THE EUROPEAN UNION'S TRADE RELATIONS: THE POTENTIAL OF EXTRA-TERRITORIAL HUMAN RIGHTS OBLIGATIONS IN THE REALISATION OF THE RIGHT TO DEVELOPMENT IN SUB-SAHARAN AFRICA

BY

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DECLARATION

I declare that this thesis is my original work and has not been previously submitted for a degree at any University.

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SUMMARY

This study investigates the Economic Partnership Agreements (EPAs), between the European Union (EU) and sub-Saharan African countries and how it affects the realisation of the right to development (RTD) in sub-Saharan Africa as well as whether the EU has an extraterritorial human rights obligation to respect RTD in sub-Saharan Africa. It further examines the concept and various meaning of development and looks at the historical view, nature and content of the RTD, the legal basis for the RTD globally and under the African human rights system as well as its implementation and monitoring mechanism.

In this study the meaning of extraterritorial human rights obligations is examined, in terms of principle 8 of the Maastricht Principles on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights. It includes first, 'Obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory' and secondly, 'obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realise human rights universally.'

This study finds that, at the global level, the RTD is commonly recognized by the international community but not really legally binding. However, under the African human rights system, the RTD is guaranteed under Article 22 of the African Charter on Human and Peoples Rights (the African Charter) and is binding on the African States which are signatories to the African Charter. Furthermore, the present EPAs and the negotiating process have a negative impact on the realisation of RTD in sub-Saharan Africa. The EU has extra-territorial human rights obligation under the TEU, TFEU and the EU Charter. Although the EU is not a signatory to the Declaration on the right to development neither is she a signatory to the two Conventions but has respected the rights protected under the two Conventions extra-territorially. Therefore, the EU can leverage its extra-territorial human rights obligation under the TEU to respect and promote the realisation of the RTD in Africa through its trade relations.

CHAPTER ONE

1.1 PROBLEM STATEMENT

The preamble to the United Nations' General Assembly's Declaration on the Right to Development[1] (RTD) underscores a wide definition of the term 'development' by describing it as an economic process that is inclusive and targets the continuous enhancement of the welfare of everyone based on participation and non-discrimination. In terms of article 3 of the Declaration, States have the responsibility for the creation of national and international conditions favourable to the realisation of RTD. Article 22 of the African Charter on Human and Peoples' Rights (African Charter) imposes on State parties the obligation to 'ensure the exercise of the right to development'. Since the adoption of the United Nations Declaration on the Right to Development in 1986 and the provisions in article 22 of the African Charter, Africa is still not developed despite these provisions, which guarantee the RTD in Africa. The realisation of RTD in Africa has remained illusory and in reality, Africa has remained underdeveloped.

Currently, different regions of Africa have concluded or are negotiating Economic Partnership Agreements (EPAs) with the European Union (EU).[2] However, the EPAs can potentially impact negatively on the realisation of RTD in Africa. EPAs are trade and development agreements conceived to promote development and trade between the two regional blocs. The EPAs sustain exporting raw materials from African States while it allows high-value-added goods from EU to freely access the African markets. This will subdue the capacity of the African States from developing their indigenous value-adding processing industries. Furthermore, the elimination of tariffs on these high-value-added goods from the EU will deny the African States much needed revenue for government expenditure on developmental projects such as health, education and infrastructure. Ensuring proper participation of all the stakeholders in the negotiation process can stimulate development through job creation, access to a wide range of quality products, reducing average prices and generating income, ultimately promoting the right to development in Africa, in particular. The EU can use its powers to influence the realisation of RTD in Africa through trade.

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1 United Nations General Assembly Resolution 41/128 of 4 December 1986.

2 See detailed discussions under chapter 6 below.

This study argues that although the declaration on RTD may not be binding on the EU, the EU has an obligation to respect and promote the realisation of the RTD in sub-Saharan Africa through her trade relations with Africa. This is based on obligations imposed on the EU to respect human rights found in both the EUs legislative framework and the Member States' obligations under international human rights law.

1.2 RESEARCH QUESTIONS

The core research question of this study is: Has the EU leveraged its extra-territorial human rights obligations, if any, to promote realisation of RTD through its trade relations with sub-Saharan Africa? In attempting to develop and answer the core research question, I will address a number of other questions:

1. What is the nature of RTD globally?
2. What is the nature of RTD under the African human rights system?
3. What is the nature of extra-territorial human rights obligation?
4. What is the legal basis for EU's extraterritorial human rights obligations?
5. What is the effect of the EU-sub-Saharan Africa EPA on RTD and how can the EU respect RTD in the sub-Saharan Africa?

1.3. LITERATURE SURVEY

The extensive literatures on the RTD have addressed many questions. I will build on the existing literature by exploring the extent to which the EPA is reflective of the EU's extraterritorial human rights obligations especially in the area of RTD.

RTD has been viewed as a 'right to a process' in addition to the product of the said process, this is so since development is not a static event; instead it includes the realisation and enjoyment of better and enhanced life.[3] According to Sengupta, Edie, Marks and Andreassen, the process must be achieved in a 'rights-based manner', all the results should be achieved with fairness, justice and accountability and those actions taken

[3] A Sengupta et al 'The Right to Development and Human Rights in Development: A Background Paper' Prepared for the Nobel Symposium organized in Oslo from 13-15 October 2003 (Nobel Symposium 125), 12. www.jus.uio.no/smr/forsking/publikasjoner/arkiv/rn/2004/0704.pdf (accessed 18 December 2014).

by the State should follow the human rights principles in a 'participatory and non-discriminatory manner'.[4] This follows the opinion of Khurshid[5] when he said development is 'a process of expanding the real freedom that people enjoy.'

Salomon, in her book *Global Responsibility for Human Rights*[6] contributes to a sustained practice that follows the description of the normative basis for international justice. She reflects largely on the impact of international law to international justice and emphasis narrowly on RTD in the United Nations institutional setting. Salomon[7] challenges the conventional understanding of international human rights law that assigns just minor responsibility to developed States in realising human rights abroad, encouraging or sustaining a standard of complementary human rights obligation with developing States. Salomon stresses that the scope of RTD transvers both external and internal scopes. The external scope tackles imbalances of the 'international political economy', which results in huge universal imbalances. This aspect of human rights comprises the responsibilities of States worldwide when acting independently or jointly. The internal scope of the RTD focuses on the obligations of all States to ensure internal policies that pursue the realisation of the human rights of all its citizens. Salomon, however, concludes that although the RTD at times is contentious and to some extent eccentric in its application, it may perhaps in our contemporary time be acknowledged as a right, short of which a collection of other rights may possibly not be enjoyed.

It has been contended that the RTD is 'dissolvable' within the present human rights framework,[8] since the Committee on Economic, Social and Cultural Rights (CESCR) has noted that Articles 1-5 and 11 on the right to adequate standard of living of the CESCR touched on the element of the RTD. However, the RTD cannot be dissolved into the present human rights framework since international human rights law is increasingly becoming more ineffectual when confronted with the impact of globalisation on human rights

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4 As above.

5 I Khurshid 'The Declaration on the Right to Development and implementation' (2007) 1 *Political Perspectives* 11.

6 ME Salomon *Global Responsibility for Human Rights world poverty and the development of international law* (2007) Oxford University Press.

7 ME Salomon 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' (2008) *LSE Law, Society and Economy Working Papers 16/2008* www.lse.ac.uk/collections/law/wps/wps.htm http://ssrn.com/abstract=1272582 (accessed 20 October 2014).

8 See generally, A Sengupta 'On the Theory and Practice of the Right to Development' (2002) 24 *Human Rights Quarterly* 837 and Committee on Economic, Social, and Cultural Rights, Submission in Follow-up to Human Rights Council Resolution 25/15, http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf (accessed 15 August 2015).

and the subsequent upsurge of influential new non-State actors, for instance the international organisations and transnational corporations.[9] It is becoming ever more difficult for States to guarantee the rights of their nationals owing to the influence and decision-making power of the developed States, transnational corporations and intergovernmental organisations on the enjoyment of RTD and economic, social and cultural rights and even more difficult if not impossible to hold these actors accountable under the current legal framework.[10] Therefore having additional rights will address the inadequacies of the existing rights considering the issue of globalization and the growing influence of non-State actors. This view is similar to De Feyter's[11] who maintains that while the RTD may be achieved through the existing human rights conventions and their monitoring mechanisms, it is challenging to see how the interpretation and implementation of the existing human rights treaties can achieve all aspects of the RTD. He also maintains that it is necessary to draw up a framework treaty on the RTD. De Feyter further suggests that this is one way to overcome the political controversy over the legal binding standing of RTD.

The book *Development as a Human Right - Legal, Political and Economic Dimensions*[12] is a compilation of articles put together by Andreassen *et al*, which has contributed considerably to this study. The book has four series of subjects as its fundamental structure: One, it examines the conceptual bases of human rights in development and the view of the RTD as a right connected with, but on the other hand not corresponding to, human rights-based development. These conceptions refer to a process where every human right continues to be realised, which is participatory, transparent, non-discriminatory, and accountable. Two, the various authors considered the question of the duties and responsibilities bearers to ensure human rights in the processes of development. They generally agree on the principle that the States has the primary duty for the realisation of human rights. They also make clear that this duty comprises equally national and international responsibilities and limits policy choices and priorities of international and national players. Three, the book explores tools for the process of achieving the RTD at the domestic level. States and civil society must recognize that the RTD defines their goals otherwise it will have no power in the strategic decisions on resources for development as well as its processes. Finally, significant

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9 A Vandenbogaerde 'The Right to Development in International Human Rights law: A call for its dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 203.

10 As above.

11 K de Feyter 'Towards a Framework Convention on the Right to Development' (2013) *Friedrich Ebert Stiftung International Policy Analysis* www.http://library.fes.de/pdf-files/bueros/genf/09892.pdf 3 (accessed 18 December 2014).

12 BA Andreassen & SP Marks (eds) *Development as A Human Right Legal, Political and Economic Dimensions* (2010) Intersentia.

deliberation is given to the roles and duties of the international community whose activities are carried out through multilateral organizations, consisting of development agencies, financial institutions and human rights bodies, to contribute to the realisation of the RTD. Their commitment and engagement will contribute to unanimity on principles and instruments for a working model for realising the RTD.

Unfair trading rule can constitute a hurdle to the fulfilment of the RTD because of the huge disparities in the level of revenue and development between the developing and developed countries.[13] The absence of democracy at the global stage and the consequent economic power and political influence of the developed countries and the developing nation's lack of real control over their natural resources due to the antagonistic interventionist policies of powerful countries is an impediment to the fulfilment of the RTD.[14]

On the external obligations of the EU, Bartels[15] asserts that, States can violate the human rights of individuals outside their territorial jurisdiction in two ways. One is by 'extraterritorial conduct; the second is by domestic conduct, in the form of policies with extraterritorial effect.'

However, Cannizzaro[16] argues that the effect of the provisions of Article 3(5) and 21 of the TEU is limited. He thinks that the provisions may not provide adequate legal foundation for EU's extraterritorial human rights obligation. His argument is based on the overarching principle of State sovereignty. He stated that the principle of State sovereignty prevents undue interference by a State on another State. He concluded that to bequeath the EU with the means of extraterritorial human rights obligation, it would be necessary to further develop the constitutional framework of the EU.

De Schutter *et al*[17] developed the Maastricht Principles, which is based on two main concepts. First, that international human rights law calls for States to respect, fulfil and protect human rights in their conducts if it will affect human rights outside their borders. Secondly, that international law requires that States act

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13 I Bunn 'The Right to Development: Implications for international economic law' (2000) 15 *American University International Law Review* 39.

14 B Rajagopal 'Right to Development and global governance: Old and new challenges twenty-Five years on' (2013) 35 *Human Rights Quarterly* 899.

15 L Bartels 'The EU's human rights obligations in relation to policies with extraterritorial effects' (2015) 25 *The European Journal of International Law* 1071.

16 E Cannizzaro 'The EU's human rights obligations in relation to policies with extraterritorial effects: A reply to Lorand Bartels' (2015) 25 *The European Journal of International* 1098.

17 O de Schutter *et al* 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084.

to actualize economic, social and cultural rights extraterritorially, through 'international assistance and cooperation.' King,[18] while supporting this principle, notes that to view jurisdiction as essentially territorial where states are required to respect and protect human rights only to individuals within their territory is insufficient in a world that is becoming progressively globalized and in a post 9/11 where the war on terrorism overseas has repeatedly lead to the violation of people's rights in other States. He argued that under the principles of jurisdiction in international law the State has a proportionate obligation to respect rights anywhere it has the legal ability to carry out a deed in relation to a person.

There are a lot of texts on the EPAs, a good number of them focus on policy options and welfare impact of the EPAs instead of evaluating the impact the EPAs has on RTD (especially participation, self-determination and international cooperation; see chapter two below for core content of the RTD). According to some scholars,[19] trade and investment is Europe's only significant connection with the world outside its territory. They maintain that the 28 Member States of the EU have a common market, external border and trade policy; with this the European Commission (EC) - the EU negotiator - has great force when it discusses trade relations with the rest of the world. They further assert that EU's trade and development policies are capable of having effect on the protection and promotion of human rights internationally. Although the EU has pursued this agenda, it has been subjected to criticism for its effectiveness or non-enforcement. The scholars stressed that the EU is the most important trading partner for most African countries and this has been ongoing for decades.

Busse and Grobmann[20] states that if the ACP nations create a Free Trade Area (FTA) with the EU, it would mean exposing their indigenous markets to almost all goods from the EU, free of tariffs within a period of twelve years. Furthermore, they state that in addition to the impact of a FTA on 'trade flows', the removal of tariff will result to a drop in import levies and subsequently the whole government income.

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18 H King 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521.

19 L Beke 'Report on the integration of human rights in EU development and trade policies' (2014) *Fostering Human Rights among European Policies* (FRAME) http://www.fp7-frame.eu. See also Y Kryvoi 'Why European Union Trade Sanctions Do Not Work' (2008) 17 *Minnesota Journal of International Law* 209; R Leal-Arcas 'Unitary Character of EC External Trade Relations' (2001) 7 *Columbia Journal of European Law* 355. See also 'What is Europe's trade policy' http://avrupa.info.tr/fileadmin/Content/Downloads/DOC/EU_Trade_and_Economy_docs/en/What_s_Trade_Policy.pdf (accessed 20 April 2015).

20 M Busse & H Grobmann 'Assessing the Impact of ACP/EU Economic Partnership Agreement on West African Countries' (2004), *HWWA DISCUSSION PAPER 294 Hamburgisches Welt-Wirtschafts-Archive (HWWA) Hamburg Institute of International Economics 2004.*

A study by Karingi *et al*[21] looked at the economic and social bearings of the trade liberalization features of the anticipated EPAs between the EU and African countries. They offer an appraisal of the probable effects of EPAs creating FTAs between the EU and the various African Regional Economic Communities (RECs). They attended to questions such as 'how will an EPA that includes reciprocal market access agreements between the EU and Africa impact on African countries' GDPs, levels of employment and other macroeconomic aggregates?' and 'What sectors in Africa are most likely to lose and what sectors gain with EPAs?' They determine that all-inclusive reciprocity can be very costly for Africa. A focus on the expansion of integration with the objective of improving intra-African trade would provide positive effects. Another study by Keck and Piermartini[22] investigates the effect of the establishment of an FTA between the EU and the Southern African Development Community (SADC). They explore a lot of subject matters, mainly the following two critical subjects: First, they assessed the impact of an FTA between the EU and SADC States on SADC members States including under a complete liberalization and partial exclusions in agriculture. And secondly, they examined whether SADC States should altogether go on with more intra-SADC liberalization. Their study not only focuses on the concerns as regards to well-being and real GDP growth, but also emphasis redistribution effects and consequences of adjustments. The study examines resource reallocation within sectors, disparities in the wage of factors of production and differences in trade patterns. They find that major growth impacts should not be anticipated from liberalization between the EU and SADC. Zouhon-Bi and Nielsen[23] also carried out an empirical analyses study that demonstration that the impact of implementing EPA on fiscal revenue for some ECOWAS States will be extensive. They find that the cost of goods imported from the EU will increase by almost '10.5 percent for Senegal to 11.5 percent for Nigeria', if free trade is effected. As regards overall government income, they discover that loss of income would be greatest for Cape Verde at about '15.8 percent and Senegal at about 10.4 percent', reason being that these nations imports mostly from the EU and they depend greatly on income generated from tariffs on importation. Other states that could also be considerably affected include Ghana, whose government income is likely to drop by '7.1 percent and

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21 S Karingi *et al* 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' (2005) African Trade Policy Centre Work in Progress 10.

22 A Keck & R Piermartini 'The Economic Impact of EPAs in SADC Countries' (2005) Staff Working Paper ERSD-2005-04 World Trade Organization Economic Research and Statistics Division http://econpapers.repec.org/paper/esswpaper/id_3a2.htm (accessed 21 December 2014).

23 SG Zouhon-Bi & L Nielsen 'The Economic Community of West African States Fiscal Revenue Implications of the Prospective Economic Partnership Agreement with the European Union' (2007) *World Bank Policy Research Working Paper* 4266, June 2007.

Nigeria who will loss an estimated amount of 2.4 percent' of government income. As regards GDP, they find that tariff income losses sum up to '1.0 percent of GDP in Nigeria, 1.7 percent in Ghana, 2.0 percent in Senegal and 3.6 percent in Cape Verde.' Nevertheless, they believe that consequent on some mitigating factors, the impact of the EPA on fiscal income losses could be minimal. They attribute this especially to the possibilities of product exclusions, the duration of the EPA implementation time frame, 'local tax reform', the range for restructuring of 'exemptions regimes,' and the income enhancing result of 'trade-induced growth.'

Andriamananjara et al[24] assess the possible effects of an EPA between the EU and Nigeria. Most of the outcomes for Nigeria as a result of an EPA would perhaps not come from enhanced access to the EU market, bearing in mind the vast quantity of oil in its collection of export. The main effect would arise from the import aspect, from dismantling of Nigerian tariffs, considering Nigeria's comparatively high tariffs. Their study pays more attention on the possible bearing of Nigeria eliminating its tariffs on imports from the EU. Their findings demonstrates that the general impacts on imports are expected to be minimal, first, because in the real sense an EPA will permit Nigeria to eliminate the most protected commodities from being liberalised and, secondly, since there is probably to be considerable trade diversions from other import suppliers towards the EU.

Juma[25] inspects the idea of reciprocal trade liberalization, which is the main aim of EPAs, and its commercial impact on Kenya's agricultural industry within the scope of the General Agreement on Trade in Services (GATS). The analysis accepts that EPAs are important and in line with the WTO's rules of reciprocal trade between parties. Nonetheless, considering the fact that Kenya is a developing nation with greater economic ambitions and obligations more than that of the EU, her trading partner, Juma calls for far-sightedness and restraint. The study examines if the EPA program has adequately considered biosafety and food security with regard to the rights of 'farmers and plant breeders, access and benefit sharing,' sustainable development and preservation of 'traditional knowledge in agriculture.' Juma determines that based on the study by Kenya Institute of Public Policy Research and Analysis, competition created by

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24 S Andriamananjara et al 'Assessing the Economic Impacts of an Economic Partnership Agreement on Nigeria' (2009) *Policy research working paper 4920* http://elibrary.worldbank.org/doi/pdf/10.15961813-9450-4920 (accessed 15 January 2015).

25 JS Juma 'The legal and economic implications of Economic Partnership Agreements in Kenya's trade arena assessing liberalization of agriculture and food security' (2010) a paper presented at the 2nd Biennial Global Conference of the Society of International Economic Law (SIEL); 8-10 July, 2010; University of Barcelona, Faculty of Economics and Business, Spain http://ssrn.com/abstract=1628112 (accessed 7 January 2015).

EPA will cost Kenya between 'US$ 26,000 and US$ 143,000' worth of output and between '3,000 to 20,000 jobs'. Furthermore, whereas trade liberalization within the EPA scheme is likely to increase the volume of Kenyan manufactured goods to the EU by almost '7.2%', EU exports to Kenya is also projected to rise by up to '8-24 %'. The significance of this pattern, from the standpoint of economics is that the EPA will worsen the balance of trade.

In the same vain, Vollmer and others[26] appraised the consequence of the interim EPA on welfare of nine African countries: 'Botswana, Côte d'Ivoire, Cameroon, Ghana, Mozambique, Kenya, Tanzania, Namibia, and Uganda'. They use the real tax drop rates negotiated between the EU and the African nations to appraise the welfare effect of trade liberalization for the African countries. Their finding shows that 'Mozambique, Botswana, Cameroon, and Namibia' will significantly profit from the interim agreements, while the trade impact for 'Ghana, Côte d'Ivoire, Tanzania, Kenya, and Uganda' will nearly be zero. They conclude that generally it can be infer that industrial goods contribute to a lot of welfare losses, but the welfare effect are encouraging for non-industrial goods. Boysen and Matthews[27] analysed the poverty impacts of an EPA between the EU and Uganda. They expressed fears this could threaten the proceeds of poor people through lower prices for agricultural produce, the crowding out of weak industries, and loss of government income.

The EPAs arrangement has been argued as being capable of weakening regional integration.[28] The arrangement neglects the main beliefs under Articles 35(2) and 37(5) of the Cotonou Agreement that compel EPAs to encourage and develop on regional integration work of the ACP States.[29] The Cotonou Agreement underlines the significance of the even now, very delicate regional integration in Africa. While many African States have initialed the interim agreements and perhaps would have preserved market

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26 S Vollmer et al 'EU-ACP Economic Partnership Agreements Empirical Evidence for Sub-Saharan Africa' (2008) http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1204741572978/vollmer2.pdf (accessed 15 January 2015).

27 O Boysen & A Matthews 'Poverty Impacts of an Economic Partnership Agreement between Uganda and the EU' (2008) *Institute for International Integration Studies Discussion Paper* No. 261 http://ssrn.com/abstract=1282191 (accessed 8 January 2015).

28 GG Seifu 'The Interplay of the ACP-EU Economic Partnership Agreements and the Rules of the World Trade Organization: Double Jeopardy for Africa' (2006) 1 *The Irish Yearbook of International Law* http://ssrn.com/abstract=1586292 (accessed 20 December 2014) and AI Ukpe 'Will the EU-Africa Economic Partnership Agreements Foster the Integration of African Countries to the Global Trading System?' (2008) *Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper.* http://ssrn.com/abstract=1145537 (accessed 2 January 2015).

29 Seifu (n 29 above).

'access preferences', it is even now having upsetting impact on regional integration, the actual basis of Africa's development strategy.[30]

All the authors discussed above have in distinct ways made esteemed contributions to the understanding of the subject of this study. But none of them has approached in a comprehensive manner the prospective of EU's extraterritorial human rights obligation and how it can be used to realise RTD through its trade relation with the outer world. This crucial gap in previous literature is what I will attempt to engage.

1.4 THEORETICAL FRAMEWORK

I approached this study from a normative development approach; in this approach, development is considered to be about people rather than increase in Gross Domestic Product (GDP), accumulation of capital or industrial growth.[31] The assumption that GDP can be used as a measure of societal well-being has been significantly challenged.[32] For example, Lorenzo Fioramonti, an advocate of the well-being economy, said a new development paradigm could be created if countries start concentrating on different indicators that track human well-being, health and education.[33] He proposed placing humans and nature at the vanguard of economic objectives and stressed that an economy that empowers people is necessary. The strategy in this approach is 'Basic Needs' and with the following objectives: aggregate the poor's wages via 'labor-intensive production', poverty reduction through encouraging public services, and promoting general participation in development process.[34] This approach is appropriate because the poor are not considered as indolent recipients of transfers of goods and services, but considered as key participants of their own development, which is in tandem with the Declaration on the Right to Development definition of RTD. Similarly, the capability approach, which was developed by Amartya Sen who pioneered the approach and Martha Nussbaum as well as a number of other scholars across the humanities and the social sciences, is a theoretical framework about well-being, development and

30 Ukpe (n 29 above).

31 U Jonsson 'Human rights approach to development programming' (2013) http://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf 6, (accessed 25 February 2015).

32 R Costanza 'Modelling and measuring sustainable wellbeing in connection with the UN Sustainable Development Goals' (2016) 130 *Ecological Economics* 130, 151.

33 L Fioramonti *Gross domestic problem, the politics behind the world's most powerful number* (2013) Zed books 101.

34 RS Marvin & PA 'Britner Normative Development the ontogeny of attachment' in J Cassidy & PR Shaver (eds) *Handbook of attachment: theory, research, and clinical applications* (1999) 44-47. See also Jonsson (n 31 above) The Guilford Press 6.

justice.[35] The capability approach asserts that freedom to realise well-being is a matter of what people are able to do and to be, and therefore the kind of life they are successfully able to live.

I also engaged this study from the 'State agent authority' (personal model) used by the European Court of Human Rights (ECtHR) to interpret the word 'jurisdiction' under Article 1 of the European Convention on Human Rights (ECHR) in the case of *Al-Skeini and others v the United Kingdom.*[36] This is coupled with the understanding of extraterritorial human rights obligations provided under principle 8 of the Maastricht Principles which states that extraterritorial human rights obligations relates to acts and omissions of a State that have effects on the enjoyment of human rights abroad; and obligations of a global nature to take action, separately, and jointly through international cooperation, to realise human rights universally. This principle emphasizes an important point that the protection of human rights extraterritorially is a joint responsibility of States who can also act jointly through international cooperation. The international community takes joint action. As discussed in chapter two of this thesis, the international community refers to a group of countries when they come together to act as a group such as the EU. The Maastricht Principles also define different ways in which States extraterritorial human rights obligations can be fulfiled, they include to respect, protect and fulfil where it exercises authority or effective control; where its acts or omissions has possible effect on the enjoyment of human rights, whether within or outside its territory; and where a State, acting separately or jointly, either through its executive, legislative or judicial organ, is capable of influencing the realization of human rights extraterritorially.

I will use these approaches and model above to frame my study of the RTD in Africa as well as the EU's extraterritorial human rights obligations particularly to Africa.

1.5 RESEARCH METHODOLOGY

I examined the EU's extraterritorial human rights obligations under the TEU and also attempted to investigate whether the EU have extraterritorial obligations to respect RTD. I also examined the interim EPAs negotiated by the sub-Saharan African countries and the EU and to what extent the EU's

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35 See generally, M Nussbaum *Women and Human Development: The Capabilities Approach* (2000) Cambridge University Press and A Sen'Capability and Well-being' in Nussbaum & Sen (eds) *The Quality of Life* (1993) Oxford University Press.

36 Application 55721/07. Article 1 ECHR provides that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

extraterritorial human rights obligation reflects in its negotiation and whether it will help realise RTD in the regions. I combined information from library sources, case law, NGO reports, and academic literature as well as international and regional treaties. In answering questions one, two and three of the research questions, I used the descriptive method – a method, which analyses historical data, to provide insight into the past and present. The aim of descriptive method is to describe a phenomenon and its characteristics. This method considers what rather than how or why something has happened.[37] This method was used extensively in chapters two and three of this thesis.

To answer question four of the research questions in chapters four and five of this thesis, I also used the analytical method – a method that critically evaluates information already available, to arrive to a conclusion. Analytic method can be applied without engaging in empirical research.[38] Hence the use of an analytic method expands the researcher's knowledge in doing so, the researcher obtain, decode or make explicit information that is hidden or encoded by the information in a preexisting knowledge base.[39] Finally, I used the predictive method to answer question five in chapter six of this thesis. The predictive method analyses available data so as to understand the future.[40]

1.6 SIGNIFICANCE OF THE STUDY

In this research I seek to:

1. Contribute to the academic debate on the concept of RTD.
2. Proffer solutions on how the international community, and the EU in particular, can foster the realization of the RTD in Africa.
3. Contribute to the jurisprudence in this field that currently has scarce data and publications.

1.7 STRUCTURE

37 H Nassaji 'Qualitative and descriptive research: Data type versus data analysis' (2015) 19 *Language Teaching Research* 129.

38 M Kosterec 'Analytic Method' (2016) 23 *Organon* 84.

39 As above.

40 G Shmueli 'To Explain or to Predict? (2010) 25 *Statistical Science* 291.

This study comprises of seven chapters.

Chapter one presents and sets out the background to the research. It introduced the problem to be studied and framed the main research questions. It further sets out the significance of the study, outlines the methodology, reviews the literatures available on the area and identified the matters that will be addressed.

Chapter two begins with an investigation of the theory of development with the view of positioning the term in a proper perspective. Then it embarks on a broad consideration of the concept of RTD and the controversies surrounding it both within the academic circle and the United Nations.

Chapter three examines RTD in the African human rights system. It also considers the implementation of RTD as it identifies the duty bearers and the rights holders as well as assess the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) and the African Court of Human and Peoples' Rights (African Court) on RTD.

Chapter four considers the nature of extra-territorial application of human rights treaties.

Chapter five will examine the legal basis for EU's extraterritorial human rights obligations and will examine if the EU has extraterritorial obligation to respect RTD. It will also examine the correlation between trade, development and human rights in EU's trade negotiations as well as development policies with third nations, especially Africa.

Chapter six assesses the EPAs between the EU and the ACP countries especially ECOWAS and SADC, and the potential effect on the RTD of these regions. It will also examine the ways in which the EU can leverage its extraterritorial human rights obligations, if any, to ameliorate the effects.

Chapter seven provides summary, conclusion and recommendations.

CHAPTER TWO

THE NATURE AND CONCEPT OF RIGHT TO DEVELOPMENT

2.1 INTRODUCTION

This chapter considers the concept and different meanings of development and takes a look at the historical view, nature and content of the RTD, the legal basis for the RTD and the implementation and monitoring mechanisms of the RTD.

2.2 THE MEANING AND NATURE OF HUMAN RIGHTS

What is meant by human rights? Today, a notable body of human rights principles is personified in international law through the United Nations enactments. No wonder when people discuss human rights, they typically think of the types of rights contained in the Universal Declaration of Human Rights (UDHR) and ensuing treaties. The rights contained in the UDHR are mostly political rights or rights based on positive law because they are aimed mainly at States and they propose what States and their institutions should or should not do.[1] The rights found in UDHR and other treaties are not interpersonal rights, although they also contain duties and some rights proposed for non-State actors, for instance rights against discrimination and slavery.[2] However, the notion of human rights based on natural law binding on States irrespective of international law or States national law play a significant part in human rights theory and practice.

For every right there is a right holder, all human persons are most times seen as the right holders. However, some rights are not held by all human persons for example, human rights that are for minorities or rights such as indigenous rights, women's rights and children's rights are not held by all human persons.[3] Similarly, rights to partake in politics are not held by infants. Nevertheless, generally, human rights are held by one group of human persons or the other regardless of their national, religious, ethnic, gender or racial, identities.[4]

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1 WJ Nickel & DA Reidy 'Philosophical Foundations' http://ssrn.com/abstract=1432868 (accessed 6 June 2016) 2.

