



PART ONE



Chapter 1

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Chapter 1

Introduction

1.1. Background

This chapter will provide the background to the study. It will discuss the political and economic context of Uganda. The chapter will further outline the research problem and set out the justification of the study. In addition, the methodology as well as the intended scope of the study will be outlined. An overview of available literature in this area will be done.

1.1.1 Political context

In the past, Uganda went through a dark and difficult period of political chaos and gross economic mismanagement. It can be said that Uganda had become a ‘killing field’ where the principles of the rule of law, democracy and justice were routinely trampled upon by the governments of the day. The respect for human dignity and rights was minimal at best and absent at worst. This past was characterised by periods of massive human rights violations and abuse.¹

For nearly three decades, the people of Uganda suffered diverse forms of human rights violations in stark contravention of the provisions of the then 1962 and 1967 Constitutions of Uganda.² The violations included the breach of the right to life, the right to personal liberty and inhumane treatment.³

These violations were also in breach of the provisions of the United Nations

¹ African Peer Review Mechanism (APRM) Republic of Uganda. APRM Country Review Report No.7 January 2009. xxxv and chapter 3. The report is available at <http://www.aprm-international.org/> (accessed on 16 March 2010).

² Government of Uganda Constitutions of the Republic of Uganda 1962 and 1967. See n 1 above for more details.

³ Government of Uganda. *Constitution of the Republic of Uganda* 1962. Articles 18, 19 and 21. Available at <http://www.scribd.com/doc/20262240/Uganda-Constitution-1962> (accessed on 16 March 2010).

Universal Declaration of Human Rights (UDHR) 1948⁴ and the African Charter on Human and Peoples' Rights (ACHPR) 1986,⁵ together with major international human rights treaties, to which Uganda was and still is a party. Uganda's political, social and economic history is therefore chequered by several incidences of human rights violations, most notorious of which was the Amin dictatorship (1971-1979) which was characterised *inter alia* by the suspension of the Constitution and the introduction of military decrees, unlawful arrests of people, mass murders, suppression of freedom of expression and the prevalence of torture. It is estimated that over 300,000 people were killed during the Amin era.⁶ The Obote II era (1980- 1985) served to solidify the dark shadow cast by the Amin era.⁷

In view of this dark period, one could say that Uganda had become a centre of tyranny. The very institutions that were supposed to be the vanguards of human rights such as the police and army were the principal violators of human rights. Umozurike asserts that the paradox in human rights is that governments are potentially their effective protectors but are also often their worst violators.⁸ As indicated above, Uganda was no exception to the picture that Umozurike paints. It could be said that to date Uganda is yet to completely shake off this legacy. Several public officials still act in a manner that violates human rights. One possible reason for this could be the dark

⁴ United Nations Universal Declaration of Human Rights GA Res 217 A (111), U.N. Doc A/810 at 71 (1948).

⁵ African Charter on Human and Peoples' Rights adopted 27 June 1981, Nairobi Kenya, OAU. Doc. CAB/LEG/67/3, Rev 5. Reprinted in 21. I.L.M 59 (1981) Available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (accessed on 15 August 2008).

⁶ International Commission of Jurists *Uganda and Human Rights* (1978) 5.

⁷ APRM Uganda Country Review Report No 7 (see n 1 above) Chapter 3.

⁸ UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 8.

legacy. The difference between right and wrong was blurred and to a large extent violating human rights was seen as an acceptable way of doing things. This is illustrated by the view of a police officer who expressed surprise that the police are not by law supposed to torture a suspect. According to the officer, torture was acceptable especially, if it led to obtaining of evidence.⁹ It is therefore not uncommon in present day Uganda to come across police officers treating suspects in an inhumane way.

The present government, the National Resistance Movement (NRM), took the reigns of power in 1986. It is committed to fulfilling the full restoration of the rule of law, democracy, justice and the respect of human rights. This commitment is reflected in a number of ways. A new Constitution was passed in 1995 with a comprehensive Bill of Rights in chapter four.¹⁰ The Uganda Human Rights Commission (UHRC) was established as the national human rights institution.¹¹ In addition, regular elections have been held. All these initiatives are aimed at creating an environment where there is respect for human rights, the rule of law, justice and democracy. It is acknowledged that human rights have greatly improved in Uganda over the last two decades.¹²

Uganda can therefore today be described as a country in transition, from a situation where there was no rule of law, no human rights culture and where democracy was a notion that could only be thought about, to a situation where

⁹ J Kanya 'The softer side of the EU HRGGP programme in the Uganda Police Force' (2008) 2 in *The Human Rights and Good Governance Programme Newsletter*, Issue No 3, 2009.

¹⁰ Republic of Uganda: *Constitution of The Republic of Uganda* 1995 (as amended).

¹¹ The Uganda Human Rights Commission Cap 276 and Article 51 of the Constitution of Uganda 1995 (as amended).

¹² APRM Uganda Country Review Report No 7 (see n 1 above) xxxv.

at least there is a semblance of political, social and economic order. There is no doubt that since Uganda gained its independence in 1962, it has been through political, economic and social upheaval. The country is still recovering from the ramifications of the brutal eras of Amin, Obote and Okello. Some might go as far as stating that the once sad Ugandan story is being turned around, although not as fast or in the direction that some might want. In recognition of this positive change, several development partners have provided assistance to Uganda for different development programmes, including the promotion and protection of human rights in Uganda. This study will examine the role development assistance is playing in the promotion and protection of human rights in Uganda.

1.1.2. Economic and social context

Uganda is one of the poorest countries in the world, but over the last decade and a half, it has registered positive economic growth. The United Nations Development Programme (UNDP) in its human development index ranks Uganda in the low human development category.¹³ Notably, progress has been achieved in the area of poverty reduction. In 1996, core poverty was estimated at 56%.¹⁴ This fell in 1998 to 44% and further dropped to 35% in 2001. It is reported to have dropped to 31% in 2006.¹⁵ The life expectancy is 54.1 years, the Gross Domestic Product (GDP) per capita is USD 1,254 and gross enrollment in education 62.3%.¹⁶ The country is divided into about 117

¹³ United Nations Development Programme *Human Development Index 2010* (2010). Available at http://hdr.undp.org/en/media/HDR_2010_EN_Table1_reprint.pdf (accessed on 17 January 2011). Uganda is ranked 143 out of 162 in the low human development category.

¹⁴ Uganda Bureau of Statistics *Uganda National Household Survey 2005 - 2006* (2007) xiii.

¹⁵ Uganda Bureau of Statistics (see n 14 above) xiii.

¹⁶ Human Development Report (see n 13).

districts that vary in size and population. It is therefore hardly surprising that Uganda is the recipient of development assistance as it is a poor underdeveloped country.

Despite the fact that Uganda has managed to record real gross domestic product (GDP) growth in recent years, the economy remains highly exposed and vulnerable. As part of its medium term economic strategy, the government is in the process of creating a suitable environment for increased private investment and savings. The adopted strategy is underpinned by the idea that strong economic growth is necessary to eradicate poverty, which will only be possible with high levels of private investment and a strong export base. It could therefore be concluded that the economic policies of the government have largely succeeded in reversing the macroeconomic disequilibria that the economy suffered for most of the period between the early 1970s and the early 1980s.¹⁷ However, it has to be acknowledged that such investment is unlikely to occur where there is no observance and protection of human rights.

It is worthwhile to note that the government had in place a Poverty Eradication Action Plan (PEAP) which was supported by five pillars that underpin the medium term economic and budget strategy.¹⁸ Pillar four thereof was devoted

¹⁷ APRM Country Review Report No 7 (see n 1 above) 114.

¹⁸ Ministry of Finance, Planning and Economic Development December. Poverty Eradication Action Plan 2004/5 – 2007/8 (2004). Available at <http://www.finance.go.ug/peap/about.php> as 20 August 2007 (accessed on 29 January 2005). The Poverty Eradication Action Plan (PEAP) is Uganda's national development framework and medium term planning tool, prepared in 1997 through wide stakeholder consultations and participation. The PEAP, which is also the Country's Poverty Reduction Strategy Paper (PRSP), guides the formulation of government policy and implementation of programmes through sector-wide approaches and a decentralised governance system. The PEAP came to an end in June 2008 and was replaced by the National Development Plan (NDP) in June 2010.

to ‘ensuring good governance’.¹⁹ As already alluded to herein, the concept of good governance embraces the promotion, respect and protection of human rights. The PEAP has now been replaced by the National Development Plan (NDP).²⁰ Later, in chapters 3 and 4, the NDP and how it relates to development and human rights shall be examined.

The Government of Uganda (GOU) has put in place a national human rights body known as the Uganda Human Rights Commission (UHRC).²¹ The UHRC is supported by both GOU and development partners. In chapter 5, more details will be provided on the government’s and development partners’ contribution to the UHRC. The role and impact of development partners’ contribution to the UHRC will be explored in detail.

Furthermore, as some donors move to general budgetary support, good governance becomes an area of increasing importance and an area for monitoring. In Uganda, the member states of the European Union (EU) and the EU as a multilateral institution have taken particular interest in ensuring that good governance indicators, which include human rights, are incorporated into the annual assessment of the impact of budget support. This debate shall be returned to in chapter 5.

President Museveni is remembered assuring the Ugandan public in 1986, when being sworn in as president, that Uganda was witnessing a fundamental

¹⁹ Ministry of Finance, Planning and Economic Development (see n 18 above).

²⁰ Government of Uganda (2010). National Development Plan 2010/11-2014/15. Available at http://www.finance.go.ug/docs/NDP_April_2010-Prot.pdf (accessed on 15 June 2010).

²¹ The Uganda Human Rights Commission Cap 276 (see n 11 above).

change and not a mere change of guards.²² Many Ugandans at the time verily believed that this was going to be an administration with a difference, one truly committed to wiping out the serious ills that had plagued the nation for so long. It could be said that part of this promised fundamental change includes the creation of new bodies like the Uganda Human Rights Commission²³ and adoption of a new Constitution in 1995 that has a progressive Bill of Rights.²⁴

There is no doubt that the current administration has created a greater degree of peace, although the northern part of the country has been plagued by a 22 year old civil war.²⁵ The administration has also put in place sound economic policies.²⁶ However, human rights abuses and violations still remain as one of its main nemesis. The UHRC in its 11 annual report for 2008 outlines a number of areas of concern.²⁷ These include:

- Maintenance of children
- Right to liberty
- Right to property
- Torture, cruel and inhumane treatment
- Non-payment of compensation awards to torture victims

²²This was said by President Yoweri Museveni in his swearing in speech as President of Uganda on 26 January 1986 in Kampala.

²³ The Uganda Human Rights Commission (see n 11 above). UHRC is the national human rights body created by an act of parliament and provided for in the Constitution of Uganda. In chapter five, its mandate and operations are discussed.

²⁴ Since independence in 1962 Uganda has had 4 constitutions: 1962, 1966, 1967 and most recently 1995. The 1995 Constitution of Uganda as amended in 2006 is the operational one.

²⁵ Refugee Law Project 'Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda' Working Paper No 11 (2004) 4. Available at http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf (accessed on 23 March 2011).

²⁶ F Kuteesa, E Tumusiime-Mutebile, A Whitworth, T Williamson (eds) *Uganda's Economic Reforms: Insider Accounts* (2009) 10-15.

²⁷ Uganda Human Rights Commission *11 Annual Report* to the Parliament of the Republic of Uganda (2008) 32.

- Insecurity and lack of peace in Northern Uganda
- Delayed trials and over long stays on remand
- Use of the military court martial which routinely violates the right to due process
- Domestic violence
- Discrimination and stigmatisation of persons with HIV/AIDS
- Violation of the freedom of assembly

1.2. Development partner interventions

Over the last two decades, poor countries of the south such, as Uganda, have received development assistance mainly from the affluent countries of the north. The stated overall objective of this assistance is to alleviate or eradicate poverty in the disadvantaged or poorer countries. It is not uncommon therefore to find a human rights component embedded within this development assistance. We now see, more and more, that most development assistance portfolios contain support for the promotion, protection and respect for human rights. In fact, having a good governance programme underpinned by *inter alia* a human rights facet is now the working practice for most development partners. For example, development partners like Ireland, Germany, Norway, Netherlands and Denmark have good governance programmes running in Uganda as discussed in chapter 5.

Buttressing this development assistance relationship is a partnership that is mooted by both the ‘giving’ and ‘receiving’ countries to be based on equality, mutual respect and the promotion of local ownership. This study sets out to

establish the actual nature of this relationship. The study will seek to establish whether international human rights standards provide an operative framework for development assistance and whether development policies take cognizance of international human rights standards.

In the last 25 years, Uganda has been the recipient of several millions of dollars in development assistance. A number of development partners have been supporting the promotion, protection and respect of human rights by funding the UHRC and several human rights civil society organisations. Uganda, just like many other African States, relies heavily on development assistance not only to run its national budget but also to roll out reform programmes in several sectors including human rights.²⁸ The assistance which amounts to about 50% of the national budget has led many to believe that it is the development partners with their deep pockets that set the agenda in almost all spheres of economic, social and political life in Uganda.²⁹ The proposed area of study therefore seeks to examine the dynamics of this relationship in the human rights arena in Uganda.

The Ministry of Finance, Planning and Economic Development of Uganda (MOFPED) further notes that, the implication of this is that Uganda is likely to be dependant on external assistance for the budget even in the medium-term³⁰.

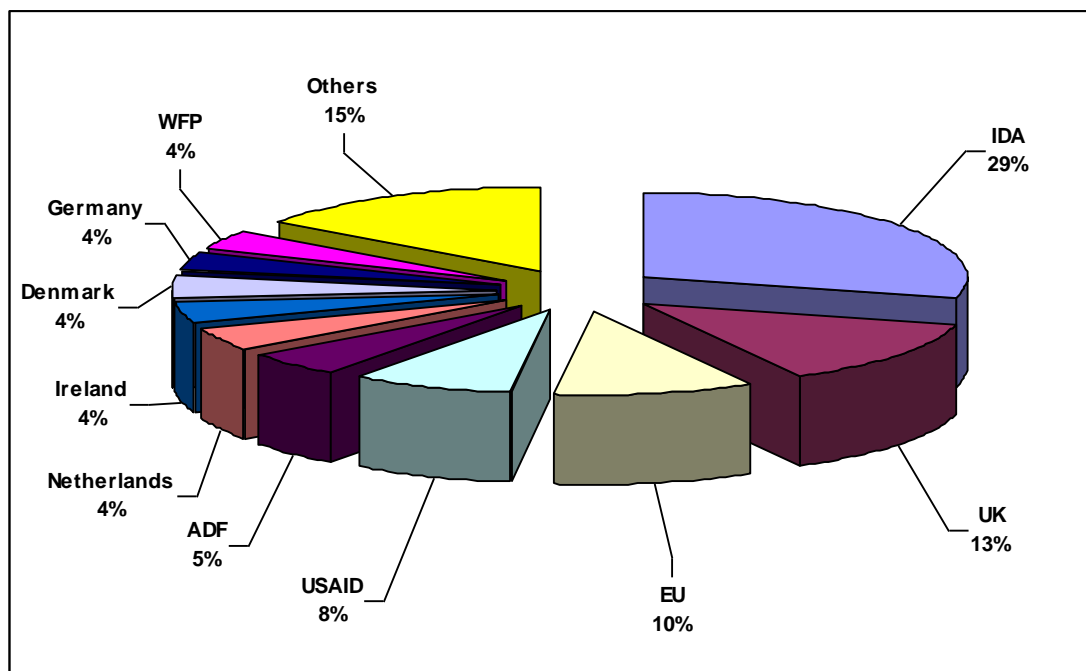
²⁸ APRM Country Review Report No 7 (see n 1 above) ixiii.

²⁹ Ministry of Finance, Planning Economic Development, National Budgets from 2004/2005 indicate that development partners contribute close to 51% of the national budget. This however, in the 2005/2006 budget fell to about 48%. In 2006/7 it was about was 45%, in 2007/2008 it was reported as 42% and in 2008/2009 it went down to 29%. It is government policy to reduce dependency on donor funding and rely more on domestically mobilised resources.

³⁰ Ministry of Finance, Planning and Economic Development Development Cooperation Report 2006/2007 (2008) 24.

In the long run, MOFPED observes that the government has planned to gradually reduce dependency on external assistance by a small percentage of GDP per year.³¹ Chart 1 below highlights the commitments by top ten individual donors to Uganda. Later in chapter 5, the study shall examine the support given to human rights agencies such as the UHRC and JLOS.

Chart 1: Percentage share of top ten donors



Source: *Aid Liaison Department, MOFPED*

The above chart shows a summary of external assistance by individual donor for the period 2000/2001 to 2006/2007. The World Bank, through the International Development Association (IDA) window, has cumulatively remained the top donor. Currently, the list of top 10 donors includes the World Bank (29% share), United Kingdom (13%), European Union (10%), USAID (8%), the African Development Bank (5%), Netherlands (4%), Ireland (4%), Denmark

³¹ Ministry of Finance, Planning and Economic Development (see n 30 above) 25.

(4%), Germany (4%) and the World Food Programme (4%). All the remaining donors take a 15% share. It is significant to note that the World Bank is the top donor. This fact has significant implications for human rights. Due to its position, the World Bank wields a lot of power and influence and yet it is very reluctant to take up issues of promotion and protection of human rights citing its mandate. Danino however, is of the opinion that, the World Bank's objectives and activities are deeply supportive of the substantive realization of human rights.³² Danino believes that one of the reasons for this is because the concept of development itself has evolved substantially over the past 60 years and along with it the Bank's mission. As currently defined, the Bank's mission consists of the alleviation of poverty through economic growth and social equity. This conception of the alleviation of poverty has an especially strong human rights dimension.³³ Danino does present a compelling argument but the reality is that this is a legal opinion which is not Bank policy.

The human rights non-governmental sector is no different from the government. In fact, the situation of the NGOs is more dire, with almost all of them relying entirely on external assistance to run their programmes. This therefore begs the question of how an institution that is 100% funded by external actors can retain its autonomy and independence. And to whom are these institutions accountable? The study aims at answering this question. One possible reason for NGO dependence is the fact that several NGOs are born or established as a result of development partners and their assistance.

