

Through this case, the African Commission ceased the “ostrich game” on the concept of people and its new approach was vital in finding the violation of the RTD by Kenya. In addition, the commission did not submit the realization of the RTD to the availability of resources as was the case in *SERAC*. It applied the principle of immediate realization secured in the African Charter.

CONCLUSION

The aim of this article was to examine critically the jurisprudence of the African Commission on the RTD. In so-doing, it has shown that, historically, the RTD was developed from the claim by poor countries for a NIEO to help in the eradication of poverty, the establishment of fair trade rules and the search for global justice. Theoretically, the right is located in the cosmopolitanism characterized by the principle of equality of all human beings.

It has shown that, although the RTD is the subject of disagreement in academic circles as well as in the UN arena, the emerging view is that it is becoming accepted. Although the state is the primary duty bearer, the RTD is a right whose actions should be supplemented by the international community. It is a composite right which can be exercised at both an individual and collective level. Furthermore, it is a fully fledged human right in the African human rights system. It is therefore no surprise that the African Commission has taken a lead role in developing jurisprudence which should clarify its nature and content. In its early decisions, the African Commission was rather circumspect and cautious. In recent years, it has become more forthright. As a result, it has pointed out the interconnectedness of human rights, and elements of the RTD, and made it clear that, where circumstances so permit, it is a right subject to immediate realization. The commission has also clarified the role of the individual and the community in the enjoyment of this right and the readiness of the African Commission to intervene where the state, as primary driver of this right, unreasonably interferes with it. Based on a few cases (*SERAC*, *DRC and Gumne*), it can be speculated that the RTD will provide more scope for many marginalized groups to assert their human rights in the future.

¹³⁶ *Endorois*, above at note 5, paras 156–57.

¹³⁷ *Id.*, para 157.