2 As above.

3 As above.

4 As above.

Defining human rights is not easy. Indeed, right is a term that can be used to define an assortment of legal relationships. At times right is used strictly to refer to a 'right holder being entitled to something with a correlative duty in another.'[5] At times right is used to point to protection from having a legal status changed for example, marital status and corporate status. At times it points to a right to do something, for example the right to political participation and to participate in developmental process. At times it points to a power to create a legal relationship. While all of these are seen as rights, they all raise different protections.[6]

Human rights are rights inherent to all human beings, by virtue of our being human, irrespective of our sex, nationality or ethnic origin, color, religion and language.[7] Human rights are all interrelated – you cannot separate right to food from right to health or right to education, they are all related. Human rights are interdependent - your capacity to participate in political affaires is dependent on your right to express yourself or to get an education. Human rights are indivisible - rights cannot be deprived because it is less important or non-essential.

2.3 CONCEPT OF DUTY

The concept of duty arises from the fulfilment of a requirement and this is in many ways, for example, moral duties, legal duties, parental duties, societal duties, and civil duties.[8]

Hohfeld defines duty as 'that which one ought or ought not to do.'[9] But what kind of duty is Hohfeld talking about? According to Cullison, Hohfeld was talking about legal duties.[10] Some legal positivists think that law is a body of rules; therefore legal duty is something ensuing from the rules of positive law.[11] Hohfeld's duty is derived from rules of positive law and in his opinion, even if the public good brands some conducts important, there is no duty to follow such conduct unless positive law provides for it.[12]

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5 JJ Shestack 'The Philosophic Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 203.

6 As above.

7 See 'What are human rights' http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (accessed 7 June 2016).

8 TSN Sastry *Introduction to Human Rights and duties* (2011) University of Pune Press 40.

9 Hohfeld's Legal Relations, https://www.ics.uci.edu/~alspaugh/cls/shr/hohfeld.html (accessed 15 July 2016).

10 AD Cullison 'A Review of Hohfeld's Fundamental Legal Concepts' (1967) 16 *Clev. Marshall L. Rev*. 559.

11 As above.

12 As above 560.

From the laws viewpoint, 'duties arise from legal norms or requirements' and 'have to be discharged, the way it was prescribed.'[13] Consequently, a man's actions can be seen as right or wrong based on the discharge of his duty, if he acts contrary to a duty, it creates a wrong.[14] A duty imposes an obligation to respect other people's rights, 'a right is a demand and a duty is an expectation.'[15]

Duties, as opined by Hohfeld involve two people, one person owes the duty, and another is owed the duty.[16] Thus, as illustrated by Cullison, 'A might owe a…duty to B, but he cannot owe such a duty to himself,' also 'A might owe two separate duties to B and C, but he cannot owe the same duty to both of them.'[17] Cullisons' illustration above is based on the assumption that a duty to do something becomes imperative once the positive law would make the duty bearer legally liable for not doing it. It is therefore certain that Hohfeld used the term 'duty' to describe a certain type of legal relation between two persons regarding an action.[18]

It is instructive to note that these foundations provide reasonable guidance and the intellectual tendons required to walk through the difficult networks involved in this research, especially in understanding how duties relates to rights. Having given some thoughts on these foundations of rights, the focus moves to examining the view on law and development.

2.4 THE MEANING AND CONCEPT OF DEVELOPMENT

Over the years the meaning of development has been contentious, unsteady, and complex.[19] The variety of different conceptualisations of development has resulted into significant confusion of the concept. One common point of convergence in most of the definitions is that development includes change in most facets of the human existence. Chamber's'[20] idea of 'good change' provides a simple definition of development, even though his notion raises some queries on what is 'good' and the type of 'change' that

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13 Sastry (n 8 above).
14 As above.
15 As above.
16 Cullison (n 10 above) 563.
17 As above.
18 As above.
19 A Thomas 'The Study of Development' (2004) Paper prepared for Development Studies Association Annual Conference, Church House, London. See also http://www.sagepub.com/upm-data/18296_5070_Sumner_Ch01.pdf (accessed 10 May 2015).
20 R Chambers 'Ideas for Development' (2004) *IDS Working Paper* 238. Sussex: IDS iii 2-3.

is desirable and if 'bad change' could as well be regarded as a type of development. According to Kanbur,[21] there is no unanimous answer to what could be regarded as 'good change.' What could be acceptable as 'good change' in one society may not be acceptable in another society.

Development was first conceptualized as a progression of 'structural societal change,'[22] it is mostly linked to capitalism, industrialization and modernization. This notion has a historical and long-term perspective and involves changes in the socio-economic structures, comprising of ownership and the institutional structure. These changes ensue over the time; nations go through changes that may relate to economic growth as well as societal change, which are normally acknowledged as development. In this regard, development is seen as the image of a better life, a life that is financially better off, with modern institutions that are technologically more advanced. Certainly, economic growth is an indispensable piece of development. [23]

Development means that the members of a society should have minimal standards of education, housing and health.[24] It means that members of the society are sufficiently clothed and fed. A developed society produces members with the necessary skills required to run the society efficiently and be responsible for its collective needs as well as providing surplus of resources and skilled people so as to provide support for development in other societies. A developed society has the capability to solve problems of economic and technological nature. However, development is not just the growth of technological advancement, industries or increase in services, but it also involves a happier and more productive and pleasurable life for the individual.[25]

As indicated above, development has also been viewed to be about people[26] instead of focusing on the amassing of capital as the core influence motivating economic growth, and consequently, development. Amartya Sen, the Nobel-prize winning economist changed the general view on the meaning of development in his book 'Development as Freedom'. Sen's view is that development should be measured,

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21 R Kanbur 'What's Social Policy got to do with Economic Growth?' (2006) http://www.arts.cornell.edu/poverty/kanbur/ (accessed 1 August 2015) 5.

22 Thomas (n 19 above).

23 As above.

24 See generally N Udombana 'The Third World and the Right to Development: Agenda for the Next Millennium' (2000) 22 *Human Rights Quarterly* 753-787.

25 As above 757.

26 U Jonsson 'Human rights approach to development program' (2013) http://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf 6, (accessed 25 February 2015).

not just by increase in people's income but also by its effect on people, in terms of their capabilities, choices and freedoms.[27]

In its first Human Development Report, the United Nations Development Programme (UNDP) started promoting a different idea of development.[28] They concluded that development is not absolutely knotted either to economic development or human development, but instead, economic development (progress in an economy) and human development (the process of enlarging people's freedoms and opportunities and improving their well-being) are interconnected and both must be present to steer development.

The meaning of development also conveys an implication of lasting change. The provision of jobs, right skills for the labor market, good health care, and a decent standard of living is an excellent way of improving a person's well-being and his development, but when the provision stops and the improvement goes away and could no longer meet the needs of the present and the future generations, it will not be described as development.[29] This suggests that development could mean more than a temporary provision of the means to improve a person's well-being. Development should have the capacity to provide the means for that well-being on a sustainable basis.[30]

Development must be sustainable. Recently there have been intensified calls for sustainable development. This is because over the year's economic growth is achieved while compromising the environment.[31] Earth's natural resources have been exploited in ways that are wasteful and unsustainable, without giving due consideration to the costs of resource depletion. According to the World Bank: 'the burning of fossil fuels supported rapid growth for decades but set up dangerous consequences, with climate change today threatening to roll back decades of development progress.'[32]

Sustainable development has been defined as 'Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[33] In several ways, a society can

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27 See generally A Sen '*Development as Freedom*' (1999) Oxford University Press.

28 UNDP, Human Development Report (1990) Oxford Univ. Press.

29 See http://www.worldbank.org/depweb/english/beyond/beyondco/beg_01.pdf (accessed 4 November 2015).

30 As above.

31 World Bank 'Sustainable development' http://www.worldbank.org/en/topic/sustainabledevelopment/overview#1 (accessed 4 January 2016).

32 As above.

33 Under chapter two of the World Commission on Environment and Development's report *Our Common Future* (1987) 40.

compromise its ability to meet the important needs of its future generations, for example, by overexploiting resources. Sustainable development acknowledges that economic growth must be realised with minimal dangerous consequence on the environment. Earth's resources should be efficiently utilized to improve and satisfy society's needs, build collective wealth for today's people and to meet the needs of future generations. The Rio Declaration on Environment and Development recognizes that people are the primary interests for sustainable development and consequently, they are entitled to a healthy and fruitful life in harmony with nature.[34]

Although, Article 22 of the African Charter did not clearly define development, it overtly separates into different elements its notion of development as economic, social and cultural elements.[35] However, the DRTD defines development in paragraph two of its preamble as:

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

The DRTD view's development as a continues process of achieving economic security for the people, and this must involve the unrestricted contribution of the people. Thus, the DRTD perceives development to be generally about people. It means access to jobs, right skills for the labor market, good health care, and a decent standard of living among others.[36] This view of development is what Article 22 of the Africa Charter also envisions.

2.4.1 Relationship between development and human rights

> Poverty eradication without empowerment is unsustainable. Social integration without minority rights is unimaginable. Gender equality without women's rights is illusory. Full employment without workers' rights may be no more than a promise of sweatshops, exploitation and slavery. The logic of human rights in development is inescapable. [37]

There are distinctive connections between development and human rights. Human rights and development possess the same goal. The definitive goal of social and economic development is to attain happier, more productive, quality and pleasurable life for the people. Human rights are 'the highest aspiration of common

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34 Principle 1 of the Rio Declaration on Environment and Development (1992).

35 See Article 22(1) of the African Charter.

36 Udombana (n 24 above) 756.

37 M Robinson *A voice for human rights* (2006) University of Pennsylvania Press 267.

people,' as proclaimed in the preamble of the Universal Declaration of Human Rights which also states that 'dignity…equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'

The universal realisation of human rights cannot be separated from development. Development will be at a loss and worthless if it is not aimed at attaining human rights.[38] Human right is the resolve, standard and substances of development.[39] The relationship between development and human rights is therefore, of great significance.

In the 1970s when insight on the connection between human rights and development came to light, the connection was more about the withdrawal of assistance, usually of financial nature, to States where the authorities have clearly violated human rights.[40] A different insight on the connection between human rights and development began to take shape during the 1980s. At that time more attention, developmental cooperation and additional financial support were given to States that had democratized and promoted human rights as well as to non-governmental organisations (NGOs) that also promote human rights.[41]

Progressively, from then onwards, the promotion of human rights, respect for rule of law and democratic principles were often included in the negotiation that led to agreements, conventions and treaties that are of developmental nature. One of the earliest of such instruments that established the connection between human rights and development was the Lomé III Convention, an agreement established between the European Community and its partner States in Africa, the Caribbean and the Pacific which was signed in 1984 (which will be discussed in detail in chapter six below). The Convention covered trade, industrial, financial and technical cooperation between the partners. The Preamble to the Convention talked about human rights. In the preamble, the parties reaffirmed 'their faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.' A strong view, therefore,

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38 Z Xiaoling 'On Relations between Human Rights and Development' (2009). http://www.china.org.cn/china/human_rights/2009-10/29/content_18792599.htm (accessed 4 January 2016).

39 As above.

40 See Human Rights and Development *Icelandic Human Rights Centre* http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-development (accessed 4 January 2016). See also H Sano 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development'(2000) 22 *Human Rights Quarterly* 739.

41 Human Rights and Development *Icelandic Human Rights Centre* (n 40 above).

emerged that the basis for every development is respect for human rights, the rule of law, political diversity and respect for democratic principles.

The relationship between development and human rights can also be seen in the human rights conditionality in bilateral and multilateral trade agreements.[42] Under the conditionality clause, a state promises to provide certain developmental aid or benefits to a state in exchange for the protection of human rights and democratic principles. The practice of conditionality has become a prominent feature of the EU's *modus operandi*. Since the late 1970s the EU has applied the policy of conditionality in its relations with third countries by suspending developmental aid, market and political incentives towards developing countries that violates human rights or experience democratic failure. This was made legally possible by defining human rights, the rule of law and democratic principles as essential element of the Cotonou Agreement between the EU and African, Caribbean and Pacific countries. In this regard, human rights conditionality in these agreements can be seen as a means of achieving protection of human rights. This is because by offering developmental aid, market and political incentives to countries that promotes and protect human rights and democratic principles, the EU is able to influence political and economic changes in its partner country. Furthermore, the use of human rights conditionality can fill the vacuum in human rights protection that arises when countries are not signatories to international human rights instruments. Gradually, different stakeholders in the area of development cooperation would apply rather diverging, sometimes even inconsistent definitions of the notion of a human rights-based approach. This includes even different UN bodies, which unavoidably caused problems.[43] In 2003 several UN bodies convened a workshop to address this, which led to the production of a statement entitled The Human Rights-Based Approach to Development Cooperation – Towards a Common Understanding Among the United Nations Agencies. The rationale behind developing a common understanding was to guarantee that

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42 N Hachez 'Essential Elements Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?' (2015) *Working Paper No. 158 Leuven Center for Global Governance Studies* 22.

43 M Broberg & H Sano 'Strengths and weaknesses in a human rights-based approach to international development – an analysis of a rights-based approach to development assistance based on practical experiences' (2018) 22 *The International Journal of Human Rights* 666.

UN agencies, funds and programmes implement a coherent Human Rights-Based Approach to developmental programs at all levels. The Statement of Common Understanding are:

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 human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.[44]

A Human Rights Based Approach to Development Programming of UN Agencies requires that its developmental programs be carried out based on the recommendations of international human rights bodies and mechanisms. The programmes should be based on the capacity of rights-holders to claim their rights, and of duty-bearers to fulfil their obligations and both outcomes and processes subsequently be monitored and evaluated guided by human rights standards and principles.

Principles like participation and consultation, inclusion, cohesion, good governance, accountability and equality or equity, are consistently becoming part of the development discourse, which compose the precepts of a rights-based approach to development.[45]

It must be noted at this juncture that insight on the connection between human rights and development has made some gains. One of such achievements is the Millennium Development Goals (MDGs). The MDGs are eight goals that world leaders, mostly Member States of the United Nations (UN), agreed to achieve by the year 2015. This agreement was reached at the UN Millennium Summit in September 2000.[46] The world leaders agreed in that summit to fight extreme poverty and hunger, illiteracy, gender equality, diseases especially HIV/AIDS, illiteracy, and environmental degradation. The MDGs were designed to

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44 See https://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common understanding-among-un-agencies (accessed 2 November 2018).

45 S McInerney-Lankford 'Human Rights and Development: a Comment on Challenges and Opportunities from a Legal Perspective' (2009) 1 *Journal of Human Rights Practice* 53.

46 D Hulme 'The Millennium Development Goals (MDGs): A Short History of the World's Biggest Promise' http://ssrn.com/abstract=1544271 (accessed 5 January 2016).

improve some fields that are regarded as crucial for human development and that will lead to improved enjoyment of human rights.

Some human rights activists think that the MDGs had no clear goal for human rights.[47] However, if economic and social rights is viewed and defined as human rights, then freedom from extreme poverty and hunger, access to education and health care, gender equality, all which are MDGs constitute clear human rights concerns. The MDGs also includes the pledge that 'we will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development'.[48]

The MDGs have resulted in more emphasis on human rights-based approaches to development.[49] Development is human rights-based if the process is consistent with human rights standard. Sengupta summarized the characteristics of a right-based approach using five principles: 'equity, nondiscrimination, participation, accountability and transparency'.[50] He also noted that 'a right-based process of development is not the same thing as the right to development.'[51]

It is also important to note that as the MDGs came to the end of their term in 2015. They have been replaced by a post-2015 agenda, including 17 Sustainable Development Goals (SDGs). At the United Nations Sustainable Development Summit on 25 September 2015, the 2030 Agenda was adopted for Sustainable Development to end poverty, fight inequality and injustice, and tackle climate change by 2030.[52] There is a conjuncture between human rights and the SDGs. While human rights provide guidance for the realisation of the 2030 Agenda for Sustainable Development as well as the 2030 Agenda through

47 T Hammarberg 'No real development without human rights' (2008) Council of Europe Commissioner for Human Rights, Trinity College https://wcd.coe.int/ViewDoc.jsp?id=1247635& (accessed 5 January 2016).

48 Resolution 24 of the United Nations Millennium Declaration 2000 http://www.un.org/millennium/declaration/ares552e.pdf (accessed 6 January2016).

49 See Human Rights and Development *Icelandic Human Rights Centre* (n 40 above).

50 A Sengupta 'The human right to development' in BA Andreassen & S Marks (eds) *Development as a human right legal, political and economic dimensions* (2010) Intersentia 16

51 As above.

52 Sustainable Development Goals (SDGs) http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html (accessed 1 June 2016).

the existing human rights instrument, which can improve 'coherence, efficiency and accountability',[53] the SDGs can also contribute significantly to the implementation of human rights.

The consideration of human rights in the 2030 Agenda also comprises the application of the agenda to a human rights based approach to development.[54] The human rights based approach requires that:

- Development should further the realisation of human rights;
- Human rights standards should guide development cooperation and programming; and
- Development cooperation contributes to the development of capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights.[55]

Agencies engage a variety of methods to include human rights in their developmental projects. Some methods are determined by the donor's human rights policies, whereas others are compelled by the limitations of agency directives, capacity, or comparative advantage in the field.[56] Mainstreaming human rights is a method employed by some agencies it involve incorporating human rights in every development project and assessing activities for human rights implications.[57] New Zealand Aid Program (NZAID), for example, has developed a useful set of screening questions for evaluating the implementation of its human rights mainstreaming policy. They include, which rights are affected by the strategy or program? Is there a risk of acting in any way that is inconsistent with its human rights commitments? Has the strategy or program been developed and implemented using participatory methodologies? Is the strategy or program inclusive? Does it discriminate against any group or people or bar them from benefiting from the program's benefits?[58]

Clearly, in most development agencies human rights are not considered in legal or obligatory terms, this may be contrasted with the notoriety of international treaty obligations concerning well-integrated issues such as trade and environment. It is important to have an international law framework that will establish

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53 See 'Human rights and the SDGs' https://www.humanrights.dk/our-work/sustainabledevelopment/human-rights sdgs (accessed 18 June 2018).

54 As above.

55 As above.

56 The World Bank 'Integrating Human Rights into Development donor approaches, experiences, and challenges' (2013) 23.

57 As above.

58 As above 27.

a binding and legitimate connections, and a body of rules, principles, indicators and processes for the integration of human rights in development.

2.5 HISTORICAL VIEW OF RIGHT TO DEVELOPMENT

The RTD can be rooted in the Universal Declaration of Human Rights (UDHR). Article 22 of the UDHR precisely addresses the concept of the RTD where it said:

> Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

At the time of the UDHR declaration, Eleanor Roosevelt's said: 'we are writing a Bill of Rights for the world, and … one of the most important rights is the opportunity for development. As they [people of the world] grasp that opportunity, they can also demand new rights, if these are broadly defined'.[59] Article 56 of the UN Charter calls for all State parties to 'take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.' The purposes outlined in Article 55 include promoting 'higher standards of living…and conditions of economic and social progress and development' and 'solutions of international economic, social, health and related problem; and international cultural and educational co- operation.'

In Ouguergouz's opinion the notion of RTD originated from Africa. The expression 'right to development' was perhaps first articulated by Doudou Thiam the Foreign Affairs Minister of Senegal, in 1967 at the Economic Conference of the Group of 77.[60] He spoke of RTD, as a new right for developing countries thus:

> The old colonial past, of which the present is merely an extension, should be denounced in favour of a new right. Just as in the developed nations, the right to education, health, employment has been proclaimed for individuals; we must here proclaim, loud and clear, the right to development for the nations of the Third World.[61]

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59 F Roosevelt 'My Day, Feb. 6, 1947' cited in MG Johnson 'The contribution of Eleanor and Franklin Roosevelt to development of international protection for human rights' (1987) 9 *Human Rights Quarterly* 48.

60 F Ouguergouz, *The African Charter on Human and Peoples' Rights a Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) Martinus Nijhoff Publishers 298.

61 D Thiam, 'L' Afrique demande un droit international [d'un] nouveau', cited in Ouguergouz (n 61 above) 298.

Later in 1969, the Archbishop of Algiers, Cardinal Duval in his New Year wishes broadcast also declared that 'the right to development should be proclaimed for the Third World.'[62]

However, Keba M'baye first articulated the call for the RTD as a human right in 1972 at the inaugural lecture of the Internal Institute of human rights where he proclaimed that 'right to development is the right for all.'[63] From that time forward there emerged interests and lots of debates on the RTD. Perhaps inspired by M'baye's lecture, the Third World countries, under the auspices of the Non-Aligned Movement,[64] put forward a proposal for a New International Economic Order (NIEO) through the United Nations Conference on Trade and Development (UNCTAD) seeking for the enhancement of the terms of international trade, the flow of capital and technology and increase in development assistance so that wealth and development could be more equitably distributed to the Third World.

The call for the creation of a NIEO was prompted by the prevailing deficiencies in the existing international economic order at those times, which were biased and more favourable to the rich developed countries.[65] The rich nations tend to have key control on decisions concerning terms of trade, finance, aids and technological flow resulting to the Third World being overly dependent on the developed countries.[66]

It was against this background that in 1973, the Chairman of the Non-Aligned Movement, Algeria's President Houari Boumedienne, requested the UN Secretary-General to convene a Special Session of the General Assembly to consider among others, economic development problems. Following an extensive support from the UN Member States the Sixth Special Session of the UN General Assembly was convened in May 1974, where a resolution was adopted by the General Assembly for a Declaration on the

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62 Ouguergouz (n 61 above) 298.
K M'baye 'Le droit au développent comme un droit de l'homme' inaugural lecture, Strasbourg, July 1972. Cited in OC Okafor 'A regional perspective: article 22 of the African Charter on Human and Peoples' Rights' in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (2013).

64 The Non-Aligned Movement represents the interests of about 115 developing countries. It originates from the Asia-Africa Conference held in Bandung, Indonesia in 1955 which was organized on the invitation of the Prime Ministers of Burma, Ceylon, India, Indonesia and Pakistan with about leaders of 29 states of former colonies from Africa and Asia in attendance, to discuss common worries and to advance joint strategies in international relations. During the cold war, the movement did not seek to officially align themselves with either the United States or the Soviet Union, but remain neutral. See http://www.nam.gov.za/background/history.htm

65 S Chand 'NIEO: New International Economic Order: Objectives, Programme of Action' http://www.yourarticlelibrary.com/trade-2/nieo-new-international-economic-order-objectives-programme-of-action/26271/ (accessed 26 January 2016).

66 As above.

Establishment of a New International Economic Order. Paragraph 4(d) and (e) of the Declaration on the Establishment of a New International Economic Order implies that development is a right, which requires the 'full and effective participation on the basis of equality of all countries in the solving of world economic problems in the common interest of all countries.' Currently, the New International Economic Order seems to be completely forgotten but it stressed the importance of international trade, access to technology, aids and the burden of debt to the RTD such that it was mentioned in Article 3(3) of the DRTD where it says that 'States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality.'

The UN Commission on Human Rights (now Human Rights Council) officially recognised RTD for the first time in 1977 at its thirty-third session. During discussions at the session, some speakers pointed to the existence of RTD and that it could be inferred from the 'Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and other United Nations instruments.'[67] The UN Commission on Human Rights recognized RTD as a human right and suggested to the Economic and Social Council to invite the Secretary-General in collaboration with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other knowledgeable expert agencies, to study the issue of 'The right to development as a human right in relation with other human rights based on international co-operation … taking account the requirements of the New International Economic Order.'[68] The deliberations at the UN sessions on the subject finally culminated during the forty-first session of the General Assembly, in 1986 when it adopted the Declaration on the Right to Development in nearly a unanimous vote. The United States (US) cast a negative vote while eight other countries abstained.[69]

Although, in 1986 when the DRTD was adopted, consensus was not reached.[70] However, as time went by, skepticism about RTD changed. At the 1993 Vienna World Conference on Human Rights consensus was reached, RTD was pronounced as an 'integral part of fundamental Human Rights'.[71] Following the

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67 UN Commission on Human Rights, Resolution 4 (XXXIII), 21 February 1977.

68 As above, 1.

69 They are Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden and United Kingdom.

70 F Kirchmeier 'The Right to Development where do we stand? State of the debate on the Right to Development' (2006) 11. http://www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf (accessed 25 June 2014).

71 Vienna Declaration (A/conf.157/23). Paragraph 10 says: 'The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.'

conference, RTD has been featured in key UN documents, such as the Millennium Declaration,[72] where it states that 'we are committed to make the Right to Development a reality for everyone and to freeing the entire human race from want.' Likewise, the Rio+20 Outcomes Document in 2012 reiterates the significance of 'freedom, peace and security, respect for all human rights, including the right to development.'[73] Moreover, many comments have been put forward in support of the RTD, mostly in legal and human rights journals as well as in the reports by the Independent Expert[74] (the Independent Expert is a Special Procedure mechanism appointed by the Human Rights Council to examine and report on a specific human rights. The Independent Expert on Right to Development was appointed in 1999 in the person of Arjun Sengupta by the Chair of the Commission on Human Rights).

2.6 THE MEANING OF RIGHT TO DEVELOPMENT

Since the 1940s the UN has been a protagonist in promoting human rights and bringing it to the forefront of international and national policy. Consequently, the UN has developed international human rights framework that codifies human rights and create mechanisms to elucidate the scope of states' obligations and to monitor their compliance. States-parties to the UN Charter realize that by ratifying the Charter, human rights became a subject of international, and not just domestic, concern.[75] RTD is one of the fairly new additions to the international human rights framework by the UN. The Organisation of African Unity (now African Union) first declared and incorporated RTD in 1981 in the African Charter on Human and

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72 Millennium Declaration (A/RES/55/2), par 11.

73 See http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf 2 (accessed 8 August 2015).
See generally, I Khurshid 'The Declaration on the Right to Development and implementation' (2007) 1 *Political Perspectives* 1; P Alston 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Year Book* 3; R Barsh 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322; Udombana (n 24 above); U Baxi *Mambrino's Helmet Human Rights for a Changing World* (1994) Har-Anand; JCN Paul 'The Human Right to Development: Its Meaning and Importance' (1992) 25 *John Marshall Law Review* 235; A Orford, 'Globalization and the Right to Development in P Alston *People's Rights* (2001) Oxford University Press 127; K de Feyter 'Towards a Framework Convention on the Right to Development' (2013) *Friedrich Ebert Stiftung International Policy Analysis* www.http://library.fes.de/pdf-files/bueros/genf/09892.pdf; A Sengupta 'Right to Development as a Human Right' (2001) 36 *Economic & Political Weekly;* A Sengupta, 'On the Theory and Practice on the Right to Development' (2002) 24 *Human Rights Quarterly* 837; A Sengupta 'Development Co-operation and the Right to Development' in M Bergsmo (ed) *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjørn Eide* (2003) Brill – Nijhoff 371.

75 L Piron 'The Right to Development A Review of the Current State of the Debate for the Department for International Development' (2002) Right to Development Report http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2317.pdf 7.

Peoples' Rights. In 1986, the DRTD was adopted by the UN General Assembly, unifying civil and political rights and economic, social and cultural rights into a right,[76] enjoyed by all human 'without distinction as to race, sex, language or religion.'[77]

RTD is a process that will result in the realistion of all human right, a process that must be carried out in a way identified as rights-based, in compliance with the international human rights standards, 'as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process.'[78] This resonates with Keba M'baye's definition of RTD as: 'an essential right for the existence of man to which all fundamental rights and freedoms link.'[79]

Mohammad Bedjaoui defined the RTD as 'the Alpha and Omega of human rights, the first and last human right, the beginning and the end, the means and the goal of human rights, in short it is the core of rights from which all the others stem.'[80] He further states that 'the international dimension of the right to development is nothing other than the right to an equitable share in the economic and social well-being of the world.'[81]

Similarly, Amartya Sen defines the RTD as 'a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious freedoms and civil rights for all.'[82] Bedjaoui and Sen's definitions of the RTD have been criticized as a right to everything.[83] Villaroman stated that the 'over expansiveness of Sen's definition is readily apparent because it describes the right to development…as a collection of virtually all human rights claims ... and a conglomeration of such collections'.[84] David Beetham regretted that the present literature on the RTD has superfluously stretched

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76 Sengupta 'On the Theory and Practice of the Right to Development' (n 74 above) 840.

77 The Declaration on the Right to Development, adopted 4 Dec. 1986, Article 6.

78 Sengupta (n 77 above) 846. Note also that 'Equity—which is essential to any notion of human rights derived from the idea of equality of all human beings in rights, dignity and opportunity, and is associated with fairness or the principles of a just society—is basic to that process.'

79 M'baye (n 64 above) 374.

80 M Bedjaoui 'The Right to Development' in HJ Steiner and P Alston, *International Human Rights Law in Context; Law, Politics, Moral* (2008) Oxford University Press 1321.

81 As above.

82 A Sen 'Human Rights and Development', in BA Andreassen and S Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions (*2006) Intersentia 2-3.

83 Y Ghai & YK Pao 'Whose Human Right to Development?' (1989) Commonwealth Secretariat Series of Occasional Papers on the Right to Development, London 13-15.

84 NG Villaroman 'Rescuing a troubled concept: an alternative view of the Right to Development' (2011) 26 *Netherlands Quarterly of Human Rights* 16.

the RTD further than its main meaning, which is to participate in the process of development, and that this has caused the RTD to lose 'its clarity of focus' thereby weakening 'its normative force'.[85] He further states that:

> The more the right to development is expanded to include all possible aspects of development, the more difficult it becomes to specify what would count as a violation or infringement of the right, since almost anything might count as such, and the responsibility for not fulfiling it becomes correspondingly diffuse and unidentifiable. In sum, a wide definition of the right to development provides a convenient excuse for the evasion of responsibility.[86]

This supports the argument that the definition the RTD should not include all aspects of development, but rather focus on a nation's or people's right to economic development. However, it is not the notion of the RTD as an individual human right but rather its collective nature and inter-State dimension that really makes it the rightful tool to address the developmental problems faced by developing countries.

According to Piron,[87] RTD is defined as containing the following core elements:

> (i) The human person is at the center of development;
> (ii) The process of development should be respectful of all human rights. Development should in particular respect the rights of participation;
> (iii) Development should promote social justice; and
> (iv) States have the primary responsibility for realising the Right to Development at the national level, but also through appropriate international policies and international co-operation.

Article 1 of the DRTD defines RTD as:

> Inalienable human rights by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. The human right to development also implies the full realistion 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.

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85 D Beetham 'The Right to Development and Its Corresponding Obligations' in BA Andreassen & S Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) Intersentia 81.

86 As above 83.

87 Piron (n 76 above) 7.

Inspired by the Preamble and Article 1 of the DRTD, the UN Independent Expert on the Right to Development defines RTD as 'the right to a particular process of development in which all human rights and fundamental freedoms can be progressively realized.'[88]

Sengupta spells out three principles from the definition of the RTD in Article 1 of the DRTD:[89]

> (a) there is an inalienable human right that is called the right to development; (b) there is a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized; and (c) the right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development.