³² R Danino. 'Legal Opinion on Human Rights and the Work of the World Bank' (2006) 1, 4. Danino is the former Senior Vice President and General Counsel of the World Bank.

³³ Danino (see n 32 above) 4.

The Organisation for Economic Cooperation and Development (OECD) takes the view that aid (development assistance) can and must be used more effectively to provide healthier and more secure lives for the 1.1 billion people in the world who live on less than a dollar a day and to achieve the Millennium Development Goals (MDGs).³⁴ In 2003, OECD countries provided development aid amounting to a record United States Dollars (USD) 69.0 billion, up from USD 58.3 billion in 2002.³⁵ OECD further acknowledges that human security – democratic and accountable governments, the protection of human rights, and respect for the rule of law – is crucial to development.³⁶ This view is held by several of the EU members that provide development assistance. The question that will be explored arising from this OECD position is whether there is a legal obligation to provide this development assistance under international law. If not, should there be such an obligation? These questions will be discussed and answered in chapters 2 and 5 of this study.

Uganda receives over USD300 million per year as development assistance from several development partners, mainly from OECD countries.³⁷ The Overseas Development Institute (ODI) reports that Uganda received substantial aid flows averaging 45.4% of total government expenditure between 1999 and 2009.³⁸ Further figures together with the development assistance agreements will be provided and discussed in chapter 5. Almost all

³⁴ Organisation for Economic Cooperation and Development (OECD's) Annual Development Cooperation Report 2004 I. Available at http://www.oecd.org/document/22/0,2340,en_2649_33721_34285782_1_1_1_1,00.html (accessed on 30 January 2005).

³⁵ OECD (see n 34 above) 1.

³⁶ OECD (see n 34 above) 1.

³⁷ The main development partners operating in Uganda are Austria, Denmark, Norway, Netherlands, United Kingdom, Sweden, Germany, Ireland, United States of America and the European Union.

³⁸ Overseas Development Institute *Donor support to domestic accountability: Budget processes and service delivery in Uganda* (2010) 6.

the major development partners have human rights programmes normally nested in their overall governance programme. In Uganda, the main development partners have attempted to harmonise and coordinate their interventions in the human rights area.

These development partners are collectively supporting the promotion and protection of human rights through support to the UHRC and NGOs. A basket fund was been created through which a number of development partners channel their support to the UHRC.³⁹ In addition, there is a donor working group on human rights that monitors human rights under a governance matrix that has been developed by development partners.⁴⁰ It is within this group that the human rights support is coordinated and monitored. The human rights working group is one of four working groups created by the Heads of missions who have come together under a group known as the Partners for Democracy and Governance (PDG). See figure 1 below for the development partner group structure under the PDG. A complete list of the other development partner groups is provided in chapter 5.

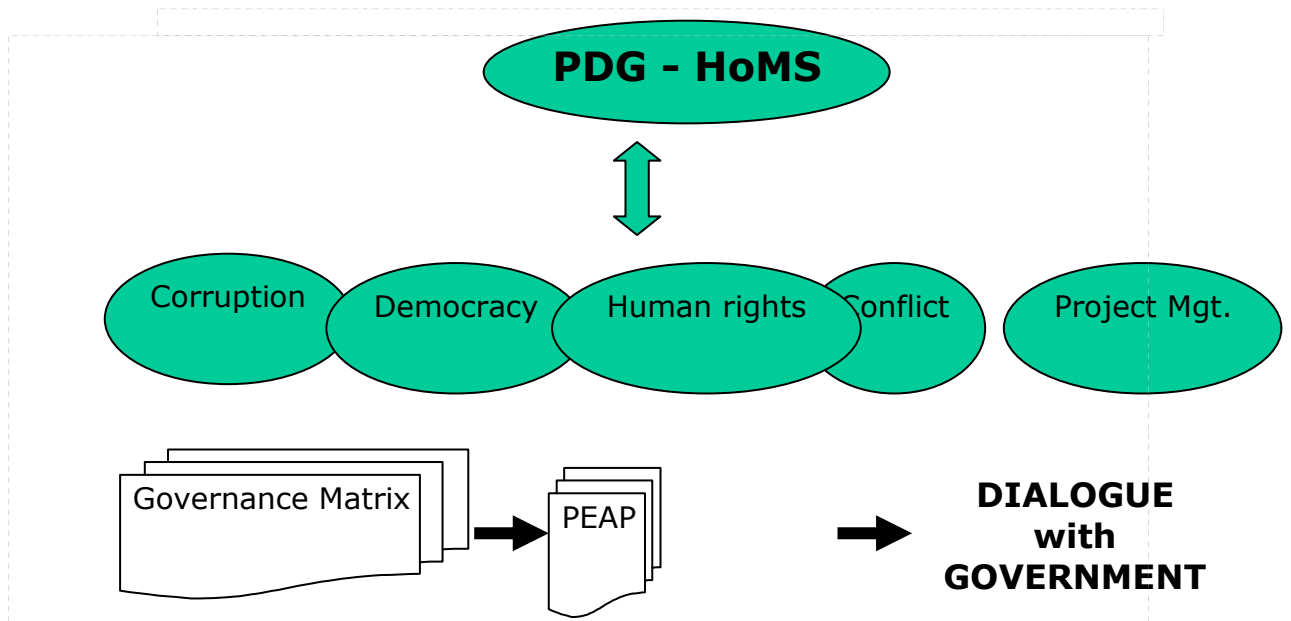
The governance matrix which contains a number of governance issues including human rights, which are monitored by development partners is presented to the government formally and forms the basis of engagement over these critical issues. (See Annex 1 for the human rights component of the

³⁹ The Uganda Human Rights Basket Fund which run from 2000- 2008, was supported by Ireland, Denmark, Sweden and Norway and provided institutional support to the Uganda Human Rights Commission. In 2008 the fund wound up and now each of these countries provides bi-lateral support to the Uganda Human Rights Commission. This was confirmed by Daniel Muwolobi, Governance Advisor with the Embassy of Ireland Kampala in a telephone interview I held with him on 10 January 2011.

⁴⁰ The Governance Matrix is a monitoring tool developed by development partners and comprises of four components (1) democratisation processes (2) human rights (3) transparency & accountability and (4) security. Monthly and bi-annual assessments are prepared, forming the basis of dialogue with the Government of Uganda.

matrix.) I developed the matrix below. The study will delve into the relationship between the development partners and the recipient agencies with the view of establishing what influence, if any, they bring to bear on the national agendas of the recipients.

Figure 1: Development Partner Groups



1.3. The research question

This study is underpinned by one central research question: What role does development assistance play in shaping the human rights agenda in Uganda? Flowing from this central question, a number of other questions arise, including:

1. Why do developed countries provide development assistance to countries like Uganda and what is the ideology behind this assistance?
2. What is the nature of the partnership between the development partner and the receiving country? Is there national ownership of programmes supported?
3. Is development assistance a right or charity and are development assistance agreements legally binding?
4. What are the various development assistance modalities and how are they used to shape the human rights agenda?

As earlier mentioned, it is therefore not uncommon to find that development partner countries will have development assistance programmes with a human rights component embedded therein. A number of principles and policies have been designed to underpin the development assistance relationship.

Concepts such as local ownership and partnership will be discussed in chapter 2. The theory and practice of development assistance and the role it plays in the human rights arena practice will also be explored. While the theory espouses concepts such as local ownership, partnership and mutual respect, in

practice the story is quite different. It is this inherent contradiction between theory and practice that has prompted me to delve deeper into this area.

Another compelling reason that prompted this study in this area was the discovery that most scholars like Tomasevski and Piron who have written on development assistance and human rights have done so from a global perspective and do not follow a country specific approach. There is hardly any literature on Uganda regarding the role that development assistance plays in promoting and protecting human rights. For example, the OECD, World Bank and leading scholars have tended to discuss development assistance and human rights from the premise of using human rights as conditionality for aid disbursement or looking at the relationship between development and human rights. This partly explains the driving force behind some development partners' reasons for providing assistance. Literature on the role that development assistance actually plays in determining the national human rights agenda in Uganda is hard to come by; a situation that this study hopes to remedy.

The study will examine implications of this dependence and determine the extent to which development partners set the agenda for UHRC. This line of investigation will also touch on the central question of national ownership. To what extent can a state that is dependent on development assistance claim to own its development/reform programme? How independent is the UHRC or NGOs that are funded between 80% and 100% by external actors? In view of

the heavy reliance on development assistance, can one expect the UHRC or NGOs to be truly independent?

In contemporary development practice, the concepts of partnership and local ownership are taking centre stage. These concepts are defined later in chapter 2. One way of realising partnership and local ownership is through the adoption of the human rights based approach (HRBA). The clarion call to adopt a HRBA to development is on from a number of development partners including the United Nations. UHRC has responded to this call and is advocating for this new approach. However, the legal and practical implications of rolling out the HRBA are not well-articulated and merit study.

1.4. Objectives and relevance of the study

This study is informed by a set of objectives which include the following:

- To provide information on how development partners provide their support for human rights programmes in Uganda,
- To determine who sets the human rights agenda in Uganda,
- To establish whether there is an international legal framework for the provision of development assistance,
- To recommend an equitable framework for the provision of development assistance that promotes and protects human rights, and
- To contribute to the body of knowledge on development assistance and the promotion and protection of human rights in Uganda.

The centrality of development assistance in supporting human rights programmes is undisputed. This study is therefore of particular significance given that the human rights landscape in Uganda is dominated by programmes and institutions supported through development assistance. Based on this background, a study of this nature, seeking to unravel this relationship and also inquire about the applicability of international human rights standards, is essential.

The study will therefore contribute to the jurisprudence in this area that currently lacks data that covers the nexus between development assistance and human rights in Uganda. This study also intends to spark interest in the paradigm that in some instances development assistance does shape the human rights agenda of the recipient country and also investigate what this means for countries such as Uganda that receive development assistance

1.5. Literature review

During the course of the study, available literature pertaining to the relationship between development assistance and human rights has been examined. However, it is important to bear in mind that most of the available literature does not examine the local situation in Uganda. In addition, most of the literature accessed discusses development assistance and human rights from the perspective of using human rights as a trigger for disbursement of assistance/aid but not from the perspective of the role that development assistance plays in setting the human rights agenda.

Within Uganda, the Centre for Basic Research (CBR) has explored the relationship between NGOs and donors.⁴¹ One of the conclusions of the CBR study was that NGOs are vulnerable to donors setting the agenda due to their financial leverage.⁴² The CBR study did not focus on human rights NGOs but rather NGOs in general, and it did not delve into the relationship between donors and national institutions such as UHRC. It is therefore hoped that this study will fill this lacunae.

In a 2003 report, Human Rights Watch (HRW) provides a number of recommendations for donor countries on the human rights issues they should monitor in Uganda.⁴³ However, there is no analysis done on the relationship between development partners and national institutions in the report or previous reports. Yet it is clear that HRW believes that donor countries have a role to play in promoting and protecting human rights in Uganda and this is why it provides a set of recommendations for donor countries.

In contrast, the Human Rights Committee which monitors implementation of the International Covenant on Civil and Political Rights (ICCPR) in its concluding observations in relation to Uganda's initial report, makes no connection between national institutions and development partners or development assistance.⁴⁴ It could be said that, the Human Rights Committee,

⁴¹ Centre for Basic Research, Economic Commission for Africa Monitoring Progress Towards Democratic Governance: The Uganda Country Report (2002) 28.

⁴² Centre for Basic Research (see n 41 above) 28.

⁴³ See Human Rights Watch. 'The State of Pain: Torture in Uganda' 2003. Available at http://hrw.org/reports/2004/uganda0404/4.htm#_Toc67373883 (accessed on 8 March 2006).

⁴⁴ Human Rights Committee; Concluding observations of the Human Rights Committee : Uganda CCPR/CO/80/UGA 05/04/2004 . The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State

failed to acknowledge the pivotal role development partners play in the human rights field, a position clearly understood by HRW. It is contended that the Human Rights Committee should provide guidance on what role development partners have or should have in promoting and protecting human rights in countries like Uganda.

Chowdhury *et al.* compiled a number of articles on the right to development.⁴⁵ The various articles in their publication deal with a wide range of issues including the right to development, development ideology in international law and the human rights approach to the right to development. The publication offers insightful ideas on the problematic question of the legitimacy of the right to development in international law. While the articles do not specifically deal with the question of what role development assistance plays in the human rights arena, they are of particular value in so far as they deal with the right to development and the human rights-based approach, issues that will be dealt with in this study. One of the issues that chapter 2 deals with, is whether there is a right to development assistance and if it can be inferred from the right to development.

Uvin discusses the implications of the development community, conferring a more central role to human rights in its work.⁴⁶ While Uvin does attempt to discuss the nexus between development and human rights, the primary thrust

parties. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.80.UGA.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.80.UGA.En?Opendocument) (accessed on 19 May 2009).

⁴⁵ SR Chowdhury, EMG Denters and PJIM Waart *The Right to Development in International Law* (1999).

⁴⁶ P Uvin *Human Rights and Development* (2004).

of his book is aimed at the points of intersection rather than the role development assistance plays in the promotion of human rights.

Two leading human rights scholars and practitioners, Alston and Robinson, discuss ways in which the strengths resources and support of the international human rights and development communities can be mobilised in order to reinforce one another in their efforts to achieved shared goals.⁴⁷ Alston and Robinson seek to unravel the challenges of meeting the agendas of the human rights and the development world. Just like Uvin, their main preoccupation is looking at the historical divide between the human rights and development communities and looking at ways of bridging this gap. While both pieces of work do provide very useful pointers on the relationship between development and human rights, they both do not explore the question of the practical role development assistance plays in shaping human rights agendas in developing countries like Uganda.

The former head of the World Bank, Wolfensohn discusses the connection between human rights and development as opposed to development assistance.⁴⁸ He recognises that, ‘there is a tremendous coalescence between human rights and what we do (in the bank).’⁴⁹ Wolfensohn arrives at the conclusion that a rights-based approach is connected to poverty eradication

⁴⁷ P Alston & M Robinson ‘The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours’ , in P Alston & M Robinson *Human Rights and Development: Towards Mutual Reinforcement* (2005) 1-18 available at <http://www.oup.co.uk/pdf/0-19-928462-8.pdf> (accessed 3 April 2006).

⁴⁸ JD Wolfensohn ‘Some Reflections on Human Rights and Development’ (2005) in P Alston & M Robinson *Human Rights and Development: Towards Mutual Reinforcement* (2005) 19.

⁴⁹ Wolfensohn (see n 48 above) 19.

and thus development.⁵⁰ However, he does not examine the role development assistance plays in promoting the rights based approach or human rights. The study will therefore go further to look at the role development assistance plays in promoting and protecting human rights in Uganda.

Robinson asks the question: What rights can add to good development practice?⁵¹ She endeavours to show that human rights are part of development. The central premise of Robinson's discussion is showing how human rights should be linked to development. She makes the case, just like Tomasevski below, for the integration of human rights in development.⁵² She does not deal with the role of development assistance in promoting and protecting human rights, which is the focus of this study. However, her view is relevant as it will help shape the discussion around the question: Why do development partners provide development assistance?

The work of the late Tomasevski is perhaps the closest in outlook and focus to this study.⁵³ Tomasevski advances the argument that human rights ought to be incorporated in development aid to prevent it from becoming part of the problem it purports to solve.⁵⁴ Some of the most valuable sections show how irregularly the goal is pursued by national donors, the World Bank and the United Nations. This is one of the major strands of debate in this study. This study will therefore take forward a number of issues raised in Tomasevski's

⁵⁰ Wolfesnohn (see n 48 above) 19.

⁵¹ M Robinson 'What Rights can Add to Good Development Practice' in *P Alston & M Robinson Human Rights and Development: Towards Mutual Reinforcement* (2005) 25.

⁵² Robinson (see n 51 above) 25.

⁵³ K Tomasevski. *Development Aid and Human Rights* (1989) 49.

⁵⁴ Tomasevski (see n 53 above) 49.

work and also take into account that since 1989, the modalities of development assistance have undergone some major changes.

In what he calls ‘donorisation of domestic policy’, Olukoshi argues that donors have taken over domestic policy.⁵⁵ He notes that, ‘the donorisation of the domestic policy processes amounted to a capture of the state by external forces and the donorisation of the system of accountability.’⁵⁶ The conclusions of Olukoshi resonate with some of the research questions that the study seeks to answer, including who, in reality, is setting the human rights agenda in Uganda. While Olukoshi’s views may inform this study, he does not discuss the role donors have played in shaping the human rights agenda of recipient countries, an issue that this study will delve into.

Wallace *et al.* discuss how local strategies and projects of NGOs are influenced by changing donor policies and other external forces.⁵⁷ They provide very useful insights on how NGOs in general respond to donor policies using Uganda and South Africa as case studies. They deal with NGOs in general to the exclusion of human rights NGOs. Nevertheless, they do provide useful pointers which will inform and enrich this study. The work of Wallace *et al* provided useful pointers in this study especially as far as the effect of development assistance on human rights NGOs is concerned.

⁵⁵ A Olukoshi ‘Assessing Africa’s New Governance Models’ in JO Onyango & N Muwanga (eds) *Africa’s New Governance Models. Debating Form and Substance* (2007) 19.

⁵⁶ Olukoshi (see n 55 above) 19.

⁵⁷ T Wallace, L Bornstein & J Chapman *The Aid Chain: Coercion and Commitment in Development NGO’s* (2007).

In a rather brazen attack on aid agencies, Hancock questions the role and effectiveness of aid (assistance) and the whole development assistance enterprise.⁵⁸ One of the central themes he advances is that the whole aid enterprise is driven by self-interest and greed. He further notes that very often aid agencies are run by inexperienced people who might end up causing more harm than good. Hancock's position will be interrogated in this study and will assist in answering the questions: Why do developed countries provide development assistance? What really is their agenda?

While discussing donor assistance to justice sector reform in Africa, Piron notes rightly that poverty reduction has become the official objective of development policy.⁵⁹ This, she argues, has been associated with a commitment to changing the provision of donor aid, which is now based on a 'partnership approach' and the 'ownership' of reform by local actors, aiming to improve coordination of aid, moving toward a harmonisation of procedures and eventual alignment of donor assistance with national partners' policies and systems.⁶⁰ Piron goes on to call upon donors to promote national leadership. The question that informs this study is whether you can ever have local/national ownership of foreign-funded programmes. Piron's work therefore will provide some insight on this.