The first principle asserts that RTD is an inalienable human right that cannot be taken away, bargained away or transferred to any other person. It is a right fundamentally related to the concept of human being. The reasoning spurring this principle is the need for development, which also necessitates the need for a set of rights that will make such development possible. The provision in the first principle suggests that both the individual person, and a group of persons, or peoples can claim the RTD. Thus, providing collective and group-based angle to the human person, nonetheless, Article 2 of the DRTD reiterates that, 'the human person is the central subject of development and should be [both] the active participant and beneficiary of the right to development.'

The second principle describes RTD as a process of development 'in which all human rights and fundamental freedoms can be fully realised.' This principle suggests that, although, there could be different process of achieving development by the state, only the process that conforms to the international standards of human rights will be regarded as RTD. This principle also describes the kind of development to be enjoyed as of economic, social, cultural and political nature. This kind of development would be made possible if all human rights and fundamental freedoms are entirely realised, thus affirming the link between development and human rights.

The third principle affirms RTD as a human right, which entitles every human person to first, participate in the process of development, secondly, contribute, which understandably is based on participation, and

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88 A Sengupta, A Eide, SP Marks & BA Andreassen 'The Right to Development and Human Rights in Development: A Background Paper' Prepared for the Nobel Symposium organized in Oslo from 13-15 October 2003, 3.

89 Sengupta (n 77 above) 847.

thirdly enjoy, which is considered as the result of participation, and contribution. The first two components – participation (a situation where local citizens and other stakeholders are involved in development process before a decision is taken) and contribution (doing some work to make the developmental process a success, this involves carrying out the duties associated with the RTD) could be viewed as rights and duties respectively.[90] It could therefore mean that all the three components (participation contribution and enjoyment) must be present for an individual or peoples to fully realise RTD. The question then is can an individual or peoples fail in their claim for RTD if they fail to perform their duties or obligation of contributing? According to Stefano Fontana, 'without duties rights spiral upon themselves, they annul each other.'[91] Some rights cannot exist without an equivalent duty, human rights, therefore, are associated with duties.[92] Article 2(2) of the DRTD requires every person to individually and collectively have a responsibility for development, considering their duties to the community, and promote and protect an appropriate political, social and economic order for development. It is logical to hence conclude that the enjoyment of RTD will depend on participation and contributing to the process of development.

2.7 CONTENT AND NATURE OF RIGHT TO DEVELOPMENT

As earlier stated, the RTD is an inalienable right to participate in a process in which all human rights and fundamental freedoms can be realised, which would lead to 'the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active…participation in development and…distribution of benefits resulting there from.'[93] Article 1 DRTD identifies the fact that both the human person and all peoples are entitled to the RTD. However, Article 2(1) DRTD emphatically states that 'the human person is the central subject of development and should be the active participant and beneficiary of the right to development.' Although, peoples or group of persons are entitled to some rights,

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90 Q Qerim 'A values-based approach to development: principles of content of development, the right to development, and sustainable (human) development' (2008) http://ssrn.com/abstract=1097287 (accessed 17 January 2016) 6.

91 S Fontana 'A Zenit Daily Dispatch Duties Before Rights' Interview With Director of Van Thuan Observatory, https://www.ewtn.com/library/Doctrine/zdutiesrights.htm (accessed 19 January 19 2016).

92 DA Hoekema '*Rights and wrongs: coercion, punishment, and the state*' (1986) Susquehanna University Press 83.

93 Declaration on the Right to Development, Article 2(3). Article 8 further explains this point by stating that: 'States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.'

for example, full authority over the natural resources within their territories, the human person is the effective participant and beneficiary of the RTD.[94] The DRTD situates the human person as the epicenter and focus of development.[95]

Failing to protect human rights constitutes an impediment to development and the RTD.[96] The process of development should encompass all human rights and fundamental freedoms and assist in the realisation of human rights for everyone. The DRTD acknowledges in Article 6(2) that human rights are indivisible and interdependent. This requires that economic, social and cultural rights as well as civil and political rights should be given equal attention, and that all human rights must be attended to in a combined way, and not in the realisation of separate single human rights.[97]

The content and nature of RTD can be examined based on the text of the DRTD. Based on the international instrument and literatures discussed above, the following constitute the core content of the RTD: participation, self-determination and international cooperation.

2.7.1 Participation

In Article 8(1) of the DRTD, States along with the international community are required to formulate suitable development policies. Since the human individual is the central subject of development, the processes by which such policies are formulated must be participatory. Article 8(1) of the DRTD also emphasizes the importance of participation by women in the development process and made it a duty for the States to ensure their active role and participation in the process of development.

Although all human rights and freedoms are integrated in the RTD, the right to participate is unmistakably indicated in Article 1(1) thus: 'every human person and peoples are entitled to participate'. Participation is the foundation of the RTD; it guarantees that no one is left out of the process of development. It prevents discrimination and underscores the need for transparency and accountability in the process of

94 Piron (n 76 above) 10.
95 Declaration on the Right to Development, Article 2(1).
96 As above Article 6(2).
97 Piron (n 76 above) 10.

development.[98] Similar provisions are made in various treaties to highlight the importance of participation.[99]

Participation in development has been generally integrated by most large international agencies and organisations that work in development area such as the World Bank and NGOs. These organisations at some stage include local peoples and other stakeholders in the development process.[100]

According to the Global Institute for Economic, Social and Cultural Rights Practitioner's Guide, the right to participate 'involves expressing policy ideas, choosing policies, implementing, monitoring and evaluating policy. Expert involvement in these stages should be transparent and presented in an understandable manner.'[101] It further states that to ensure the participation of people, 'a minimum level of economic security must be ensured, capacity building activities…must occur.'[102] The capacity building should include educating the participants on human rights. Civil society should be vibrant and be guaranteed freedom of association. To ensure meaningful participation, the rights to freedom of expression and information, freedom of association and assembly, and the right to participate in cultural life are basic rights that must be present.[103] This means that individuals can voice their opinions, publicly and privately, about the development process or of either accepting or rejecting the developmental program without fear of victimization. Likewise, individuals can have the freedom of peaceful assembly and association with others, having the ability to join trade unions to protect their interests including protesting against unacceptable developmental project.

The DRTD encourages participation for particular groups, including women, indigenous groups, and minority group.[104] Article 8(1) states that: 'States should undertake…effective measures…to ensure that

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98 The right to participation mirrors the provisions of article 21 of UNDHR which states that: (1) everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) everyone has the right of equal access to public services in his country; (3) the will of the people shall be the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be by universal and equal sufferings and shall be held by secret votes or by equivalent free voting procedures.

99 See Article 25 of the ICCPR; Article 1 of the ICESCR; and Article 3 and 4 of the 1990 African Charter for Popular Participation in Development and Transformation.

100 See A Rights-Based Approach to Participation, the Global Institute for Economic, Social and Cultural Rights Practitioner's Guide May 2014, http://globalinitiative-escr.org/wp-content/uploads/2014/05/GI-ESCR Practitioners-Guilde-on-Right-to-Participation.pdf (last accessed 31 January 2016) 4.

101 As above.

102 As above 5.

103 As above.

104 Article 2 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic

women have an active role in the development process.'[105] It does not only transcend to social justice if women's participation in development process is improved but it will help reduce poverty.[106] Participation by women is vital to sustainable development; it helps to slow population growth rates, it improves mortality rate in children and general family health, reduces fertility and in overall, contributes to economic growth.[107]

According to the Global Institute for Economic, Social and Cultural Rights Practitioner's Guide,[108] participation should be incorporated in every aspect and stage of development such as planning, design, implementation, and monitoring. The best and important stage for participants to be involved is prior to the authorization and at the commencement of the development process.[109] However, participants should also be involved in the evaluation of the development programme before and after completion. This is because the participating beneficiaries are in the best position to determine whether a development programme had its desired effect and their evaluation will help the NGOs to amend the development programmes to suit the beneficiaries' needs.

In order for participation to justly be right-based, there is the need to also respect the right to refuse consent to development programmes. According to the Global Institute for Economic, Social and Cultural Rights Practitioner's Guide 'in the absence of the right to say no "or deny consent" participatory methods can be

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Minorities says '1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. 2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. 3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.'

105 Effective measures may be construed as a set of interrelated and interdependent general conditions such as policies, laws, institutional mechanisms, resources, etc., employed by the State, which facilitate the promotion of participation by the women in the development process. See also Convention on the Elimination of Discrimination Against Women, Article 7 says: 'States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.'

106 See World Bank Group 'Enhancing women's participation in economic development' (1994) http://elibrary.worldbank.org/doi/abs/10.1596/0-8213-2963-4 (last accessed 31 January 2016) 1.

107 As above.

108 See A Rights-Based Approach to Participation (n 101 above) 14.

109 Commission on Human Rights Standard-setting Legal Commentary on the Concept of Free, Prior and Informed Consent E/CN.4/Sub.2/AC.4/2005/WP.1 2005 par 57.

empty and meaningless' and stressed that it will be a 'smokescreens for elite control in which elites merely provide information on decisions already made and listen only to placate.'[110]

2.7.2 Self-determination

Article 1(2) of the DRTD establishes that 'the human right to development also implies the full realisation of the right of peoples to self-determination.' Self-determination means the legal right of a group of people to determine their own purpose and control their political, economic or socio-cultural future. Self-determination is a basic principle of international law, which evolved from customary international law and included in the common Article 1 of the ICCPR and ICESCR. It is also accepted as a general principle of law, and protected in some other international treaties.[111] The Concept of Free, Prior and Informed Consent is established on the notion of the right of all people to self-determination, 'to freely pursue their economic, social and cultural development, to freely dispose of their natural wealth and resources and to be secure in their means of subsistence.'[112]

In their report on the International Conference of Experts on the Implementation of Right to Self-Determination as a contribution to conflict prevention organised by the UNESCO division of Human Rights Democracy and Peace and the UNESCO Centre of Catalonia held in Barcelona in 1998, Praag and

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110 See A Rights-Based Approach to Participation (n 101 above) 13.

111 For instance, self-determination is protected in Article 1(2) of United Nations Charter which says that among the resolutions of the United Nations is 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'; the common Article 1 of the ICCPR and ICESCR which states: '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'; United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Chapter of the United Nations where the UN general assembly declared in the paragraph 13 of the preamble their conviction that 'the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law…' and that 'Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence'; part 1(viii) of the Conference on Security and Co-operation in Europe (CSCE), Helsinki Final Act 1975 which says: 'By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development'; Article 20 of the African Charter of Human and Peoples' Right which says: 'All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen' and Article 1(2) of Vienna Declaration and Programme of Action, 1993 that says: '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.'

112 See A Rights-Based Approach to Participation (n 101 above) 13.

Seroo identify two types of self-determination - Internal self-determination and external self-determination. Internal self-determination includes the right to decide the system and personality of rulers by citizens of a State and the right to participate in decision-making at the State level by groups of individuals. It also includes the right to exercise cultural, linguistic, religious or (territorial) political autonomy within the territory of the State. While external self-determination includes the right to decide on the political status of a people within a State and its place on the International community as well the right to separate from the existing States and to set up a new independent state.[113]

From Praag and Seroo's report above we deduce that self-determination has two sides - internal and external. Internal self-determination is seen as the right of peoples to govern or rule themselves devoid of external interference, while external self-determination is seen as the right of peoples to decide their own political identity without external interference, and this includes the right to form their own independent State, although under limited circumstances.[114] Thus echoing the provisions of the United Nations Resolution 2625 (XXV) which provides that:

> The establishment of a sovereign and independent state, the free association or integration with an independent state, or the emergence into any other political status freely determined by a people constitutes mode of implementing the right [to] self-determination by that people.[115]

The Declaration on Friendly Relations restates that all peoples have the right to self-determination and imposed a duty on every State to respect this right, the reason being to: 'a) to promote friendly relations and co-operation among States; and b) to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.'[116] The Declaration further stressed that achieving self-determination could be through independence or 'free association or integration with an independent State or the emergence into any other political status freely determined by a people.'[117] The Declaration did not

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113 MC Praag and O Seroo 'The Implementation of The Right to Self-determination as a Contribution to Conflict Prevention' Report of The International Conference of Experts held in Barcelona from 21 to 27 November 1998, http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO% 0SELF.pdf (accessed 5 February 2016) 12.

114 As above

115 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution 2625 (XXV) adopted at the Twenty-fifth session by the General Assembly on 24 October 1970 http://www.un-documents.net/a25r2625.htm (accessed February 5, 2016)

116 As above.

117 As above.

suggest that the purpose of the right to self-determination is to provide every culturally separate people with a State.

Although the meaning of 'peoples' is not provided by the Declaration, however, The UNESCO International Meeting of Experts for the Elucidation of the study of the Concepts of Right of peoples provides the meaning of 'people' to whom the right applies. According to the Experts 'people' is:

> 1. a group of individual human beings who enjoy some or all of the following common features:
> (a) a common historical tradition;
> (b) a racial or ethnic identity;
> (c) cultural homogeneity;
> (d) linguistic unity;
> (e) religious or ideological affinity;
> (f) territorial connection;
> (g) common economic life;
> 2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
> 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such grows, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
> 4. the group must have institutions or other means of expressing its common characteristics and will for identity.[118]

It should be noted that the right to self-determination does not supersede the principle of territorial integrity.[119] However, there are different views on the relationship between the right to self-determination and the right to territorial integrity.[120] There are opinions that the consent of the territorial state is a precondition to secession and on the other hand in some situations the right to self-determination

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118 Final Report and Recommendation of the International Meeting of Experts on further study of the concept of the rights of peoples 27-30 November 1989 United Nations Educational, Scientific and Cultural Organization, http://unesdoc.unesco.org/images/0008/000851/085152eo.pdf (accessed 5 February 2016) 7.

119 See N MacFarlane & N Sabanadze 'Sovereignty and self-determination: Where are we? (2013) 68 *International Journal* 623.Territorial integrity is the principle under international law that prohibits States from promoting secessionist movements or border changes in other States. The principle considers as an act of aggression the imposition by force of a border change. This principle is enshrined in the Charter of the United Nations, in Article 2, paragraph 4 thus: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state…'

120 V Crnić-Grotić & D Kasipović 'The right to self–determination – the Kosovo Case before the International Court of Justice' (2013) 34 *Zb. Prav. fak. Sveuč. Rij* 899.

supersedes the principle of territorial integrity.[121] Nothing in the right to self-determination encourages any deed or action, which would weaken this principle. However, States can only enjoy territorial integrity if they comply with the principle of equal rights and self-determination of the people.[122] The government of a State must represent all the people within the territory of that State devoid of discrimination as to race, belief or color.[123] This does not mean that every ethnic, religious and linguistic group as well as all community within the territory of a State must be represented. It means that there should be internal democracy where all the people will participate in the democratic process and no particular group is formally excluded from participating in the political process, based on race, belief, or color.

However, the repudiation of territorial integrity and the promotion of secessionist movement have been justified in order to avert grave injustices where there is injustice; systematic discrimination, unjust and forceful annexation of territory, violation of fundamental human rights and where decision to secede is made by the majority of the people.[124] According to Buchanan legitimate secession can be justified in these three cases, first, 'large-scale and persistent violations of basic individual human rights,' secondly, 'unjust taking of a legitimate state's territory,' and thirdly, 'a state's persistent violation of an intrastate autonomy agreement.' [125] Buchanan maintains that these three conditions are more appropriate in evaluating rights to secession.

The right to self-determination reaffirms the independence and equality of nations and underlines the rights of persons that are members of minorities and indigenous groups to decide for themselves the suitable procedures and methods of development that is fit for their cultures and environments.[126] At this point, self-determination is understood to mean that, at the very least; minorities and indigenous groups must enjoy the right to participate in their development process. This aspect of RTD should feature in the EPA negotiations so as to ensure their engagement in the process where they will determine for themselves the suitable procedures and methods of development that is fit for their cultures and environments, the

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121 As above

122 H Hannum 'Legal Aspects of Self-Determination' https://pesd.princeton.edu/?q=node/254 (accessed 5 February 2016).

123 As above.

124 C Mueller 'Secession and self-determination – Remedial Right Only Theory scrutinised' (2012) 7 *POLIS Journal* 298.

125 A Buchanan *Justice, legitimacy and self-determination: moral foundations for international law* (2003) Oxford University Press 219-220.

126 Piron (n 76 above) 11.

sub-Saharan African countries should be treated as equals and giving the opportunity to determine for themselves the best development process in the EPA.

2.7.3 International cooperation

International cooperation involves:

> Group of actions and/or resources exchange of technical, financial and/or human resources nature from different countries, voluntarily and according to their own interests and strategies for the purpose of promoting anything that can lead to development[127]

It has an important role to play in the quest to realise RTD. The realisation of the RTD involves not only applicable domestic policies, but also appropriate international conditions for development, with appropriate international policies and co-operation.

The DRTD requires that 'States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development.'[128] International cooperation also involves 'eliminating obstacles to development'.[129]

The importance of international cooperation and assistance in realising universal respect for human rights is underscored in the UN Charter and several other treaties and monitoring bodies. For example, the aims and objectives of the United Nations is to promote human rights universally, this is made clear by the provision of Article 1(3) of the United Nations Charter which states that the purpose is to attain 'international cooperation' when unraveling global problems of economic, social, cultural, or humanitarian nature as well as to attain respect for human rights to everyone. To accomplish this purpose Article 56 of the United Nations Charter calls for all State parties to 'take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.' The purpose outlined in Article 55 includes 'universal respect for, and observance of, human rights and fundamental freedoms for all.' Similarly the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993 restated in Article 1(1) that: 'enhancement of

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127 See HR Vazquez 'International Cooperation for Development: A Latin American Perspective' http://www.southsouth.info/profiles/blogs/international-cooperation-for (accessed 7 February 2016).

128 Declaration on the Right to Development, Article 4(1).

129 Declaration on the Right to Development, Article 3(3).

international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.'

Likewise, Article 2(1) of ICESCR refers to the international aspect of the realisation of ESCR through 'assistance and co-operation…to achieving progressively the full realisation of the rights.'[130] The need for international cooperation is also mentioned during discussions to the Optional Protocol to the ICESCR, where some developed nations acknowledged its importance.[131]

Additionally, the Committee on Economic, Social and Cultural Rights believe that international cooperation for the enjoyment of ESCR is a responsibility of all States and that it is essential that those States who are able to assist others do so regarding this.[132] In other comments the Committee has most times suggested that States protect ESCR in other countries through international cooperation and assistance.[133]

In the opening sentence to the preamble of the DRTD, the UN General Assembly take into consideration the purpose and principles of the Charter of the United Nations connecting to the attainment of international cooperation in solving global problems of an 'economic, social, cultural or humanitarian nature,' thus its emphasis on international cooperation in realising RTD.

International cooperation is also important to international trade. International cooperation is required when negotiating reducing government interference with private flows of trade and investment.[134] The major trade rounds since the 1940s has led to the creation of WTO and have been successful in achieving

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130 Article 11(1) of ICESCR also brings up the concept of international co-operation concerning the right to a suitable standard of living which says that: 'States Parties will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of international cooperation based on free consent.'

131 See Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Third Session, U.N. ESCOR, Commission on Human Rights, 62d Session, 78, 82, U.N. Doc. E/CN.4/2006/47 (2006).

132 General Comment No 3 on the Nature of States Parties Obligations 1990.

133 See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20 2009 para 14. Non-discrimination in economic, social and cultural rights which states that: 'States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.' See also U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009) par. 56 Right of everyone to take part in cultural life which states that: 'States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.'

134 M Feldstein 'International Economic Cooperation: Introduction' in M Feldstein, (ed) *International Economic Cooperation* (1988) University of Chicago Press 7.

reductions of tariffs and quotas, this is made possible due to international cooperation. To successfully reduce Government subsidies to domestic industries engaged in international competition, especially of agricultural policies in every major industrial country requires international cooperation, to progress in this area will involve collective international trade negotiations. The Uruguay Round of trade negotiations has recognised the importance of these issues.[135]

2.7.4 The duty bearers envisioned under the Declaration on the Right to Development

For an effective implementation of the RTD and to establish accountability, the duty bearers must be identified. The DRTD assigns these duties and responsibilities to individuals, States and the international community as well as to everyone who is able to help.

2.7.4.1 Individuals

Article 2(2) of the DRTD 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.

The DRTD clearly impose a duty on individuals towards the community, to respect human rights of others and to promote 'political, social and economic order for development.' How this can be achieved in practice is not clearly stated by the DRTD. But an individual's duties to the community may include cooperating with the community so as to achieve common interests and values, respect each individual's right to pursue life, happiness and goals without interference, and duty to participate. An individual's active participation is a vital element for the realisation of the common development of the community.[136]

However, the provisions of Article 29(1) of the UDHR evidently inspire Article 2(2) of the DRTD, which is one of the international human rights instruments that contain copious references to the conception that

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135 See 'The Uruguay Round' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (accessed 3 July 2018).

136 Although, participation has been viewed as a right in 2.5.1 above, it can also be a duty, consisting of moral duty to serve in a jury or to vote (some countries like Belgium, Brazil, Australia and a lot more make it legally compulsory to vote) and a legal duty to pay tax.

individuals have duties. Article 29(1) of the UDHR says: 'Everyone has duties to the community in which alone the free and full development of his personality is possible.' This affirms that individuals have general duties that may result from the application of particular rights.

Similarly, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998 imposes obligations on the individual. These duties are contained in Article 18 of the Declaration and they are:

> 1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible. 2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes. 3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.

In the same vein the African Charter comprises of three Articles and up to eleven paragraphs that is dedicated to the matter of individual duties. For example, it provides in the Preamble that: 'Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.' Article 27 further states:

> 1. Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community. 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

Article 28 of the Charter continues thus: 'every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.' Article 29 imposes some more duties on individuals; this includes duties within the family, the duty to work hard and pay taxes, and the duty to contribute to the good and honourable well-being of the society.

In line with other international human rights instruments such as those mentioned above, the DRTD imposes duties on the individual which includes the duty to contribute as mentioned earlier, duties towards

the community, duties to respect human rights of others and to promote 'political, social and economic order for development.'

2.7.4.2 The State

Conventionally, the State has the duty to create the conditions necessary for the realisation of human rights. The Charter of Economic Rights and Duties of States[137] and the ICCPR support this notion.[138] The DRTD in several Articles clearly shows that the State is the primary duty bearer. According to its Preamble, 'the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States.' Article 3 of the DRTD highlights the duty bearers of the RTD. It states:

> 1. States have the primary responsibility for the creation of national and international conditions favourable to the realistion of the right to development.
> 2. The realistion of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.
> 3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realistion of human rights.

Undoubtedly, Article 3 identifies the State as primarily responsible for ensuring the realisation of the RTD. It also underscores the importance of international cooperation among States in line with the UN Charter.[139] The DRTD further provides in Article 8 that:

> 1. States should undertake, at the national level, all necessary measures for the realistion of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services,

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137 Article 7 CERDS states: 'Every State has the primary responsibility to promote the economic, social and cultural development of its people. To this end, each State has the right and the responsibility to choose its means and goals of development, fully to mobilize and use its resources, to implement progressive economic and social reforms and to ensure the full participation of its people in the process and benefits of development. All States have the duty, individually and collectively, to co-operate in eliminating obstacles that hinder such mobilization and use.'

138 Article 1 states: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

139 Cooperation among States is emphasised under Article 56 of the United Nations Charter, as mentioned earlier, which calls for all State parties to 'take joint and separate action in cooperation with the Organization for the achievement of … universal respect for, and observance of, human rights and fundamental freedoms for all.'

> food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
>
> 2. States should encourage popular participation in all spheres as an important factor in development and in the full realistion of all human rights.

It should be noted that the duties of the State is not to actualise or realise development but to create the conditions necessary for the realisation of the RTD.[140] The State can do this by ensuring that everyone has equal opportunity to 'access basic resources, education, health services, food, housing, employment and the fair distribution of income.'[141] The State can also achieve this by taking effective measures to ensure that women participate actively in the development process.[142] Article 2(3) DRTD further provides ways in which the State could create the conditions necessary for the realisation of the RTD. It says:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

This duty is also reiterated in Paragraph 10 of the 1993 Vienna Declaration thus:

> Lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level.

The 'development policies at the national level' that States have a duty to formulate will have dualistic features: first, the policies have to be participatory 'on the basis of their active, free and meaningful participation'[143] and secondly, it must be equitable in the sense of 'the fair distribution of benefits.'[144]

Additionally, Article 6(3) requires States to 'take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.' This is necessary because promoting and implementing the rights enshrined under the ICCPR and the ICSECR is crucial for realising the RTD. Articles 6, 9, and 10 evidently underline the fact that the application of the RTD includes applying all the socio-economic rights as well as the civil and political rights since they

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140 Sengupta (n 51 above) 853.

141 As above.

142 As above.

143 Article 2(3) of the DRTD

144 As above.

are indivisible and interdependent. This implies that all the duties imposed on the States by the ICCPR and the ICSECR apply to all procedures related to implementing the RTD.[145]

These provisions above, point to the States as the duty bearer of the RTD. However, the State can fulfil its duties or obligations in three ways.

(1) Types of State duties

In human rights laws, duties can be 'positive' which involve the performance of a necessary action in order to protect human rights or 'negative', which includes abstinence from the commission of a prohibited act to protect human rights.[146] The types of duties have been further categorized into the duties to respect, protect and fulfil.[147]

(i) Duty to respect

This category of duty suggests that States should desist from engaging in any act that will obstruct the enjoyment of the RTD of individuals and peoples.[148] The duty to respect human rights, according to Bartels, is the minimum human rights obligation,[149] which includes what is fundamentally a negative duty on the State not to engage in whatever thing that will directly or indirectly impede the enjoyment of the human rights in question.[150] In the case of *SERAC v Nigeria* the African Commission found that the duty to respect the rights protected in the African Charter requires that states should not allow any practice or policy that will impede the enjoyment of human rights of the individual or peoples.[151]

(ii) Duty to protect

Third parties (non-state actors such as Transnational Corporations) can also violate the RTD; the duty to protect is a positive obligation that requires the States to take necessary action in form of regulations to

145 Sengupta (n 51 above) 853.

146 TS Bulto *The extraterritorial application of the human rights to water in Africa* (2014) Cambridge University Press 85.

147 O de Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1090.

148 Bulto (n 148 above) 85.

149 L Bartels, 'A model Human Rights clause for the EU's International trade agreements' (2014) *German Institute for Human Rights* http://ssrn.com/abstract=2405852 17.

150 Bulto (n 148 above) 85.

151 (2001) AHRLR 60 (ACHPR 2001).

prevent the violation[152] of RTD by non-state actors. According to the African Commission in *SERAC case*, to protect human rights, in other words RTD, a State need to enact laws to make sure that right holders are protected from the interference of third parties.[153]

(iii) Duty to fulfil

The duty to fulfil requires that States should provide basic needs, for example, jobs, resources and other means of realising RTD where the peoples lack the resources and means of achieving RTD. According to Bulto,[154] the obligation to fulfil is owed to peoples who for any reason do not have the resources and means to enjoy their human rights, in other words, their RTD. Succinctly put, the State parties are obligated to provide the minimum resources and means of enjoying RTD by the peoples.

2.7.5 The international community

The DRTD underscores the importance of cooperation at the international level. Article 3(3) of the DRTD imposes a duty on all States to cooperate with one another in ensuring and removing impediments to development (note that this duty is different from the duty of States to create the conditions necessary for the realisation of human rights discussed above in 2.6.4 under States as duty bearers.). This duty should be carried out in a way that will encourage a 'new international economic order based on sovereign equality, interdependence and mutual interest.' This duty is stressed again in Article 6 which says 'All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms' without discrimination. Article 7 goes further by stating that:

> All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

In the same vein Article 4 emphatically declares that States are duty bound to individually and collectively take actions 'to formulate international development policies with a view to facilitating the full realisation

152 Bartels (n 150 above) 17.
153 *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
154 Bulto (n 148 above) 96.

of the right to development.' According to Article 4, this is necessary to encourage a more speedy development of the developing nations. Furthermore, Article 4 stresses that 'effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.'

Although the DRTD did not categorically state how the international cooperation could be achieved, it obviously is not asking States to claim RTD from another State but rather that States should take collective actions. The international community takes collective action. The international community refers to all countries when they come together to act as a group.[155] According to the then UN's Secretary-General Kofi Annan[156] 'when governments, urged along by civil society, come together to create the International Criminal Court, that is the international community at work for the rule of law.' He further stated that 'when we see an outpouring of international aid to the victims of recent earthquakes in Turkey and Greece … that is the international community following its humanitarian impulse.' He continued, 'When people come together to press governments to relieve the world's poorest countries from crushing debt burdens … that is the international community throwing its weight behind the cause of development.'[157] In reply to critiques that claim that international community is not real he stressed that the international community exist 'it has achievements to its credit' and 'it has an address'.[158]

The United Nations General Assembly (General Assembly) carries the mantle of the international community. The General Assembly is a medium for decision making where the entire 193 Member States hold multilateral discussion and democratically take decisions on a range of international issues including international political cooperation, threats to peace and economic development, as well as the huge range of social, humanitarian and cultural issues covered by the UN Charter.

States can also collectively act or cooperate under regional groups, for example, the Assembly of the African Union (AU) which is a medium where Heads of States of all the AU Member States meet,

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155 M Rocard 'What Is the International Community?' https://www.project-syndicate.org/commentary/defining-the-international-community-s-role-and-responsibility-by-michel-rocard (accessed 1 March 2016).

156 In his address delivered to the fifty-second DPI/NGO Conference in New York on 15 September 1999 entitled The Meaning of International Community.

157 K Annan 'The Meaning of International Community' being an address delivered to the fifty-second DPI/NGO Conference in New York on 15 September 1999 http://www.un.org/press/en/1999/19990915.sgsm7133.doc.html (accessed 1 March 2016).

158 As above.

deliberate and take decisions on issues contained in the Constitutive Act of the African Union.[159] Some of the obligations of the AU include: 'promote and protect human and peoples' rights' in harmony with the provisions of the African Charter as well as promote democratic principles and institutions;[160] put in place the conditions necessary for Africa to play equitable role in the world economy and in international negotiations; integration of the continents economies; promote co-operation necessary to elevate the 'living standards of African peoples' and work with international partners to exterminate preventable diseases and the promotion of good health in Africa.[161]

Another example is the European Council, which brings together the European Union's Heads of State to act together to provide general political directions and priorities to the EU, it represents the uppermost level of cooperation among EU countries (see chapter five below for more discussions on the European Council).[162] Likewise, States can also collectively act or cooperate under sub-regional groups, for example, the ECOWAS, SADC, Central Africa, EAC and ESA.

It can therefore be said that the DRTD's expressions 'individually and collectively take actions' and 'through international co-operation' suggest that States actions to realise RTD can both be exercised by an individual State or by a number of States acting cooperatively, for example, the UN, EU or AU who are referred to as the international community. Invariably the international community is also a duty bearer.

The international community as a duty bearer is derived from international solidarity and the moral universalism which suggest that 'individual and political communities have moral obligation to their fellow citizens and the universal community of mankind.'[163] In accordance with this, the international community while adopting the Millennium Declaration recognises under section I titled 'Values and principles' subsection 2 that, 'in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level.'

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159 C Heyns and M Killander *Compendium of key human rights documents of the African Union* (2013) Pretoria University Law Press.

160 See Article 3 of the African Charter.

161 As above.

162 The European Council http://www.consilium.europa.eu/en/european-council/ (accessed March 1 2016).

163 SAD Kamga 'Human rights in Africa: Prospects for the realisation of the right to development under the New Partnership for Africa's Development' unpublished LLD thesis, University of Pretoria, 2011, 170.

2.7.6 The right holders envisioned under the Declaration on the Right to Development

The right holders envisioned under the DRTD are individuals as well as peoples. This is made clear in its definition of RTD as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in …'. Likewise in the definition of development by the DRTD it recognises that 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals …'. The provisions of Article 2(1) of the DRTD, which describe the individual as 'the central subject of development' and who 'should be the active participant and beneficiary of the right to development' further strengthen the individual as a right holder. In support of this notion the US representative at the 61st Commission on Human Rights stated that:

> The RTD implies that each individual should enjoy the right to develop his or her intellectual capabilities to the maximum extent possible through the exercise of the full range of civil and political rights[164]

Some scholars think that the dual nature of the right holders of the RTD does not maintain the historical development of RTD and that it places the RTD on an unstable legal foundation.[165] Villaroman argues that 'Adding an individual dimension to the right to development does not give it clarity and focus; instead, such addition only dilutes its normative strength as a legal principle.' He further argues that for the RTD to attain a stronger convincing weight in theory and practice, it is important to 're-envisage it as a collective right like in its original formulation' specifically, a collective right to be entreated on behalf of the people by their State in relation to the international community.[166]

Bunn also opines that the dual nature of the RTD holders creates 'difficulties in identifying the beneficiaries and duty-holders under the right,' and that to view every individual inside a State as RTD holder subjects the RTD to a severe definitional challenge.[167]

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164 US representative, J Danies' presentation on the vote on right to development at the 61st Commission on Human Rights in April 2005.

165 Villaroman (n 85 above) 16.

166 As above 20.

167 ID Bunn 'The Right to Development: Implications for International Economic Law' (2000) 15 *American University International Law Review* 1435.

In contrast, the United States of America views the RTD as only individual rights; they reject the notion of RTD as collective rights.[168] According to Piedra, 'the United States is willing to talk about an individual's right to development but not a nation's right to development, for the simple reason that nations do not have rights'.[169]

However, there have been strong proponents of the view that the beneficiaries of the RTD are both individuals and peoples.[170]

In defense of collective rights, Sengupta opines that the right to self-determination for example, provides groups and nations the complete control over their entire natural wealth and resources, but which has to be applied for the advantage of all persons.[171] Certainly, in some instances individual rights can only be fulfiled in a collective setting, the right of a nation to develop is an essential condition for the actualization of the development of individuals.[172]

In Resolution No. 5 (XXXV) the Commission on Human Rights stated that 'the right to development is a human right and that equality of opportunity is as much a prerogative of nations as of individuals within nations.'[173] The Working Group[174] on the RTD likewise enumerated groups as beneficiaries.[175] Jones argues that if we maintain that 'human rights must be rights that people can hold only as independent individuals, our conception of human rights will not match the social reality of the human condition.'[176] The motives behind accrediting rights to individuals are also the motives for identifying collective rights, individual rights may be theoretically different from collective rights; however, both rights are integrated by the same fundamental values and concerns.[177]

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168 Danies (n 167 above).

169 Statement by Lino Piedra, public member of the US Delegation before the Commission on March 22, 2005 cited in Kirchmeier (n 71 above) 14.

170 See 3.5.1 for the meaning of peoples.

171 Sengupta (n 51 above) 862.

172 As above 863.

173 United Nations Economic and Social Council, Official Records, Supp. No. 6, U.N. Doc. E/CN.4/1347 (1979) cited in Sengupta (n 51 above) 862.

174 working group is an ad hoc group of experts on a particular topic who work together on specific goals.

175 Report of the Working Group on the Right to Development on its Second Session E/CN.4/1994/21 9-10.

176 P Jones 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 *Human Rights Quarterly* 81.

177 As above.

States are not clearly declared as the RTD holders by the DRTD. However, Article 2(3)[178] has been interpreted as introducing the view that States are beneficiaries. For example, Sengupta argues that Article 2(3) implies that 'if States acting on their own are unable to formulate and execute those policies … they have the right to claim cooperation and help from other States.'[179] This interpretation implies that States can claim RTD against other States. This view is against the general notion that the duty to ensure human rights is held by States towards all peoples.[180] This study disagrees with the interpretation implying that States can claim RTD against other States. As indicated earlier, the DRTD is not asking States to claim RTD from another State but rather that States should take collective actions. The international community takes collective action. The international community refers to group of countries when they come together to act as a group such as the UN, EU or the AU. However, as will be seen later under chapter four, States may have the extraterritorial obligation to refrain from acts that will obstruct the realisation of RTD in another State.

2.8 THE NORMATIVE CHARACTER OF THE RIGHT TO DEVELOPMENT

The binding force is the most contentious facet of the DRTD. It has not been generally accepted as forming binding obligations under international law. Many scholars view it as *lex ferenda* (the body of law being developed), not *lex lata* (established law). Some think that a right will lose its appeal and effectiveness and may not be taken seriously unless a legal authority, for example, a State through legislation or treaty, endorses it.[181] Sen compares this line of thinking to saying that:

178 Which states that: 'States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being 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.'

179 Sengupta (n 51 above) 853.

180 See 'States Duty-Bound to Protect against Human Rights Abuses within Their Territories, Third Committee Hears during Interactive Discussions with Experts' https://www.un.org/press/en/2016/gashc4174.doc.htm (accessed June 18, 2018); see also the last paragraph of the preamble of the African Charter and Article 2 of Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly resolution 53/144 of 9 December 1998

181 Sengupta (n 51 above) 859.

> Human beings in nature are, in this view, no more born with human rights than they are born fully clothed; rights would have to be acquired through legislation, just as clothes are acquired through tailoring.[182]

This view, according to Sengupta 'confuses human rights with legal rights. Human rights precede law and are derived not from law but from the concept of human dignity.'[183] He further states that 'there is nothing in principle to prevent a right being an internationally recognized human right even if it is not individually justiciable.'[184] However to state that individuals cannot invoke human rights if they cannot be legally binding would be most incongruous.[185] The RTD might be grounded in Article 28 of the Universal declaration on Human Rights, which entitled everyone to a social and international order in which the rights contained in the UDHR can be fulfiled, the DRTD could be viewed as promoting a social and international order in which all rights can be realised.[186] There is nothing in principle that can inhibit a right from being internationally recognized human right even if it is not justiciable.[187] Human rights can be fulfiled in diverse ways subject to the acceptability of the ethical base of the claims.[188]

In order to contribute to unraveling this issue, we need to examine the sources of international law so as to determine the source under which the RTD is established and recognised as legally binding. There are four principal sources of international law that can create international legal obligations, according to the Statute of the International Court of Justice these sources are:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognized by civilized nations;
- subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[189]

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182 Sen (n 83 above) 228.

183 Sengupta (n 51 above) 860.

184 As above.

185 As above.

186 ID Bunn *The Right to Development and International Economic Law: Legal and moral Dimension* (2012) Studies in international trade law, Hart publishers 280.

187 A Sengupta 'On the Theory and Practice of the Right to Development' in A Sengupta, A Negi & M Basu *Reflections on the right to development* (2005) Sage publications 77.

188 As above.

189 Article 38(1) of the Statute of the International Court of Justice.

From the sources of international law elucidated above it can be said that customary law and conventions are the two principal sources of international law. It is clear that the DRTD is not an international convention or a treaty; it is a UN General Assembly Resolution, which is nonbinding. The African Charter on Human and Peoples' Rights (as will be discussed in the next chapter) is the only treaty that clearly references the RTD,[190] which is legally binding on the State parties.

For a practice to become an international customary law it must be consistent and must be a general practice.[191] According to Cheng, one practice can form an international customary law; he maintained that a UN General Assembly Resolution could form international customary law.[192] In the decision of the International Court of Justice (ICJ) in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), the ICJ relied on UN General Assembly Resolutions as indication of State belief or *opinio juris* regarding the customs of non-use of force.[193]

An example of a UN General Assembly Resolution that has formed international customary law is the 1948 General Assembly resolution 217 A in which the Universal Declaration of Human Rights was adopted.[194] The common opinion of the ICJ is that 'the Universal Declaration of Human Rights is a document of sufficient legal status to justify its invocation by the Court in the context of a State's obligations under general international law.'[195] Another UN General Assembly Resolution that has formed international customary law is the 2007 UN General Assembly Resolution 61/295 in which the United Nations Declaration on the Rights of Indigenous Peoples was adopted. Some Courts have referenced the Declaration and have relied upon its contents in Court decisions.[196]

The DRTD is clear and unambiguous; it clearly sets out the intention of the General Assembly, which is to declare a binding RTD. For example, in the preamble to the DRTD the General Assembly confirms that 'the right to development is an inalienable human right and that equality of opportunity for development

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190 Article 22 of the African Charter on Human and Peoples' Rights.

191 I Brownlie *Principles of public international law (*2003) Oxford University Press 7.

192 B Cheng 'United Nations Resolutions on outer space: instant customary law?' (1965) 5 *Indian Journal of International law* 23-24.

193 [1986] ICJ Rep 14 [Nicaragua].

194 See *Frank David Omary and others v the United Republic of Tanzania* application No. 001/2012, para. 73.

195 See N Rodley & M Pollard *The treatment of prisoners under international law* (2009) 76, see also Nottebohm, 1955 I.C.J. 4, 63 (Second Phase) South West Africa, 1962 I.C.J. 319, 379 (Preliminary Objections); Aegean Sea Continental Shelf, 1978 I.C.J. 3, 641-42.

196 See *Saramaka People . Suriname* (2007), Inter-Am Ct HR (Ser C) No 172; *Aurelio Cal et al v Attorney General of Belize* (2007) Supreme Court of Belize, Claims No 171 and 172, Judgment 18 October 2007, unreported.

is a prerogative both of nations and of individuals who make up nations' and in Article 1 it declares that 'every human and peoples' are entitled to RTD.

The practice of States could support the idea that the DRTD is part of customary international law. There has been a strong consensus among the States on RTD; for example, when the DRTD was adopted in 1986 it was with a large majority. In June 1993 the Vienna Declaration and Programme of Action came to a unanimous consensus (including the USA) to reaffirm the RTD 'as a universal and inalienable right and an integral part of fundamental human rights' and urges States to 'promote an effective international cooperation for the realistion of the right to development.' In 1998 the Commission on Human Rights[197] (now Human Rights Council) and the Economic and Social Council (ECOSOC) established the Intergovernmental Open-ended Working Group on the RTD (by consensus)[198] to 'monitor and review reports and progress made in the promotion and implementation of the RTD'. To assist the Working Group in the implementation of RTD, an independent expert was appointed in 1999 in the person of Arjun Sengupta by the Chair of the Commission on Human Rights. The Independent Expert conducted a study (1999-2004) on the level of progress in the realisation of the RTD that was presented to the Working Group on each of its sessions. Additionally, the Durban Declaration and Programme of Action of 2001 further recognise the RTD as a 'universal and inalienable human right'.[199] The Durban Declaration recognise the negative impact of 'racism, racial discrimination, xenophobia and related intolerance' on development in developing countries especially Africa.[200] In 2004 the High-level Task Force on the Implementation of the Right to Development (HLTF) was established by the Commission on Human Rights,[201] and the Economic and Social Council, by its decision 2004/249 to provide the needed expertise to the Working Group to enable it fulfil its mandate.[202] The establishment of HLTF inspired fixated debate and conceptual clarity of the RTD on many central themes of genuine concern for both developed and

197 The Human Rights Council 'is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them. It has the ability to discuss all thematic human rights issues and situations that require its attention throughout the year. It meets at the UN Office at Geneva. The Council is made up of 47 United Nations Member States which are elected by the UN General Assembly.' See http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx (accessed 21 March 2016).

198 See K Iqbal *The Right to Development in International Law: The Case of Pakistan* (2009) Routledge 23.

199 See preamble of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban Declaration and Programme of Action) 31 August to 8 September 2001.

200 As above para 19.

201 See resolution 2004/7.

202 See High-Level Task Force on the implementation of the right to development available at http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx (last accessed 20 December 2015).

developing countries.[203] On the recommendations of the HLTF, the Working Group in its 6th Session report tacitly pointed out that 'the RTD is not a right to assistance' nor is it a right to share in the wealth of the western countries;[204] it however agreed that the implementation of the RTD requires growth with equity. [205] The Working Group also clarified the difference between a rights-based approach to development and RTD, when it agreed 'that a rights-based approach to…development contributes to the realisation of the right to development.'[206] In September 2007 the General Assembly in its Resolution 61/295 adopted United Nations Declaration on the Rights of Indigenous Peoples in which it recognizes RTD in its preamble[207] and in Article 23.[208]

Furthermore, the existence of State practice regarding development assistance, which forms an essential part of the RTD, provided by the developed nations to the developing countries, may be seen as having formed part of the legal obligations of developed countries. The United States started development aid programmes in 1949.[209] Afterward, other Western countries followed this practice, by the 1950s; they were providing aid of up to one per cent of their GDP.[210] The member states of the Organisation for Economic Co-operation and Development (OECD)[211] regularly provides development assistance to

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203 I Salama 'The Right to Development: Towards a new approach?' (2005) http://sam.gov.tr/wpcontent/uploads/2012/02/IbrahimSalama.pdf 58 (accessed 22 January 2016).

204 Report of the Working Group on the Right to Development on its sixth session, E/CN.4/2005/25 3 March 2005, pars 32-58 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/115/80/PDF/G0511580.pdf?OpenElement

205 As above para 42.

206 As above para 46.

207 Where it states that: 'Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.'

208 Which states: 'Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.'

209 For example the Point Four Program, which was a technical assistance program for developing countries introduced by the US President, Harry S. Truman in his inaugural address on January 20, 1949. And the Mutual Defense Assistance Act of 1949, which was succeeded by the Mutual Security Act of 1951 and The Foreign Assistance Act of 1961 to provide foreign aid programs to developing countries. Presently, the United States Agency for International Development (USAID), which was established by the executive order of President John F. Kennedy, unites several existing foreign assistance organizations and programs under one agency. It is the US foreign assistance organization whose primary focus was long-term socioeconomic development.

210 MA Tadeg 'Reflections on the right to development: Challenges and prospects' (2010) 10 *African Human Rights Law Journal* 340.

211 Members include Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand,

developing countries. This practice is regarded as one of their important and demonstrated national objectives. Many developed countries have made the obligation to provide development assistance part of their domestic law, for example, the US Foreign Assistance Act of 1961 and the United States Agency for International Development (USAID),

The EU is the largest donor of development assistance in the world. It is committed to increasing its assistance to at least 0.7% of its gross national income a year[212] even though very few are meeting the target. The EU's development assistance policy aims to eradicating poverty and seeks to promote the sustainable development of developing countries. It is a foundation of EU relations with the outside world and constitutes one of the major objectives of EU external action. The European Development Fund, which was created in 1957 by the Treaty of Rome and launched in 1959, is the EU's main mechanism for providing development assistance to Africa. It is funded by direct contributions from EU Member States in accordance with a contribution formula and managed according to its own financial rules.

The common practice and the long history of providing development assistance and preferences to developing countries reveal proof of the acceptance by developed countries of this obligation. The States practice as shown above clearly indicates that RTD is a general practice accepted and established under international customary law, which may be enforced under the international legal system.

In Brownlie's opinion, whenever a UN General Assembly resolution reflects on a subject matter in the UN Charter, it may be viewed as an authoritative interpretation of the Charter.[213] In the ICJ's opinion in Nuclear Weapons:

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary

Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

212 See https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy coordination/international-economic-relations/international-development-aid_en (accessed 18 November 2018).

213 Brownlie (n 194 above) 15 & 663.

> to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradua1 evolution of the *opinio juris* required for the establishment of a new rule.[214]

Viewing it from this angle, it may also be argued that there exists a normative character in the DRTD since it reflects on some of the purposes and principles contained in the UN Charter. For example, the DRTD in Articles 3(3), 4, 6 and 7, underscore the importance of international cooperation and assistance in eradicating poverty and 'strengthening universal respect for and observance of all human rights and fundamental freedoms' without discrimination. This reflects the purposes and principles of the UN Charter in Article 1(3), which states:

> To achieve international cooperation 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;

The DRTD in Article 1(2) also establishes that the RTD advocates for the 'full realisation of the right of peoples to self-determination', which is a basic principle of international law that evolved from customary international law. It is also accepted as a general principle of law, and protected in some of the international treaties. For instance, self-determination is protected in Article 1(2) of UN Charter which says that among the resolutions of the United Nations is 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples;' Article 1(1) of the ICCPR which states '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(1) ICESCR provides thus: '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.' From the above, it can be said that although the DRTD is not codified in a treaty[215] the binding force of the RTD can be established from other binding treaties such as the ICCPR, ICESCR and the UN Charter.

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214 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, **I.**C.J. Reports 1996, para 70.

215 The Non-Aligned Movement, at its fifteenth summit in 2009, requested 'the UN human rights machinery to ensure the operationalisation of the right to development as a priority, including through the elaboration of a Convention on the Right to Development by the relevant machinery... [and to] [p]ropose and work towards the convening of a United Nations-sponsored High-Level International Conference on the Right to Development.' See Final Document of the XV Summit of Heads of State and Government of the Non-Aligned Movement, Sharm el Sheikh, Egypt, 11-16 July 2009, document NAM2009/FD/Doc.1, paras. 421.13-421.14.

2.9 IMPLEMENTING AND MONITORING RIGHT TO DEVELOPMENT

The UN Commission on Human Rights initiated the implementation of the RTD in 1986 when it asked the working group of government experts responsible for initiating the Declaration to clarify the RTD and its effects. The Working Group had three sessions and published its last report in 1989.[216] In 1989 the UN Commission on Human Rights requested the Secretary General to establish a 'Global Consultation' on the RTD, which will bring together experts such as 'UN representatives, regional intergovernmental organizations and relevant non-governmental organizations.'[217] The 'Global Consultation', in its report highlights participation as the primary approach to fulfiling the RTD and stresses the need for a yardstick to monitor the quality, democratisation of decision-making and effectiveness of participatory processes in development projects.[218] In 1993 the UN Commission on Human Rights again set up a working group to report on obstacles to the implementation of the RTD.[219]

The UN Commission on Human Rights established another Working Group on the RTD in 1996 with a two-year mandate. It recommended an upward review of 0.7% of GDP as aid to developing countries, and the integration of RTD in the policies of international financial institutions, for example, the World Bank and the International Monetary Fund.[220]

The Working Group became open-ended in 1998 and an independent expert was appointed in the person of Arjun Sengupta (as earlier stated) to assist the Working Group.[221] The independent expert has written

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216 Report of the Working Group of Governmental Experts on the Right to Development, UN Doc. E/CN.4/1989/10 (1989).

217 Commission Res 1989/45 (1989).

218 See Global Consultation on the Realization of the Right to Development as a Human Right, U.N. Commission on Human Rights, 46th Sess., Agenda Item 8, U.N. Doc. E/CN.4/1990/9/Rev.1. (1990).

219 See E/CN.4/1994/21; E/CN.4/1995/11; E/CN.4/1996/10.

220 E/CN.4/1997/22.

221 The UN Human Rights Commission also requested the UN High Commissioner for Human Rights to report to the working group on the activities of her office 'relating to the implementation of the right to development; the implementation of resolutions of the General Assembly and the Commission on Human Rights with regard to the right to development; The coordination among the relevant entities of the United Nations system, within their respective mandates, in the implementation of relevant resolutions of the General Assembly and the Commission on Human Rights in that regard.' See A/55/302. 'The Office of the High Commissioner provided technical and substantive support, administrative and research assistance on request to the independent expert on the right to development.' The Office of the High Commissioner participated in seminar and workshops on the right to development, and 'facilitated the integration of elements of the right to development into the programmes and policies of development agencies and programmes of the United Nations system… most notably through the common country assessment and the United Nations Development Assistance Framework (UNDAF) process.' See A/55/302.

six reports on the RTD, which has clarified the nature and scope of the RTD.[222] The independent expert's reports typify RTD as a right that links the gap between ICCPR and ICESCR. These two sets of rights (ICCPR and ICESCR) 'have to be fulfiled together and the violation of one would be as offensive as the other.'[223] He compares the RTD to a 'vector' that comprises of 'a large number of elements such as income, employment, health, education or opportunities in general which include all forms of freedoms.'[224] The independent expert sees RTD as a process that permits a person to participate in all phase of decision-making on developmental policies, equal opportunity to access to resources, entitled to impartial spreading of the gains of development and of proceeds.[225] 'All such activities will be carried out while maintaining full respect for civil and political as well as economic, social and cultural rights.'[226]

He further states that 'the right to development can be implemented mainly by collective action,'[227] (see 5.4.3 below for discussions on collective action). The collective action 'would consist of the positive actions of the State and of non-State public activist groups, but would also have to be complemented by international action by other States' as well as the international institutions,[228] (see detailed discussion on collective action above). The independent expert sketched a structure for operationalizing the RTD, which will lead to its implementation in a 'step-by-step manner' involving the developing countries implementing their own programme to eliminate poverty in a chronological method within a time frame.[229] He maintains that 'the eradication of poverty would therefore be a first step towards the progressive realisation of the human right to development.'[230] This programme must be articulated following a rights-based approach and 'equity which demands that the most vulnerable and least privileged groups be cared for...'[231] Critical to the implementation of the RTD is the 'role of the international community in encouraging trade and foreign direct investments in developing countries.'[232] In his fifth report, the independent expert pointed out that one of the obstacles to the realisation of the RTD is the 'problem of

222 First report: E/CN.4/1999/WG.18/2; second report: A/55/306; third report: E/CN.4/2001/WG.18/2; fourth report: E/CN.4/2002/WG.18/2; fifth report: E/CN.4/2002/WG.18/6 and E/CN.4/2003/WG.18/2; sixth report: E/CN.4/2004/WG.18/2.

223 See E/CN.4/1999/WG.1/2, para 13.

224 As above para 67.

225 See E/CN.4/1999/WG.18/2 para 45.

226 As above.

227 As above para 58.

228 As above.

229 See E/CN.4/2001/WG.18/2 para 37.

230 As above.

231 As above para 38.

232 See E/CN.4/2003/WG.18/2 para 21.

indebtedness, especially to the international community' and calls for the international community to address this problem.[233]

In 2004 the Commission on Human Rights, established the High-Level Task Force (HLTF) on the implementation of the right to development in its resolution 2004/7, and the Economic and Social Council, in its decision 2004/249, at the recommendation of the intergovernmental Working Group on the RTD to help it in accomplishing its mandate.[234] The HLTF role is to offer the required expertise to the Working Group so that it can provide suitable recommendations to the different players for the implementation of the RTD.[235] The HLTF is comprised of five independent experts nominated by the Chairperson of the Working Group on the Right to Development. In the HLTF 2010 report, it was pointed out that the attainment of Millennium Development Goals (MDGs) is critical to the implementation and realisation of the RTD.[236]

According to the HLTF report, the realisation of the MDGs has been severally obscured by conflicts, especially in the developing countries which impedes peace and security, environmental degradation, ineffective policy, lack of democracy, 'and lack of a supportive external environment for the improvement of conditions for developing countries in terms of international trade, debt sustainability and internationally agreed levels of aid.'[237] The report pinpoints four distinguishing features of human rights, including the RTD that could hinder the implementation of the MDGs, some of which are the 'inclusion of universally recognized and legally binding human rights standards in strategies for meeting the Goals; indivisibility and interdependence of human rights in formulating coherent policies in addressing the

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233 See E/CN.4/2003/WG.18/2 para 23. In view of this the adoption of UN General Assembly resolution 68/304 on a multilateral legal framework for sovereign debt restructuring sought to address the issue and gear the financial system and its institutions towards assisting developing countries combat this issue. See https://www.un.org/press/en/2014/gaef3396.doc.htm (accessed 18 June 2018).

234 See http://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx

235 As above. 'The task force initially examined the obstacles and challenges to the implementation of the Millennium Development Goals in relation to the right to development; social impact assessments in the areas of trade and development at the national and international levels; and best practices in the implementation of the right to development. Thereafter, the task force examined Millennium Development Goal 8, on a global partnership for development, which led to development of criteria for evaluation of global partnerships with the aim to improve their effectiveness in support of the realization of the right to development.'

236 See A/HRC/15/WG.2/TF/2/Add.1 para 8.

237 As above.

Goals' and 'mobilization of civil society to use the human rights framework in participating in and monitoring development efforts.'[238]

The HLTF also found in its report that the least-developed States who are afflicted with poverty have their situation worsened by an unmanageable debt burden and that the enormous funds used in debt servicing responsibilities divert a huge portion of the limited funds available for essential programs such as education, health and infrastructure, thereby limiting the prospects for realising the RTD.[239] The HLTF observed that 'Heavy debt burdens pose major obstacles for a few low-income developing countries in achieving the Goals and meeting obligations on economic, social and cultural rights.'[240]

The United Nations Human Rights Council appointed a Special Rapporteur on the right to development in resolution 33/14, adopted on 29 September 2016, with the following mandate:

> (a) Contributing to the promotion, protection and fulfilment of the right to development in the context of the implementation of the 2030 Agenda for Sustainable Development;
>
> (b) Engaging and supporting efforts to mainstream the right to development among various United Nations bodies, development agencies, international development, financial and trade institutions;
>
> (c) Contributing to the work of the Working Group on the Right to Development, with a view to supporting the accomplishment of its overall mandate, taking into account, inter alia, the deliberations and recommendations of the Working Group, while avoiding any duplication;
>
> (d) Submitting studies requested by the Human Rights Council in accordance with its mandate;
>
> (e) Submitting an annual report to the Human Rights Council and to the General Assembly covering all activities relating to the mandate with a view to maximizing the benefits of the reporting process.[241]

In August 2017, the Special Rapporteur delivered his first report on RTD. In the report, the Special Rapporteur highlighted the major challenges for the realisation of the RTD as:[242] a) politicization – where States still have divided views on the nature of the duties States in the realization of the RTD, b) lack of engagement – as a result of the division, there is low engagement of the UN agencies and civil society

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238 As above para 9.

239 As above para 53.

240 As above para 54.

241 http://www.ohchr.org/EN/Issues/Development/SRDevelopment/Pages/SRDevelopmentIex.aspx (accessed 18 November 2018)

242 UN Report of the Special Rapporteur on the right to development, A/HRC/36/49, 2 August 2017, para 30.

in promoting, protecting and fulfiling the RTD, and c) adverse global trends – the implementation of the RTD is facing global challenges such as the global financial and economic crisis, the energy and climate crisis, the relentless natural disasters, the increase in automation in many sectors, corruption, illicit financial flows, the privatization of public services, austerity measures and the ageing of the global population.

In his report, the Special Rapporteur called on development agencies to put the RTD at the center of their work. He stressed that the recent adoption of global agreements on the SDGs, climate, financing for development, and disaster risk reduction (DRR) means that 'the building blocks for change' are available.[243]

2.10 EUROPEAN UNION's POSITION ON THE RIGHT TO DEVELOPMENT

The EU delegation to the United Nations at the 2005 world summit reaffirmed their commitment to the realisation of the right to development.[244] The EU demonstrates its commitment through wide 'national, European Community and multilateral initiatives around the world.'[245] The EU stresses that it is the duty on the State to work for the realisation of the RTD. This includes creating the national conditions conducive to the realisation of the RTD. Achieving this will require that States applying a human rights view 'to national development plans and global partnerships, which stress the universality, indivisibility, inter-relatedness and interdependence of all human rights.'[246]

Similarly, in the EU contribution on the Right to Development to the United Nations on April 2012, the EU delegates maintained that: 'Indeed the Right to Development requires the full realisation of all Human Rights, including civil, political, economic, social and cultural rights;'[247] and that it remains firmly dedicated to realising 'sustainable development and eradicating poverty; promoting respect for all human rights and fundamental freedoms'; as well as 'encouraging good governance, gender equality, human development, accountability and equitable globalization'. To show this commitment the EU has provided

243 http://sdg.iisd.org/news/special-rapporteur-delivers-first-report-on-right-to-development/ (accessed 8 June 2018)
244 See http://www.eu-un.europa.eu/articles/en/article_5414_en.htm (accessed on 26 June 2014).
245 As above.
246 As above.
247 See http://www.ohchr.org/Documents/Issues/Development/Session13/EUSubmission.pdf (accessed 25 June 2014).

56% of Global Aid to Development and additional '1 billion Euros to the most off-track Developing Countries' and restated its commitment to meeting MDGs by 2015.[248]

The EU agreed with the report of the HLTF and took note of some obstacles to the realisation of the RTD stressed by the HLTF namely 'the strengths and weaknesses of the MDGS, structural impediments to economic justice, the resistance to addressing trade and lending from a right to development perspective', the vagueness of worldwide partnerships, 'the lack of policy coherence and incentives to move from commitment to practice, and the necessary balance between national and international responsibilities.'[249]

The EU also agreed with the observation of the HLTF that poverty is more than not having enough earnings and requires, as provided in Article 8 of the DRTD: 'equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.'

However, the EU concluded by stating that it believes strongly that, by the nature of the right to development as a complex right, 'the elaboration of a new international legal standard of a binding nature is not the most appropriate means of operationalising the right to development.'[250]

Based on its comments and contributions the EU proposed the following:[251]

> i. Continue to use the HLTF report as a basis for future work;
> ii. With the support of a set of experts to be selected by the Working Group on the Right to Development, the Working Group should discuss each of the HLTF criteria, sub-criteria and indicators, with a view to refining them;
> iii. On that basis, once the criteria, sub-criteria and indicators have been agreed, the Working Group could develop appropriate instruments, such as templates, checklists or voluntary guidelines, as a means of implementing and assessing progress on the right to development,
> iv. In concrete terms, the following changes should be made to the HLTF proposals:
> 1. the principle of gender mainstreaming should apply to all criteria, sub-criteria and indicators
> 2. The first criteria should be the ratification and effective implementation of core UN and ILO instruments, especially the Decent Work Agenda.