⁵⁸ G Hancock *Lords of Poverty* (1987).

⁵⁹ LH Piron 'National Criminal Justice Reform: Donor Assistance to Sector Reform in Africa: Living up to the New Agenda?' in Open Society *Justice Initiatives* (2005) 6.

⁶⁰ Piron (see n 59 above) 6.

Moyo is one of the more recent critics of aid. In her recent book, her main argument is that aid has not worked for Africa.⁶¹ Moyo maintains that we live in a culture of aid which has made Africa aid-dependant. She goes on to observe that while in the past forty years at least a dozen developing countries mainly in Asia have experienced phenomenal growth, over the same period as many as thirty other developing countries, mainly aid-dependent in sub-saharan Africa, have failed to generate consistent economic growth and have even regressed.⁶²

Moyo advocates for a world without aid, with focus on trade and capital as the solutions to Africa's development woes.⁶³ While Moyo's assertions, may be true, they fail to take cognizance of the role development assistance (positive or negative) has played or is playing to promote and protect human rights. Moyo, who is dismissive of aid, does not acknowledge this, which is a major omission in her very convincing book. In this study, the role of development assistance in promoting and protecting human rights will be unravelled, taking into account the question of who is and ought to be shaping this agenda. It is also acknowledged that aid alone can never be the answer, it must be accompanied by initiatives such as trade and private sector- led growth in order for African countries to be able to truly shape and own their destiny.

Hansen *et al.* ask the question, 'does aid to Africa actually work?'⁶⁴ The common answer that comes out of the book is that after nearly 50 years of

⁶¹ D Moyo *Dead Aid: Why Aid is not working and how there is another way for Africa* (2009).

⁶² Moyo (see n 61 above) 29.

⁶³ Moyo (see n 61 above) part II.

⁶⁴ HB Hansen, G Mills & G Wahlers *Africa Beyond Aid* (2008) section 2.

independence and development efforts backed by more than half a trillion dollars of western aid, most of Africa's citizens are poorer than ever. The authors have a sceptical perspective on aid and seek to establish if we can conceive of an Africa beyond aid.⁶⁵ While the authors do make a valid point that Africa needs to go beyond aid, they fail to acknowledge the role that aid has played in moving the development agenda in Africa. It is wrong to completely dismiss aid as a failure. Notwithstanding this, one of the conclusions of this study is that Uganda cannot rely forever on development assistance to support its human rights programmes. In this regard, the study relies on the views in Hansen's book calling for Africa beyond aid.

Degnbol-Martinussen and Engberg-Pedersen strongly support aid.⁶⁶ The authors argue that there is no better alternative to replace taxpayer financed-aid as the main mechanism for promoting greater equality between North and South and within the countries of the south.⁶⁷ They strongly recommend that it aid should be continued but be made more effective and efficient.⁶⁸

Four traps that have ensnared underdeveloped countries like Uganda are identified by Collier: Conflicts, being landlocked, natural resources and bad governance.⁶⁹ Collier states that one way the developed world has tried to address these traps is to provide aid. He however, comes to the conclusion that aid alone is really unlikely to the address the problem of the bottom billion

⁶⁵ Hansen *et al* (see n 64 above) sections 2 and 4.

⁶⁶ J Degnbol-Martinussen & Poul Engberg-Pedersen *Aid Understanding International Development Cooperation* (1999).

⁶⁷ Degnbol-Martinussen & Engberg-Pedersen (see n 66 above) i.

⁶⁸ Degnbol-Martinussen Engberg-Pedersen (see n 66 above) i.

⁶⁹ P Collier *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*. (2007) 17-64.

(from the underdeveloped world).⁷⁰ While Collier does discuss aid and human rights, this study comes to the same conclusion with him on one position that development assistance cannot be the solution to promoting and protecting human rights in Uganda. It can and should only supplement the government in carrying out its primary obligation of promoting and protecting the human rights of its citizens.

Calderisi advances the same argument as Collier and others. He believes that aid has failed Africa and also Africa has failed to manage itself.⁷¹ Calderisi calls for a reduction in aid to poor African countries.⁷² Calderisi makes a valid point, poor countries like Uganda should aim at reducing their dependency on aid to run human rights programme. This is one of the key recommendations of this study. The role of development assistance in promoting and protecting human rights should be reduced over time.

Marks, together with several other eminent scholars like Baxi, Salomon and Shrijver, deals with the role of international law in implementing the right to development.⁷³ The various scholars in this very insightful book make compelling arguments on how the right to development can be made legally binding. Some of the thoughts and ideas of for example Baxi and Shrijver have been relied upon in this study. Both put forward a number of suggestions on how the right to development can be legally recognised.

⁷⁰ Collier (see n 69 above) 99.

⁷¹ R Calderisi *The Trouble with Africa: Why Foreign Aid isn't Working* (2007) 153.

⁷² Calderisi (see n 71 above) 209.

⁷³ SP Marks *Implementing the Right to Development The Role of International Law* (2008).

The United Nations High Level Task Force on the Implementation of the Right to Development in a recent report highlights the ongoing debate and thinking of the right to development within the member states of the UN.⁷⁴ It highlights the deep polarisation over the legal status of the right to development with several developed countries like Canada and the United States of America not supporting the recognition of the right while others from Africa like Nigeria in favour of the right.

Bolton explores how globalisation and aid have not worked.⁷⁵ Bolton who was the former head of the British Government Aid programme in Rwanda provides a vivid insider account on how globalisation and aid are failing the world's poorest continent Africa. He notes that Africa is not able to take advantage of the increased opportunities that globalisation provides.⁷⁶ Bolton's view could be modified to say that Africa is not allowed to take advantage of the opportunities due to for example an unfair international trading regime.

Baxi discusses the state of human rights in the current global atmosphere defined by security concerns and terrorists threats.⁷⁷ Baxi is critical of Sen's theory of human rights which is rooted in an ethical context. Baxi provides an interesting discussion on why the United Nations Declaration on the Right to Development has not been taken seriously. Baxi provides useful pointers on

⁷⁴ High-Level Task Force on the implementation of the right to development (2010) A/HRC/15/WG2/TF/2 presented at the fifteenth session of the Human Rights Council in Geneva 14-22. January 2010. Available at <http://www.ohchr.org/EN/Issues/Development/Pages/HLTFSession6th.aspx> (accessed on 20 January 2011).

⁷⁵ G Bolton *Aid and other Dirty Business* (2007).

⁷⁶ Bolton (see n 75 above) 240.

⁷⁷ U Baxi *Human Rights in a Post Human World: Critical Essays* (2007).

the work of Sengupta and the implications this has on the right to development.

The relationship between aid, the media and conflict is examined by Polman.⁷⁸ Polman makes the point that aid, the world media and countries in conflict in bound together for selfish interests. While Polman does not specifically look at development assistance and human rights she does provide a very telling account of the motivation, frustration and deceit of the aid industry. There is a lot of commonality with what Polman narrates in her book in the Ugandan development assistance arena.

The International Law of Development is the main theme of the book edited by Snyder and Slinn.⁷⁹ Various scholars deal with the concepts and ideologies of the international law of development, sources of the law of development and the implementation of the law of development. The articles by Bedjaoui, Allott and Kanyeihamba provide useful insights on law and development which have been relied on in this study.

⁷⁸ L Polman *War Games The Story of Aid and War in Modern Times* (2010).

⁷⁹ F Snyder and P Slinn (eds) *International Law of Development: Comparative Perspectives* (1987).

1.6 Methodology

In undertaking this study, a variety of methods have been relied upon. These include desk review, internet, legal data bases, interviews and comparative research methods. This multi-method approach allowed for data triangulation which enhanced the validity of the data through cross -verification from multi-sources.

During the desk review, a content analysis of the literature on development, development assistance and international human rights law was undertaken. In addition a detailed review and analysis of international treaties, conventions, protocols, reports and other relevant instruments on the law of development, development assistance and human rights was done. Furthermore Ugandan national laws and policies on development and human rights were critically examined. Desk reviews tend to lead to the problem of a study being overly descriptive. In order to address this issue, a critical analytical approach was adopted while conducting the desk review.

The internet and various legal databases were also used to complement the desk review. Through the internet and legal data bases like Westlaw and Heinonline a number of international treaties and policies on human rights, development and development assistance were accessed. While using the internet and legal data bases it was recognised that these sources can be unreliable and inaccurate. Therefore every effort was taken to respect the academic tradition of relying on reliable and accurate sources of information like the legal data bases outlined above.

Apart from desk review, semi-structured, unstructured and telephone interviews and discussions were held with fifty senior and knowledgeable persons working in the area of human rights, development and development assistance in Uganda. These persons were drawn from government institutions, civil society, academia, diplomatic and development agencies. The information got from the interviews and discussions form an integral part of the study, as the views and ideas of those involved intimately in the provision of development assistance and the implementation of human rights programmes have been solicited. A complete list of people met and interviewed is attached in Annex 4. An open-ended questionnaire was developed and used during the interviews. The use of interviews raises concern over reliability of the data generated and the possibility of bias of the people interviewed. The study has taken care of this by interviewing fifty people and validating the information got from the interviews with other sources like the desk review.

The use of comparative research was also employed. The study was able draw comparisons between the Uganda Human Rights Commission and national human rights institutions of some countries like Kenya, Malawi and South Africa. The approach used was to look at the role of development assistance in funding the Uganda Human Rights Commisison and compare it to the suitation of other national human rights instititons in the African region. Through the comparative analysis best practices were examined. One major problem with comparative research is that the data sets in different

countries may not use the same categories and the situation in each country is different. However notwithstanding this the comparative method serves to enhance the study by infusing examples from the region.

1.7. Scope of the study

The study is limited to examining the relationship between development partners that provide development assistance to support human rights programmes in Uganda and the human rights NGOs in Uganda (supported agencies). These development partners include Ireland, Germany, Netherlands, Norway, UNDP and the EU. The supported agencies include, the Justice, Law and Order Sector (JLOS) with specific focus on the police and prisons, the UHRC and Human Rights NGOs like the Foundation for Human Rights Initiative (FHRI), Human Rights Network (HURINET), Uganda Debt Network (UDN), Uganda Joint Christian Council (UJCC). These NGOs were chosen primarily because they are among the leading human rights NGOs in Uganda. The information in this study is updated as of 31 August 2010.

1.8. Chapter overview

The study is divided into 3 parts and comprises 6 chapters. Part one, contains chapters 1 and 2. Chapter 1 provides a general introduction of the study, laying out the background to the study and identifying the main research questions. Chapter 1 also contains the objectives of the study, the literature review, limitations of the study and methodology adopted in the study.

Chapter 2 is devoted to the conceptual and theoretical framework in which this study is rooted. The concepts and theories on development, development assistance, human rights, partnership, local ownership and the various aid modalities such as project and budget support will be examined. It is within these frameworks that the ensuing discussion will be tested. The practice that will be explored will be dipped into the conceptual and theoretical pool to determine to what extent the concept and theories are matched in practice.

Part two comprises chapters 3, 4 and 5. Chapter three outlines the legal, policy and institutional framework of development in Uganda. In chapter 4, an analysis of the human rights landscape in Uganda is done.

The study, in chapter 5, discusses the different development assistance modalities used by development partners. In this chapter an audit of the development policies and practices will be done. This audit will seek to establish whether the said policies and practices conform to international human rights standards that will have been outlined in chapter 2. In addition chapter 5 of this study will look at the relationship between development partners and recipient organisations. The theory and practice will be examined. This chapter is the heart and soul of this study. It seeks to answer the key research question of the study: What role does development assistance play in shaping the human rights agenda in Uganda?

The study in part three concludes with a number of findings and recommendations contained in chapter 6. These findings and recommendations

are intrinsically linked to the key research questions. Each finding and recommendation will be addressing the research questions.

1.9. Limitations of the study

In undertaking a study of this nature challenges and limitations are bound to be encountered. One of the major challenges faced in the study, was marrying the two disciplines of development and law. The central question in this study straddles these two disciplines and this in itself poses a scholarly challenge. Uvin acknowledges the same problems and points out that, ‘until quite recently, the development enterprise operated in perfect isolation, if not ignorance, of the human rights community.’⁸⁰ Bridging this isolation is not an easy endeavour.

A second challenge met in carrying out this study was trying to maintain a delicate balance between a practitioner’s and a scholar’s/academic view point. The author finds himself in the unique position of both a practitioner and scholar of human rights and development assistance. This may be both a strength and a challenge. The strength lies with the fact that the author will be able to observe whether the theory is applied in practice while on the other it is a challenge since the author relies in some cases on his observations of the practice in meetings which cannot easily verified.

⁸⁰ P Uvin ‘On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise’ (2002) 171 *Fletcher Journal of Development Studies* 1-11, also available at <http://fletcher.tufts.edu/praxis/archives/xvii/Uvin.pdf> (accessed on 4 May 2006) He further urges that, this does not mean that all development practitioners are undemocratic people or lack personal interest in human rights. Rather, it means that development practitioners did not consider human rights issues as part of their professional domain: they neither weighed the implications of their own work on human rights outcomes, nor sought explicitly to affect human rights through their work.

The lack of adequate material on Uganda makes for the third challenge. As pointed out in the literature review section of this chapter, there is hardly enough literature on development assistance and its role in promoting and protection human rights in Uganda. This has proved to be a major obstacle. The study when completed will hope to remedy this to some degree.

A fourth challenge faced in the undertaking of this study, is the fact that in the areas being explored are fairly untrodden. How development assistance shapes the promotion and protection of human rights agenda is a relatively new area in international law. Most literature and discourse as indicated above is limited to the use of observance of human rights as a conditionality for receiving development assistance. As a result, there is limited academic agreement in this area and as a result there is bound to be academic reluctance to some of the views expressed in this study.

1.10. Conclusion

There is no doubt that in contemporary times, development assistance plays a central part in supporting the promotion, protection and respect for human rights in several developing countries, including Uganda. The scope, nature and impact of this assistance merits study, taking into account what international human rights law, development policy and practice have to say or show. It is therefore hoped that the findings of this study will contribute to the limited information in this area. Chapter 2 that follows sets out the conceptual and theoretical framework of the study.



Chapter 2

Concepts of development assistance and human rights

2.1. Introduction

2.2. Theoretical and conceptual framework

2.2.1. Human rights

2.2.2. Development

2.2.3. Right to development

2.2.4. Development assistance

2.2.5. The right to development assistance

2.2.6. Human rights-based approach to development cooperation

2.2.7. Partnership

2.2.8. Ownership

2.3. Conclusion

Chapter 2

Concepts of development assistance and human rights

2.1. Introduction

This chapter sets out the conceptual and theoretical framework of the study. The key concepts and theories of development assistance, development, human rights, the human rights-based approach to development assistance are discussed. In addition the rights to development and development assistance are examined. The chapter will also outline the current theories of harmonisation and specialisation of development assistance as outlined in the Paris Declaration on Aid Effectiveness and the Accra Agenda of Action.⁸¹ The views of both the proponents and detractors of these various concepts will be considered. It is against this theoretical and conceptual platform that the discussion and findings in this study are tested.

2.2. Human rights

What are human rights? The answer to this seemingly simple question is not straightforward. Definitions of human rights are vast and varied. It should however be pointed out that there is no definition of human rights prescribed in international human rights treaties. It is the Courts of Law and scholars therefore who have attempted to provide guidance in this regard as outlined below.

⁸¹ Paris Declaration on Aid Effectiveness adopted at the High Level Forum on Aid Effectiveness held in Paris February 28 March 2005. The Accra Agenda for Action (AAA) builds on the commitments agreed in the Paris Declaration.

The Uganda Human Rights Commission (UHRC) views human rights as those basic and fundamental rights to which every person for the simple reason of being human is entitled.⁸² They are inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. They are therefore innate, universal, inalienable, indivisible and interdependent/interrelated.⁸³ The UHRC has a tribunal that has the mandate to hear and determine human rights cases/complaints.⁸⁴ An examination of some of the cases heard by the UHRC tribunal reveal that there is little guidance and interpretation provided in terms of the nature and content of some of the human rights dealt with.

In *Kinkuhire Bonny v Kamugisha Stephen*,⁸⁵ the issue before the tribunal was whether the right of the child to be cared for by Mr Kamugisha had been violated, while in *Tusiime Bruce v Attorney General*⁸⁶ the tribunal was confronted with determining (1) whether the complainant's right to personal liberty was violated by the respondent (2) whether the complainant's right to freedom from torture, cruel, inhuman and degrading treatment or punishment was violated. In both these cases the tribunal did not outline what the content and nature of the human rights that were alleged to have been violated. However, in *Fred Tumuramye v Gerald Bwete & others* the tribunal highlighted the central contours of the definition of torture, cruel, inhuman and

⁸² See Uganda Human Rights Commission statement on their website available at <http://www.uhrc.ug/> (accessed on 7 February 2010).

⁸³ Uganda Human Rights Commission (see n 81 above).

⁸⁴ Constitution of Uganda (see n 10 above) article 53(2).

⁸⁵ *Kinkuhire Bonny v Kamugisha Stephen* The Human Rights Commission at Mbarara Complaint No. MBA/063/2005.

⁸⁶ *Tusiime Bruce v Attorney General* The Human Rights Commission at Fort Portal Complaint No. FP/25/2005.

degrading treatment or punishment.⁸⁷ This practice of providing the nature and content of the right being violated is not consistent across all complaints heard by the Commission. It would be very helpful if the UHRC tribunal would provide guidance on the nature and content of the particular human right in the cases they handle just like the South African Human Rights Commission does.