248 Submission in follow-up to HRC resolution 19/34 'The right to development' European Union.
249 Submission in follow-up to HRC resolution 15/25 'The Right to Development', European Union.
250 See http://www.ohchr.org/Documents/Issues/Development/Session13/EUSubmission.pdf (accessed 26 June 2014).
251 Submission in follow-up to HRC resolution 19/34 'The right to development' European Union.

3. Equal emphasis should be put on all human rights, including civil, political, economic, social and cultural rights (based on the principle of indivisibility, interdependence and interrelatedness of all human rights).
4. More emphasis should be given to the environmental dimension, as key to sustainable development and in the context of several Special Procedures mandates that are linked with the environment, such as the recently created mandate for an Independent Expert on human rights and the environment.
5. The Criteria should include – and build upon, where appropriate - those used by UNDP, ILO, OECD and other regional or international organisations.

EU Member States also have a positive view on the RTD. For example, Germany is devoted to the concept of the RTD. However, Germany believes that it is the responsibility of the developing States themselves to create an enabling environment for the actualisation of the RTD.[252] Germany does not see the RTD as containing any particular legal duty of a particular State in contrast with any other individual State, but sees the concept as 'growth with equity'.[253] After examining the HLTF report on the implementation of the RTD in its sixth session contained in document A/HRC/15/WG.2/TF/2/Add.2 Portugal reiterated its appreciation for the work of the task force and expressed support for the inclusion of criteria and sub-criteria for the implementation of the RTD in a set of guidelines addressed to States.[254]

The UK encouraged a different methodology to the concept of RTD. This was presented in its proposal in the 2005 meeting of the High Level Task Force on the RTD.[255] This new methodology stresses on 'development cooperation and partnership', which include allowing trading partner nations to make their own decisions concerning the development processes.[256] The UK is committed to assisting partner countries to accomplish their RTD obligations, which are in line with the context of the RTD. However, the UK prefers to maintain their assistance on a charitable basis, pursuing to safeguard themselves from a legally binding obligation and against likely further demands by developing nations.[257] In line with this the UK is completely dedicated to spending '0.7% of the UK's gross national income on development aid from 2013'.[258] In 2015 the UK parliament passed a bill that enshrines in law its promise to spend '0.7% of its gross national income' on aid each year. In relation to this, the UK's international development secretary, Justine Greening, said:

252 Kirchmeier (n 71 above).
253 As above.
254 Submission in follow-up to HRC resolution 19/34 'The right to development' Portugal.
255 Kirchmeier (n 71 above) 14.
256 As above.
257 As above.
258 Submission in follow-up to HRC resolution 15/25 'The Right to development' United Kingdom.

> Britain is the first major economy to meet the UN's target on aid spending and I am proud that parliament has now passed this bill, which cements Britain's global leadership in creating a world that is healthier, more stable and increasingly prosperous.[259]

2.11 CONCLUSION

Without doubt the RTD is an inalienable human right to participate in a process in which all human rights and fundamental freedoms can be realised. The RTD leads to the sustainable improvement of the well-being of all the peoples based on their active participation in development and distribution of benefits resulting therefrom. Poverty is often recognised as deprivation in well-being, insufficient access to simple means of living, for example, water, food, housing and health care. The poor are susceptible to adverse events they cannot control. They are often mistreated by the society and even more so by their countries, their voices are not included in development process nor are they consulted in programmes that affect them. This is a problem that should attract the interest of each state government, and the international community since it is now glaring that the world, especially the third countries are grieving from austere poverty threat.

Interestingly, the RTD has attracted the attention of many States and the international community as a whole. In the Millennium Declaration, consensus was reached by the world leaders; the RTD was recognised as a human right and they committed themselves to the realisation of the RTD for everyone and to the emancipation of the whole human race from poverty. Likewise, the Rio+20 Outcomes Document in 2012 recaps the implication of freedom, peace and security, respect for all human rights, including the RTD.

Although the RTD can be termed as a soft law, commonly accepted by the international community but not completely legally binding, the binding force of the RTD can be sought from other legally binding documents. The content of RTD can be found in the ICESCR and the ICCPR.

CHAPTER THREE

[259] See https://www.theguardian.com/global-development/2015/mar/09/uk-passes-bill-law-aid-target-percentage income (accessed 25 September 2015).

RIGHT TO DEVELOPMENT UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

3.1 INTRODUCTION

As part of developments in the international human rights, Africa has developed its own regional system for promoting and protecting human rights. The African regional human rights system attempts to blend international human rights standards and African cultural values. Most importantly, it is the only system where the RTD finds clear recognition. This chapter will consider the concept and development of human rights in Africa, the African human rights architecture, RTD in the African human rights system, the jurisprudence of the African Commission and the African Court on Human and Peoples' Rights on RTD. This is necessary since the RTD is only binding under the African human right system notwithstanding the controversy around the RTD. As it is now known, the RTD is originally an African concept, since it was first conceived as such by Doudou Thiam of Senegal, in 1967 who stated that the RTD must be declared loud and clear for the people of the third world. The RTD gained more prominence after Kéba M'Baye of Senegal lectured on it in France, in 1972. Events afterwards led to the codifying of the RTD under the African Charter. The understanding of the RTD under the Charter will help determine to what extent the African countries have considered it in the EPA negotiations.

3.2 THE CONCEPT OF HUMAN RIGHTS IN AFRICA

The expression 'human rights' is a relatively new term in Africa. But that is not to say that the African people have not been fighting for freedom, social justice, equality and dignity, it has been found that some resemblance of human rights existed in Africa. Nowadays, 'human rights' is a common expression in the African context.

Today, we witness rising public agitation for African countries to respect, protect and fulfil the human rights of its people. 'A sudden proliferation of opportunists masquerading as human rights experts and activists has recently emerged.'[1] In Mwenda's opinion 'human right in these parts of the world is, indeed,

[1] KK Mwenda 'Deconstructing the concept of human rights in Africa' http://www.afbis.com/analysis/human%20right.htm (accessed 5 August 2016).

a lucrative business.'[2] Most of the experts and activist are 'not in search of human rights,' according to him, 'their concern is with donor funds and the ideological re-focusing of the continent.'

However, whether the human rights experts and activists in Africa are opportunistic or not, today, the concept of human rights could be found in almost all African countries' constitutions[3] as well as in the African Union's instruments. Moreover, African countries record of ratification of the human rights treaties of the United Nations is at par with practices around the world.[4] Nonetheless, even with the emergence of all of these 'opportunists' and development of human rights in Africa, the several 'sub-cultures of the traditional African set-up are not entirely obliterated.'[5]

The human rights discursion in the continent of Africa echoes its political and cultural history.[6] Consequently, any debate of human rights in the continent needs to be dealt with in the context of its political, cultural and ideological history, spanning pre-colonial, colonial and post-colonial era.

Africa's pre-colonial era saw the emergence of traditional African political systems,[7] where traditional ethnic communities lived under various socio-political arrangements. These arrangements consist of components of human rights rooted in the religion and culture of these communities. Some African authors are of the view that there is an exceptional African concept of human rights, which is culturally specific but not universal.[8]

A study of the organisation of African social life reveals several organising principles.[9] The African social life differs from the Western world; it underscores grouping and commonality, members of the community do not think only of themselves as individuals, neither do they think about individual rights[10] (although not widely practiced today). Instead of the survival of the fittest, the African communities are guided by

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2 As above.

3 CH Heyns and M Killander 'The African Regional Human Rights System' in Heyns CH and Stefiszyn K (eds) *Human Rights, Peace and Justice in Africa: A Reader* (2006) Pretoria University Law Press 196.

4 As above.

5 Mwenda (n 1 above).

6 EOA EI-Obaid and K Appiagyei-Atua 'Human Rights in Africa -A New Perspective on Linking the Past to the Present' (1996) 41 *Mcgill Law Journal/Revue De Droit De Mcgill* 821.

7 As above.

8 DM Wai, 'Human Rights in Sub-Saharan Africa,' in Adamantia Pollis and Peter Schwab, eds., Human Rights: Cultural and Ideological Perspectives (New York: Praeger, 1979), 116-118 cited in R Howard 'Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons' (1984) 6 *Human Rights.*Quarterly 173.

9 JA Cobbah 'African Values and the Human Rights Debate: An African Perspective' (1987*) 9 Human Rights Quarterly* 320.

10 Howard (n 8 above) 174.

the principle of the survival of the whole community and a 'sense of cooperation, interdependence, and collective responsibility.'[11]

Sudarkasa,[12] has structured the rights and duties possessed by each kinship member in the African community into four fundamental principles: respect, restraint, responsibility, and reciprocity. The most important principle is respect for the elders in the community; it guides the behavior within the family and the community, which is hierarchical.[13] A child in the African community learns to respect very early in his childhood. In these communities, anyone older than you, even with a day, commands your respect, which is demonstrated in greetings, how they address their seniors, bows and other gestures.[14] As a child grows in the community he moves up in the hierarchy and attains seniority rights, which are strictly guaranteed.

African culture, therefore, promotes respect for human rights; it has a place in the African human rights discourse. To ensure the safeguard of African cultures, the OAU adopted the African Cultural Charter in 1976, and in 2006, Charter for African Cultural Renaissance Consequently; most African constitutions preserve rights to its peoples' cultural development[15] similar to that protected by Article 22 of the African Charter.

3.3 THE DEVELOPMENT OF A HUMAN RIGHT SYSTEM IN AFRICA

The African nationalism and pan-Africanism movements started the struggle for respect and protection of human rights in Africa.[16] Initially, these movements were involved in the fight against the abuse of human rights in Africa and the despoliation of Africa's resources by the colonial masters. African nationalists regularly reminded the colonial masters on the need to respect human rights of the people colonized and

11 Cobbah (n 9 above) 320.

12 N Sudarkasa 'African and Afro-American Family Structure: A Comparison' Black Scholar 11 (1980) 50, cited in Cobbah (n 9 above).

13 As above.

14 As above.

15 For example, Articles 41(9) and 91(1) of the 1995 Ethiopian Constitution declare that the 'The State has the responsibility to protect and preserve historical and cultural Legacies...' Likewise Chapter 5, section 26(1) of the 1992 Ghana Constitution and Chapter 4 section 20 of the 2005 Uganda Constitution ensure that everyone has a right to enjoy, practice, profess, maintain, and promote any culture subject to the provisions of the Constitution.

16 EI-Obaid & Appiagyei-Atua (n 6 above) 823.

also educate the Africans on their rights.[17] This was demonstrated in the Declaration of the 1945 pan-African Congress held in Manchester, which reads in part:

> We are determined to be free. We want education. We want the right to earn a decent living; the right to express our thoughts and emotions, to adopt and create forms of beauty. We will fight in every way we can for freedom, democracy, and social betterment.[18]

During the colonial reign, human rights became a significant part of the fight for independence. According to EI-Obaid and Appiagyei-Atua,[19] three international human rights instruments provided a favourable basis for the fight for the respect of human rights by the African nationalists, they are: the United Nations Charter, which commits six of its Articles (particularly Articles 1, 13, 55, 62, 73, 76) to protecting and promoting respect for human rights; the UDHR, which in their opinion provides 'a powerful source of inspiration for the founding pattern of African nations;' and the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, the African nationalists also relied on an important right, which is the right to self-determination. It entitles all 'peoples to freely determine their political status and freely pursue their economic, social and cultural development.'[20] Evidently, the right to self-determination became the main right used by the African nationalist in the struggle of Africans independence from European colonialism.[21]

After independence, the leaders of the new African States transformed their human rights mantra into provisions in their countries' constitutions. The arrival of African nationhood created an anticipation of a secure human rights guarantee for the African people. This expectation was re-enforced by sustained promises by the new African leaders to respect human rights.[22] However, notwithstanding the hopes and human rights rhetoric by the African leaders, human rights abuses quickly became common in Africa.

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17 An analysis of human rights situation under the colonial rule reveals massive violations of the right to life and Liberty. For example, according to Howard (n 8 above) 170, 'Sir Garnet Wolseley, the hero of the 1874 conquest of Ashanti, had the Ashanti capital of Kumasi burned to the ground. In Kenya, another country taken through active warfare, every person in the market of the village of Muruka was slaughtered in vengeance for the killing of one British soldier in 1902. Recalcitrant chiefs were routinely exiled (as was the Asantehene, or king, of Ashanti as well as the Kabaka of Buganda) or detained. The Maxim gun was used in Africa as early as the 1890s against indigenous Ugandan and Tanzanian resistance. That such brutality was not confined merely to the nineteenth-century imperialist phase is evidenced by the massive incarcerations of "Mau Mau" rebels in Kenya in the 1950s and confinement of African women and children to "protective" concentration camps.'

18 Cited in EI-Obaid and Appiagyei-Atua (n 6 above) 823.

19 As above 823 and 824.

20 As above.

21 As above.

22 As above 824.

Postcolonial human rights abuses became common in most sub-Saharan Africa, for example, Nigeria, Equatorial Guinea and Central African Republic.[23] This incited a call by the United Nations Commission of Human Rights, NGOs, interest groups and interested States in the OAU to establish a human rights instrument for Africa.[24] The opportunity came in 1979 after the ouster of three main African dictators (Idi Amin of Uganda, Francisco Macias Nguema of Equatorial Guinea and Jean-Bedel Bokassa of Central African Republic), which motivated thoughtful discussions among African leaders.[25] The human rights abuses committed by the independent African leaders diluted the integrity and reputation of the OAU.[26] There was therefore, the need to establish an African human rights system. In 1981, thirty-three years after the United Nations adopted the 1948 Universal Declaration of Human Rights, the OAU, in a Summit in Nairobi, adopted the African Charter on Human and Peoples' Rights which entered into force in October 1986. The African Charter is one of the foremost and most important legal instruments for the promotion of human rights in Africa that underpin the African human rights architecture or mechanism.

The Constitutive Act of the African Union (2000) underscored human rights protection as one of its main objectives.[27] The AU and its predecessor, the OAU founded in 1963 have established a number of mechanisms for the promotion and protection of human rights in Africa. Some of the most important

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23 See generally, A Jauhari 'Colonial and Post-Colonial Human Rights Violations in Nigeria' (2011) 1 *International Journal of Humanities and Social Science*; N Nwachukwu, A Aghamelo & S Nwaneri 'An account of Human Right violations in Nigeria (Pre-British, British and Post-Independence) (2014) 2 *European Scientific Journal*; O Agbu 'Human Rights Implications of African Conflicts' (2000) 5 *African Journal of Political Science* and C Chitereka 'Human Rights and Social Work in Post-Colonial Africa (2010) 1 *Rajagiri Journal of Social Development*.

24 GW Mugwanya *Human rights in Africa: enhancing human rights through the African regional human rights system* (2003) Transnational Publishers 187. 'The Charter establishing the OAU imposed no explicit obligation on member states for the protection of human rights. The OAU founding Charter only required states parties to have due regard for human rights as set out in the Universal Declaration of Human Rights in their international relations. In spite of the absence of a clear human rights mandate, the OAU took bold steps to address a number of human rights issues such as decolonisation, racial discrimination, environmental protection and refugee problems. The continental organisation however ignored the massive human rights abuses wantonly perpetrated by some despotic African leaders against their own citizens. This was due largely to the OAU's preference for socio-economic development, territorial integrity and state sovereignty over human rights protection, as well as firm reliance on the principle of non-interference in the internal affairs of member states.' See http://www.achpr.org/instruments/achpr/history/ (accessed 4 September 2016).

25 Mugwanya (n 32 above) 187.

26 'The Charter establishing the OAU, adopted in 1963, was based on the principles of state sovereignty and non-interference, and stipulated the fight for the decolonisation of Africa among its main objectives. Linked to this was an obligation on OAU member states to provide support to people involved in liberation struggles.' See Gawanas B 'The African Union: Concepts and implementation mechanisms relating to human rights' http://www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/6_Gawanas.pdf (accessed 7 September 2016).

27 See Articles 3 and 4 of the Constitutive Act of the African Union (2000)

human rights mechanisms established by the Union are the African Commission and the African Court among others.

3.4 RIGHT TO DEVELOPMENT UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

There are substantive provisions on the RTD under the African human rights system. The African Charter contains specific provisions on the RTD. A look at the RTD contents under these instruments follows-

3.4.1 Right to Development under the African Charter on Human and Peoples Rights

Under the African human rights system, RTD is legally binding on all State parties. Article 22 of the African Charter on Human and Peoples' Rights provides thus:

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

Paragraph one of Article 22 highlights the multidimensional nature of RTD; it states that RTD consists of economic, social and cultural development. Although it did not mention civil and political rights, it did mention freedom, which is a component of civil and political rights.[28] Additionally, paragraph 7 of the preamble to the African Charter shows that Article 22 could not have neglected civil and political rights, it states:

> Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

Article 22(1) also presents the RTD as peoples' rights; however, it does not repudiate the point that the RTD is also an individual right. Regarding this Ouguergouz opines that the RTD certainly consist an individual element and that the view of RTD in the Charter has the eventual objective of the complete development of the individual. Individual rights and peoples' rights endeavor to achieve the same goal.[29]

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[28] See Articles 18 and 19 of the International Covenant on Civil and Political Rights.

[29] F Ougergouz *The African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) Martinus Nijhoff Publishers 306.

There is also, evidence in the Charter to show that the RTD enshrined in the Charter has an individual dimension. For example, Article 2 of the African Charter assures every individual the enjoyment of the rights and freedoms recognised and guaranteed in it including the RTD.

The Commission has made pronouncements on the RTD. The case of *Centre for Minority Rights Development (on behalf of the Endorois) v Kenya*[30] is perhaps the most authoritative decision on RTD by the Commission. The Endorois community brought a claim against the Kenyan government who failed to include them in the process of the development. The complainants in this case (the Endorois community) sought a declaration that the Kenyan government was in violation of, among others, Article 22 of the African Charter, which guarantees the RTD.[31] They alleged that the Kenyan government violated these rights by forcibly removing them from 'their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province,' without consulting and adequately compensating them.[32]

The complainants stated that the almost sixty thousand people of the Endorois community have lived in the Lake Bogoria area for centuries. They argued that before they were dispossessed of their land in 1973 'through the creation of the Lake Hannington Game Reserve, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978' by the Kenyan government, 'the Endorois had established, and, for centuries, practiced a sustainable way of life which was inextricably linked to their ancestral land.'[33]
The Commission, while ruling in favour of the complainants was of the opinion that:

> The right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfiling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants' arguments that recognising the right to development requires fulfiling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[34]

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30 Communication 276/2003 African Commission on Human and Peoples' Rights decided on Novevember 25, 2009, http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf (accessed 2 September 2016).

31 As above para 22.

32 As above para 2.

33 As above para 3.

34 As above para 277.

Concerning the RTD, the Commission noted the report of the UN Independent Expert who said that development is not just the provision of housing for certain individuals by the State, 'development is instead about providing people with the ability to choose where to live.'[35]

The Commission also noted that freedom of choice is a criterion necessary for the fulfilment of RTD and is of the view that 'the Respondent State bears the burden for creating conditions favourable to a people's development.' The Commission ruled that the Endorois people have been denied their rights guaranteed under Article 22 of the African Charter.[36]

Another case in which the Commission made pronouncement on RTD is the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda*.[37] In this case, Democratic Republic of the Congo (DRC) brought a communication before the African Commission alleging violations of the African Charter and international law including the Geneva Conventions 1949 and Additional Protocols, the UN Charter and UN Declaration on Friendly Relations. The DRC accused Burundi, Uganda and Rwanda of occupying its territory in the eastern part of the country with their armed forces and committing large violations of human rights. The alleged human rights violations comprised the mass killing of its nationals, dumping them in a mass grave and the barricade of a hydroelectric dam causing homes, schools and hospitals to lack electricity, a situation that led to the death of patients who relied on life support systems.

In addition, the DRC accused the Ugandan soldiers especially for spreading HIV/AIDS deliberately among the local population through rape. Furthermore, the DRC alleged there were mass looting of resident property and the natural mineral resources in the region, as well as the forcefully removing the local residents from that region into 'concentration camps' in Rwanda in order to establish a 'Tutsi land'.

The DRC alleged that these countries had violated Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter; the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949; Additional Protocol 1 to the Geneva Conventions; UN Charter; and UN Declaration on Friendly Relations Between Nations.

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35 As above para 278.

36 As above para 278 and 298.

37 Communication 227/99.

The DRC argued that the violations of international law outlined above constituted a violation of the African Charter. The respondents denied all the allegations of human rights abuses but justified the presence of soldiers in the DRC's territory as a safety measure intended to protect their own territory from the activities of armed rebel groups hiding and getting assistance from the Congolese government.

The Commission found that there was an operative occupation of parts of the applicant's territory, which resulted in a violation of the African Charter. The purported human rights violations stemmed from this unlawful occupation and this violates some provisions of the African Charter and international law.

On the alleged violation of Article 22 of the African Charter (RTD) the Commission found that the killings and mass burial of victims were horrendous and also:

> Finds these acts barbaric and in reckless violation of Congolese peoples' right to cultural development guaranteed by Article 22 of the African Charter, and an affront on the noble virtues of the African tradition and values enunciated in the preamble of the African Charter.

Furthermore, the Commission linked wealth and national resources to the RTD, when it asserted that:

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

Similarly, in *Open Society Justice Initiative v Côte d'Ivoire*[38] the Commission made a pronouncement regarding RTD. In that case, the complaint was filed by Open Society Justice Initiative based in New York against the Republic of Côte d'Ivoire alleging that, for 33 years following independence, Côte d'Ivoire's economy boomed from cocoa production under the leadership of President Félix Houphouet-Boigny. The President encouraged a policy of ethnic tolerance and welcomed migrant farmers from bordering countries. However, the complainant alleged that after the country was destabilized based on political divisions, President Henri Konan Bédié, who succeeded President Houphouët-Boigny, deepened the divisions by introducing the concept of 'ivoirité'. The policy implies that Ivorian nationality can only be acquired by persons born in Côte d'Ivoire and both of whose parents are Ivorians. According to the complainant, 30% of the population, comprising individuals who were born in Côte d'Ivoire and had

[38] Communication 318/06.

grown up and lived all their life in the country will be affected. These affected individuals were denied access to land, voting and holding of public offices.[39] The consequence, among others, was a socio-political exclusion.

The complainant further claimed that even when their nationality was proved, some Dioulas who were considered migrant farmers continued to surfer denial of certain benefits and services by the government, such as acquisition of passports, birth certificates and national identity cards. Finally, the complainant claimed that, 'during the 2000 presidential elections, the Supreme Court enforced the 'ivoirité concept by confirming the exclusion of several applications including that of Mr. Ouattara, because he had held burkinabé nationality'[40] and alleged the violation of Articles 2, 3, 4, 5, 6, 12, 13, 14, 18 and 22 of the African Charter.

Concerning the infringements on Article 22 of the African Charter the Commission 'considered that if there were proven, acts of economic marginalization and lack of economic infrastructure, they could constitute a violation of the right to development.'[41]

> The Commission considers that due to these multiple denials, a human potential has inevitably been destroyed, ambitions have been dashed, entire lives have been shattered, not only for the individuals, but also for the Dioulas as a community within the big Ivorian community. This has obviously led to an incalculable loss of a life plan, an accumulated loss of generation to generation over the decades. The Commission concludes on a serious violation of the right to development under the provisions of Article 22 of the Charter.[42]

Consequently, the Commission declared that the Republic of Côte d'Ivoire had violated the provisions of Article 22 of the African Charter.[43]

In the case of *Front for the Liberation of the State of Cabinda v Republic of Angola*,[44] the Commission also made a pronouncement on RTD. The complainant (Front for the Liberation of the State of Cabinda on behalf of the people of Cabinda, Victims) alleged that in 1975 Angola declared the annexation of Cabinda without consultation or the participation of any Cabindan and that Angola has maintained

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39 As above para 4.
40 As above para 9.
41 As above para 182.
42 As above para 186.
43 As above para 206.
44 Communication 328/06.

sovereignty over Cabinda in spite of protest by the Cabinda people. Furthermore, from 2002 Angola commenced an immense military operation against Cabinda following efforts by individuals in Cabinda claiming independence for the people of Cabinda. During this military operation, the military committed numerous well-documented human rights violations including 'extrajudicial/summary executions, arbitrary arrests and detention, sexual violence, denial of civilian's freedom of movement, torture and other mistreatment.'

The complainant also averred that even though Cabindans are culturally and linguistically distinct from Angola and have prodigiously branded themselves as 'Cabindans', not Angolans, they have been denied their right to self-determination by Angola. The complainant declared that regarding the Cabindans, Angola has violated among others Articles 22 of the African Charter because:

> the people of Cabinda are a distinct people with a right to economic and social development and contends that the current policy of the Respondent State is one of 'Angolanisation of Cabinda' involving discriminating against and arresting individuals and groups that claim a Cabindan identity. Accordingly, the Complainant alleges that the Respondent State has violated Article 22 of the African Charter.[45]

However, on the alleged violation of Article 22 of the African Charter, the Commission declared that:

> the Complainant's allegation that the Respondent State has violated Article 22 of the African Charter with regards to the people of Cabinda is based exclusively on the argument that the Respondent State pursues a policy of "Angolanisation of Cabinda". In the absence of any other argument or evidence in support, the African Commission finds no violation.

Similarly, in *Gunme and Others v. Cameroon*,[46] the Commission determined that there had been no violation of Article 22 for lack of evidence. However, it declared that if 'they were proven acts of economic marginalization and lack of economic infrastructure could constitute a violation of the right to development.'[47]

The right holders envisioned under Article 22

45 Communication 328/06, para 64.
46 Communication 266/03 (2009) AHRLR 9 (ACHPR 2009) paras 205-206.
47 As above para 157.

Under the provisions of Article 22, all peoples, as alluded earlier, should enjoy the RTD, it does not repudiate the point that the RTD is also an individual right.[48] The individuals and peoples are therefore the right holders. In the *Open Society Justice Initiative* case,[49] the Commission considered that:

> there is indeed a fundamental convergence to comprehend the right to development as an inalienable, individual or collective right, to participate in all forms of development, through the full realization of all fundamental rights, and to enjoy them without unjustifiable restrictions.

However, the word 'peoples' is not defined under Article 22 or anywhere in the African Charter. There are contentions as to whether the term people embrace ethnic groups and minorities or whether it refers solely to the States as the representatives of the whole inhabitants of their nations.[50] The Commission in some of its cases has settled this contention. For example, in *Katangese Peoples' Congress v Zaire,*[51] the Katangese peoples' Congress, brought a claim of the denial of self-determination guaranteed under Article 20(1) of the African Charter. Although, the Commission declared that the claims lacked merit and there was no evidence of violation of the rights guaranteed under Article 20(1) of the African Charter, neither Zaire nor the Commission objected to the admissibility of this claim on the basis that it did not satisfy the meaning of peoples under Article 20(1) of the African Charter. Likewise, in *SERAC v Nigeria,*[52] the Commission recognized the people of Ogoni - an ethnic minority group - as a people within the meaning of Article 21 of the African Charter, which states that 'all peoples shall freely dispose of their wealth and natural resources'. The Commission found that Nigeria did violate the Ogoni people's rights guaranteed under Article 21. The Commission's decisions on the above cases can logically be applied to the meaning of peoples under Article 22.

The duty bearers envisioned under Article 22

Article 22 clearly imposes the duty to ensure the enjoyment of RTD both within and outside its territory on state parties to the Charter (see chapter 4 below). It also urges the African states to act 'collectively' to

48 See Communication 318/06 – Open Society Justice Initiative v. Côte d'Ivoire para 183.

49 As above.

50 See R Kiwanuka 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 84; EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and Procedures* (1996) Martinus Nijhoff Publishers 167 and Ougergouz (n 37 above) 20.

51 (2000) AHRLR 72 (ACHPR 1995).

52 (2001) AHRLR 60 (ACHPR 2001).

ensure the realisation of RTD. This implies that the State parties also have the obligation to act through international co-operation to ensure the enjoyment of the RTD of its citizens.

Concerning the States as duty bearers the Commission, the *Open Society Justice Initiative* case asserts that:

> From the perspective of the contents of the right to development under the Charter, the States Parties have a mediate obligation to meet the requirements for the enjoyment of this right and an immediate obligation to at least create the opportunities and environment conducive to the enjoyment of the said right. In other words, there is the need to ensure a gradual implementation, but it is immediately recommended that the individual and collective right to development should be respected, protected and promoted.[53]

There have been arguments that similar lawful obligations should be imposed on such bodies as the transnational corporations (TNCs); the powerful industrialised nations and their development organisations; the international financial institutions - IMF and the World Bank.[54] Regarding this, it will not be practicable for any African people to allege violations of her RTD under Article 22 by any of the above-mentioned bodies since they are not parties to the African Charter. Moreover, the Vienna Convention on the Law of Treaties in Article 26 entreats State parties to respect the doctrine of *pacta sunt servanda;* meaning that only parties to a treaty are bound by it. Moreover, some cases decided by the Commission also point to this fact, for example, in the case of *SERAC v Nigeria*,[55] mentioned earlier, the Commission could not find Shell Petroleum Development Corporation (SPDC) – a TNC - guilty of violating the RTD of the Ogoni people, despite that the Commission find the TNC to be profoundly involved in denying the RTD of the Ogoni people. The Commission considered Nigeria's obligations as a State party to the African Charter, and violations of human rights by Nigeria as a result of the government's failure to apply the necessary amount of due diligence concerning the conduct of the TNC.

Article 22(2) also imposes a duty on the international community; it urges States to take collective action to ensure the exercise of the RTD. Although the Article 22 did not categorically state how the international cooperation could be achieved, it obviously is not asking States to claim RTD from another State but

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53 Communication 318/06 – Open Society Justice Initiative v. Côte d'Ivoire para 183.

54 O Okafor 'Righting the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples' Rights' in SP Marks (ed) *Implementing the Right to Development - The Role of International Law* (2008) Friedrich Ebert Stiftung 59.

55 (2001) AHRLR 60 (ACHPR 2001).

rather that States should take collective actions. As mentioned earlier, the international community takes collective action. The international community in this case will refer to all African States when they come together to act as a group. Therefore, the duty of acting collectively can only take place within the African States who are parties to the Charter as they are bound by its provisions. Acting collectively may not be achieved between the African States and the EU or UN, as they are not bound by the provisions of the Charter. Nevertheless, that is not to say that the EU or UN cannot voluntarily cooperate with the African States in order to ensure RTD.

3.5 CONCLUSION

In this chapter, it has been shown that some resemblance of human rights existed in Africa. The African peoples have been fighting for freedom, social justice, equality and dignity. The African nationalism and Pan-Africanism movements began the struggle for the respect and protection of human rights in Africa to fight against abuses by the colonial masters. The protection of human rights is one of the main objectives of the OAU now AU; consequently, the OAU has established important human rights mechanism such as the African Charter, the African Commission and the African Court.

This chapter has also highlighted the nature of the RTD under the African human right system. The African Charter clearly guarantees the RTD and the African Commission has made pronouncements in its decisions to support the binding force of the provision of the RTD under Article 22 of the African Charter. It should be noted that the RTD as provided in Article 22 is not just a declaration of intent; States parties to the African Charter have the duty to ensure the enjoyment of the RTD in their domains. The Charter require that States should take appropriate actions intended to improve the welfare of all individuals based on free participation and fair or equitable distribution of the benefits of development. This lies at the heart of Article 22 of the African Charter. The appropriate actions required by States to guarantee the RTD should also be reflected in the EPA's between the African States and the EU.

CHAPTER FOUR

THE NATURE OF EXTRA-TERRITORIAL APPLICATION OF HUMAN RIGHTS

4.1 INTRODUCTION

In the preceding chapter, we considered the nature of RTD under the African human rights system and found that RTD is binding on the African States through the provisions of the African Charter. In this chapter we shall examine the extra-territorial application of human rights and whether the RTD can apply extra-territorially.

Although States are obligated to promote, protect and fulfil human rights within their territory, they cannot do this in seclusion. As members of the international community, States, to an extent, depend on international cooperation to fulfil their human rights obligations within their territories.[1] In these times of globalization the need for international cooperation is becoming more and more essential. Recently, the application of human rights obligations has gradually developed and its scope is undergoing a paradigm shift, from a territory-based notion to a conception, which includes extra-territorial promotion and protection of human rights.

Most international human rights treaties require State parties to respect protect and guarantee the rights of individuals subject to or within their 'jurisdiction'. However, the meaning of 'jurisdiction' is a subject of dispute and the scope of States parties' human rights obligations abroad is not clear. The term 'jurisdiction' is viewed essentially as territorial.[2] This conception suggests that States are obligated to protect human rights of, mainly, individuals within their territory. However, this conception is insufficient in an ever more globalized world.

In this chapter, the term 'jurisdiction' will be examined, since in most international treaties (for example, the ICCPR and ECHR)[3] this term defines States' obligations. In doing so, this chapter will also examine

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1 Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

2 See *Bankovic v Belgium* 2001-XII: 44 EHRR SE5 at para 61.

3 Article 2(1) of the ICCPR and Article 1 of the ECHR.

the case law on extra-territoriality and the extra-territorial human rights obligations of the African States under the African human rights system, especially regarding RTD.

4.2 DEFINING EXTRA-TERRITORIAL HUMAN RIGHTS OBLIGATIONS

At this point, it is imperative to understand the meaning of extra-territorial human rights obligation before going further. Under principle 8 of the Maastricht Principles[4] on Extra-territorial Obligations of States in the Area of Economic, Social and Cultural Rights, extra-territorial obligations encompass:

a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and

b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

Human rights extra-territorial obligations of States could arise separately or jointly under the two principles outlined above.[5] For example, principle 8 (a) and (b) could arise under the obligation of the State to ensure that corporate organisations such as financial institutions domiciled within its territory does not provide funds for projects that could lead to the violation of human rights such as forced evictions in another State. This obligation arises under Principle 8 (a) and (b) because the State legally possess the power to control the conduct of corporate organisations domiciled within its territory and also because of the obligation to take separate and joint action to realise human rights internationally.[6]

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4 The Maastricht Principles was adopted by a group of experts in international law and human rights, which include current and former members of UN human rights treaty bodies, former and current Special Rapporteurs of the Human Rights Council, as well as academics and legal advisers of leading non-governmental organizations on September 28, 2011, at a meeting convened by Maastricht University and the International Commission of Jurists. The Principles is based on legal research carried out over a period of more than a decade. According to the preamble of the Maastricht Principles, it seek to 'clarify the content of extraterritorial State obligations…with a view to advancing and giving full effect to the object of the Charter of the United Nations and international human rights'. Although, like other soft laws, the Maastricht Principles does not have a binding force it however, enclose significant principles that can be useful in safeguarding human rights outside a States' territory.

5 O de Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1101.

6 As above.

According to Milanovic, extra-territorial application of human rights implies that at the time of the purported abuse of an individual's rights 'the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title.'[7]

Most of the human rights treaty obligations apply to a State's territory, but the exact scope of its territory is a subject of debate. The Vienna Convention on the Law of Treaties (VCLT) of 1969 provides little clue. Under Article 29 titled 'Territorial Scope of Treaties' it provides thus: 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.' Article 29 is, however, silent on the application of treaties outside its territory and may generate a supposition against extra-territoriality. In the International Law Commission's (ILC) commentaries to the Draft Articles on the VCLT, the ILC states that 'it is by looking at the subject matter of a treaty – the content of the rights and obligations that it creates – that we can tell whether and how those rights and obligations apply territorially.'[8]

The traditional meaning of territoriality has been increasingly challenged. In reality, it is clear that States and other actors have the ability to impact human rights outside their territory. Economic globalisation has underscored socio-economic inequalities across the world.[9] 'The often decentered position of the territorial States and the increased power and impact of corporations, international organisations and other non-State actors' constitutes a major challenge to human rights law.[10] States need to adjust to the changing realities as they are no longer major actors, otherwise human rights law will become irrelevant.

Many scholars argue against the extra-territorial application of human rights treaties, they tend to favour a literal interpretation of the jurisdictional clauses found in some human rights treaties and contend that such treaties were designed to protect individuals within a State's national territory and not beyond.[11] In

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7 M Milanovic *Extraterritorial application of human rights treaties Law, Principle, and Policy* (2011*)* Oxford University Press 8.

8 ILC, 'Draft Articles on the Law of Treaties with Comments,' (1996) 2 yearbook of the International Law Commission 187, cited in Milanovic (n 7 above).

9 W Vandenhole and W van Genugten 'Introduction: an emerging multi-duty-bearer human rights regime?' in W Vandenhole (ed) *Challenging Territoriality in Human Rights Law Building blocks for a Plural and diverse duty-bearer regime* (2015) Routledge 1.

10 As above.

11 See M Dennis and A Surena 'Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap between Legal Theory and State Practice' (2008) 6 *European Human Rights Law Review* 719 and M Dennis 'Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?' (2006) 12 *ILSA Journal of International and Comparative Law*

their reasoning, they seem to totally ignore, a liberal interpretation of the jurisdictional clauses found in some human rights treaties. Some scholars view the extra-territorial application of human rights treaties as a judicial interpretation that has not been accepted by States.[12] To support this, they cite cases where States dispute the rulings and findings of courts and monitoring bodies on this issue.[13]

Additionally, it has been argued that the liberal interpretation of Article 1 of the ECHR as to allow extra-territorial application of the ECHR would render the 'colonial clause' meaningless.[14] However, despite the argument against, and opposition to the extra-territorial application of human rights treaties by some scholars, other scholars accept that there are situations where human rights treaties may apply extra-territorially.[15]

Loucaides argues that there is no provision in most treaties expressly disallowing the extra-territorial application of its provisions.[16] Concerning the language used in some treaties, particularly the jurisdictional clause, it has been argued that the broad and liberal interpretation given to it by international bodies, signify that their application is not restricted only to a State's territory.[17] Scholars who argue in favour of extra-territorial application of human rights treaties maintain that the understanding of

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459, 460, cited in K da Costa *The Extraterritorial Application of Selected Human Rights Treaties* (2012) Leiden NL: Brill Nijhoff 10.

12 G Verdirame 'Human Rights in Wartime: A Framework for Analysis' (2008) 6 *European Human Rights Law Review* 694.

13 See, for example, the US initial report to the Human Rights Committee, of 24 April 1995, CCPR/C/SR.1405, at p. 6–7. See also Annex I to the US second and third periodic reports to the HRC, of 28 November 2005, CCPR/C/USA/3, titled 'Territorial application of the International Covenant on Civil and Political Rights' 109–112. Cited in K da Costa *The Extraterritorial Application of Selected Human Rights* 11.

14 See Article 56 of the ECHR. The colonial clause provided under Article 56 of the ECHR was intended to enlarge the geographical reach of this treaty. As Milanovic points out, 'the colonial clause was inserted into the ECHR due to the insistence of the British government, which professed that it could not extend the application of the Convention to its overseas territories without consulting the governments of these respective territories and obtaining their consent. Thus, the principal justification for the colonial clause is the colonial power's respect for local self-governance in its colonies.' See Milanovic (n 7 above) 14. In this regard, da Coster observes that this have nothing to do with extraterritorial application of human rights treaties. See da Costa (n 11 above) 14, see also M Frostad 'The Colonial Clause and Extraterritorial Application of Human Rights: The European Convention on Human Rights Article 56 and its Relationship to Article 1' (2013) *Arctic Review on Law and Politics* vol. 4 26,27.

15 See generally, F Coomans and T Kamminga '*Extraterritorial application of human rights treaties'* (2004).

16 L Loucaides 'Determining the Extra-Territorial Effect of the European Convention: Facts, Jurisprudence and the Banković Case' (2006) 4 *European Human Rights Law Review* 397, 398.

17 For example, in the Human Rights Committee General Comment number 31 titled 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' under paragraph 10, the committee states: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party…'

jurisdiction under public international law is not exactly the same under human rights treaties. Jurisdiction in public international law assumes legality and the authority to affect legal interests, it gives a sovereign State the power to effect the rights of persons.[18] However, jurisdiction in human rights law echoes the exercise of State power or authority.[19] This notion has been supported in some judgments of the ECtHR and some views of the Human Rights Committee.[20] Scholarly work on the extra-territorial human rights obligations has increased recently, many of them focusing on defining its legality, nature and scope. One of the controversies surrounding extra-territorial human rights obligation is the understanding giving to the term 'jurisdiction' found in many human rights treaties which is the term used in defining the scope of the application of the rights guaranteed under those treaties. This research will investigate the meaning of the term 'jurisdiction' to determine its clear understanding under international law and international human rights law (there are other treaties that have defined the scope of its application other than using the word jurisdiction. This will also be considered in the next section).

4.3 UNDERSTANDING THE JURISDICTION CLAUSE IN HUMAN RIGHTS TREATIES

Human rights are set of goals, for them to be actualised requires the establishment of a system of rules that determines its scope of application and protection.[21] The legal nature of human rights must be understood in order to properly interpret its rule. Human rights are part of international law and

18 See da Costa (n 11 above) 13.

19 As above.

20 See, for example, *Loizidou v Turkey* – Preliminary Objections 15318/89, where it was observed that 'the concept of "jurisdiction" under Article 1 is not restricted to the national territory of the High Contracting Parties. Responsibility may also arise when as a consequence of military action, whether lawful or unlawful, a Contracting Party exercises effective control of an area outside its national territory.' See also the views of the Human Rights Committee in *Lopez Burgos v. Uruguay*, Communication no. 052/1979, of 29 July 1981. The Committee observed under paragraph 12.1 and 12.2 that 'although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction...") or by virtue of article 2 (1) of the Covenant ("... individual within its territory and subject to its jurisdiction...") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch as these acts were perpetrated by Uruguayan agents acting on foreign soil.' And that 'the reference in article 1 of the Optional Protocol to 'individuals subject to its jurisdiction does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.'

21 L Jardón 'The Interpretation of Jurisdictional Clauses in Human Rights Treaties' (2013) XIII *Anuario Mexicano de Derecho Internacional* 104.

international law has gone beyond being a system of rules that only regulates the correlation between States.[22]

Following the Vienna Declaration and Programme of Action recognising the universality and interrelatedness of human rights, Skogly and Gibney, states that:

> 'One of the great disappointments concerning human rights is the way in which these rights are declared to be "universal," at the same time that the protection of those rights (and even responsibility for the commission of human rights violations) has been severely limited by territorial considerations.'[23]

It is generally accepted that in a globalised world, deeds and omissions of States can have impact beyond a States territory, however, the legal recognition of States' exterritorial human rights obligations has not gotten the same acceptance. In light of this, some treaties have used the term jurisdiction to define the scope of its application, although the term jurisdiction has different meanings.

4.3.1 State's jurisdiction under international law

As we will find in this section, the term jurisdiction has a number of meanings and some concepts and principles are hidden within this term, which will need some clarifications. First, it will be important to point out that both States and courts can claim jurisdiction. However, court's jurisdiction will not be subject of discussion under this section.

Traditionally, jurisdiction under international law refers to the power, authority or competence of a State to impose and apply regulatory laws within its territory. This understanding is based on 'territorial principle'.[24]

Bishop avers that:

> when talking about jurisdiction, we think about that part of international law which distinguishes situations where the state may lawfully take action with respect to persons, things and events, from those situations in which taking such action is unlawful. Sometimes we are concerned with whether a state may lawfully take physical action, exercise its

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22 As above.

23 SI Skogly & M Gibney 'Economic Rights and Extraterritorial Obligations' in S Hertel & L Minkler (eds) *Economic Rights conceptual, measurement, and policy issues* (2007) 267.

24 R Beckman and D Butte 'Introduction to International Law' https://www.ilsa.org/jessup/intlawintro.pdf (accessed 22 October 2016) 7. See also R Liivoja 'The criminal jurisdiction of states A theoretical primer' (2010) 7 *Journal of Extreme Legal Positivism* 28.

> authority; and at other times with whether the particular state may properly ascribe the character of legality or illegality to particular action of events.[25]

States could claim jurisdiction over activities outside their territory, which have effect in their territory.[26] Likewise, based on the 'nationality principle', States can extend jurisdiction over their nationals who are outside its territory.[27] An example is where civil law countries extend their criminal law to include crimes committed by their nationals who are abroad.

Additionally, based on the 'universality principle', States may claim jurisdiction over individuals who commit crimes recognised by the international community of nations as of universal concern. Such crimes include genocide, torture, piracy, aircraft hijacking, hostage taking, war crimes, and the slave trade. Regardless of nationality of the individual or location of the crime, a State can claim jurisdiction.[28]

States can also claim jurisdiction under the 'protective principle', where a State asserts jurisdiction over acts committed outside their territory that are injurious to its security, such as treason, espionage, counterfeiting of government money or seal, perjury before consular officials and certain economic and immigration offences.[29]

Similar to jurisdiction under 'protective principle' is jurisdiction under the 'passive personality principle', which creates jurisdiction based on the nationality of the victim. For example, States can claim jurisdiction over terrorist whose acts, although outside the States territory, are directed against their nationals.[30] In this case, what matters is the nationality of the victim or individual who is the subject of the terrorist act. This type of jurisdiction finds a base under international law, for example under Article 6(2) of the International Convention for the Suppression of Terrorist Bombings 1999, which requires each Party to establish its jurisdiction over an offence when it is committed against one of its nationals.

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25 W Bishop 'General Course of Public International Law' (1965) 115 *Recueil des Cours*, cited in Liivoja (n 24 above) 29.

26 'The nationality principle is grounded in the view that a sovereign state is entitled to regulate the conduct of its own nationals anywhere, for the reason that such nationals owe a duty to obey the state's laws even when they are outside the state.' see Am. Soc'y Int'l L., 'Jurisdictional, Preliminary, and Procedural Concerns' in Amann DM (ed) *Benchbook on International Law* (2014) https://www.asil.org/sites/default/files/benchbook/jurisdiction.pdf (accessed 22 October, 2016) 4.

27 Beckman and Butte (n 24 above).

28 As above.

29 As above. See also Am. Soc'y Int'l L (n 26 above) 3.

30 Beckman and Butte (n 24 above).

Furthermore, the concept of jurisdiction under international law is also understood to be closely associated to the concept of sovereignty.[31] Jurisdiction is termed as an 'ingredient or an aspect of sovereignty,' therefore, laws cannot extend beyond the sovereignty of the State which puts them into force.[32] 'Whereas 'sovereignty' is referred to as the general legal competence of States, jurisdiction refers to particular exercises of sovereignty.'[33]

In the Lotus Case (*France v Turkey*) the Permanent Court of International Justice (PCIJ) suggested that the powers of States to pass legislation on acts outside their territories should not be subjected to a general prohibitive rule thus:

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the 'jurisdiction' of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules (…). [A]ll that can be required of a State is that it should not overstep the limits which international law places upon its 'jurisdiction'; within these limits, its title to exercise 'jurisdiction' rests in its sovereignty.[34]

4.3.2 State's jurisdiction under international human rights law

The meaning of jurisdiction under international human rights law has been derived from the interpretation of the courts and the HRC comments on the word jurisdiction used to define the scope of application found in some treaties.

In line with the General Rule of Interpretation provided under Article 31 and 32 of the VCLT,[35] the HRC, ECtHR, ICJ and the Inter-American Commission have interpreted jurisdiction to include extra-territorial application.

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31 See M Heijer 'Europe and Extraterritorial Asylum' (2011) unpublished doctoral thesis submitted to Universiteit Leiden 7 April 2011, https://openaccess.leidenuniv.nl/bitstream/handle/1887/16699/02.pdf?sequence=14 (accessed 28 October, 2016) 25.

32 As above.

33 As above.

34 The Lotus Case (*France v Turkey*) 1927 PCIJ. http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (accessed 28 October, 2016) para 46.

35 Which provides that: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the

It is important to note that under the draft articles on Responsibility of States for internationally wrongful acts, certain extra-territorial actions by a state can be attributed to it. According to Article 4(1) of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts 'the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions …' The mention of a State organ under Article 4 is envisioned to apply generally. It is not restricted to the organs of the central government or to individuals that is charged with the external relations of the State. It applies to State organs of any classification, exercising any functions, and at any level as far as they are 'in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'[36]

A State is considered to be an intangible entity; it exists in thought but lacks a physical existence. It is incapable of undertaking any physical act itself. Similar to domestic corporation law where the companies act through their officers and agents, under international law the State ordinarily acts through its agents and officials. The acts or conduct of a private entity or transnational cooperation (TNC) that is exercising public or governmental functions can be attributed to the relevant State.[37] Such attribution is now even more necessary with the increase in privatization of State organs that still hold some public functions. Consequently, the Draft Articles express its opinion in this regard as follows:

> The conduct of a person or entity which is not an organ of the State... but which is empowered by the law of that State to exercise elements of the governmental authority shall

treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended. Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.'

36 See Article 8 of the Responsibility of States for Internationally Wrongful Acts 2001.

37 See the decision of the International arbitral tribunal in Técnicas Medioambientales Tecmed S.A. v United Mexican States Case No ARB (AF)/00/2, award, 29 May 2003, para 120 where the arbitral tribunal constituted to hear this matter made reference to the text of article 4 to support its finding that the actions by the National Ecology Institute of Mexico, an entity of the United Mexican States in charge of designing Mexican ecological and environmental policy, were attributable to Mexico. See also Noble Ventures, Inc. v Romania Case No ARB/01/11, award, 12 October 2005, para 69.

> be considered an act of the State under international law provided the person or entity is acting in that capacity in the particular instance.[38]

Therefore, the extra-territorial acts of a TNC vested with a State's authority and, which violate international human rights law can be attributed to the State and give rise to international responsibility including even when 'it exceeds its authority or contravenes instructions.'[39]

State responsibility includes where a State knowingly aids another State in the commission of an international wrongful act by providing critical facility or finances the act in question. Regarding this, Article 16 of the Draft Articles provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

Note that the phrase 'knowledge of the circumstances of the internationally wrongful act' requires that the State providing aid, material or financial assistance to another State must be aware that the object of or purpose for which it is providing assistance is internationally wrongful and must contribute considerably to the act.[40] However, the assisting State bears no international responsibility if it is oblivious of the purpose for which its aid or assistance is intended to be used.[41] States have contended that providing assistance to the commission of an internationally wrongful act can gives rise to a State's responsibility. This has been contended by Iran regarding the assistance by the United Kingdom to Iraq during the war between Iran and Iraq in 1984.[42] This also seem to be the opinion of the ICJ in *Nicaragua v US*[43]

4.3.2.1 Jurisdiction clause in the ECHR as interpreted by ECtHR

Regarding restrictive interpretation of treaties, the European Court held in *Wemhoff*, that it was necessary 'to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the

38 Article 5 ILC Articles on State responsibility.
39 see Article 7 of the Responsibility of States for Internationally Wrongful Acts 2001.
40 See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 66.
41 As above.
42 As above.
43 [1986] ICJ Rep 14.

treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.'[44] In this connection, Bernhardt, a former President of the European Court, opined that:

> Treaty obligations are in case of doubt and in principle not be interpreted in favour of State sovereignty. It is obvious that this conclusion can have considerable conclusion for human rights conventions: Every effective protection of individual freedoms restricts States sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictions on State activities on the other hand.[45]

In a separate opinion of Fitzmaurice the European Commission of Human Rights emphasised that 'a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of this treaty.'[46] The European Commission of Human Rights made similar observation in *East African Asians* thus: 'the European Convention should be interpreted objectively and not by reference to what may have been the understanding of one Party at the time of its ratification.'[47] The above views show that the object of human rights treaty must be kept in mind when interpreting its clauses.

The ECHR provides for a jurisdiction clause in Article 1 of the Convention thus: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' The interpretation of jurisdiction given by the ECtHR points to the extra-territorial nature of the ECHR, for example, in *Drozd and Janousek v Spain*[48] the Court in its ruling asserted that the word jurisdiction may not be limited to a State's territory; the States can be accountable for acts or omission by them or their agents that affects human rights outside their own territory. Similarly, in *Yonghong v Portugal*,[49] the ECtHR viewed the term jurisdiction in these words:

> the term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory[50]

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44 Wemhoff Judgment of 27 June 1968, series A No. 7, para. 8. Cited in Orakhelashvili A 'Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* 534.

45 Bernhardt 'Evolution Treaty Interpretation, Especially of the European Convention of Human Rights' 42 GYIL (1999) 14, cited in Orakhelashvili (n 44 above).

46 Separate opinion of Judge Sir Gerald Fitzmaurice, Belgian Police, 57 ILR (1980) 295, cited in Orakhelashvili (n 44 above).

47 *East African Asians* 3 EHRR 76, 81, cited in Orakhelashvili (n 44 above).

48 (1992) EHRR 745.

49 App. No. 50887/99 (1999) ECtHR.

50 As above.

However, in *Bankovic v Belgium*[51] the court took a different view of the word jurisdiction. This 2001 case concerned the violation of the right to life of victims of NATO's air strikes, which claimed five lives. The Court repelled the extra-territorial application of the ECHR in the following terms:

> It is [...] difficult to contend that a failure to accept the extra-territorial jurisdiction of the respondent States would fall foul of the Convention's *order public* objective, which itself underlines the essentially regional vocation of the Convention system. [...] In short, the Convention is a multi-lateral treaty operating […] in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States. The [Federal Republic of Yugoslavia] clearly does not fall within this legal space. The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States. Accordingly, the desirability of avoiding a gap or vacuum in human rights' protection has so far been relied on by the Court in favour of establishing jurisdiction only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention.[52]

The ECtHR in *Bankovic* made an exception to the strict interpretation of the word jurisdiction in Article 1 of the ECHR. The ECtHR contend that it could apply where the occupants of a territory are under the effective territorial control[53] of a Contracting State.[54] This decision by the ECtHR attracted a lot of criticism.[55]

Al-Skeini v United Kingdom[56] mentioned earlier is one of the ECtHR leading authorities on the extra-territorial application of the ECHR.[57] *Al-Skeini* case was as a result of the occupation of Southern Iraq of Al-Basrah, Masyan, Thi Qar, and Al-Muthanna provinces by the British troops.[58] The applicants were six. The British military patrolling the occupied territory purportedly killed five of them. While Baha Mousa, the sixth applicant, was arrested by British military and detained in a military facility, where he was killed.

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51 Appl. No. 52207/99 European court of Human Rights (2001).

52 *As above* para. 80.

53 Effective control model of jurisdiction conceive jurisdiction as effective control of an area (not of an individual). This supports the traditional treaty practice, which uses the term jurisdiction to refer to the control over territory. See Milanovic (n 7 above) 127.

54 *Bankovic* Application no. 52207/99 para.80.

55 See W Kälin and J Künzli *The Law of International Human Rights Protection* (2009) Oxford University Press 140; S Joseph *Blame it on the WTO? A Human Rights Critique* (2011) Oxford University Press 249 and G Oberleitner *Human Rights in Armed Conflict Law, Practice, Policy* (2015) Cambridge University Press 159.

56 App. No. 55721/07 (2011) ECtHR; See also *Al-Jedda v United Kingdom* appl. No. 27021/08 (2011) ECtHR, where the Court held that the detention of the applicant in a British facility in Basrah on the suspicion of recruiting terrorist abroad with the intent of committing atrocities in Iraq was in breach of Article 5(1) of the ECHR. Thereby, affirming the extraterritorial application of the ECHR.

57 Milanovic (n 7 above) 121; see also S Miko *'Al-Skeini v. United Kingdom* and Extraterritorial Jurisdiction under the European Convention for Human Rights' (2013) 35 *Boston College International and Comparative Law Review*.

58 Milanovic (n 7 above) 4.

The case was first instituted in the UK High Court, then it went to the Court of Appeal, and lastly the House of Lords (now UK Supreme Court). The three UK courts chose to dismiss the application of the five killed by the British military claiming that the UK lacked jurisdiction, and that the ECHR lack extra-territorial application. However, the ECtHR ruled otherwise and held that the five applicants were under UK jurisdiction and affirmed the extra-territorial scope of the ECHR.[59] The ECtHR concludes in these words:

> It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be divided and tailored.[60]

The ECtHR recently added another case to its rising body of case law in relation to the extra-territorial scope of the ECHR in its decision in *Jaloud v the Netherlands*.[61] The case involved the killing of the applicant's son in a car while approaching a checkpoint. The Netherlands military opened fired at the car when the occupants of the car refused to obey an order to stop, killing the applicant's son sitting next to the driver. The Netherlands asserted that the matter did not fall within its jurisdiction, which is a requirement under Article 1 ECHR for the Convention to have extra-territorial application. Although the Netherlands military were in Iraq to help the UK bring stability and security to Iraq and as a result under the operational command of the UK, nonetheless, the ECtHR Grand Chamber established that the event is within the jurisdiction of Netherlands.

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59 *Al-Skeini v United Kingdom* App. No. 55721/07 (2011) ECtHR.

60 As above para. 137.

61 Application No. 47708/08 (2014) European Court of Human Rights.

4.3.2.2 Jurisdiction clause in the ICCPR as interpreted by the HRC and ICJ

The ICCPR contains a jurisdiction clause in Article 2(1), which states:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) of ICCPR contains a twofold written obligation that is not contained in the ECHR, which is to ensure the rights contained therein to individuals who are within both the States territory and jurisdiction. The HRC has, in many cases, interpreted the term jurisdiction in Article 2(1) to imply the extra-territorial application of the ICCPR. One of such cases is in *Sergio Euben Lopez Burgos v Uruguay*,[62] in which Lopez Burgos, a Uruguayan trade-union leader, who fled to Argentina to avoid persecution from the authorities, was kidnapped by Uruguayan agents with the help of Argentina who tortured him, brought him back to Uruguay where he was further abused. The HRC observed that:

> The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred. Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but … does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it … In line with this, it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.[63]

The HRC reiterated this approach in its General Comment 31 when it held that:

> A State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party … This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.[64]

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62 (52/1979). CCPR/C/13/D/52/1979 (1981).

63 Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981), para. 12.2 and 12.3.

64 General Comment No. 31, para 10.

From the above, it is clear that the HRC has taken the view that States has human rights obligations to individuals outside their geographic territory who are under their agent's effective control.

In response to the US continuous categorical stance that the obligations contained in the ICCPR have no extra-territorial application,[65] the HRC in its concluding observations on the fourth periodic report of the United States of America:

> regrets that the State party continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1, supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice. The Committee further notes that the State party has only limited avenues to ensure that state and local governments respect and implement the Covenant, and that its provisions have been declared to be non-self-executing at the time of ratification. Taken together, these elements considerably limit the legal reach and practical relevance of the Covenant (art. 2). The State party should: (a) Interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of the object and purpose of the Covenant, and review its legal position so as to acknowledge the extra-territorial application of the Covenant under certain circumstances, as outlined, inter alia, in the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant…

Similarly, this approach was also validated by the ICJ in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Following continued violent attacks in which Israeli citizens were victims, Israel decided to build an extensive wall they (Israel) called 'security fence' to avert further attackers from entering Israel.[66] The first phase of the wall was completed in July 2003.[67] The wall, however ran almost solely within the Palestinian areas occupied by Israel by over 20 km.[68] separating lands from their owners; the 'security fence' comprised check-points to screen Palestinians and their goods while they cross the barrier, the mode of operation in the check-points created a severe hindrance to the Palestinians' freedom of movement which resulted to grave hardship.[69]

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65 See generally BV Schaack 'The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change (2014) 90 *International Law Studies*.

66 A Watts 'Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory) (2007) Max Planck Encyclopedia of Public International Law [MPEPIL] http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e150 (accessed 29 October 2016).

67 As above.

68 As above.

69 As above.

The United Nations General Assembly adopted resolution ES-10/14 on 8 December 2003 requesting an advisory opinion from the ICJ on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions.[70]

The ICJ advisory opinion observes that:

> While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[71]

4.3.2.3 Jurisdiction clause in the ACHR as interpreted by the Inter-American Commission

The American Convention on Human Rights (ACHR) also requires State parties to guarantee and respect the rights provided in the Convention to everyone 'subject to their jurisdiction.'[72] In *Victor Saldano v Argentina*,[73] the Inter-American Commission observed that it did not agree that the word jurisdiction as contained in Article 1(1) of the ACHR is restricted to national territory. Instead, the Commission considered that a 'State party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that states territory.'[74] In this case the Inter-American Commission referred to decisions of the ECtHR and Commission of Human Rights' interpretation of the scope and meaning of Article 1 of the European Convention for the Protection of Human Rights and Fundamental Duties (European Convention) as supporting its position.[75] Furthermore the Inter-American Commission states:

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70 Resolution ES-10/14 'Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory' adopted by the General Assembly at the Tenth emergency special session.

71 Legal Consequences of the Construction of a Wu11 in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, para. 109.

72 Article 1 American Convention on Human Rights which states: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.'

73 REPORT N° 38/99 Petition Victor Saldaño Argentina March 11, 1999.

74 As above para. 17.

75 As above.

> The European Commission addressed this issue in the interstate complaint Cyprus lodged against Turkey following Turkey's invasion of that island. In that complaint, Cyprus charged Turkey with violations of the European Convention in that part of Cypriot territory invaded by Turkish armed forces. For its part, Turkey claimed that under Article 1 of the European Convention the Commission's competence is limited to the examination of acts allegedly committed by a state party in its own national territory and that its responsibility could not be engaged under the Convention since it had not extended its jurisdiction to any part of Cyprus. The Commission rejected this … understanding of jurisdiction … and therefore responsibility for compliance with international obligations…as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court. This Commission also recognizes that the nationals of a state party to the American Convention are subject to that state's jurisdiction in certain respects when domiciled abroad or otherwise temporarily outside their country or State and that a state party must accord them, when abroad, the exercise of certain convention based rights. [76]

The Inter-American Commission also held this view in *Armando Alejandre v Cuba*,[77] when it observed that:

> Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extra-territorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[78]

Furthermore, in 2010, the Inter-American Commission made a similar observation in *Franklin Guillermo Aisalla Molina v Ecuador*. [79] Certainly, the Inter-American Commission has shown its consistency in the interpretation of the term jurisdiction to include extra-territorial application of the ACHR.