The office of the United Nations High Commissioner for Human Rights (OHCHR) defines human rights as universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.⁸⁸ OHCHR goes further to aver that human rights law obliges governments (principally) and other duty-bearers to do certain things and prevents them from doing others.⁸⁹ The OHCHR definition recognises the human rights of both individuals and groups, which is a welcome position. This is because there is a large rift in thinking over this among human rights scholars as will be exposed in chapter 4 in respect of the right to development. The OHCHR definition assumes that human rights are universal. This assumption is riddled with problems as many will not agree that human rights are universal. OHCHR itself recognises that international human rights are universally recognised regardless of cultural differences, but their practical implementation does demand sensitivity to

⁸⁷ *Fred Tumuramye v Gerald Bwete & others* Uganda Human Rights Commission No.264/1999. The tribunal outlines the elements of torture to be (1) an act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person (2) for a purpose such as obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind (3) the act is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁸⁸ Office of the United Nations High Commissioner for Human Rights. Frequently asked questions on a human rights-based approach to development cooperation 2006 1. Available at <http://www.un.org/Depts/dhl/humanrights/toc/toc9.pdf> (accessed on 14 December 2009).

⁸⁹ Office of the United Nations High Commissioner for Human Rights (see n 88 above) 1.

culture.⁹⁰ This, in reality, amounts to a contradiction: How do you implement human rights, taking into account cultural sensitivities, while at the same time claim they are universal? Implementation of human rights lies at the heart of the human rights agenda and therefore, if universal, should be implemented as such.

Mawa provides an interesting view when he suggests that the concept of human rights in Africa is one of struggle against all forms of domination, exploitation, oppression and abuse.⁹¹ Mawa goes on to support his position by pointing out that this conception of human rights is also clearly reflected in the African Charter on human and peoples' rights noting that, in its preamble, the Charter affirms the duty of everyone, 'to achieve the total liberation of Africa, the people of which are still struggling for their dignity and genuine independence.'⁹² Shivji believes that human rights must be rooted in the perspective of class struggle and must be claimed and enjoyed collectively.⁹³ Stavenhagen discusses cultural rights and universal human rights.⁹⁴ He provides a useful insight into the debate on whether human rights are universal or culture specific. Stavenhagen carries out a relativist critique of universal human rights. He cites the American Anthropological Association which, as early as 1947, recognised the issue of cultural relativism.⁹⁵ This association argues that the individual realises his personality through his culture and hence

⁹⁰ Office of the United Nations High Commissioner for Human Rights (see n 88 above) 5.

⁹¹ M Mawa 'Human Rights and Development in Uganda: Reflections on the Constitutional Provisions on the Right to Development' in AT Dalfovo, JK Kigongo, J Kisekka, G Tusabe, E Wamala, R Munyonyo, Ab Rukooko, ABT Byaruhanga-Akiiki, M Mawa (eds) *Ethics, Human Rights and Development in Africa: Ugandan Philosophical Studies III* (2002) 2.

⁹² Mawa (see n 91 above) 1.

⁹³ I Shivji *The Concept of Human Rights in Africa* (1989) 71.

⁹⁴ R Stavenhagen 'Cultural Rights and Universal Human Rights' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights. A Textbook* (1995) 63-78.

⁹⁵ Stavenhagen (see n 94 above) 69.

respect of individual differences entails a respect for cultural difference.⁹⁶ The association goes further to state that even as the UDHR was being drafted 62 years ago, American anthropologists considered it to be embodying the values of only one culture and they questioned the automatic applicability of this standards to other cultures.⁹⁷ It is clear that referring to universal human rights is problematic and there is no universal acceptance of this position.

Weiss *et al.* argue that human rights are fundamental entitlements of persons, constituting means to the end of minimal human dignity or social justice. They go on to advance the point that if persons have human rights, they are entitled to a fundamental claim that others must do or refrain from doing something.⁹⁸

Wronka defines human rights as statements of human needs.⁹⁹ He maintains that the idea of human rights is a social construct, which reflects social acknowledgements of individual and communal basic and perceived needs in a particular historical period.

Human rights, according to Malanczuk, are fundamental and inalienable rights essential to the human being.¹⁰⁰ Nhamburo goes a bit further and defines human rights as fundamental entitlements to which all persons have a claim.¹⁰¹

⁹⁶ American Anthropological Association 'Statement on Human Rights' submitted to the Commission on Human Rights, United Nations, by the Executive Board, American Anthropological Association, (1947) 49, *American Anthropologist* 4.

⁹⁷ American Anthropological Association (see n 96 above) 4.

⁹⁸ TG Weiss, DP Forsythe & RA Coate *The United Nations and Changing World Politics* (1994) 105.

⁹⁹ J Wronka *Human Rights and Social Policy in the 21st Century* (1992) 22.

¹⁰⁰ P Malanczuk *Akehurst's Modern Introduction to International Law* (1997) 207.

¹⁰¹ AT Nhamburo 'Towards Global Human Rights in Zimbabwe' in P Morales *Towards Global Human Rights* (1996) 121.

Bentham¹⁰² and Burke¹⁰³ take the view that human rights cannot be inalienable but rather stem from actions of governments. Locke on the other hand strongly believes that life, liberty, and estate (property) were fundamental natural rights.¹⁰⁴ Locke's view of rights is rather narrow and focused on civil and political rights at the expense of other rights such as economic, social and cultural rights. Pollis and Schwab conclude that through the philosophic and legal writings of Grotius, Locke, Montesquieu and Jefferson a new conception of popular sovereignty and individual rights was conceived.¹⁰⁵

The Canadian Development Agency (CIDA) states that 'human rights derive from the inherent dignity of the human person and are fundamental to the well-being of the individual and to the existence of freedom, justice and peace in the world'.¹⁰⁶ This study will examine whether development assistance and development policy assists in achieving the basic tenets outlined in the various definitions of human rights.

¹⁰² J Bentham 'Critique of the Doctrine of Inalienable, Natural Rights' (1843) 2, in J Bentham *The Works of Jeremy Bentham* (1843). Available at <http://www.ditext.com/bentham/bentham.html> (accessed on 9 June 2010).

¹⁰³ E Burke 'Reflections on the Revolution in France' (1790) 144.

¹⁰⁴ J Locke 17th century English, philosopher John Locke discussed natural rights in his work, identifying them as being "life, liberty, and estate (property)", and argued that such fundamental rights could not be surrendered in the social contract. See JR Milton (ed) 'Locke's Moral, Political and Legal Philosophy' (1999) chapter 6.

¹⁰⁵ A Pollis P, Schwab 'Human Rights: A Western Construct with Limited Applicability' in A Pollis and P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1979) 2

¹⁰⁶ The Canadian Development Agency (CIDA) See <http://www.acdi-cida.gc.ca/cida> (accessed on 4 May 2006).

Donnelly asserts that there is a special connection between human rights and the rise and consolidation of liberalism in the modern west.¹⁰⁷ Morsink agrees with this noting that the liberalist agenda is closely aligned to that of universal human rights.¹⁰⁸

2.3. Development

In trying to understand what development is, one will immediately be thrust into an inter-disciplinary turf battle. This battle has been one mainly between economists and development practitioners, with the international human rights scholars joining the fray in the last two decades. Lofchie acknowledges that, ‘the notion of development has become so diffuse that it must be redefined afresh by each scholar who wishes to use it.’¹⁰⁹ Classical or traditional economists tend to gravitate towards a definition of development which places a lot of currency on the measurement of a country’s Gross Domestic Product (GDP) as well as Gross National Product (GNP). GDP is the total final output of goods and services produced by a country’s economy, within the country’s territory by residents and non-residents, regardless of its allocation between domestic and foreign claims.¹¹⁰ GNP is the total domestic and foreign output claimed by residents of a country. It comprises gross domestic product plus factor incomes accruing to residents from abroad, less the income earned in the domestic economy, accruing to persons abroad.¹¹¹

¹⁰⁷ J Donnelly *Universal Human Rights in Theory and Practice* (2003) 2.

¹⁰⁸ J Morsink *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (1999) x-xi.

¹⁰⁹ MF Lofchie *State of the Nations: Constraints on Development in Independent Africa* (1971) 3.

¹¹⁰ MP Todaro *Economic Development* (1994) 680.

¹¹¹ Todaro (see n 110 above) 680.

Todaro, for example, asserts that in strictly economic terms, development has traditionally meant the capacity of a national economy whose initial economic condition has been more or less static for a long time to generate and sustain an annual increase in its GNP at rates of perhaps 5% to 7% or more.¹¹² Classical economists will therefore assess whether a country is developing, depending on whether there is an increase in the amount of goods and services produced by an economy of a particular country.¹¹³

This kind of definition of development, as Hansungule notes, did not bother to counter check the net effect of such an increase of the GDP on, for instance, the life of an ordinary person.¹¹⁴ In addition the GDP/GNP approach does not take into the account the question of who owns and produces these goods and services. It does not ask about the income inequality question. It is therefore possible that a country may register impressive GDP figures yet the reality on the ground indicates that the development is enjoyed by the few, while the majority wallow in chronic poverty.

However, with the chronic levels of poverty that the world, especially sub-Saharan Africa is experiencing, something was bound to give in as far as development is defined, viewed or understood. Hansungule believes that it became increasingly obvious that the poor of the world would not disappear by simply being ignored.¹¹⁵ The nobel prize-winning economist Sen has

¹¹² Todaro (see n 110 above) 14.

¹¹³ Todaro (see n 110 above) 14.

¹¹⁴ M Hansungule 'The Right to Development: An African Response' (2005), unpublished paper presented to the workshop on Human Rights and Development at the Centre for Human Rights – University of Pretoria 28 November 2005.

¹¹⁵ Hansungule (see n 114 above) 3.

articulated a view that development is not the acquisition of more goods and services, but the enhanced freedom to choose to lead the kind of life one values.¹¹⁶ Sen refers to these enhanced choices as capabilities. Poverty, he explains, is the deprivation of basic capabilities and goes on to urge that attention must be focused on aspects of life other than income to understand what poverty is and how to respond to it in places like South Asia and sub-Saharan Africa where extreme poverty is concentrated.¹¹⁷

Taking into account Hansungule and Sen's concerns of inequality it is critical to keep in mind the contemporary dominant development paradigms of neo-liberalism and globalisation. The main features of both are the diminished role of the State in development and adoption of free market policies.¹¹⁸ Development and development assistance since 1989 have therefore been informed by the free market ideology or what Williamson termed the 'Washington consensus.'¹¹⁹ Looking at development from a neo-liberal/globalisation/ free market lens entails accepting the survival for the fitness mentality, which is a concern. The strong States and individuals survive while the weak perish. In addition it could be said that development assistance in some ways maintains the status quo of keeping poor countries like Uganda poor. In fact it could be said that developed countries will normally provide development assistance to countries that have a free market development

¹¹⁶ A Sen *Development as Freedom* (1998) 87-110. Sen is one of the first scholars to suggest this radical paradigm shift.

¹¹⁷ Sen (see n 116 above) 88.

¹¹⁸ E Martinez, A Gracia 'What is "Neo-liberalism"? A brief definition (2000) 1 unpublished article available at [http://www.mona.uwi.edu/liteng/courses/E29a/documents/What is Neoliberalism.doc](http://www.mona.uwi.edu/liteng/courses/E29a/documents/What%20is%20Neoliberalism.doc) (accessed on 20 January 2011).

¹¹⁹ J Williamson 'What Washington Means by Policy Reform' in J Williamson (ed) *Latin American Readjustment: How Much has Happened*, Washington (1989) chapter 1.

model. However what is really needed is an equitable international trading regime that gives all States an equal opportunity to develop. The study shall revert back to this issue in chapter 5.

Seers shares concerns as those of both Hansungule and Sen. Seers poses very critical and basic questions which merit citing in full:

The questions to ask about country's development are: What has been happening to poverty? What has been happening to unemployment? What has been happening to inequality? If all three of these have declined from high levels then, beyond reasonable doubt, this has been a period of development for the country concerned. If one or two of these central problems have been growing worse, especially if all three have, it would be strange to call the result 'development' even if per capita income doubled.¹²⁰

Several other economists like Goulet¹²¹ and Owens¹²² have challenged the use of the GDP/GNP model. They advocate for a broad understanding of development which calls for the development of people rather than the development of things. The World Bank, which until the 1980s was the main advocate for economic growth as the primary goal of development, has also adopted the broader perspective of development. The World Bank in its world development report of 1991 asserted that:

The challenge of development is to improve the quality of life. Especially in the world's poor countries, a better quality of life generally calls for higher incomes, but it involves much more. It encompasses as ends in themselves, less poverty, a cleaner environment, more equality of opportunity, greater freedom and a richer cultural life.¹²³

¹²⁰ D Seers 'The meaning of development' *International Development Review* (1969) 3-4.

¹²¹ D Goulet *The cruel choice: A New Concept in the Theory of Development* (1971) 23.

¹²² E Owens *The Future of Freedom in the Developing World: Economic Development as Political Reform* (1987) 19.

¹²³ World Bank *World Development Report 1991: The Challenge of development* Vol. 1 (1991) 4.

In furtherance of the interdisciplinary debate Professor (of History) Rodney, as far back as 1972, suggested definitions to development that went far beyond the GDP/GNP model.¹²⁴ Rodney suggests that development in human society is a many-sided process. At one level, there is the individual and development implies increased skills, capacity, great freedom, creativity, self-discipline, responsibility and material well-being.¹²⁵ At the level of social groups, Rodney argues that development implies an increasing capacity to regulate both internal and external relationships.¹²⁶ Rodney concludes that a society develops as its members increase jointly their capacity for dealing with the environment. This capacity to deal with the environment in turn depends on the extent to which they understand the laws of nature (science), on the extent to which they put that understanding into practice by devising tools (technology) and the manner in which the work is organised.¹²⁷

It is therefore evident that the concept of development is a multi-dimensional one that has several layers which include basic needs of the persons, questions of inequality, enhanced freedoms and the eradication of poverty. Improvement of human dignity, and not only increase in goods and services, should therefore be at the heart of development.

¹²⁴ W Rodney *How Europe Underdeveloped Africa* (1972) vi- x.

¹²⁵ Rodney (see n 124 above) x.

¹²⁶ Rodney (see n 124 above) x.

¹²⁷ Rodney (see n 124 above) x.

2.4. Law of Development

Allott takes the view that the international law of development is about development.¹²⁸ It can therefore be said, taking a cue from Allott that, the law of development sets out the legal or normative framework for pursuing development. It provides for the addressees of development, namely, states, individual and collectives. Allott poses critical questions related to the issue of addressees of development, for what is development and for whom is development?¹²⁹ Allott goes on to answer these questions by saying that there is a need to distinguish between immediate and ultimate goals. Immediate goals refer to provision of infrastructure like roads while ultimate goals are for the enhancement of life and life possibilities for the individual in society.¹³⁰ Allott's view makes the point that development is not just about physical development of things like roads but also touches upon improving the lives of the individuals. This is akin to Sen's view that development means, among others, improving the freedoms of the individual.¹³¹ This section will therefore establish whether the various instruments express Allott and Sen's understanding of development.

On the other hand, Chemillier-Gendreau opposes that notion of the law of development. She takes the view that development cannot be an object of law and therefore comes to the conclusion that development law regulates an

¹²⁸ AN Allott 'The Law of Development and the Development of Law' in F Snyder & P Slinn, P (eds) *International Law of Development: Comparative Perspectives* (1987) 69.

¹²⁹ AN Allott 'Development for What? False Goods and Holy Writ' in International Third World Legal Studies Association *Human Rights and Development* (1984) 4.

¹³⁰ Allott (see n 129 above) 4.

¹³¹ Sen (see n 116 above) 87.

illusion.¹³² Chemillier-Gendreau goes further in support of her position to point out that any branch of law must have as its object a certain sector of social life which it organises legally.¹³³ The logical extension of Chemillier-Gendreau's argument is that development law does not regulate any sector. This is far from the truth. A close examination of the various instruments in this chapter will reveal that development law does regulate a cross-section of sectors, including but not limited to education, health, and the environment. Chemillier-Gendreau, therefore, grossly misunderstands what development is all about. Development, as defined above, is an integrated concept that goes beyond material items and involves improving the quality of life of individuals and communities.

Furthermore, this section will create the foundation for discussing the right to development below. This section is therefore critical in providing the basis for discussing the right to development. Brietzke neatly makes the connection between development and the right to development when he notes that the human right to development teaches that the only way to resolve the liberty/equality dilemma is through development.¹³⁴ In addition this section will provide the basis for answering the question posed below, on whether development assistance is a right or charity.

¹³² M Chemillier-Gendreau 'Relations between the Ideology of Development and Development Law' in F Snyder & P Slinn, P (eds) *International Law of Development: Comparative Perspectives* (1987) 58.

¹³³ Chemillier-Gendreau (see n 132 above) 58.

¹³⁴ PH Brietzke 'Development as a Human Right' in *International Third World Legal Studies Association Human Rights and Development* (1984) 25.

2.5. Africa and the law of development

Within the African region several treaties, declarations and other non-binding standards focusing on development have been adopted. In this section, focus will be on some of main treaties that deal with development. In addition a number of declarations are outlined in Annex 2, together with their areas of interface with development. The study has deliberately omitted reference to several non-binding resolutions, but this is in no way diminishing their value.¹³⁵ The African body of treaties and declarations make a bold attempt to bring an African flavour and footprint on issues such as human rights and development. Umozurike, in particular reference to the African Charter on Human and Peoples' Rights, says that it reflects a particularly African footprint.¹³⁶ While the African footprint is very welcome, it suffers from lack of implementation and being able to translate theory into practice. The African development footprint, which is discussed below, is very faint with no tangible results on the ground.

The African Charter on Human and Peoples' Rights (1981) is a legally binding treaty that 53 African States have signed and ratified.¹³⁷ The Charter explicitly addresses the issue of development. In the preamble of the Charter, it is provided that 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

¹³⁵ M Hansungule, S Kamanga & D Rukare (eds) are in the process of preparing a book on the African Law of Development (due to be published). This book is a collection of all the major African treaties, declarations and non binding resolutions that provide for development.

¹³⁶ Umozurike (see n 8 above) 46.

¹³⁷ The African Charter on Human and Peoples' Rights (see n 5 above).

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.¹³⁸

The ACHPR outlines a number of rights which are critical for development and these include: (1) the right to existence for all peoples;¹³⁹ (2) inalienable right to self-determination;¹⁴⁰ and (3) right of peoples to freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.¹⁴¹

Article 22 recognises that all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.¹⁴²

In addition, the article goes on to make clear who have the duty. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.¹⁴³ Under article 24, all peoples shall have the right to a general satisfactory environment favourable to their development.¹⁴⁴

¹³⁸ The African Charter on Human and Peoples' Rights (see n 5 above) preamble.