4.3.3 Treaties without jurisdiction clause but with extra-territorial application

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76 As above paras 18-20.

77 *Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v Republica de Cuba*, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999).

78 As above para 23.

79 *Franklin Guillermo Aisalla Molina v Ecuador*, Case IP-02, Report No. 112/10, Inter-Am.C.H.R., OEA/Ser.L/V/II. 140 Doc. 10 (2010), para 102.

There are treaties that did not use the jurisdiction clause to define its scope of application, but also provides for its application extra-territorially. Some of these treaties are analysed bellow.

4.3.3.1 Extra-territorial scope of the International Covenant on Economic, Social and Cultural Rights

In reference to the scope of the obligation of the State parties, Article 2(1) of ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…

The expression 'individually and through international…co-operation' suggests that a States action to realise ESCR abroad can both be exercised by an individual State or by a number of States acting cooperatively, for example, the UN, EU or AU.

Article 2(1) ICESCR did not limit its scope with the words territory or jurisdiction but referred to the international facet of the realisation of ESCR through 'assistance and co-operation…to achieving progressively the full realisation of the rights.' It can therefore be rightly assumed that the drafters envisioned a level of extra-territorial application of the treaty.[80] There have been disagreements on the lawful obligatory nature of the provisions of Article 2(1).[81] In the discussions that led to Article 2(1) the drafters decided on the importance of 'international cooperation and assistance' towards the enjoyment of ESCR, nonetheless, there was no consensus as to whether it may perhaps be demanded as a right.[82] This disagreement reechoed during discussion to the Optional Protocol to the Covenant, some developed nations acknowledged the need for international cooperation, but on the other hand contended that it is not a legally binding obligation.[83] Article 11(1) also brings up the concept of international co-operation

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80 F Coomans 'Application of the International Convention on Economic, Social and Cultural Rights in the framework of International Organizations' 2007 11 *Max Planck Yearbook of United Nations Law* 4.

81 De Schutter (n 5 above) 1094. See also Vandenhole, 'Completing the UN Complaint Mechanisms for Human Rights Violations Step by Step' (2003) 21 *Netherlands Quarterly of Human Rights* 423-462 and M Craven *The International Covenant on Economic, Social and Cultural Rights : A Perspective on Its Development* (1995) Oxford monographs in international law 147-150.

82 P Alston & G Quinn 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 188–90. See also De Schutter (n 5 above) 1094.

83 See Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on Its Third Session, U.N. ESCOR, Commission on Human Rights, 62d Session, 78, 82, U.N. Doc. E/CN.4/2006/47 (2006).

concerning the right to a suitable standard of living which says that: 'State Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.' It could be argued that Article 11(1) does not impose a legally binding obligation by calling on the States to freely consent to international cooperation. In this regard, international cooperation seems to be by choice. The extra-territorial scope of the ICESCR may be contested, probably because there is no case law that could put to rest the question of extra-territorial scope of the Covenant.[84]

Some States do however agree that the Covenant foists some amount of extra-territorial obligations. This is shown in the resolution of the UN General Assembly on the right to food, which require that States adopt policies locally and internationally aimed at eradicating poverty and to fulfil human rights for everyone, it also requires that they endeavour to safeguard right to food in their international policies as well as in trade agreements.[85] Additionally, the ESCR committee believes that international cooperation for enjoyment of ESCR is a responsibility of all States and that it is essential that those States who are able to assist others to do so.[86] Similarly, in the ESCR committee General Comment No. 14 on the right to the maximum achievable standard of health, the Committee observed that State parties should promote the realisation of the right to health outside their borders in harmony with the UN Charter and relevant international law, as well as prevent the violation of rights by third parties in foreign land if they have the means of influencing the actions of these third parties through legal and political means.[87] A related declaration can be seen in the ESCR committee General Comment No. 15 on the right to water, which enjoins Member States to respect the right to water in other countries. Furthermore, cooperating internationally includes that Member States abstain from deeds that can obstruct achieving the right to water in other nations.[88] The Committee also stated that whichever actions embarked inside a State's

84 Coomans (n 80 above) 6.

85 See The Right to Food, G.A. Resolution 59/202, U.N. GAOR, 59th Session, 32, 20, U.N. Doc. A/RES/59/202 2005.

86 General Comment No 3 on the Nature of States Parties Obligations 1990.

87 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 2000, the right to the highest attainable standard of health U.N. Doc. E/C.12/2000/4 par. 39.

88 Para 31 of U.N. Committee on Economic, Social and Cultural Rights, 'General Comment No. 15: The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' UN doc. E/C.12/2002/11 states: 'To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction…'.

jurisdiction should not prevent another State from realising the right to water in its territory.[89] In 2007, the Committee also maintained this concept in the ESCR committee General Comment No. 19 on the right to social security where it said that in line with States external obligations regarding right to social security, they should avoid actions that interfere in anyway with attaining the right to social security in another State and should stop their own nationals from violating this right abroad.[90]

In other comments the Committee has most times suggested that States protect ESCR in other countries through international cooperation and assistance.[91] While the Committee's comments, recommendations and interpretations of the Covenant may not be legally binding, they play important role in the interpretation of the Covenant. For instance, in *SERAC v Nigeria*,[92] the African Commission on Human and Peoples' Rights (African Commission) depended on General Comments Nos 3, 4, 7 and 14 to rule that the Federal Government of Nigeria did in fact violate the right to food, housing and health of the Ogoni people. Similarly, in *Government of South Africa and others v Grootboom and others*,[93] the Constitutional Court of South Africa applied General Comments Nos 3 and 4 in interpreting the reasonableness of the housing policy of the South African Government.[94]

In determining the extra-territorial scope of the ICESCR, the International Court of Justice (ICJ) in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, analysed the provisions of ICCPR and ICESCR and concluded that the two Covenants has extra-territorial scope and asserted that Israel has the duty not to constitute any impediment to the enjoyment of the rights in territories under the Palestinian authorities.[95] Furthermore, the Maastricht Principles on extra-

89 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 2002, the right to water U.N. Doc. E/C.12/2002/11.

90 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 19 2007 on the Right to Social Security.

91 See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20 2009 par. 14 Non-discrimination in economic, social and cultural rights which states that: 'States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.' See also U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009) par. 56 Right of everyone to take part in cultural life which states that: 'States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.'

92 (2001) AHRLR 60 (ACPHR 2001).

93 (2000) 11 BCLR 1169 (CC).

94 As above, see paras 14 and 29.

95 International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the

territorial obligations regarding ESCR reaffirmed the extra-territorial scope of the ICESCR. The Maastricht Principles states that States has obligations to respect ESCR in circumstances where State acts or omissions, separately or jointly has conceivable influence on the realisation of ESCR, outside its borders.[96]

It will appear that Article 2(1) of the ICESCR imposes the minimum obligation to 'respect' human rights in other States. As noted in Chapter two above, this type of obligation suggests that States should cease from engaging in any act that will impede the enjoyment of human rights of individuals irrespective of nationality. The most important part of the obligation to respect the provisions of the ICESCR will be as regards to internal acts of a State that could have human rights effect in another State. For example, States have the obligation not to extradite a person to a State where that individual may be subjected to torture or other severe injury to his human rights such as his right to life, if such an injury is probable at the time of the extradition.[97] This implies that if a State's internal decisions, actions and policies cause foreseeable harm to ICESCR rights outside its territory, that State may have failed in its obligation to respect human rights in other States.

Certainly, it can be argued that some trade policies of some developed States can potentially harm the enjoyment of human rights in the less developed States. Examples of such policies, in Joseph's opinion 'might be export subsidies, cotton subsidies, tariff escalation, and the enforcement of intellectual property rights over goods which are essential to the enjoyment of human rights.'[98] Joseph further opines that, 'a State should not seek to conclude trade deals which, if implemented, would undermine another State's capacity to fulfil its human rights duties.'[99] Similarly, the Special Rapporteur on the Right to Health, Paul Hunt, states that: 'States should respect the enjoyment of the right to health in other jurisdictions, and ensure that no international trade agreement or policy adversely impacts upon the right to health' in other States.[100] In the same vein, the Special Rapporteur on the Right to Food, Jean Ziegler, states:

Occupied Palestinian Territory (9 July 2004) 9 available at http://www.icjcij.org/docket/files/131/1677.pdf, (accessed 25 January 2015).

96 De Schutter, (n 5 above) 1104.

97 See *Agiza v. Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005) para. 4.21 and 4.22 and *Mohammed Alzery v. Sweden*, Communication No. 1416/2005, U.N. Doc. CCPR/C/88/D/1416/2005 (2006) para. 2.3. These cases do not bother on the extraditing State taking extraterritorial actions to protect the rights of the individual but refraining from taking internal action that can have extraterritorial effect.

98 Joseph (n 55 above) 251.

99 As above.

100 Commission on Human Rights, 'The right of everyone to the enjoyment of the highest attainable standard of

> States should also refrain from taking decisions within the WTO … that can lead to violations of the right to food in other countries. It is evident that decisions taken by a Ministry of Agriculture or a Ministry of Finance within WTO … are acts of the authorities of a State that can produce effects outside their own territory. If these effects lead to violations of the right to food, then these decisions must be revised.[101]

It is more contentious to characterize the State's extra-territorial obligations under the ICESCR to include fulfiling or supporting the fulfilment of ICESCR rights in other States.[102] This will mean that rich States have the duty to provide aid to assist poorer States; however, the rich States have rejected this notion.[103] As noted by Joseph, the obligation to fulfil could be divided into three more obligations. The first is 'to facilitate (for example, to provide an enabling environment for the fulfilment of ICESCR rights)'; the second is 'to promote (for example, to disseminate information and raise awareness of a right); and lastly 'to provide, namely to furnish direct assistance to those people who need such assistance in order to enjoy a particular right.'[104] All the above sub-obligations to fulfil are controversial with the most controversial being the obligation to provide and all these have been rejected by the rich nations.

Notwithstanding the position of the rich nations, the ESCR committee has indicated that 'it is particularly incumbent upon those States that are in a position to assist others in this regard.'[105] Furthermore, the ESCR committee states:

> in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realistion of economic, social and cultural rights will remain an unfulfiled aspiration in many countries.[106]

Likewise concerning the right to health, the ESCR committee in its General Comment 15 on The Right to the Highest Attainable Standard of Health:

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physical and mental health: Report of the Special Rapporteur on the Right to Health, Paul Hunt: Mission to the World Trade Organization', UN doc. E/CN.4/2004/49/Add.1 (1 March 2004).

101 Commission on Human Rights, 'Report of the Special Rapporteur on the right to food, Jean Ziegler', UN doc. E/CN.4/2005/47 (24 January 2005) para. 52.

102 Joseph (n 55 above) 253.

103 As above.

104 As above.

105 See, eg, U.N. Committee on Economic, Social and Cultural Rights, 'General Comment 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)', UN doc. E/1991/23 Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990, para 14.

106 As above.

> drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realistion of the rights recognized in the Covenant, such as the right to health. In the spirit of Article 56 of the Charter of the United Nations, the specific provisions of the Covenant (arts. 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realistion of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.[107]

With regards to the right to water, the ESCR committee also states that:

> Depending on the availability of resources, States should facilitate realisation of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required.[108]

The ESCR committee also stressed that the provision of water will also be extended to refugees and displaced persons from other countries.[109]

4.3.3.2 Extra-territorial obligations under the United Nations Charter and the Universal Declaration of Human Rights

The UN Charter has not been characterized as providing for extra-territorial human rights obligations. More attention has been given to the Charter's provisions on human rights protection and the duties of States within their territory. However, there may be provisions in the UN Charter that could relate to extra-territorial obligations.

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107 U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the
Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000, para. 38 and 39.

108 General Comment 15 (2002) The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) paras 34 and 35.

109 As above.

As noted in chapter two, one of the purposes of the United Nations as stated in Article 1(3) of the UN Charter is:

> 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…

The presence of the phrase 'to achieve international co-operation' in Article 1(3) is significant to the question of extra-territorial human rights obligations.[110] The Member States of the UN are required to participate in this 'cooperation' meant to tackle the problems of economic, social, humanitarian and human rights nature. The requirement for 'international cooperation' in Article 1(3) would be difficult to achieve if human rights obligations are exclusively territorial.

Article 56 of the UN Charter requires States to take 'joint and separate action' to achieve the purposes set out in Article 55. Article 55 requires the promotion of:

- higher standards of living; full employment, and conditions to enable social progress and development;
- solutions of international, economic, social, health, and related problems, and international cultural and educational cooperation; and
- universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The UN Charter proclaims the supremacy of the obligations provided under the Charter over any other international instruments, including bilateral and multilateral agreements, in Article 103 of the Charter of the United Nations, which states:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

The UDHR echoes the importance of international cooperation emphasised by the UN Charter in Article 22, which states:

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110 S Skogly 'Extraterritoriality - Universal Human Rights without Universal Obligations?' http://eprints.lancs.ac.uk/26177/1/Microsoft_Word_-_Monash_-_Extraterritoriality_-_Final_draft.pdf (accessed 3 November 2016) 5.

> Everyone, as a member of society, has the right to social security and is entitled to realistion, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Moreover, Article 28 of the UDHR also provides by declaring the right of all individuals 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' According to Morsink, these provisions above materialized from the dialogue in the Commission's third session on every person's right to employment and the corresponding duties of States to combat unemployment.[111] The drafters of the UDHR, being aware of the pronounced economic crisis of the 1930s characterized by its mass unemployment, came to reason that such cataclysm cannot be stamped out without collective effort on the part of all the States.[112]

4.3.4 Extra-territorial scope of the African Charter on Human and Peoples' Rights

The extra-territorial scope of human rights under the African human rights system has not been given prominence. However, there are noticeable dispositions in the jurisprudence of the African Charter as well as in the African Commission's rulings regarding the extra-territorial scope of states' human rights duties. Understanding the extra-territorial scope of the African Charter will help in the understanding of the extra-territorial nature of the RTD.

The African Charter does not contain a jurisdiction clause nor does it contain any provision that explicitly restricts the Member States' obligation to their individual territories. Furthermore, the African Charter does not contain any provision that has the import of 'territoriality' of States' human rights duties.[113] Article 1 of the African Charter, which contains a general obligation of the Member States, says:

> The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

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111 J Morsink *The Universal Declaration of Human Rights. Origins, Drafting and Intent* (1999) cited in M Gondek *The reach of human rights in a globalizing world: extraterritorial application of human rights treaties* (2009) Intersentia 319.

112 Gondek (n 111 above).

113 TS Bulto 'Patching the "legal black hole": the extraterritorial reach of states' human rights duties in the African human rights system' (2011) 27 *South African Journal on Human Rights* 257.

Some scholars contend that State parties to the Charter do not have the obligation to realise the rights provided in the African Charter abroad. For example, Viljoen stated that basically, State parties to the African Charter are obligated to protect human rights within their territory.[114] He further opines that establishing an alleged abuse of human rights occurred within a State party's territory is a condition for admissibility of a case against the said State.[115] However, Viljoen did not rule out the possibility that the provisions of the African Charter could apply extra-territorially, but claims that it depends on the extent of control a State exercises over the said occurrence.

In Article 1 of the Charter, which defines the obligations of the State Parties, there is no indication that the Charter is intended to apply territorially or within a State Party's jurisdiction only.[116] The absence of territorial or jurisdiction clause in the African Charter is akin to that of the ICESCR, but that does not prevent the application of the provisions of the ICESCR abroad as noted above.[117] In line with Article 60 of the African Charter, the ICESCR could be an inspiration source that could possibly provide guidance to the African Commission regarding its interpretation of the African Charter. It can therefore be reasoned that the exclusion of a territorial or jurisdiction clause in the African Charter does not prevent its extra-territorial reach.[118]

This line of reasoning is echoed in the African Commission General Comment on the right to life adopted during the 57th ordinary session of the African Commission on human and peoples' rights in November 2015. The General Comment layout the African Charter Member States' extra-territorial obligations concerning the right to life as follows:

> A State shall respect the right to life of individuals outside its territory. A State also has certain obligations to protect the right to life of such individuals. The nature of these obligations depends for instance on the extent that the State has jurisdiction or otherwise exercises effective authority, power, or control over either the perpetrator or the victim (or the victim's rights), or exercises effective control over the territory on which the victim's rights are affected, or

114 F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (2002) 61, 78. Cited in Bulto (n 113 above) 257.

115 As above 257.

116 TS Bulto 'Towards rights-duties congruence: extraterritorial application of the human right to water in the African human rights system' (2011) 28 *Netherlands Quarterly of Human Rights* 504.

117 As above.

118 As above 505.

> whether the State engages in conduct which could reasonably be foreseen to result in an unlawful deprivation of life. In any event, customary international law prohibits, without territorial limitation, arbitrary deprivation of life.[119]

The General Comment further developed the extra-territorial scope of the right to life in the Charter by saying:

> States must hold to account private individuals and corporations, including private military and security companies, that are responsible for causing or contributing to arbitrary deprivations of life in the State's territory or jurisdiction. Home States also should ensure accountability for any extra-territorial violations of the right to life, including those committed or contributed to by their nationals or by businesses domiciled in their territory or jurisdiction.[120]

Some text in the African Charter may point to the existence of extra-territorial application of the African Charter. For example, the texts in Article 21(4) which urges States to 'individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.' And 22(2), which says that: 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development' is akin to text in Article 2(1) of ICESCR. As pointed above, the expression 'individually and collectively' suggests that a State's action to realise the rights guaranteed in the Charter abroad can both be exercised by an individual State or by a number of States acting collectively, for example, the AU or the Regional Economic Communities. Furthermore, both the ESCR committee and the ICJ agree that the ICESCR imposes some degree of extra-territorial obligations. This can also provide an inspiration to the understanding and interpretation of the Charter.

Additionally, there is an example of the Charter's clear extra-territorial application in Article 23 of the Charter which bestow on everyone the right to national and international peace and security and makes reference to the Charter of the United Nations' principles of solidarity and friendly relations reaffirmed by that of the then OAU which shall govern relations between States. To strengthen this principle, the Charter urges States parties to ensure that their territories are not used for subversive activities, such as terrorist activities, by any individual enjoying the right of asylum against his country of origin or any other State.[121]

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119 General Comment no. 3 on the African Charter on human and peoples' rights: the right to life (Article 4), adopted during the 57th ordinary session of the African Commission on human and peoples' rights held from 4 to 18 November 2015 in Banjul, the Gambia, para. 14.

120 As above para 18.

121 Article 23(2) of the African Charter.

Protecting the right to national and international peace and security will require collective action by State parties through the AU to instil peace and security which is necessary for the enjoyment of human rights in any State. The Protocol relating to the Establishment of the Peace and Security Council of the African Union has the mandate, decided by the Assembly, to 'intervention, on behalf of the Union, in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity,' including human rights violations;[122] 'institute sanctions whenever an unconstitutional change of government takes place in a member state, as provided for in the Lomé Declaration;'[123] as well as 'examine and take such appropriate action within its mandate in situations where the national independence and sovereignty of a member state is threatened by acts of aggression, including by mercenaries'[124] among others.

International cooperation and collective action are necessary to implement the extra-territorial application of human rights. Article 58 of the African Charter provides an insight to the importance of international cooperation and collective action to the protection of human rights in any African State. Article 58(1) state:

> When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.

Upon receiving such report from the Commission, the Assembly may then invite the Commission to 'undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.'[125] This will guide the actions that the Assembly may take. Although this action points to collective action and in practice it is rarely applied, it is also a subset of extra-territorial obligation.

Another provision of the African Charter which suggests the presence of extra-territorial application could be found in Article 27(1) of the Charter which states that 'every individual shall have duties towards his family and society, the state and other legally recognized communities and the international community'; and Article 27(2) also provides that 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.' The expressions

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122 Article 7(e) of The Protocol relating to the Establishment of the Peace and Security Council of the African Union.
123 As above Article 7(g).
124 As above Article 7(o).
125 Article 58(2) of the African Charter.

'other legally recognised communities' and 'international community' are unselective as to the duty holder.[126] These provisions imply that persons, including legal persons, 'ought to exercise their rights with due regard to the rights of other individuals and peoples wherever they may be.'[127] In view of this, it could be asserted that transnational corporations in Africa that violates the rights of individuals in their host countries may be held responsible by their home countries, as part of the home country's obligation to protect.[128] An example of how the home country can do this is by establishing applicable judicial mechanisms to hold such corporations responsible for violating human rights abroad.[129]

4.3.4.1 The jurisprudence of the African Commission on Human and Peoples' Rights on the extra-territorial application of the African Charter

The African Commission has been presented with the prospects of deliberating on allegation of human rights violations by some African States on another States' territory. In one of the earliest cases of the African Commission, *D. R. Congo v. Burundi, Rwanda and Uganda*,[130] as earlier mentioned, the DRC alleged that the forceful occupation of its territory, the massacre and incineration of its people and the systematic looting of the underground riches of the regions controlled by the armed forces of Burundi, Rwanda and Uganda constitutes a violation of Articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the African Charter. The applicants requested the Commission to:

> Declare that [t]he violations of the human rights of the civilian population of the eastern provinces of the Democratic Republic of Congo by Rwanda, Uganda and Burundi are in contravention of the relevant provisions of the African Charter on Human and Peoples' Rights cited above; and Examine the communication diligently, especially in the light of Article 58 (1) & (3) of the Charter with a view to producing a detailed, objective and impartial report on the grave and massive violations of human rights committed in the war-affected eastern provinces and to submit it to the Assembly of Heads of State and Government of the Organisation of African Unity.[131]

The African Commission finds the forceful occupation of its territory, the massacre and incineration of its people and the systematic looting of the underground riches of the regions and other severe human rights abuses perpetrated while the respondent States' 'armed forces were still in effective occupation of the

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126 The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System, a report prepared by South African Institute for Advanced Constitutional, Public, Human Rights and International Law (2010) 36.

127 As above.

128 As above.

129 As above.

130 African Commission on Human and Peoples' Rights, Communication No. 227/99 (2003).

131 As above para 10.

eastern provinces of the Complainant State reprehensible and also inconsistent with their obligation.'[132] The African Commission found the respondent States in violation of Articles 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter.

The Commission admitted the DRC's case even though it was an act establishing human rights violations outside the boundaries of any of the respondent States. The extra-territorial nature of the human rights violation did not dissuade the Commission from finding the respondents States responsible for the act; neither did the respondent States raise any objection to the Commission's consideration of alleged violations of human rights outside its borders.

4.4 CONCLUSION

This chapter has revealed that States can affect the enjoyment of human rights outside their territories and should be held accountable for their actions when it violates human rights in other States. It is clear that States have an obligation to protect human rights abroad through international cooperation and collective actions.

Scholars, Commissions and Committees have read the term 'jurisdiction' in human rights law to include a legal relationship between State and individual. There subsists jurisdiction under international law in different ways for different purposes. Therefore, jurisdiction as territorial-based has to be set apart from jurisdiction resulting from non-territorial elements. Jurisdiction as territorial-based grants the State the power, authority or competence of to impose and apply regulatory laws within its territory. However, jurisdiction under international human rights law is assumed where the State possess effective control over an individual irrespective of whether he is under its territory or outside its territory.

Some treaties used the jurisdiction clause to define the scope of its application such as the ICCPR and the ECHR and as we have seen, the term jurisdiction is used to define the scope those treaties to apply extra-territorially. Yet, there are other treaties that have no jurisdiction clause such as the ICESCR, DRTD and the African Charter but have provisions, which require the States to protect human rights including RTD in other States through international cooperation and collective action. This chapter finds that Article 2(1) of the ICESCR, Article 1(3) of the UN Charter, Article 1 of the African Charter, the African Commission's

[132] As above para 79.

General Comment on the right to life and the jurisprudence of the African Commission points to the application of extra-territorial human rights obligation.

CHAPTER FIVE

THE LEGAL FRAMEWORK FOR EU'S EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS

5.1 INTRODUCTION

This chapter will consider if the EU as an international organisation has an obligation to respect human rights in its external relations. The EU has developed into a leading global player as can be seen in its growing membership, the relationships it promotes with other States and in the wide-ranging treaties and bilateral agreements it has entered into with other States and international organisations. The EU is progressively becoming a highly successful regional body that is a model for other regional bodies to follow. The EU's membership enlargement process plays a role in the political and economic reforms of the potential member countries. The EU demands that some necessary conditions are fulfiled to qualify as a member State. Some of these conditions are good governance, improving the rule of law, human rights, economic reform and improving their capacity to adopt and implement the accumulated legislation, legal acts, and court decisions, which constitute the body of the EU Law.

Undoubtedly, the promotion and protection of human rights is a key aspect of the EU's mission. The EU is a party to the UN Convention on disability rights, and more recently, the Paris Agreement - The United Nations Framework Convention on Climate Change (UNFCCC). The impact of the EU's promotion and protection of human rights on the international system is worthy of consideration. In this chapter, the question what is the legal basis for EU's extraterritorial human rights obligations will be answered. It will examine EU's nature, structure and competence as well as its human rights policies especially with sub-Saharan Africa, the tools and instrument employed by the EU to promote human rights and EU's contributions to sub-Saharan African countries capacity to develop human rights values. In this chapter, the historical development and the legal basis for EU's extra-territorial human rights' obligations will be examined under the provisions of the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the EU Charter on Fundamental Rights and Freedoms (EU Charter), and under the UN Charter.

5.2 THE NATURE AND STRUCTURE OF THE EUROPEAN UNION

Before examining the nature and structure of the EU it is imperative to distinguish between the EU and the Council of Europe (CoE). The CoE and the EU promote the same fundamental values based on human rights, democracy and the rule of law. However, they are distinct bodies that execute different but complementary roles.[1] The CoE is the oldest intergovernmental organisation in Europe, comprising of 47 countries including some countries, for example, Azerbaijan, Russia, Turkey and Ukraine who are not members of the EU. It brings together countries from across Europe to deliberate and decide minimum standards on a wide range of areas as well as monitor its implementation by Member States.[2]

The CoE started in 1949 as an alliance of ten Western European States, with the objective of promoting human rights and fundamental freedoms.[3] After the fall of the Berlin Wall the membership of the CoE grew rapidly to comprise the growing democracies of Central and Eastern Europe. Most of the Member States of the CoE are also members of the EU, for example, France, Germany, Italy and the United Kingdom (although the UK may soon be out of the EU). The CoE and EU are quite similar in that they both use the same flag and the same anthem.[4]

5.2.1 European Union as an international organisation

An international organisation is an organisation that encourages voluntary cooperation and coordination among its members.[5] Inter-state cooperation has been one of the defining features of world politics after the Second World War. Many international organisations has spawned through which States work together on common or shared interests such as promoting peace, encouraging trade, sharing ideas, and addressing shared problems such as illegal immigration, environmental decline, cross-border crime, and financial regulations.[6] States have found it more efficient to create international organisations where representatives

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1 See 'The Council of Europe and the European Union: different roles, shared values' http://www.coe.int/en/web/portal/european-union

2 As above.

3 See Article 3 of Statute of the Council of Europe of 1949.

4 The flag containing twelve gold stars on a blue background was initially accepted as its official insignia by the CoE in 1955, and afterward adopted by the EU in 1986. Beethoven's 'Ode to Joy' was first adopted by the CoE in 1972 and again by the EU in 1986.

5 J McCormick *The European Union: Politics and Policies* (2011) Palgrave Macmillan 14.

6 As above.

of the States can work together to manage joint programms, gather data and monitor the progress of international agreements.[7]

International organisations could either be an intergovernmental organisation and/or a supranational organisation.[8] An intergovernmental organisation (IGO) consists of States that encourages voluntary co-operation and coordination among its members, the IGO has no independent power or authority, it is instead the meeting place of representatives of the Member States who pursue States interest while paying less attention to the broader interests of the community of States represented.[9] Resolutions and agreements reached in IGOs are however not enforceable and the Member States stay independent. The perilous feature of an IGO is that the Member States do not surrender any of their powers or sovereignty to the IGOs.[10]

Contrary to an IGO, Member States of a supranational organisation can surrender their powers or authority in specific areas to the organisation so as to promote the common interest of all the States. The Member States must obey resolutions and agreements reached by a supranational organisation.[11] In most cases, there exist courts to determine when violations have occurred.[12]

According to McCormick, elements of an IGO and a supranational organisation exist in the EU; the EU therefore, is partly an intergovernmental organisation and partly a supranational organisation.[13] As an IGO, the EU is a forum within which Member States negotiate in an attempt to reach unanimity, and where every decision is reached by the representatives of the Member States.[14] For example, the Member States of the EU co-operate to articulate common foreign policy and security policy such as peacekeeping, human rights, democracy, aid to non-State members and financial aspect of defence. In these areas, the EU Member States maintain their authority and autonomy.[15] Likewise, we can find an element of

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7 As above.

8 See 'Extension: What are International Organizations? http://carleton.ca/ces/eulearning/introduction/what-is-the-eu/extension-what-are-international-organizations/ (accessed 13 February 2017).

9 As above. See also McCormick (n 5 above) 23.

10 McCormick (n 5 above) 23.

11 As above.

12 As above.

13 As above 24.

14 As above 23.

15 See 'Extension: What are International Organizations?' http://carleton.ca/ces/eulearning/introduction/what-is-the eu/extension-what-are-international-

a supranational organisation in the EU when Member States surrender to its executive bodies the power to make decisions on behalf of the Member States and in the interest of the EU generally.[16] For example, the executive bodies of the EU makes decisions above the level of the Member States in the areas of custom and single market, agricultural policy, trade policy, EU citizenship, asylum policy and immigration policy.[17]

5.2.2 The historical evolution of the European Union

The Treaty of Paris

The evolution of the EU can be traced to the establishment of the European Coal and Steel Community (ECSC) in April of 1951 under the Treaty of Paris.[18] The ECSC was signed by six nations, (France, Germany, Italy, Belgium, Netherlands and Luxemburg) seeking to unite Western Europe during the period of the Cold War.[19] Europe had come out from a second devastating World War II (1939-1945) and had become fully aware of the dangerous incongruity that nationalist enmity had led the continent into. It became evident the need for a European integration so as to restructure the European political and economic cataclysm.[20] The first step towards European integration in the post-war period was made by the former British Prime Minister Winston Churchill in 1946, during his celebrated speech at Zurich University (Switzerland).[21] However, the foundation for the establishing of the European Community was laid by the French Foreign Minister, Robert Schuman. In a speech on 9 May 1950 [22] motivated by Jean

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organizations/ (accessed 13 February 2017).

16 McCormick (n 5 above) 23.

17 See 'Extension: What are International Organizations?' (n 15 above).

18 See 'The first Treaties' http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.1.pdf (accessed 13 February 2017).

19 N Nuget *The Government and Politics of the European Union* (2006) Palgrave Macmillan 37.

20 See 'The history of the European Union: the European citizenship' http://www.historiasiglo20.org/europe/anteceden2.htm (accessed 13 February 2017).