¹³⁹ The African Charter on Human and Peoples' Rights (see n 5 above) article 20.

¹⁴⁰ The African Charter on Human and Peoples' Rights (see n 5 above) article 20.

¹⁴¹ The African Charter on Human and Peoples' Rights (see n 5 above) article 20.

¹⁴² The African Charter on Human and Peoples' Rights (see n 5 above) article 22.

¹⁴³ The African Charter on Human and Peoples' Rights (see n 5 above) article 22.

¹⁴⁴ The African Charter on Human and Peoples' Rights (see n 5 above) article 24.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa notes that women's rights and women play an essential role in development.¹⁴⁵ The Protocol calls upon State parties to take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.¹⁴⁶ The Protocol highlights the important issue of budgetary allocations and priorities. Without the necessary resources the right to development will remain a theoretical aspiration. In chapter 5, the study will look at the priority areas of the Government of Uganda. Additional African instruments that provide for development are contained in Annex 2.

2.6. International law of development

At the international level, a number of instruments deal with the subject of development. The major international instruments will be examined in this section. Annex 3 outlines several other international instruments that deal with development. The UN Charter is a useful place to start because the Charter reflects the vision and aspirations of the 192 member states of the United Nations.¹⁴⁷ The preamble of the UN Charter reveals that the peoples of the United Nations are determined 'to promote social progress and better

¹⁴⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 13 September 2000 (entered into force 25 November 2005) CAB/LEG/66.6 Available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf> (accessed on 19 November 2009). The Protocol reaffirms what is stipulated in the United Nations Plans of Action on the Environment and Development of 1992 in so far as recognising the right to development.

¹⁴⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (see n 145 above) article 10 (3).

¹⁴⁷ United Nations Charter 24 October 1945 I UNTS XVI Available at <http://www.un.org/aboutun/charter/> (accessed on 28 November 2008) preamble.

standards of life in larger freedom'.¹⁴⁸ In addition, the peoples of the United Nations affirm that one of the reasons of setting up the United Nations is to employ international machinery for the promotion of the economic and social advancement of all peoples.¹⁴⁹ It is clear from these statements that one of the aims of setting up the United Nations was to promote social progress and better standards of life which, in reality, amounts to development as discussed in chapter 2. The UN Charter could therefore be said to be one of the international instruments that aims at advancing development.

The UN Charter goes further to amplify the vision in the preamble by outlining its principles in article 1. As indicated below, a reading of the founding principles reveals an implied commitment to development. Article I provides that the principles underpinning the UN are:

- (1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace,
- (2) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁵⁰

¹⁴⁸ United Nations Charter (see n 147 above) preamble.

¹⁴⁹ United Nations Charter (see n 147 above) preamble.

¹⁵⁰ United Nations Charter (see n 147 above) article 1.

It can be surmised that international peace and security are seen by the member States of the UN as essential to ensuring development. It will be shown later in this chapter that the United Nations Declaration on the Right to Development clearly makes the connection between international peace and security and development. In addition, the UN Charter introduces the idea of international cooperation in solving problems of an economic, social, cultural or humanitarian character, including promoting respect of human rights. It could be argued that promotion of development can be inferred from this principle. Problems that have an economic, social or cultural nature are development problems. One underlying assumption here is that States especially those that are economically better off are willing to cooperate with those that are economically disadvantaged. While it can be said that indeed the UN Charter does create an obligation to cooperate, in practice cooperation is done on a voluntary basis. In chapter 6 therefore, it will be argued that this principle of international cooperation supports the provision of development assistance and also forms the basis of argument supporting the right to development.

The UN Charter in article 55 becomes very explicit on the subject of development. Article 55 provides that, the United Nations shall promote (1) higher standards of living, full employment, and conditions of economic and social progress and development and (2) solutions of international economic, social, health, and related problems, and international cultural and educational cooperation.¹⁵¹ It is clear that the UN aims at promoting development and it

¹⁵¹ United Nations Charter (see n 147 above) 55.

could be therefore said that development within the ambit of the UN Charter amounts to higher standards of living, full employment and conditions of economic and social progress.

The other international instrument that deals with development is the Universal Declaration of Human Rights (UDHR).¹⁵² The UDHR in its preamble echoes the provision in the UN Charter and notes that the peoples of the United Nations have in the UN Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.¹⁵³ This reaffirmation reinforces the notion of development.

One possible argument that could be used to rebut the position of the UDHR is its legal standing. The argument would be that the UDHR is not a legally binding treaty in international law and therefore its provisions should not be deemed to be binding. The response to this position would be that the UDHR has over the years acquired legal force through customary international law. Reisman acknowledges that the UDHR provides a common standard of achievement and now is accepted as declaratory of customary international law.¹⁵⁴ In addition, Schwarzenberger points out that resolutions on development adopted unanimously or by consensus in heterogeneous bodies such as the United Nations General Assembly, may have been adopted

¹⁵² UDHR (see n 4 above) preamble.

¹⁵³ UDHR (see n 4 above) preamble.

¹⁵⁴ WM Reisman 'Sovereignty and Human Rights in Contemporary International Law' (1990) in 84 *The American Journal of International Law* 866-876.

with the mental reservation that development equals anything that is so termed by those involved and/or their governments.¹⁵⁵ Schwarzenberger's position could mean a number of things. At one level it could mean that several States that adopted the UDHR knowing that it is not legally binding took a very loose and vague understanding of development to mean everything and probably nothing. On the other hand it could be that some States, especially developing ones, were under the impression that development could be achieved in their countries by, among others, the tool of international cooperation.

In a very progressive judgment the South African Constitutional Court in the case of the *State v Makwanyane and another* stated that customary international law and international agreements that South Africa had ratified may be used as tools of interpretation by the court based on the Constitution of South Africa. The Court went on to specifically note that in the context of section 35(1) of the Constitution of South Africa, public international law would include non-binding as well as binding law.¹⁵⁶ This case which was based on an appeal against the death penalty, clearly illustrates that a progressive court would be able to use non-legally binding instruments in coming to its judgment. The problem here lies in the reliance on a progressive court and judge which are not always easy to come by.

¹⁵⁵ G Schwarzenberger 'Meanings and Functions of International Development Law' in F Snyder & P Slinn (eds) *International Law of Development: Comparative Perspectives* (1987) 5.

¹⁵⁶ *The State v Makwanyane and another Constitutional Court of South Africa*. Case No. CCT/3/94 1995 ZACC 3. Available at <http://law.gsu.edu/ccunningham/fall03/DeathPenalty-SouthAfrica-Makwanyane.htm> (accessed on 30 May 2010).

The UDHR goes on to outline a number of rights which, it is argued, are essential to development. These include for example the right to own property¹⁵⁷, right to social security¹⁵⁸, right to work¹⁵⁹, right to education¹⁶⁰, right to participate in the cultural life of the community¹⁶¹ and right to a social and international order in which the rights set forth in the UDHR can be fully realised.¹⁶²

Drzewicki concludes that all in all, the adoption and content of the UDHR has been a great success. The declaration constitutes the first internationally adopted catalogue and, in this sense, definition of human rights. It may be submitted that the universal declaration is one of the best legal instruments on human rights ever adopted.¹⁶³ Drzewicki further points out that on the international level, the declaration has established the very first international catalogue of human rights as a common standard of achievement for all peoples and all nations.¹⁶⁴ It can therefore be argued that the clauses that relate to development in the UDHR are a common standard of achievement for all peoples and all nations.

¹⁵⁷ UDHR (see n 4 above) article 17.

¹⁵⁸ UDHR (see n 4 above) article 22.

¹⁵⁹ UDHR (see n 4 above) article 23 (1).

¹⁶⁰ UDHR (see n 4 above) article 26 (1-2).

¹⁶¹ UDHR (see n 4 above) article 27.

¹⁶² UDHR (see n 4 above) article 28.

¹⁶³ K Drzewicki 'The United Nations Charter and the Universal Declaration of Human Rights' (1995) in R Hanski & A Suksi (eds) *An Introduction to the International Protection of Human Rights* (1999) 65.

¹⁶⁴ Drzewicki (see n 163 above) 75.

The UNDRD is an international instrument solely devoted to development.¹⁶⁵

It however must be noted that the UNDRD is not a legally binding instrument and has been the subject of much debate and disagreement. For purposes of this section we shall limit ourselves to what the UNDRD set forth as development.

The UNDRD starts out in article 1 to state that (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 realised (2) the human right to development also implies the full realisation 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.¹⁶⁶ It is clear from this opening article that the UNDRD sets out the right to development as an inalienable human right which every human person is entitled to participate in and contribute to.

The UNDRD goes further to make the connection between development and self determination.¹⁶⁷ The UNDRD further points out that States have the primary responsibility for the realisation of the right to development.¹⁶⁸ As a result States have the duty to take steps individually and collectively to

¹⁶⁵ United Nations Declaration on the Right to Development A/RES/41/128 4 December 1986 Available at <http://www.un.org/documents/ga/res/41/a41r128.htm> (accessed on 26 June 2009).

¹⁶⁶ UN Declaration on the Right to Development (see n 165 above) article 1.

¹⁶⁷ UN Declaration on the Right to Development (see n 165 above) article 1(2).

¹⁶⁸ UN Declaration on the Right to Development (see n 165 above) article 3.

formulate international development policies that facilitate the full realisation of the right to development.¹⁶⁹ It would be helpful if the UNDRD provided some guidance on what development is. However, it can be assumed that according to the UNDRD, development is comprised of economic, social cultural and political aspects. In order, therefore, for development to take place, people must be able to participate in their economic, social and political development. The UNDRD probably should have added the word freely. Every person, it is contended must be able to freely take part. In most of Africa this is not the case. Most citizens are excluded from the development process.

The UNDRD makes it very clear who the central subject is and participant in development.¹⁷⁰ The human person according to the UNDRD is the central subject of development and also the active participant and beneficiary of development. The UNDRD further stipulates that 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.¹⁷¹

¹⁶⁹ UN Declaration on the Right to Development (see n 165 above) article 4.

¹⁷⁰ UN Declaration on the Right to Development (see n 165 above) article 2.

¹⁷¹ UN Declaration on the Right to Development (see n 165 above) article 2 (2).

States, according to the UNDRD 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.¹⁷²

Article 10 calls for steps to 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.¹⁷³ Article 10 uses language similar to that found in the ICESCR. Progressive realisation refers to the gradual and incremental realisation of the right to development. One major loophole that renders article 10 redundant is that the fact that states do not link their development programmes and development assistance programmes to the UNDRD. This will be further examined in chapter 5. However, it can be said that most development plans do, by their very nature, contain a road map of how States intend to roll out their development programmes. This in effect amounts to progressive realisation. The problem lies in translating the theory into practice. In fact if most African countries like Uganda could implement what is contained in their development plans, development of the State and its people would be realised.

¹⁷² UN Declaration on the Right to Development (see n 165 above) article 2 (3).

¹⁷³ UN Declaration on the Right to Development (see n 165 above) article 10.

The ICESCR is a legally binding treaty with over 180 countries that have signed and ratified it.¹⁷⁴ In article 1, it is provided 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. Article 1 is similar to article 5 of the UNDRD. Both recognise that self-determination or independence of peoples is critical to them achieving development. However, it is interesting to note that the UNDRD speaks of human beings and not peoples. While the difference may not be easily seen, the term peoples in international law is synonymous with self determination. It is therefore vital that the legally binding ICESCR refers to peoples while the UNDRD to human beings. It could be contended that peoples and human beings are one and the same thing.

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 cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.¹⁷⁵

The ICESCR also provides for a series of rights that are at the heart of any development agenda. These include (1) the right of everyone to the enjoyment of the highest attainable standard of physical and mental health¹⁷⁶ (2) the right

¹⁷⁴ International Covenant on Economic, Social and Cultural Rights 993 U.N.T.S 3 GA Res 220 (1966) Available at <http://www.ohcr.org/english/law/cescr.htm> (accessed on 28 November 2008) article 1(1).

¹⁷⁵ International Covenant on Economic, Social and Cultural Rights (see n 174 above) article 1(2).

¹⁷⁶ International Covenant on Economic, Social and Cultural Rights (see n 174 above) Article 12. Article 12 provides for the steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for which include:(a) The provision for the

to education, which should be universal and free at primary level¹⁷⁷ (3) right to take part in cultural life.¹⁷⁸ It could therefore be said that a person without an education, in poor health and with no culture cannot be said to be developed. These are essential for the dignity of the human person and ultimately, his or her development.

The ICCPR is a legally binding treaty.¹⁷⁹ Article 1 stipulates 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.¹⁸⁰ The ICCPR just like the ICESCR and the UDHR recognises that self-determination is a critical element for peoples to attain development. One underlying assumption that seems to run across all these treaties is that self-determination alone will cause development. It should be kept in mind that self-determination alone, it could be said, will not cause development. Peoples and states need to be able to freely trade and engage in the international economic system. Without this, no level of self-determination will cause development. Several African countries attained self-determination over 40 years ago but remain underdeveloped. Why? One may ask. The

reduction of the still birth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

¹⁷⁷ International Covenant on Economic, Social and Cultural Rights (see n 174 above) article 13. State parties agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

¹⁷⁸ International Covenant on Economic, Social and Cultural Rights (see n 174 above) article 15.

¹⁷⁹ International Covenant on Civil and Political Rights 999 U.N.T.S 171 GA Res 220 (1966).

¹⁸⁰ International Covenant on Civil and Political Rights (see n 179 above) article 1(1).

answer mainly lies in the fact that African countries are not equal participants in the international economic system.

This concern is ably captured further in article 1 of the ICCPR which stipulates that 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.¹⁸¹ It is critical that all peoples and their states are able to freely interact in the international economic arena.

In 1974 the UN Charter on the Rights and Duties of States was adopted with the intent to constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries.¹⁸² The idea behind the Charter could be summed up as aiming to attain: (1) wider prosperity among all countries and of higher standards of living for all peoples, (2) the promotion by the entire international community of the economic and social progress of all countries, especially developing countries, (3) the encouragement of co-operation, on the basis of mutual advantage and equitable benefits for all peace-loving States which are willing to carry out the provisions of the present Charter, in the economic, trade, scientific and technical fields, regardless of political, economic or social systems, (4) the overcoming of main obstacles in the way of economic

¹⁸¹ International Covenant on Civil and Political Rights (see n 179 above) article 1(1).

¹⁸² Charter on Economic Rights and Duties of States A/RES/29/3281 (1974). Available at <http://www.un-documents.net/a29r3281.htm> accessed on 14 November 2009.

development of the developing countries, (5) the acceleration of the economic growth of developing countries with a view to bridging the economic gap between developing and developed countries, and (6) the protection, preservation and enhancement of the environment.

However, it is important to stress that a number of developed countries did not adopt it or accept it,¹⁸³ while most developing countries embraced the Charter. The primary reason why the developed countries reject this Charter can be found in articles 9 and 13.¹⁸⁴

It is evident from article 9 and 13 of the Charter that developed countries that sign up to it would be obliged to transfer scientific knowledge and technology to developing countries at no cost. Science and technology are at the heart of advancing development. A country devoid of science and technology cannot develop. Developed countries are able to maintain and improve their status because they have the science and technology to do so. It was therefore quite

¹⁸³ Charter on Economic Rights and Duties of States (see n 182 above) preamble.

¹⁸⁴ Charter on Economic Rights and Duties of States (see n 182 above). Article 9 provides, 'All States have the responsibility to cooperate in the economic, social, cultural, scientific and technological fields for the promotion of economic and social progress throughout the world, especially that of the developing countries'.

Article 13 provides that every State has the right to benefit from the advances and development in science and technology for the acceleration of its economic and social development.

2. All States should promote international scientific and technological co-operation and the transfer of technology, with proper regard for all legitimate interests including, *inter alia*, the rights and duties of holders, suppliers and recipients of technology. In particular, all States should facilitate the access of developing countries to the achievements of modern science and technology, the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies and their needs.

3. Accordingly, developed countries should cooperate with the developing countries in the establishment, strengthening and development of their scientific and technological infrastructures and their scientific research and technological activities so as to help to expand and transform the economies of developing countries.

4. All States should cooperate in research with a view to evolving further internationally accepted guidelines or regulations for the transfer of technology, taking fully into account the interest of developing countries.

naïve of developing countries to expect developed countries to transfer their technology and scientific innovations to them free of charge. It would have probably benefited developing countries more to adopt the Japanese and Chinese model of copying and adapting to the technology of the developed world. Expecting to be given the technology, was asking for the impossible.

In article 10, all States are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making processes in the solution of world economic, financial and monetary problems, *inter alia*, through the appropriate international organisations in accordance with their existing and evolving rules, and to share in the benefits resulting therefrom.¹⁸⁵ The reality on the ground is very far from the picture painted by article 10. It is clear that not all states are equal and do not participate as equal members of the international community. To illustrate this point, the World Bank and International Monetary Fund which are the two main international financial and monetary bodies are historically headed by an American and European respectively. In addition, developing countries like Uganda have little or no leverage at all in these financial institutions.

This is despite the provision of article 11 which notes that all states should cooperate to strengthen and continuously improve the efficiency of international organisations in implementing measures to stimulate the general economic progress of all countries, particularly of developing countries, and

¹⁸⁵ Charter on Economic Rights and Duties of States (n 182 above) article 10.

therefore should cooperate to adapt them, when appropriate, to the changing needs of international economic cooperation.¹⁸⁶

The Charter goes on to state that international cooperation for development is the shared goal and common duty of all States.¹⁸⁷ Every State should cooperate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives, with strict respect for the sovereign equality of States and free of any conditions derogating from their sovereignty. Development assistance is the main theme of article 19. Article 19 obliges States to cooperate with developing countries through active assistance which is consistent with their development needs. This implies that development assistance should not be used to impose external values and ideas but rather it should advance national development objectives. This issue of national led development programmes shall be revisited in chapter 5.

The Declaration on Establishment of a New international Economic Order (DNIEO) attempted to set forth a New International Economic Order.¹⁸⁸ DNIEO was meant to be a set of proposals put forward during the 1970s by developing countries, through the United Nations Conference on Trade and Development, to promote their interests by improving their terms of trade, increasing development assistance, developed-country tariff reductions, and

¹⁸⁶ Charter on Economic Rights and Duties of States (n 182 above) article 11.

¹⁸⁷ Charter on Economic Rights and Duties of States (see n 182 above) article 17.

¹⁸⁸ United Nations Declaration on Establishment of a New international Economic Order (NIEO) A/RES/S-6/3201 available at <http://www.un-documents.net/s6r3201.htm> (accessed on 12 November 2009).

other means. It was meant to be a revision of the international economic system in favour of third world countries, replacing the Bretton Woods system, which had benefitted the leading states that had created it – especially the United States.¹⁸⁹

The main tenets of the DNIEO are:

1. Developing countries must be entitled to regulate and control the activities of multinational corporations operating within their territory.
2. They must be free to nationalize or expropriate foreign property on conditions favourable to them.
3. They must be free to set up associations of primary commodities 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.
4. International trade should be based on the need to ensure stable, equitable, and remunerative prices for raw materials, generalized non-reciprocal and non-discriminatory tariff preferences, as well as transfer of technology to developing countries, and should provide economic and technical assistance without any strings attached.¹⁹⁰

In the 1970s and 1980s, the developing States pushed for DNIEO and an accompanying set of documents to be adopted by the UN General Assembly. Subsequently, however, these norms became only of rhetorical and political value, except for some partly-viable mechanisms, such as the non-legal, non-binding Restrictive Business Practice Code adopted in 1980 and the Common Fund for Commodities which came in force in 1989.¹⁹¹ In Matsushita *et al.*'s book, the authors explained part of the legacy of the NIEO writing that that:

Tensions and disagreements between developed and developing countries continue: The latter expect a greater degree of special treatment than industrialised countries have afforded them. This demand was expressed comprehensively in the New International Economic Order and the Charter of

¹⁸⁹ JN Bhagwati (ed) *The New International Economic Order: The North-South Debate* (1997) 36.

¹⁹⁰ United Nations Declaration on Establishment of a New international Economic Order (NIEO) (see n 188 above).

¹⁹¹ Bhagwati (see n 189 above) 28.

Economic Rights and Duties of States promoted by UNCTAD in the 1970s. Although the Charter was never accepted by developing [sic] countries and is now dead, the political, economic, and social concerns that inspired it are still present. The Charter called for restitution for the economic and social costs of colonialism, racial discrimination and foreign domination.¹⁹²

2.7. The right to development

The right to development remains a subject of debate and controversy, as will be discussed below. Tomasevski rightly points out that the right to development, which was meant to become the umbrella notion unifying human rights and development, divided rather than unified the international community.¹⁹³ This division is characterised by proponents of the rights, who are predominantly scholars from the south and assert that the right to development is the foundation from which all other rights spring. The opponents of the right to development urge that it is not a right under international law.

A leading African scholar on the right to development, Bedjaoui, has defined the right to development as the ‘fountain-head of all other human rights’.¹⁹⁴ In other words, Bedjaoui takes that view that all other human rights are derived from the right to development. It is therefore a necessary condition for the achievement of all human rights. Bedjaoui’s views represent the African radical school of thought. In addition to Bedjaoui, M’Baye, who is widely believed to have first coined the phrase ‘the right to development’, is one of the main African promoters of this right. When he was President of the

¹⁹² M Matsushita, TJ Schoenbaum, PC Mavroidis *The World Trade Organisation: Law, Practice, and Policy* (2003) 388–389.

¹⁹³ Tomasevski (see n 53 above) 48.

¹⁹⁴ M Bedjaoui ‘The Right to Development’ in M Bedjaoui, (eds), *International Law: Achievements and Prospects* (1991) 1177.

Senegal Supreme Court, M'Baye enunciated the right to development in an address to the International Institute of Human Rights Strasbourg in 1972. He went on to refer to articles 55-56 of the United Nations Charter and 22-27 of the Universal Declaration of Human Rights and to statutes of specialised agencies in which international cooperation and solidarity are important.¹⁹⁵ Ghai on the other hand views any attempt to recognise or protect the right to development as diversionary and as capable of providing increasing resource and support for state manipulation and repression of civil society.¹⁹⁶

Subscribing to this view, Robinson calls for the protection of individual welfare, especially in this globalisation era.¹⁹⁷ The United Kingdom Department for International Development (DFID) says it is important to consider the impact of global policies on poor people, particularly in the areas of trade, investments, financial regulations, the environment and debt.¹⁹⁸ In response to Donnelly, regarding the question on who is to be the beneficiary of the right to development, Bedjaoui said that it is not a problem whether it is a collective or individual right: 'The right to development is a right of the human race in general', he said.¹⁹⁹

¹⁹⁵ KM M'Baye 'Le Droit Development comme un droit de l'homme' (1982) 5 *Revue de Droit de l'homme* 623-626.

¹⁹⁶ Y Ghai 'Whose Human Right to Development?' Commonwealth Unit Occasional Paper (1989) 2.

¹⁹⁷ Robinson (see n 51 above) 23.

¹⁹⁸ United Kingdom Department for International Development (DFID) *Halving World Poverty by 2015: Economic Growth, Equity and Security* (2000) 15.

¹⁹⁹ Bedjaoui (see n 194 above) 1177.

Chowdury and DeWaart take the view that the right to development is a principle of international law.²⁰⁰ They derive this conclusion from articles 28 of the Universal Declaration of Human Rights,²⁰¹ article 2 of the United Nations Covenant on Economic, Social and Cultural Rights²⁰² and articles 55 and 56 of the UN Charter.²⁰³ The collective message from these articles is that there is a legal duty imposed on States to take joint and separate action to further social progress and development in the interest of human rights. Rosas, reacting to Chowdury and De Waart, notes that they speak of the right to development in international law without any convincing argument.²⁰⁴ Alfredsson, in support of Rosas's view, states that it may be fair to conclude that the right to development, at least as presented in this entirety in the Declaration on the Right to Development, does not yet exist as a legally binding obligation on States.²⁰⁵

Piron is of the view that though the right to development has met the procedural requirements to become a new internationally recognised human right, the Declaration on the Right to Development is not a legally binding treaty.²⁰⁶ Alston takes the position that for a right to be legally recognised, it should be endorsed by the general assembly of the United Nations and later

²⁰⁰ Chowdury and DeWaart (see n 45 above) 10.

²⁰¹ Universal Declaration of Human Rights (see n 4 above) article 28.

²⁰² International Covenant on Economic, Social and Cultural Rights (see n 174 above) article 2.

²⁰³ United Nations Charter (see n 147 above) articles 55 and 56.

²⁰⁴ A Rosas 'The Right to Development' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (2001) 251.

²⁰⁵ G Alfredsson 'The Right to Development Perspectives from Human Rights Law' in L.A. Rehof & C.Gulmann (eds) *Human Rights in Domestic Law and Development Assistance Policies of Nordic Countries* (1989) 84.

²⁰⁶ LH Piron 'The Right to Development. A Review of the Current State of the Debate for the Department for International Development' (2002) (unpublished) 14.

reaffirmed in conferences.²⁰⁷ The right to development has not only been endorsed by the United General Assembly but also reaffirmed in several international conferences as outlined below. Interestingly, Piron recommends in a report prepared for the Department for International Development (DFID) that DFID and other development agencies should take the right to development debate seriously and even goes as far as saying that as a concept, it could replace the internationally agreed objective of eradicating poverty.²⁰⁸ Piron should have further recommended that the right should be legally recognised.

Alston provides a useful overview on the possible status of the right to development. He argues that there are two paths by which one can reach the conclusion that there exists the right to development. The first winds through untrodden fields and requires the assertion that new rights have emerged within the international community as a consensus response to new problems and perceptions. The second and more accessible path is a well-worn one, which relies upon internationally recognised human rights guarantees. Alston concludes that by this approach the right to development is viewed largely as a synthesis of existing rights, informed and given an extra dimension by the emergence of a growing consensus on a variety of development objectives. In this way, the right can be seen as an example of the essential dynamism of the concept of human rights.²⁰⁹ Alston rightly cautions that using the new rights argument has certain dangers associated with it. He notes that the human rights

²⁰⁷ P Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78 *American Journal of International Law* 614-616.

²⁰⁸ Piron (see n 206 above) 5.

²⁰⁹ P Alston 'The Right to Development at the International Level' (1979) 814, paper presented at the Workshop of the Hague Academy of International Law, October 1979.

tradition has often been criticised in the past for the tendency to accord the status of a fundamental human right to certain desirable but allegedly non-essential objectives like the right to tourism.²¹⁰

Baxi goes further than both Piron and Alston to suggest that the UNDRD should be transformed into the Right to Development Treaty.²¹¹ The effect of the Baxi proposal would be making the Right to Development legally binding. Baxi presents a very compelling argument in favour of moving to a treaty on the Right to Development. One main argument that he presents is the general acceptance of the normativity of the UNDRD by States.²¹² Baxi goes as far as equating the UNDRD to the UDHR and notes that it is clear that the programmatic content of the UNDRD has attained over the decades a wider endorsement from the community of states than in sight at times of its adoption.²¹³

Schrijver on the other hand believes that a treaty on the right to development is not the only way to achieve the goal of a legally binding instrument.²¹⁴ Schrijver citing *inter alia* the UDHR and the Millennium Declaration suggests that declarations can have considerable legal effect beyond their formally non-binding legal status and can at times be a more effective technique in

²¹⁰ Alston (see n 209 above) 814.

²¹¹ U Baxi 'Normative Content of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Observations' in SP Marks (ed) *Implementing the Right to Development. The Role of International Law* (2008) 47. Available at <http://library.fes.de/pdf-files/bueros/genf/05659.pdf> (accessed on 21 January 2011).

²¹² Baxi (see n 211 above) 47.

²¹³ Baxi (see n 211 above) 47.

²¹⁴ N Schrijver 'Many roads lead to Rome. How to arrive at a legally binding instrument on the right to development?' 127 in SP Marks (ed) *Implementing the Right to Development. The Role of International Law* (2008). Available at <http://library.fes.de/pdf-files/bueros/genf/05659.pdf> (accessed on 21 January 2011).

generating consensus and subsequently compliance then the instrument of a formal treaty.²¹⁵ Schrijver sets forth additional options which include (1) reviewing the UNDRD and adopting a meaningful follow up declaration (2) preparing new instruments in the form of guidelines or recommendations (3) enhancing the institutional status of the right to development within the UN system (4) concluding development compacts (5) mainstreaming the declaration into regional and interregional agreements and (6) drafting a new human rights treaty on the right to development.²¹⁶ Baxi and Schrijver, both advance compelling avenues that could lead to the recognition of the right to development.

One of the central points of departure in this debate is collective rights versus the individual rights. Individual rights as those enjoyed by persons in their individual capacity, for instance the right to life, while collective rights are those rights that are enjoyed by a group of people collectively, like the right to a clean environment and the right to development. Western scholars, such as Rosas and Donnelly, take the view that there cannot be collective rights, a view that Bedjaoui dismisses by maintaining that the right to development is a right of the human race in general.²¹⁷ Donnelly, who comes from the opposition spectrum of the right to development debate, just as he is of the non-western human right system, believes that the right is not justiciable, i.e. an individual cannot hold it against their state, society, or individual *qua* individual.²¹⁸

Donnelly is very hostile to any attempt to link development and human rights.

²¹⁵ Schrijver (see n 214 above) 127.

²¹⁶ Schrijver (see n 214) 127-129.

²¹⁷ Bedjaoui (see n 194 above) 1177.

²¹⁸ J Donnelly 'In search of the Unicorn: the Jurisprudence and Politics of the Right to Development' (1985) 15 *California West International Law Journal* 485.

He says that the necessity of development for self-determination does not mean that development is itself a human right.²¹⁹

Rosas, who is one of the proponents of the idea that the right to development is not a right, shares the same view when he points out that the right to development is not one of the traditional core of human rights.²²⁰ Rosas maintains that ‘the precise meaning and status of the right are still in flux.’²²¹ This view is reflected in how international bodies, such as the United Nations, treat this matter. The result of this divided opinion has been relegated to being a subject of a non-binding declaration as will be discussed later in this chapter.

Hansungule notes that taking into account that more than half the world lives in chronic poverty or in squalor and the other in opulence, the right to development can not be ignored or dismissed.²²² Poverty has been defined and discussed in chapter 2. Africa is beset by chronic poverty and a look at the UNDP human development index confirms this with the bottom half of the list filled with African States. This, in part, explains the position taken by the likes of M’Baye and Bedjaoui. They are essentially making the case for the disadvantaged poor countries of the south.

²¹⁹ Donnelly (see n 218 above) 485.

²²⁰ Rosas (see n 204 above) 251.

²²¹ Rosas (see n 204 above) 251.

²²² In a discussion I held with Professor Michelo Hansungule at the Centre for Human Rights University of Pretoria South Africa 26 May 2006. Professor Hansungule was my supervisor and I met with him in this respect.

On the other hand, academic lawyers drawn mainly from the north, like Rosas and Donnelly above, believe that the right to development is not really a right in the first place because its content, claims, beneficiaries and victims are not precise. The right to development, according to them, is a misnomer and does not exist.²²³ Several scholarly expositions and books authored by western or north based scholars tend to either diminish the relevance of this right or downright ignore it.

Within the African human rights system, the right to development has been incorporated within a treaty that is to say a legally binding agreement between States that is governed by international law. This, in itself, is a rather unique and novel feature, as it means the right to development within the African context is entrenched by treaty or hard law while at the international level the right to development is a subject of non binding declarations or soft law. This is discussed in detail below. Rosas²²⁴ and Okafor²²⁵ acknowledge that the only binding international human rights treaty which has recognised the right to development is the African Charter on Human and Peoples' Rights. He however qualifies this by saying that this provision is only binding on African States that are parties to the African Charter. He interestingly acknowledges that it has served as a source of inspiration for the then initiated preparations of a universal instrument on the right to development.²²⁶ This means that the

²²³ Rosas (see n 204 above) and Donnelly (see n 218 above).

²²⁴ Rosas (see n 204 above) 248.

²²⁵ OC Okafor ' "Righting" the Right to Development: A socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights' in S Marks (ed) *Implementing the Right to Development The Role of International Law* (2008) 52.

²²⁶ Rosas (see n 204 above) 248.

ACHRP could be used to regulate development assistance between its State parties like South Africa and Uganda.

The ACHPR in article 22 provides for the protection and implementation of the right to development while articles 60 and 61 provide for the African Commission. An African Court of Justice and Human Rights is also in place.²²⁷ The Commission and Court are the two main regional bodies deal with compliance with the provisions of the ACHPR.

The ACHPR is the only human rights instrument which recognises the right to development as legally binding. States that are party to the ACHPR can be legally held accountable for the implementation of the right to development. At a regional level, therefore, the African Commission has the appropriate legal framework to promote and monitor the right to development. The African Commission on Human and Peoples' Rights in the landmark case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (known as the *SERAC* case and referred to as such herein)²²⁸ came to this conclusion as discussed below.

This communication was filed by two non-governmental organisations (NGOs) on behalf of the Ogoni people before the Commission against Nigeria, for claims based on Article 21 of the African Charter of Human and

²²⁷ Protocol on the Statute of the African Court of Justice and Human Rights July 2008 Available at <http://www.africa-union.org/root/au/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf> (accessed on 17 January 2011).

²²⁸ *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No 155/96 of 2001 available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html> (accessed on 23 May 2008).

Peoples' Rights. The NGOs challenged the agreements the Nigeria government had entered into for the exploration and mining of oil in Ogoniland without considering the interests of the Ogoni people. The interests that were allegedly ignored included participation of the local community during the conclusion of the contracts, the local people not being given a share of the profit from the exploitation of their land, and their displacement from their ancestral land without compensation in order to clear the way for mining activity.

The Commission in a historical and ground-breaking decision took the position that:

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter.²²⁹

The African Commission in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (herein referred to as the *Endorois* case) found Kenya to be in violation of Articles 1, 8, 14, 17, 21 and 22 the African Charter which included the rights to free practice of religion, property, education, culture, natural resources and development.²³⁰ The Commission seemingly utilizes

²²⁹ African Commission on Human and Peoples' Rights is created under article 30 of the African Charter on Human and Peoples' Rights 1986.

²³⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b8275a12.html> (accessed

Article 22 – the right to development – as an umbrella to safeguard numerous human rights including the right to property, religion and culture of the Endorois people.

It therefore follows that the right to development is a recognised right within the Africa. Hansungule is of the view that this decision created awareness among victims to protest conditions of underdevelopment and that it gave States a frame to look to as a standard of what is expected of them to realise their duties to develop their societies.²³¹ Despite this ground-breaking decision many African governments still routinely breach this right by not consulting or involving the people in decisions that affect their lives. This decision was a consecration of the legality over illegality²³² and proof that the right to development is a human right, which can be enforced. We share the opinion of Hansungule shared earlier.²³³

The debate on the right to development is not an easy one. Fortunately the interests of the poor were considered by the UNDRD. Furthermore, the Vienna Declaration and Programmes of Action reaffirmed the right to development as a universal inalienable right and an integral part of fundamental human rights.²³⁴

6 April 2011). The Endorois people is a sub-tribe from central Kenya that was evicted from its lands near Lake Bogoria in the 1970s. The government relocated them to an area that limited their access to a clean water source, central sites of worship and other daily requirements for their pastoral way of life. The Kenyan government failed to provide compensation for this eviction but still proceeded to develop a Game Reserve on the Endorois former lands.

²³¹ Hansungule (see n 222 above).

²³² African Commission on Human and Peoples' Rights (see n 229 above).

²³³ Hansungule (see n 222 above).

²³⁴ The conference affirms its attachment to the principles enshrined in the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights as well as in other relevant international human rights instruments.

2.8. Development assistance

The Organisation for Economic Cooperation and Development (OECD)'s Development Assistance Committee (DAC) defines official development assistance (ODA) as:

Flows to developing countries and multilateral institutions provided by official agencies, including state and local governments, or by their executive agencies, each transaction of which meets the following test:

- it is administered with the promotion of the economic development and welfare of developing countries as its main objective, and
- it is concessional in character and contains a grant element of at least 25% (calculated at a rate of discount of 10%).²³⁵

The World Bank defines ODA as ‘grants and loans that donors (the governments of rich countries) give to developing countries’. In 1970, global leaders of rich (donor) countries agreed to contribute 0.7 % of their gross national product to aid.²³⁶ Most donor countries are yet to reach this agreed target.

Development aid (also development assistance, international aid, overseas aid or foreign aid) is aid given by developed countries to support economic development in developing countries.²³⁷ It is distinguished from humanitarian

²³⁵ A combined total of \$78.568 billion USD, with subsets as follows:

- The G7 countries donated \$56.686 billion USD
- The European Union countries combined donated \$42.919 billion USD
- The United States donated \$18.999 billion USD, the smallest contribution as a percentage of GNI, at 0.16%
- Norway donated \$2.200 billion USD, but were the largest contributors as a percentage of GNI at 0.87%.

²³⁶ United Nations Resolution 2626 (1970) *The International Development Strategy for the Second United Nations Development Decade*.

²³⁷ As agreed by the United Nations Economic and Social Council, the General Assembly, on the recommendation of the Committee for Development Policy, decides on the countries to be included in the list of *least developed countries* (LDCs).

aid as being aimed at alleviating poverty in the long term, rather than alleviating suffering in the short term.

The United Nations defines ODA as comprising of grants or loans to developing countries and territories on the Organisation for Economic Co-operation and Development/Development Assistance Committee (OECD/DAC) list of aid recipients, that are undertaken by the official sector with promotion of economic development and welfare as the main objective and at concessional financial terms (if a loan, having a grant element of at least 25%). Technical cooperation is included. Grants, loans and credits for military purposes are excluded. Also excluded is aid to more advanced developing and transition countries, as determined by the DAC.²³⁸

It is important when discussing development assistance to locate this narrative with the globalisation context. Dohlman and Halvorson-Quevedo note that donors are increasingly turning their attention to how development cooperation can spread the benefits of globalisation to a larger proportion of the world's population by for example, promoting joint ventures, stimulating technology acquisition and building trade capacity.²³⁹

2.9. Development assistance redefined

It is important to point out from the onset that in the last few years, there has been a change in the terminologies used in the development world. The terms

²³⁸ United Nations Development Group (UNDG) *Indicators for monitoring the Millennium Development Goals: Definitions, Rationale, Concepts and source (2003)*, United Nations: New York available at <http://www.undg.org/index.cfm?P=2> (accessed on 19 August 2005).

²³⁹ E Dohlman, E Halvorson-Quevedo 'Globalisation and Development' in *The OECD Observer* No 204 (1997) 36.

‘donors’ and ‘foreign aid’ have been replaced by ‘development partners’ and ‘development assistance’ respectively.²⁴⁰ This change has been adopted by the multi-lateral financial institutions like the World Bank and International Monetary Fund (IMF). Words such as ‘conditionalities’ have been replaced with concepts such as ‘undertakings’ and ‘prior actions’. ‘Conditionality’ is a concept in international development, political economy and international relations and describes the use of conditions attached to a loan, debt relief, bilateral aid or membership of international organisations, typically by the international financial institutions, regional organisations or donor countries.²⁴¹

Multilateral financial institutions such as the International Monetary Fund, the World Bank or a donor country before providing loans, debt relief or financial aid imposed a number of conditions to be fulfilled before a country can access the loan or aid. Conditionalities may involve relatively uncontroversial requirements to enhance aid effectiveness, such as anti-corruption measures, but they may involve highly controversial ones, such as austerity or the privatisation of key public services, which may provoke strong political opposition in the recipient country.²⁴² These conditionalities are often grouped under the label structural adjustment as they were prominent in the structural adjustment programmes following the debt crisis of the 1980s. Of course it

²⁴⁰ Degnbol-Martinussen & Engberg-Pedersen (see n 66 above) 42.

²⁴¹ This is according to the International Monetary Fund. Available at <http://www.imf.org/external/np/pdr/cond/2001/eng/overview/> (accessed on 19 August 2010). Conditionality is intended to ensure that these two components are provided together: it provides safeguards to the Fund to ensure that successive tranches of financing are delivered only if key policies are on track, and assurances to the country that it will continue to receive the Fund's financing provided that it continues to implement the policies envisaged.

²⁴² World Bank Review of Conditionality (2007). Available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (accessed on 19 August 2010).

must be said that once you lift the development veil you might quickly find that the change is mainly in form and not content.²⁴³

The main reason advanced for this change according to Hearn is that the term aid had overtones of charity written into it.²⁴⁴ Charity involves the donor giving help to those in need.²⁴⁵ It has an element of benevolent giving. Degnbol-Martinussen & Engberg-Pedersen assert that in order to mitigate the unfortunate picture of needy and helpless people, donors gradually begun to speak about humanitarian assistance and further state that the border line between humanitarian assistance and development assistance has become vague.²⁴⁶ Donors, as discussed above, are therefore now called development partners who provide development assistance rather than aid. The relationship, as we shall see, is based on the notion of partnership rather than ‘give and take’. A question that needs to be asked is whether there is any real change or whether it is a matter of old wine in new bottles. Is this partnership real and based on mutual respect and equality? These questions will be discussed in chapter 5.

2.10. Development assistance a right or charity?

Sengupta defines a right to mean, ‘to have a claim to something of value on other people, institutions, the State, or international community, who, in turn, have the obligation of providing or helping to provide that something of

²⁴³ See IMF (see n 241 above) and World Bank (see n above 517) above.

²⁴⁴ Aine Hearn was the Ambassador of Ireland to Uganda from 2006-2008. She revealed this during an interview I held with her on 28 June 2008 in Kampala.

²⁴⁵ Hearn (see n 244 above).

²⁴⁶ Degnbol-Martinussen & Engberg-Pedersen (see n 66 above) 42.

value'.²⁴⁷ Sen looks at rights as entitlements that require correlated duties. He points out that if person A has a right to some X, then there has to be some agency say B, that has a duty to provide A with X.²⁴⁸ A right, therefore, can refer to a claim on other persons, that is acknowledged and perhaps reciprocated among the principals associated with that claim. A right could also mean an entitlement conferred by law.

In recognising that there is a right, there would be a need to identify the duty holder who has the obligation of fulfilling or enabling the fulfilment of the right. It is precisely this situation that Piron notes above, that explains the reluctance by developed countries to acknowledge that there is a right to development.²⁴⁹ The recognition of the right to development would mean that developed countries have an obligation to provide assistance to developing countries and also cater for their own people. Notwithstanding this, in view of this definition, this section seeks to answer the question: Can development assistance be classified as a right or mere charity given at the behest of the rich country?

As can be imagined, opinions on this issue are varied. There are two primary schools of thought. One claims that without a legally binding international instrument providing for the right to development assistance, there is no entitlement or claim and therefore no right. This school is mainly subscribed to

²⁴⁷ A. Sengupta 'The Content of the Right to Development: What is to be implemented?' (unpublished paper) 3.

²⁴⁸ Sen (see n 116 above) 227-321.

²⁴⁹ Piron (see n 206 above).

by northern scholars such as Rosas.²⁵⁰ According to this school development assistance is seen as a form of charity. President Bush revealed that that the United States needed to spread compassion through aid around the world.²⁵¹ It is therefore hardly surprising that the United States Agency for International Development (USAID), which is the development agency of the United States, has as its motto: ‘a gift from the people of the United States of America.’

DFID, which is the development arm of the United Kingdom, recently rebranded itself to read UK Aid, from the Department for International Development.²⁵² Irish Aid changed to Development Cooperation Ireland and has now changed back to Irish Aid.²⁵³ This position clearly embodies the view that development assistance is meant to save and help the poor people of Africa.

The comments of the United Kingdom, on behalf of the European Community when the Right to Development Declaration was being adopted, succinctly sums up the views of those opposed to the right to development as a right.²⁵⁴

The UK stated that:

While the circumstances of developing countries have prompted many aid initiatives on their behalf, this does not at present confer to them a right in the strict sense of the word. Instruments such as the international development

²⁵⁰ Rosas (see n 206 above).

²⁵¹ Comments made in a *BBC World Service* interview on 7 November 2007.

²⁵² See Department for International Development website, <http://www.dfid.gov.uk/> (accessed on 15 June 2010).

²⁵³ See Department of Foreign Affairs of Ireland website <http://www.dfa.ie> (accessed on 15 June 2010).

²⁵⁴ The submission of the European Community to the Working group on the Right to Development, originally issued as a comment related to progressive development of the principles and norms of international law relating to the new international economic order. UN Doc A/41/536 15 September 1986, 16 para 13.

strategy provide a framework for international action but constitute guidelines rather than legally binding obligations.²⁵⁵

It is therefore evident that the right of developing countries to obtain assistance from member States of the European Community is denied by all the governments which view themselves as potential addressees of such development assistance request. This fear is at the heart of the rejection of the notion of the right to development and the right to development assistance.

The Government of the Republic of Ireland in its White Paper on Irish Aid clearly states why it provides aid. The reason is quite instructive and merits quoting verbatim:

First and foremost, we give aid because it is right that we help those in greatest need. We are bound together by more than globalisation. We are bound together by a shared humanity. The fate of others is a matter of concern to us. From this shared humanity comes a responsibility to those in great need beyond the borders of our own state. For some, political and strategic motives may influence decisions on the allocation of development assistance. This is not the case for Ireland. For Ireland the provision of assistance and our cooperation with developing countries is a reflection of our responsibility to others and of our vision of a fair global society.²⁵⁶

It is clear from the above statement that Ireland's reason for providing assistance is devoid of political strategic interest but rather driven by a sense of humanity and responsibility to help those in greatest need. There is mention that what is right but not a right. It is can therefore be surmised that assistance is viewed more as a responsibility on the part of the Republic of Ireland and not a right of those in greatest need.

²⁵⁵ See n 254 above para 13.

²⁵⁶ Government of Ireland White paper on Irish Aid (2006).

The other school of thought is that there is a right to development assistance provided under international law and practice. Tomasevski is of the view that the existing international human rights norms contained in the ‘hard law’ (that is in international treaties) provide a sufficient basis to demand the observance of human rights in development, including development aid.²⁵⁷ She makes the point that there is a vast number of international policy documents and an immense library of works which argue the case for the right to development assistance.²⁵⁸

The second school of thought is now examined in more detail. The starting point is the UN Charter. Article 3 of the Charter outlines as one of the purposes of the United Nations, the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights.²⁵⁹ From the reading of this article, one may argue that member States of the United Nations have committed themselves to international cooperation which includes development assistance. Using this article, countries could make the case that international cooperation is a right under international law, as laid down in the UN Charter.

In a rather interesting way, Finland departs from the common position of most western countries and recognises that there is a right to development

²⁵⁷ Tomasevski (see n 53 above) 48.

²⁵⁸ Tomasevski (see n 53 above) 48.

²⁵⁹ United Nations Charter (see n 147 above) article 3.

assistance.²⁶⁰ This is interesting in the sense that it departs from the majority view of the member States of the European Community stated above. Pirkko Kourula of the Finnish International Development Agency (FINNIDA) said that in case a State is not able to realise its goals without international assistance, it should be entitled to external aid by individual States of the international community as whole.²⁶¹ Such assistance is called for on the basis of the principle of solidarity and burden sharing.

Development assistance should be seen as a practical expression of the principle of solidarity.²⁶² According to Verwey, the principle of solidarity is derived from the principle of justice and entails that henceforth needs instead of only power, would provide the basis for entitlement, basic need superceding non-basic needs.²⁶³ It can therefore be surmised that the principle of solidarity calls upon those states that have, to give to those that do not have. Articles 55 and 56 of the UN Charter allude to this scenario as discussed in this chapter.

At the summit of the Heads of State and Government of the member States of the then Organisation of African Unity, in 1999, in Algiers it was pointed out in the Algiers Declaration that they observed that current trends in the world economy do not augur well for Africa and, among others, singled out a decline

²⁶⁰ See n 254 above para 13.

²⁶¹ P Kourula FIINIDA's view on the relationship between development aid and human rights. in Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries. Proceedings of the Fourth Nordic Seminar on Human Rights (42) hosted by the Danish Centre of Human Rights.

²⁶² Kourula (see n 261 above) 3.

²⁶³ WD Verwey 'The new international economic order and the realisation of the right to development and welfare' 827, extracted from F.E. Snyder & S. Sathirathai (eds) *Third World Attitudes towards International law: An Introduction* (1987).

in international development cooperation, and a continuous fall in official development aid.²⁶⁴ They went ahead and:

Called for a mutually beneficial and genuine international partnership; a partnership based on a balance of interests and mutual respect, a partnership, the most crucial and immediate ingredients of which are the genuine democratisation of international relations, the renewal of multilateralism and consolidation of its instruments, the reorganisation of international cooperation based on sustained inter-dependence and the decline in national egoism.²⁶⁵

It is therefore clear that indeed international cooperation is a recognised feature but, the Heads of State did not however make express reference to the UN Charter and treaties as a point of reference. This, would have added more weight to their call. They could have take the opportunity to remind the developed world of their commitments to international cooperation that they have undertaken.

The UDHR does not make express reference to international cooperation in the same manner as the UN Charter. There is, however, reference in the preamble to the essential need to promote the development of friendly relations between nations.²⁶⁶ While this could be interpreted to include provision of development assistance, it hardly confers rights. Article 28 refers to the entitlement of everyone to a social and international order in which the rights and freedoms set forth in the UDHR can be fully enjoyed. One

²⁶⁴ Organisation of African Unity 1999. Algiers Declaration AHG/Decl. 1 (XXXV) Adopted at the Assembly of Heads of State and Government Thirty-Fifth Ordinary Session of OAU/Third Ordinary Session of AEC 12-14 July 1999 Algiers, Algeria para II. Available at http://www.au2002.gov.za/docs/summit_council/algiers.pdf (accessed on 4 June 2008).

²⁶⁵ Organisation of African Unity 1999 (see n 264 above) para II.

²⁶⁶ Universal Declaration of Human Rights (see n 4 above) preamble.

interpretation of article 28 is that it does confer rights to development assistance as this promotes international order and the enjoyment of the human rights set forth in the declaration. One of the counter arguments to this position would be first, that there is no express reference to development assistance but rather international order and in any case, the UDHR is not a legally binding instrument under international law.

Another way of looking at the right to development assistance is by asking whether there is a right to development. As indicated above, the right to development is articulated in the UNDRD. Chowdury and De Waart maintain that through article 4 of the UNDRD the right to development of States withdraws development cooperation from the ambit of charity.²⁶⁷ One of the major weaknesses of Chowdury and De Waart's position is the fact that the UNDRD is not a legally binding instrument and has not been adopted or accepted by the major developed countries. This therefore means that while article 4 of the UNDRD does attempt to make international cooperation and development assistance a legal obligation, the ability to claim this obligation by developing countries under international law is non-existent.

The ICESCR, in contrast to its twin the ICCRP, provides for international assistance and cooperation with emphasis on the economic and technical aspects. This assistance is meant to assist State parties to the Covenant progressively realise the rights recognised in the Covenant.²⁶⁸ This provision suggests that international assistance is indeed a right, albeit restricted to the

²⁶⁷ Chowdury and De Waart (see n 45 above) 20.

²⁶⁸ International Covenant on Economic, Social and Cultural Rights (see n 174 above) article 2.

rights within the ambit of the ICESCR. The Committee on Economic, Social and Cultural Rights in the General Comment that interprets article 2, notes as follows:

Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result.²⁶⁹

The Committee goes further and states that:

The Committee wishes to emphasise 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 realisation 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 recognised therein. It emphasises that, in the absence of an active programmes of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.²⁷⁰

²⁶⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23 available at: <http://www.unhcr.org/refworld/docid/4538838e10.html> (accessed 5 June 2008).

²⁷⁰ UN Committee on Economic, Social and Cultural Rights (see n 269 above) para 14.

It is however important to note that countries like the Netherlands,²⁷¹ the United Kingdom,²⁷² and Sweden²⁷³ in their state reports to the Committee on Economic, Social and Cultural Rights do not make any reference to international cooperation when reporting on article 2. The Committee also does not in its concluding observation ask them to do so in future reports.²⁷⁴ This indicate that these countries do not take the provision under article 2 of the ICESCR as creating a legal obligation to provide international assistance and that is why they do not even bother to report on it. It could be said that these countries are violating their reporting obligation and do not acknowledge their legal obligation, though in practice most do provide development assistance.

It therefore can be said that arising from the international instruments discussed above that there is a right to development assistance. However just like the right to development discussed above, this right is not universally recognised or accepted. In addition both individuals and States are the beneficiaries of this right. Development assistance is provided to assist the people in Uganda for example and therefore they are beneficiaries and claimants of this right. In addition the State which receives the assistance has

²⁷¹ Netherlands Implementation of the International Covenant on Economic, Social and Cultural rights fourth and fifth State Reports 9 April 2008. E/C.12/NLD/4-5 17 July 2009. Available at <http://www2.ohchr.org/english/bodies/cescr/cescrwg43.htm> (accessed on 14 December 2009).

²⁷² United Kingdom of Great Britain and Northern Ireland Implementation of the International Covenant on Economic, Social and Cultural rights fifth periodic State Report E/C.12/GBR/5 7th August 2007. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/403/68/PDF/G0840368.pdf?OpenElement> (accessed on 14 December 2009).

²⁷³ Sweden Implementation of the International Covenant on Economic, Social and Cultural rights fifth periodic State Report E/C.12/SWE/5 30th June 2006. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/441/36/PDF/G0644136.pdf?OpenElement> (accessed on 14 December 2009).

²⁷⁴ The committee's concluding observations can be found at <http://www2.ohchr.org/english/bodies/cescr/cescrwg39.htm> (accessed on 14 December 2009).

the obligation to implement the development programmes for which this assistance is given.

2.11. International customary law and development assistance

It could be argued that the right to development assistance through international cooperation has become part of international customary law and therefore is legally binding. International custom, as evidenced of a general practice accepted as law, is recognised as one the sources of international law in the Statute of the International Court of Justice (ICJ).²⁷⁵ In the *Nicaragua* case, the ICJ confirmed that custom is constituted by two elements, the objective one of a general practice and the subjective one accepted as law or *opinio juris*.²⁷⁶ The ICJ in the *Continental Shelf* case stated that the substance of customary international law must be looked for primarily in the actual practice and *opinio juris* of States.²⁷⁷ It can therefore be deduced that when looking for evidence of customary law, the actual practice of States is a useful place to start. Malanczuk agreed with this.²⁷⁸ In view of the fact that a number of developed countries have provided development assistance for the last 40 or so years, this has become an actual practice.

In the *Fisheries Jurisdiction* case, it was determined that for a rule to qualify as custom, it must receive general or widespread acceptance.²⁷⁹ However, Judge Lachs, in the *North Sea Continental Shelf* cases, pointed out that

²⁷⁵ Statute of the International Court of Justice Article 38.

²⁷⁶ *Nicaragua v USA* ICJ Reports 1986 14, 97.

²⁷⁷ *Continental Shelf Case Libya v Malta* ICJ Reports 1985 29.

²⁷⁸ Malanczuk (see n 100 above) 39.

²⁷⁹ *Fisheries Jurisdiction* case ICJ Reports 1974 23-26.

universal acceptance is not necessary.²⁸⁰ Brownlie concedes that proof of *opinio juris* is difficult to produce and consequently it is argued by some jurists that *opinio juris* will be presumed when there is evidence of general practice in support of a particular rule.²⁸¹ Since provision of development assistance has over the years received general and widespread acceptance, it could be said to have acquired recognition under international customary law.

Dugard however cautions that a settled practice on its own is insufficient to create a customary rule.²⁸² In addition there must be a sense of obligation, a feeling on the part of states that they are bound by the rule in question and that the general practice is accepted as law.²⁸³ It therefore could be contended, that there is a demonstrated sense of obligation on the part of countries that have been providing assistance to Uganda for close to 49 years.

Malanczuk²⁸⁴ and Dugard²⁸⁵ both maintain that valuable evidence can also be found in documentary sources produced by the United Nations. It has been demonstrated above in this chapter that the provision of development assistance through international cooperation finds expression in several United Nations documents. This further supports the argument that development assistance is now part and parcel of international customary law.

²⁸⁰ *North Sea Continental Shelf* cases 1969 ICJ Reports 3, 229.

²⁸¹ I Brownlie *Principles of Public International Law* (2003) 8.

²⁸² J Dugard *International Law: A South African perspective* (1999) 33.

²⁸³ Dugard (see n 282) 33.

²⁸⁴ Malanczuk (see n 100 above) 39.

²⁸⁵ Dugard (see n 282) 399.

In order for a customary rule to emerge it must be based on a constant and uniform usage. This was the position of the ICJ in the *Asylum* case.²⁸⁶ This would imply that a single act is not sufficient to establish a customary rule. It must be based on repetition over a period of time. The operative words here are ‘constant’ and ‘uniform’. It is important to demonstrate consistent usage. This was clearly the view of the ICJ in the *Nicaragua case*.²⁸⁷ The *Fisheries case* provides some guidance on the issue of consistence, noting that minor inconsistencies do not prevent the creation of a customary rule.²⁸⁸

One other element of international customary law is general practice of States. Malanczuk makes the point that general practice is a relative concept and cannot be determined in the abstract. It should include the conduct of all States which can participate in the formulation of the rule and it can be general even if not universally accepted by all States.²⁸⁹ Following from this, it can be said that the provision of development assistance has become a general practice and therefore a rule under international customary law.

Some authors like Malanczuk have argued that State practice consists of only what States do and not of what they say.²⁹⁰ Conradie confirms Malanczuk’s position and states that it is necessary to consider the action or practice of States and not their promises or rhetoric, as customary international law is founded on practice not on preaching.²⁹¹ If one adopts this line of reasoning,

²⁸⁶ *Asylum case* ICJ Reports 1950 266-389.

²⁸⁷ *Nicaragua case* (n 274 above) 462 98.

²⁸⁸ *UK v Norway* ICJ Reports 1951 116.

²⁸⁹ Malanczuk (see n 100 above) 43.

²⁹⁰ Malanczuk (see n 100 above) 43.

²⁹¹ This was stated by J Conradie in *S v Petane* 1988 (3) SA 51 (c) 61.

then the fact that some States have been providing development assistance for the last 40 years means that, it has now become part and parcel of State practice.

Malanczuk²⁹² and Paul²⁹³ observe that when inferring rules of customary law from the conduct of States, it is necessary to examine not only what States do but also why they do it. This psychological element, as Slama notes, is also known as *opinio juris*.²⁹⁴ This would therefore entail trying to understand the intention or conviction behind a states conduct. In Chapter 5, the study discusses why countries provide development assistance and various reasons from political interests to poverty reduction are outlined. It can be said that States that provide development assistance and conclude development assistance agreements do have the intention to create a legal obligation.

Ago²⁹⁵ and Cheng²⁹⁶ are the main proponents of the notion of instant customary law. Ago and Cheng imply that State practice and time are not relevant but rather they rely on *opinio juris* as expressed in non-legal binding resolutions and declarations as the constitutive element of custom. Bernhardt disagrees with both Ago and Cheng.²⁹⁷ The ICJ clearly rejects the doctrine of instant customary law in the *Nicaragua* case when it states that the mere fact that the States declare their recognition of certain rules is not sufficient for the

²⁹² Malanczuk (see n 100 above) 43.

²⁹³ LD Paul 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1-79.

²⁹⁴ JL Slama 'Opinio juris in Customary International law' (1990) 15 *Oklahoma City University Law Review* 606.

²⁹⁵ R Ago 'Science juridique et droit international' (1956) 90 *Recueil des Cours de l'Académie de droit International (RCADI)* 849-955.

²⁹⁶ B Cheng United Nations Resolutions on Outer Space: 'Instant international customary law' (1965) 23 *Indian Journal of International Law* 489.

²⁹⁷ R Bernhardt 'Customary International Law' (1992) 4 *Encyclopaedia of Public International Law* 902.

Court to consider these as being part of customary international law. Bound as it is by article 38 of its Statute, the Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.²⁹⁸ The *opinio juris* of States is confirmed by the continuous provision of development assistance to Uganda over the last 25 years.

Taking into account the above, one question that arises is what happens in cases where a State objects to a particular act. Brownlie says that if a State persistently objects to a particular practice while the law is still in the process of development, it cannot be bound by any customary rule that may emerge from such a practice.²⁹⁹ The principle of a persistent objector was further expounded in several judicial opinions.³⁰⁰ In the case of the provision development assistance to Uganda for human rights, there is no evidence of any persistent objector, but rather persistent provision of development assistance by developed countries to developing countries.

International human rights treaties and declarations provide for international cooperation. This implies that developed States that are party to the various treaties discussed above are obliged to provide development assistance. To that extent, one can talk of a right to development assistance under international law, backed by the various international instruments provisions which have been discussed above. However, as indicated in this chapter and later in chapter 5, development assistance is still viewed as charity or a gift

²⁹⁸ *Nicaragua* case (see n 276 above) 97.

²⁹⁹ Brownlie (see n 281 above) 11.

³⁰⁰ See *Anglo-Norwegian Fisheries* case 1951 ICJ reports 131, *North Sea Continental Shelf* case 1969 ICJ report 131, *Asylum* case 1985 ICJ reports 277-278 and *Nicaragua* case 1986 ICJ reports 107.

given by the rich countries to the poor countries. This view is reflected in the one-sided development assistance agreements concluded with recipient countries, which are discussed in chapter 5.

2.12. Development partners/donors

The terminology development partner is relatively new in development lexicon. Historically, the term donor was used and, to a large extent is still used or understood today. A donor refers to a person or state that gives or a person who makes a gift of property.³⁰¹ Donor states ('giving' States) could therefore be described as those states that provide aid or gifts to the poor underdeveloped countries. However, in the later 90s, a move was made to change the terminology from donors to development partners. This was mainly because it was felt that the phrase donor had a charitable connotation attached to it.

Furthermore, there was a growing need by the multilateral donors like the World Bank to move away from the conditionality approach and embrace local ownership of development processes. Therefore as partners, the receiving and giving countries would through consultations and discussions move the development agenda.³⁰² 'Development partners' was the now favoured term to indicate a change in the relationship between the giving and receiving countries. Instead of being just the end receivers of charitable gifts from donors, countries were now 'development partners'. It must be pointed out that

³⁰¹ See <http://wordnetweb.princeton.edu/perl/webwn?s=donor> (accessed on 14 June 2010).

³⁰² Uvin (see n above 46). He notes that since the early 1999, the World Bank has also been trying to develop post conditionality approach namely the creation of a process of soliciting input and discussion around liberal policy. The idea here is that ownership the crucial missing link can be achieved as a result of broad consultation and discussion.

this change in terminology was really mainly in form and not content and most development partners still view and consider themselves as donors who provide charitable aid.

It should be noted that there are several types of development partners or donors. On the one hand, we have bi-lateral development partners. These refer to individual states that provide development assistance. This, in the case of Uganda, would include the United Kingdom, Austria, Denmark, Norway, Ireland, United States of America, Netherlands and Germany. On the other hand, we have multilateral development partners. A multilateral development partner is an international organisation that provides development assistance. One such example is the European Union (EU). Under this umbrella of multilateral development partners we could also include international financial institutions like the World Bank and the African Development Bank. While these banks mainly provide long term loans, they also provide concessionary loans and in some cases grants. This qualifies them as development partners.

In addition to the above, wealthy individuals and philanthropists are also development partners or donors. These wealthy individuals, through foundations or trusts, provide assistance to poor countries like Uganda. Examples of these include George Soros and his Open Society,³⁰³ Bill

³⁰³ The Open Society Institute works to build vibrant and tolerant democracies whose governments are accountable to their citizens. To achieve its mission, OSI seeks to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. More details can be found at <http://www.soros.org/about> (accessed on 15 June 2010).

Gates with the Bill and Melinda Gates foundation,³⁰⁴ and the Ford Foundation.³⁰⁵

In the case of Uganda, there is a combination of all the above categories of development partners supporting human rights programmes as will be discussed in Chapter 5. It needs to be pointed out that as discussed below in this chapter, a number of bilateral and multilateral development partners are in line with the harmonisation and specialisation agenda, reducing their presence in several sectors. This in some cases, like the health sector, has led to a huge gap in the policy dialogue. This gap is occasioned by the fact that individual development partners or their foundations remain as the active development partners and very often do not have field presence.

In addition, foundation and individual development partners do not carry the same level of leverage, especially when engaging with States and governments. This new emerging trend needs to be closely monitored and studied. At the end of the day, it is critical to be aware of, Wallace *et al.* point out, of where the power lies and how it is currently used in the north-south funding aid chains, something which is often acknowledged but rarely analysed.³⁰⁶ One of the central questions that this study seeks to answer is what role development partners play in promoting and protecting human rights in Uganda.

³⁰⁴ The Gates Foundation believes that every life has equal value is at the core of their work at the foundation More about the Gates Foundation can be found at <http://www.gatesfoundation.org/about/pages/overview.aspx> (accessed on 15 June 2010).

³⁰⁵ The Ford Foundation's goals are to strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement. More details can be found at <http://www.fordfoundation.org> (accessed on 15 June 2010).

³⁰⁶ Wallace *et al.* (see n 57 above) 30.

2.13. Human rights-based approach to development cooperation

Development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. This was acknowledged by the Vienna Declaration adopted by the United Nations World Conference on Human Rights way back in 1993.³⁰⁷ Following on from this all entities of UN system were called upon to mainstream human rights into their various activities and programmes within the framework of their respective mandates³⁰⁸ Since then a number of UN agencies have adopted a human rights-based approach to their development cooperation. To this end a statement of common understanding on human rights-based approach to development cooperation has been agreed in which the key elements of this approach are outlined.³⁰⁹

According to the common understanding the human rights based approach to development cooperation is informed by three elements which include (1) all programmes of development co-operation, 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 principles derived from the Universal Declaration of Human Rights and other international

³⁰⁷ United Nations World Conference on Human Rights Vienna Declaration and Programme of Action A/CONF.157/23 12 July 1993. Available at <http://www.unhchr.ch/html/menu5/wchr.htm> (accessed on 19 August 2005).

³⁰⁸ United Nations Renewing the United Nations: A Programme for Reform A/51/950 (1997). Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/189/79/IMG/N9718979.pdf?OpenElement> (accessed on 15 January 2011)

³⁰⁹ United Nations The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies (Available at http://www.undg.org/archive_docs/6959 (accessed on 17 January 2011))

human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process and (3) development cooperation contributes to the development of the capacities of ‘duty-bearers’ to meet their obligations and/or of ‘rights-holders’ to claim their rights.³¹⁰ It could therefore be said that a human rights-based approach to development cooperation required putting human rights at the centre of development cooperation.³¹¹

International Human Rights Network *et al.* understand the human rights-based approaches to development to mean understanding human rights as both the means and the goal of development.³¹² IHRN outlines five interconnected principles of the HRBA which are derived from the international legal framework. These principles are outlined below.

OHCHR says that essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development. The norms and standards are those contained in the wealth of international treaties and declarations. The principles include equality and equity, accountability, empowerment and participation. A human rights-based approach to development includes the following principles:

- express linkage to rights

³¹⁰ United Nations (see n 309 above) 1-2.

³¹¹ United Nations Office of the High Commissioner for Human Rights. Rights-Based Approaches: What is a rights based approach to Development? Available at <http://www.unhchr.ch/development/approaches-04.html> (accessed on 31 March 2009).

³¹² International Human Rights Network, Action Aid, Amnesty International & International Federation (2008) Human Rights-Based Approaches and European Union Development Aid Policies (47).

- accountability
- empowerment
- participation
- non-discrimination and attention to vulnerable groups³¹³

It is critical that in planning and implementing programmes in any sector (energy, Justice Law and Order, rural water, refugees, finance, education (vocational training), or youth and HIV/AIDS, these principles are taken into account.

The definition of the objectives of development in terms of particular rights as legally enforceable entitlements – is an essential ingredient of human rights approaches, as is the creation of express normative links to international, regional and national human rights instruments.

Human rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent and interrelated rights: Civil, cultural, economic, political and social. This calls for a development framework with sectors that mirror internationally guaranteed rights, thus covering, for example, health, education, housing, justice administration, personal security and political participation.

³¹³ United Nations Office of the High Commissioner for Human Rights (see n 309 above) A detailed discussion of these principles is provided.

By definition, these approaches are incompatible with development policies, projects or activities that have the effect of violating rights, and they permit no ‘trade-offs’ between development and rights.

2.14. Partnership

A partnership in law is defined as ‘the relation which subsists between persons carrying on a business in common with a view of profit’.³¹⁴ The operative word in this legal definition of a partnership is ‘relation’. In the development world, partnership is now a commonly accepted phenomenon, at least in theory. A partnership is said to exist between the country giving development assistance and the one receiving the assistance. Most development policies and strategy documents, as will be discussed later in this study, allude to partnership between governments.

In addition, the term ‘donors’ has been replaced with ‘development partners’. The issue herein is what is the nature of this partnership? Wallace *et al.*, rightly note when discussing the relationship between donors and NGOs, that inequalities are acknowledged then brushed aside or hidden through the use of language.³¹⁵ The terms ‘partners’ and ‘partnership’ replace the concepts of donor- recipient or subcontractor.³¹⁶ They continue to state that while donors and NGOs in the United Kingdom (UK) universally use these terms, many so called partners in Africa feel more like supplicants or dependants. For many, this language of partnership denies the relationships of power but in reality,

³¹⁴ Partnership Act of Uganda Cap 114 Article 3(1).

³¹⁵ Wallace *et al.* (see n 57 above) 38.

³¹⁶ Wallace *et al.* (see n 57 above) 38.

these are strong and defined by some as the new colonialism.³¹⁷ In view of this, study asks: Are the partners in the human rights arena equal or is one partner dormant and inactive? The answers to these questions will be discussed in chapter 5.

2.15. Ownership

According to Black:

Ownership is the collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control.³¹⁸

Ownership is the right to the exclusive enjoyment of a thing.³¹⁹ From the above stated definitions one can say that ownership, in essence, refers to control. The phrase ‘local ownership’ has over the years crept into development language and practice. It refers to the recipient country owning and controlling the development or reforms programmes supported through ODA. The question that is going to be asked in this study is, can countries, like Uganda, that are dependent on ODA, claim or be expected to own development programmes that are funded mainly by ODA? Is it possible to assume that a country can really own a development agenda funded by external assistance to the tune of over 40% of the national budget?

³¹⁷ Wallace *et al.* (see n 57 above) 38.

³¹⁸ Black’s Law Dictionary (1999) 1131.

³¹⁹ Osborne’s Concise Law Dictionary (1993) 239.

The Government of Uganda and its development partners have signed up to partnership principles that govern the provision of ODA.³²⁰ Principle two states that the delivery of financial assistance (aid) by development partners must be fully compatible with the national budget process and with government ownership of the budget.³²¹ The partnership principles do not define what government ownership means. However, taking cue from the above definition, ownership in this case could refer to Government of Uganda taking control of the budget process and execution.

The concept of ownership is featured prominently in the Paris Declaration on Aid Effectiveness.³²² Ownership according to the Paris Declaration requires partner countries on the one hand, to exercise leadership in the development and implementation of their national development strategies, set their own strategies for poverty reduction, improve their institutions and coordinate aid at all levels.³²³ On the other hand donor countries are supposed to respect country leadership and help strengthen their capacity to exercise it.³²⁴ Ownership therefore entails Government of Uganda assuming the primary responsibility for its development programme. This includes among others the funding of the programme, policy development and implementation. Later, the study shall, critically examine whether this is the case in reality in respect of the human rights agenda.

³²⁰ Ministry of Finance, Planning and Economic Development, September 2003 Partnership Principles between Government of Uganda and its Development Partners.

³²¹ Ministry of Finance, Planning and Economic Development (see n 320 above) 1.

³²² Paris Declaration (see n 81 above) 3.

³²³ Paris Declaration (see n 81 above) 3.

³²⁴ Paris Declaration (see n 81 above) 3.

2.16. Conclusion

Development assistance and human rights are rooted in several concepts and theories that have been identified and discussed above. These theories and concepts will underpin the rest of the study. The study will therefore seek to establish whether there is a connection or disconnection between the theories /concepts and the practice. This will be done chapters 3 and 5.