21 In his speech, Winston Churchill declared, 'I wish to speak to you today about the tragedy of Europe. (...) Yet all the while there is a remedy which, if it were generally and spontaneously adopted by the great majority of people in many lands, would as if by a miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and as happy as Switzerland is today. What is this sovereign remedy? It is to recreate the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe. (...) The first step in the recreation of the European Family must be a partnership between France and Germany.'

22 In which he said, 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements, which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries. With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation

Monnet's vision that 'technical functional integration could lead to political transformation,'[23] Schuman recommended that France and Germany as well as any other European State who wish to join them should pool together their coal and steel resources. Schuman sought that France, Germany and other European States move away from the haunt of war in Europe towards economic integration.[24]

The Treaty of Paris laid the foundation of the ECSC by creating a supranational institution known as the High Authority, a Common Assembly, a Council of Ministers, a Court of Justice and a Consultative Committee.[25]

In addition to the ECSC institutions, the Treaty of Paris created a framework of rules that may perhaps be used to support the competitive nature of the coal and steel market. Part of this framework included: Banning cartels, eliminating subsidies, labor policy and foreign relations.[26] Although, Schuman may not have gotten all he wanted, the Treaty of Paris did establish structures for Europe's coal and steel industries. His plan was the first step to a united Europe;[27] he reasoned that the ECSC would basically and promptly create that blend of interest that could be the leaven from which a broader and deeper union may grow.[28]

The Treaties of Rome

Six years following the adoption of the Treaty of Paris, the Treaties of Rome were also adopted by the six founding members of the ECSC, initiating the creation of European Economic Community (EEC) and the European Atomic Energy Community (EAEC), which were based, with some modification, on the ECSC.

The opinion of Robert Schuman and Jean Monet which is that a more enhanced co-operation between the European Member States would reduce or eliminate the possibility of another war between them is in tandem with that of Paul-Henri Spaak of Belgium who equally thought that the possibility of war would

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of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe (...)'

23 K Alter & D Steinberg 'The theory and reality of the European Coal and Steel Community' (2007) *Buffet Center for International and Comparative Studies Working Paper Series* No. 07-001 2.

24 See The history of the European Union: the European citizenship' http://www.historiasiglo20.org/europe/anteceden2.htm (accessed 13 February 2017).

25 See Article 7 of the Treaty of Paris.

26 Alter and Steinberg (n 23 above) 4.

27 As above.

28 As above.

not be a treat if all of Western Europe agree to more co-operation.[29] In June 1955, representatives from France, Germany, Italy, Belgium, Netherlands and Luxemburg met in Messina, Italy under the chairmanship of Paul-Henri Spaak, where two proposals for a general Common Market and a European atomic energy authority was put forward. The creation of the Common Market was intended to promote tariff-free trade within the Common Market Zone.[30] Paul-Henri Spaak believed that the creation of the Common Market Zone would have four key benefits:

- a vast zone in Europe would be created that would have the same trading policy;
- such a zone would challenge the economic muscle of the United States;
- the strength of combined resources would bring about expansion and greater prosperity; and
- there would be a rise in the standard of living for those who lived within the common market.[31]

Although the meeting in Messina did not reach an agreement on the duty to be charged by Member states of the Common Market zone on products imported into the zone from non-member States and no agreement was reached on a common agricultural policy for Member States of the Common Market zone, the meeting indicated that there was an objective to expand on what had been started by the ECSC.[32]

On 25 March 1957, following the Messina Conference France, West Germany, the Netherlands, Belgium, Italy and Luxemburg signed the Treaty of Rome. The treaty came into force on 1 January 1958 and the Common Market zone transformed into the European Economic Community (EEC) in which trade by Member States inside the EEC was free of tariffs. The Treaty of Rome, which established the EEC, affirmed in its preamble that Member States were 'determined to lay the foundations of an ever closer union among the peoples of Europe'. Thus, the Member States explicitly avowed the political objective of a liberal political integration. The notion behind this policy is that costs would be low and the general public within the EEC would be at advantage, therefore improving their standard of living.[33]

The EEC Member States agreed to disassemble all tariff barriers within a 12 year transitional period; this meant complete free movement of goods, people, capitals and services.[34] The free commercial exchanges

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29 CN Trueman 'The Treaty of Rome' http://www.historylearningsite.co.uk/britishpolitics/thetreaty-of-rome/ (accessed 20 February 2017).

30 As above.

31 As above.

32 As above.

33 As above.

34 See 'The history of the European Union: the European citizenship' http://www.historiasiglo20.org/europe/traroma.htm (accessed 20 February 2017).

brought economic success leading to the reduction of the transitory period and in July 1968 all tariffs among the EEC States were abolished.[35] Simultaneously, a tariff was introduced for all goods coming from non EEC Member States.[36]

Another important agreement built into the Treaty of Rome was the establishing of a 'Common agricultural policy' (CAP).[37] Basically, the CAP created a free market of agricultural products within the EEC. The CAP established a framework that assured adequate incomes to European farmers and evading competition from non-Member States' products by guaranteeing agricultural prices.[38]

Finally, the Treaty of Rome created four institutions – a Commission, a Council of Ministers, a European Parliament and a European Court of Justice. These institutions were responsible for fashioning closer cooperation on a variety of economic and trade matters from agriculture to overseas aid, commerce to taxation.[39]

The Maastricht Treaty

The Maastricht Treaty (also called the Treaty on European Union) came into force on 1 November 1993. The Maastricht Treaty, which left quite a lot of lasting legacies for the future of European integration, was established by Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom.[40]

The Treaty of Maastricht indicated an important advance in the evolution of European development and integration process. It expanded and justified ideas proposed in the earlier Single European Act of 1986.[41] The Treaty of Maastricht created the European Monetary Union (EMU) and the Treaty on European Union

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35 As above.

36 As above.

37 See Article 38 of the Treaty of Rome.

38 See 'The history of the European Union: the European citizenship' http://www.historiasiglo20.org/europe/traroma.htm (accessed 20 February 2017).

39 See 'Treaty of Rome' http://civitas.org.uk/content/files/TR.1.Treaty-of-Rome.pdf (accessed 20 February 2017).

40 See 'Maastricht Treaty: everything related to Euro & Dollar http://www.euro-dollar-currency.com/maastricht_treaty.htm (accessed 20 February 2017).

41 The Single European Act (SEA) was the leading key amendment of the Treaty of Rome. The Act outlined an objective for the European Community to create a single market by 31 December 1992, and codified European Political Cooperation, the precursor of the European Union's Common Foreign and Security Policy. It came into effect on 1 July 1987, under the Delors Commission. See http://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eec-to-single-european-act/, see also Moravcsik A' Negotiating the Single European Act: national interests and conventional statecraft in the European Community' (1991) Winter https://www.princeton.edu/~amoravcs/library/sea.pdf

(TEU), which is considered to be its noted achievement and which led to the creation of the core pillars of the EU and the institution of the single currency.[42]

The EU created by the Maastricht Treaty was given some powers, which were categorized into three groups and were generally called 'pillars'.[43] The first pillar comprised of the three European Communities - the ECSC, EURATOM, and the EEC. This pillar provides a framework where the member States transferred sovereignty to the EU; the EU institutions now exercised powers in the areas governed by the Treaty.[44] The first pillar the EU dispensed with the economic, monetary, and trade policies that it encounters on a regular basis. The Treaty abolished the unanimity-voting pattern within the Council of Ministers and established a voting by qualified majority on issues that falls within the first pillar.[45] Thus the EU became more reinforced at the expense of the Member States for the reason that it reduced a single State's capacity to veto policy proposals that it does not agree with.[46]

In the second pillar the EU had the mission of designing and applying a common foreign and security policy through intergovernmental methods.[47] The objectives of the second pillar were:

> to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; to strengthen the security of the Union in all ways; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.[48]

The third pillar deals with cooperation in the spheres of Justice and Home Affairs. Its aim is to provide the people with a high level of safety in the area of freedom, security and justice. It covered the following areas:

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42 See http://www.e-ir.info/2011/02/26/why-is-the-maastricht-treaty-considered-to-be-so-significant/ (accessed 22 February 2017).

43 See 'The Maastricht and Amsterdam Treaties' http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf (accessed 24 February 2017).

44 As above.

45 See 'Strengthening The Union: The Maastricht Treaty' https://iuwest.wordpress.com/2011/12/14/strengthening-the-union-the-maastricht-treaty-3/ (accessed 24 February 2017).

46 As above.

47 'The Maastricht and Amsterdam Treaties' http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf (accessed 24 February 2017).

48 As above.

> rules and the exercise of controls on crossing the Community's external borders; combating terrorism, serious crime, drug trafficking and international fraud; judicial cooperation in criminal and civil matters; creation of a European Police Office (Europol) with a system for exchanging information between national police forces; controlling illegal immigration and common asylum policy.[49]

In the second and third pillars voting pattern is by unanimity, showing the fact that States were not ready to relinquish their sovereignty in these policy areas. While the Lisbon Treaty later reformed this pillar structure, the Maastricht Treaty for the first time officially expanded the EU's competence on foreign policy and police and judicial cooperation, confirming the enduring aspiration among some Member States to establish a political Union as well.[50]

The Maastricht Treaty also created distinction within the Member States. For example, it allowed the UK and Denmark to opt out of the Euro currency zone.[51] Some argued that this distinction created a 'multi-tiered EU' that detracted from the sense of unity that has been the objective of the EU.[52] Notwithstanding these fears, many of the changes made by the Maastricht Treaty have been improved upon by succeeding treaties.

Treaty of Amsterdam

The Treaty of Amsterdam, officially known as the Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, was signed on 2 October 1997, and entered into force on 1 May 1999. It made significant changes to the Treaty of Maastricht, which was signed in 1992.

Under the Treaty of Amsterdam, Member States decided to transfer some powers to the European Parliament across various areas, these includes legislating on immigration, adopting civil and criminal laws, foreign and security policy (CFSP), as well as applying institutional changes for growth as new Member States join the EU.[53]

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49 As above.

50 See 'Strengthening The Union: The Maastricht Treaty' https://iuwest.wordpress.com/2011/12/14/strengthening the-union-the-maastricht-treaty-3/ (accessed 24 February 2017).

51 As above.

52 As above.

53 See Part one 'Substantive Amendments' of the Treaty of Amsterdam 1997.

The Treaty of Amsterdam made some major changes regarding the institutions. For example, the Co-decision system, relating to the European Parliament and the European Council was reformed in terms of scope; the Parliament now plays a greater role.[54] The Parliament has the power to; more efficiently set out the Commission's policy guidelines and select members of the Commission with help from the national governments. This way, the Commission becomes more politically accountable especially to the European Parliament.[55]

The Treaty of Amsterdam established a common area of freedom, security and justice. All activities connected to 'free movement of persons; controls on external borders; asylum, immigration and safeguarding of the rights of third-country nationals; and judicial cooperation in civil matters' were brought under the legal framework of the first pillar by the Treaty.[56] To actualise this, the Schengen Agreement and Convention were incorporated into the Treaty. United Kingdom, Ireland and Denmark (Denmark latter joined Schengen in 1996) opted out of the Schengen Agreement retaining their right of exercising controls on people's movement in and out of their borders.[57]

Debuting in the Treaty of Amsterdam is the EU's resolve to respect human rights. The Article 6 of the treaty affirms:

> 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
>
> 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
>
> 3. The Union shall respect the national identities of its Member States.
>
> 4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

The Treaty of Amsterdam clearly assured that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, values which are shared by the

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54 As above, see also 'The Treaty of Amsterdam' http://testpolitics.pbworks.com/w/page/20734325/The%20Treaty%20of%20Amsterdam (accessed 25 February 2017).

55 As above.

56 See 'The history of the European Union: the European citizenship' http://www.historiasiglo20.org/europe/amsterdam.htm (accessed 25 February 2017).

57 As above.

Member States. To this effect, European Council, in 1998, decided to begin drafting a Charter of Fundamental Rights.[58] It was considered that the fundamental rights had better be fortified in a Charter so as to promote awareness of these rights among the people.[59] On 7 December 2000 the Charter of Fundamental Rights was solemnly proclaimed and ratified by the European Parliament, the Council of Ministers and the European Commission.

The Treaty of Amsterdam was criticized mainly in the areas of democratic shortfall, and the seeming insufficiency of its reforms. The democratic deficit was perceived because negotiations prior to the signing of the treaty were mostly between governments and States, there was no public involvement, and moreover, the negotiations were held behind closed doors.[60] Furthermore, the Europeans Parliament's power was not extended into sufficient areas. These concerns were to be addressed in upcoming revisions of the treaty - the Treaties of Nice and the Lisbon treaty.

Treaty of Nice

The Treaty of Nice was signed on 26 February 2001 about three and a half years after the signing of the Treaty of Amsterdam. It reformed the institutional structure of the EU to endure eastward expansion (of Member States - Poland, Hungary, Lithuania, Latvia, Estonia, Slovenia, Slovakia, Czech Republic, Malta and Cyprus) and to give a renewed drive to the process of integrating Europe.[61]

The Intergovernmental Conference (IGC)[62] made changes to the Treaty of Amsterdam regarding four major institutional matters: - the change in the decision-making processes from unanimity to qualified majority, the improved cooperation of certain Member States, the weighting of votes and the size and the composition of the Commission and the Parliament.[63]

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58 As above.

59 As above.

60 As above.

61 I Bache and S George '*Politics in the European Union'* (2006) Oxford University Press 190 – 193, See also http://www.europedia.moussis.eu/books/Book_2/2/2/4/?all=1 (accessed 25 February 2017).

62 The IGC 'is the formal procedure for negotiating amendments to the founding treaties of the European Union. Under the treaties, an IGC is called into being by the European Council, and is composed of representatives of the member states, with the Commission, and to a lesser degree the Parliament also participating.' See https://en.wikipedia.org/wiki/Intergovernmental_Conference (accessed 27 February 2017).

63 See 'Summary of the treaty of Nice' http://europa.eu/rapid/press-release_MEMO-03-23_en.htm (accessed 27 February 2017).

The Treaty of Nice expanded the qualified majority voting to new areas, and in so doing increased the role the European Parliament play in the co-decision making processes with the Council.[64] It strengthened and expedited the 'enhanced cooperation'[65] of some Member States. The Treaty of Nice also reformed the weighting of the votes of each Member State in the Council.[66] It introduced a population component into the voting procedure by stating that:

> When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. If that condition is shown not to have been met, the decision in question shall not be adopted.[67]

The Lisbon Treaty

The Lisbon Treaty made amendments to the Maastricht Treaty known in updated form as the Treaty on European Union (TEU), and the Treaty of Rome known in updated form as the Treaty on the Functioning of the European Union (TFEU).[68]

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64 See 'The Treaty of Nice' http://www.europedia.moussis.eu/books/Book_2/2/2/4/?all=1 (accessed 27 February 2017).

65 'The Treaty of Amsterdam created the formal possibility of a certain number of Member States establishing enhanced cooperation between themselves on matters covered by the Treaties, using the institutions and procedures of the European Union. Although these provisions had never been used, the European Council considered it necessary to revise them with a view to making them less restrictive in the context of the enlargement of the Union to 27 Member States. Enhanced cooperation was not included in the original mandate of the Intergovernmental Conference (IGC) but was formally included by the Feira European Council of 20 June 2000. The Treaty of Nice facilitates the establishment of enhanced cooperation: the right of veto which the Member States enjoyed over the establishment of enhanced cooperation has disappeared (except in the field of foreign policy), the number of Member States required for launching the procedure has changed from the majority to the fixed number of eight Member States, and its scope has been extended to the common foreign and security policy (CFSP). The general provisions applicable to enhanced cooperation have been grouped together in Title VII of the Treaty on European Union (EU Treaty). The provisions on triggering the procedure and on the future participation of other Member States vary across the three pillars.' See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:xy0015&from=EN (accessed 27 February 2017).

66 See http://www.europedia.moussis.eu/books/Book_2/2/2/4/?all=1 (accessed 27 February 2017).

67 See Article 3(4) of the Treaty of Nice.

68 See Article 1 of the TEU (Lisbon Treaty).

Noticeable reforms in the Lisbon Treaty included the change from unanimity to qualified majority voting (QMV) in more policy areas[69] in the Council of Ministers.[70] A change in calculating the QMV to a new double majority,[71] a stronger European Parliament forming a bicameral legislature together with the Council of Ministers, a merged legal personality for the EU and the establishment of a long-term President of the European Council and a High Representative of the Union for Foreign Affairs and Security Policy.[72] The Treaty also declared legally binding, the EU's bill of rights - the Charter of Fundamental Rights.[73] Similarly, debuting in the Lisbon Treaty is the granting of Member States the explicit legal right to exit the EU and the process to do so.[74]

The Lisbon Treaty stated that its aim is 'to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union.'[75] However, antagonists of the Treaty of Lisbon argued that it would centralize the EU, and weaken democracy by 'moving power away' from national electorates.[76] Enthusiasts contend that it introduces additional checks and balances into the EU system, with more powers for the European Parliament and more roles for national parliaments.[77]

The Lisbon Treaty also introduced institutional structures in the EU similar to the previous Treaties designed to promote and defend its values, objectives and interests, the interests of its people and those of

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69 The EU has powers to make decisions specifically in those areas stated in the Treaties. The Lisbon Treaty included more policies areas to the responsibility of the EU. Additionally, qualified majority voting was extended to policy areas that required unanimity according to the Nice Treaty. The new areas of qualified majority voting includes: Initiatives of the High Representative for Foreign Affairs; Freedom to establish a business; Asylum; Immigration; Common defense policy; General economic interest services; Freedom of movement for workers etc. see https://en.wikipedia.org/wiki/Voting_in_the_Council_of_the_European_Union#Policy_areas (accessed 27 February 2017).

70 Article 16(4) of the TEU. See also McCormick (n 5 above) 126.

71 A double majority is a voting system where a majority of votes is needed in to two separate criteria. Under the Treaty of Lisbon, any decision taken under this scheme will require the support of at least 55% of the Council of the European Union members who must also represent at least 65% of the EU's citizens. See Article 191(a) of the Lisbon Treaty. See also https://en.wikipedia.org/wiki/Double_majority#European_Union (accessed 27 February 2017).

72 McCormick (n 5 above) 126.

73 See Article 6(1) of the TEU.

74 See Article 50 of the TEU.

75 See Preamble of the Lisbon Treaty.

76 For example, Jens-Peter Bonde, the former Danish Member of the European Parliament . see Bond J 'From EU Constitution to Lisbon Treaty' http://www.tuks.nl/docs/From_EU_Constitution_to_Lisbon_Treaty_april_2008.pdf (accessed 27 February 2017).

77 See generally McCormick (n 5 above).

its Member States.[78] This framework also contributes to ensuring the coherence, effectiveness and continuity of EU policies and actions.[79]

As outlined in Article 13 of the TEU, the EU institutional structure comprises 7 institutions:

- the European Parliament;
- the European Council;
- the Council of the European Union (simply called 'the Council');
- the European Commission;
- the Court of Justice of the European Union;
- the European Central Bank;
- the Court of Auditors.

Each institution's actions are within the limits of its sphere of activity, established in line with the procedures, conditions and purposes contained in the Treaties. The EU activities circle around three main institutions, which have separate roles - European Parliament, the Council of the European Union and European Commission.[80] These three main institutions shall be the focus in the brief analysis below.

The European Parliament, the Council of the European Union and the Commission are supported or assisted by the European Economic and Social Committee as well as the Committee of the Regions performing advisory functions.[81]

The European Parliament is the EU's legislative body and every five years the EU voters elect its members.[82] It performs three major roles. First is legislative, which includes passing EU laws along with the Council of the EU, based on European Commission proposals; 'deciding on international agreements; deciding on enlargements and reviewing the Commission's work programme and asking it to propose legislation.'[83] The second role is supervisory which includes democratic 'scrutiny of all EU institutions;

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78 See 'European institutions' http://eur-lex.europa.eu/summary/glossary/eu_institutions.html (accessed 1 March 2017).

79 As above.

80 See '3 main institutions of the EU' http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IMPRESS+20090525STO56250+0+DOC+XML+V0//EN (accessed 12 June 2018).

81 See Article 13(4) of the TEU. See also http://eur-lex.europa.eu/summary/glossary/eu_institutions.html (accessed 1 March 2017).

82 Article 14 of the TEU. see alsohttps://europa.eu/european-union/about-eu/institutions-bodies/european parliament_en (accessed 1 March 2017).

83 J Peterson & M Shackleton *The Institutions of the European Union* (2002) Oxford University Press 107.

electing the Commission President and approving the Commission as a body. Possibility of voting a motion of censure, obliging the Commission to resign; granting discharge,' for example, 'approving the way EU budgets have been spent; examining citizens' petitions and setting up inquiries; discussing monetary policy with the European Central Bank; questioning Commission and Council and election observations.'[84] Lastly is budgetary which includes 'establishing the EU budget, together with the Council and approving the EU's long-term budget, the Multiannual Financial Framework.'[85]

The Council of the European Union (the Council) is the principal decision-maker or legislative institution of the EU.[86] It is the institution representing the governments of the EU Member States in the EU system.[87] It is composed of national ministers of the Member States and along with the European Parliament creates European laws by examining, amending and adopting EU legislation proposed by the European Commission.[88] The Council represents the general interests of the Member States of the EU, bringing together the 28 ministers of the Member States who meet according to the subjects presently being deliberated.[89] If the subject matter of discussion for the day is on agriculture, then the Member States' ministers in charge of this area will meet and deliberate on the matter. Likewise, if the subject matter of discussion for the day is on transport, then the Member States' ministers in charge of this area will meet and deliberate on the matter.[90] The ministers possess the power to commit their governments to the actions agreed upon in the meetings.[91]

Decision-making within the Council can be in three main processes:

- voting by simple majority: requires 15 votes of 28. The simple majority vote is used very rarely, principally when no other voting system is stipulated in the treaties;
- voting by qualified majority: Most of the decisions are taken by qualified majority. Voting by qualified majority in the Council of the European Union is defined as being equal to at least 55% members of the Council (comprised of at

84 As above.
85 As above.
86 See '3 main institutions of the EU' http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM PRESS+20090525STO56250+0+DOC+XML+V0//EN (accessed June 12, 2018).
87 As above.
88 C Archer & F Butler *The European Union Structure & Process* (1996) Pinter London 41 – 42.
89 See 'Presentation of the Institutions of the European Union' http://en.strasbourg-europe.eu/detailed explanations-about-the-institutions-of-the-european-union,3214,en.html (accessed 5 March 2017).
90 As above.
91 See 'Council of the European Union' https://europa.eu/european-union/about-eu/institutions-bodies/council eu_en (accessed 5 March 2017).

least fifteen of the Members States) and representing at least 65% of the population of the European Union. A blocking minority requires that at least 4 countries vote against the proposal; and

- voting by unanimity: The voting procedure applied to a certain case depends on the topic currently being discussed. For rather "sensitive topics" such as common foreign and security policy, or justice and home affairs co-operation, voting by unanimity is employed.[92]

The European Commission (the Commission) is the central administrative machinery of the EU system; it is in charge of propositioning new EU laws to the Parliament and the Council and if passed, implements them.[93] The Commission also implements EU policies and coordinates EU programs and activities in Europe and the world at large.[94] The Commission comprises of one commissioner from each of the EU Member States whose term is for 5 years, and holds a specific policy portfolio such as education, transports, health, etc. The Commission is led by a President appointed from among them and whose nomination is approved by the European Parliament.[95] Although, the Commissioners are in charge of specific policy portfolio, the Commission always decides collectively on every policy.[96] The Commission negotiates with non-EU members under the scope of the Common Commercial Policy (CCP).[97] Under Article 113 Rome Treaty,[98] the Commission was empowered to act as the EU's negotiator (which includes trade), paragraphs 3 and 4 states:

> Where agreements with third countries need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct the negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

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92 See 'Presentation of the Institutions of the European Union' http://en.strasbourg-europe.eu/detailed explanations-about-the-institutions-of-the-european-union,3214,en.html (accessed 5 March 2017). See also Article 7 of the TEU and Article 354 of the Treaty on the Functioning of the European Union.

93 M Cini 'The European Commission' in A Warleigh *Understanding European Union Institutions* (2002) Routledge 43

94 See '3 main institutions of the EU' http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IMPRESS&reference=20090525STO56250 (accessed 5 March 2017).

95 See 'Presentation of the Institutions of the European Union' http://en.strasbourg-europe.eu/detailed explanations-about-the-institutions-of-the-european-union,3214,en.html (accessed 5 March 2017).

96 As above.

97 The common commercial policy was established by the Lisbon Treaty as an exclusive EU competence where member states cannot do anything on their own.

98 Art. 113 of the Rome Treaty have been amended (and renumbered) by the Maastricht, Amsterdam, Nice and Lisbon Treaties.

The Commission carries out analyses on different aspects of EU trade policy so as to assess the impact of trade on the EU and global economy. The Chief Economist team in Directorate-General (DG) Trade[99] and independent consultants undertakes this analysis with funding from the Commission. This analysis helps in formulating better trade policy.

Since the creation of the European Economic Community in 1958, it has evolved considerably. It has expanded both in its membership and the scope of its policy competence, which has transformed its character in significant ways.

The EU is considered as a great power in the global economy.[100] The EU represents the most liberalised trading bloc in the world with a great deal of experience in abolishing different types of tariffs. This experience has led to it employing different approaches while dealing with different partner countries, for example, the General System of Preferences (GSP) and the General System of Preferences + (GSP+) in dealing with developing countries and the Everything But Arms (EBA) in dealing with the least developed countries. (GSP, GSP+ and EBA are discussed under section 6.6.2 below.)

After so many years of activities in the global context, the EU is now legally represented in almost all countries and frequently relates with governments, businesses, civil societies and other related groups.[101]

5.3 THE EUROPEAN UNION'S EXTERNAL RELATIONS

The EU clearly is not a State such as France or Sweden. It has no President to order military troops to go to war, yet it has thousands of soldiers involved in several peacekeeping missions around the world. The EU has no seat at the UN but it is the strongest exponent of the UN organization. In other capacities, the EU is a direct player. It is the biggest provider of development and technical assistance in the world.[102] It negotiates as one in international trade process. It has participated and led in the negotiation on climate change (Kyoto Protocol) and on the creation of the International Criminal Court (ICC). It pursues the expansion of its values, for example, promotion of democratic values, human rights and abolition of the death penalty by including these values in the bilateral and

99 The Chief Economist team in DG Trade undertakes economic analysis with funding from the Commission to help in formulating a better trade policy.

100 C Bretherton & J Vogler *The European Union as a global actor* (1999) Routledge 67.

101 S Lucarelli & L Fioramonti 'The EU in the eyes of the others – why bother?' in S Lucarelli & L Fioramonti *External perceptions of the European Union as a global actor* (2010) Routledge 1.

102 F Cameron *An Introduction to European Foreign Policy* (2012) Routledge 5.

multilateral negotiations with third countries through the imposition of conditionality on them. These strategies have given rise to the view that the EU is a great actor in international affairs.

It is important to first note that the legal personality of the EU is explicitly recognised under Article 47 of the Treaty on European Union (TEU). This makes the EU an independent body in its own right.

The EU's possession of legal personality suggests that it has the capacity to:

- conclude and negotiate international agreements in accordance with its external commitments;
- become a member of international organisations;
- join international conventions, such as the European Convention on Human Rights, stipulated in Article 6(2) of the TEU.[103]

However, irrespective of the legal personality of the EU, it still has to act within the competence provided under the Lisbon Treaty. The treaties establishing the EC/EU set the limits and agenda of the EU's external relations by conferring upon the EU's various external relation mechanisms[104] certain competences and by detailing the decision-making process. The allocation of the EU's prescribed competences is essential to understanding the nature of the EU's external relations and the relationship between EU's external relations and that of the member states. The competences in EU's external relations have evolved significantly, going from a clear-cut position in the Treaty of Rome to very intricate competences in the Lisbon Treaty. In accordance with the principle of conferral powers, the EU must act within the limits of the competences conferred upon it in the treaties by the member states.[105]

The EU has only the competences conferred on it by the Treaties principle of conferral.[106] Under this principle, the EU Member States confer upon the EU the competence to act and to achieve the objectives provided in the Treaties.[107] The Lisbon Treaty, therefore, confers upon the EU the competence to act in the area of external relations which includes 'the negotiation of trade agreements, and cooperation on

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103 See 'Legal personality of the Union' http://eur-lex.europa.eu/summary/glossary/union_legal_personality.html (accessed 7 March 2017).

104 There are different EU machinery for different aspects of EU external relations such as the Foreign Affairs Council (FAC), Common Foreign and Security Policy (CFSP), Political and Security Committee (PSC), the European External Action Service (EEAS) and so on.

105 S Keukeleire & J MacNaughtan *The Foreign Policy of the European Union* (2008) Palgrave Macmillan 98.

106 'Under this fundamental principle of EU law, laid down in Article 5 of the Treaty on European Union, the EU acts only within the limits of the competences that EU countries have conferred upon it in the Treaties. These competences are defined in Articles 2–6 of the Treaty on the Functioning of the EU. Competences not conferred on the EU by the Treaties thus remain with EU countries.' See http://eur-lex.europa.eu/summary/glossary/conferral.html (accessed 7 March 2017).

107 See 'Division of competences within the European Union' http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Aai0020 (accessed 7 March 2017).

energy, health, climate and environmental issues.'[108] The competences not conferred on the EU in the Treaties will remain with the EU Member States. But note that the competence can be express or implied as indicated by Article 216(1) of the Treaty on the Functioning of the European Union (TFEU),[109] which provides for the EU competence in several situations thus:

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding act of the Union or is likely to affect common rules or alter their scope.

The Lisbon Treaty shed light on the division of competences between the EU and the EU Member States. These competences are divided into three key classes:

- exclusive competences;
- shared competences; and
- supporting competences.

Under the exclusive competences the EU has exclusive powers to make their own laws concerning some areas. The Member States are not allowed to act or make their own laws regarding those areas; the EU Member States are able to act or make their own laws only if authorized by the EU to do so.[110] According to Vooren and Wessel, there are three sub-categories where the EU possesses such exclusive powers:[111] First, exclusive based on the provisions in the EU Treaty. 'This is called a priori exclusivity or policy area

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108 See 'External relations' http://eur-lex.europa.eu/summary/chapter/external_relations.html?root_default=SUM_1_CODED%3D28 (accessed 10 March 2017).

109 Treaty on the Functioning of the European Union (TFEU) is formerly known as the Treaty of Rome or the Treaty establishing the European Community. It is one of two primary Treaties of the European Union, alongside the Treaty on European Union. The Lisbon Treaty amended the TEU and the Treaty Establishing the European Community (TEC). The TEU has kept its previous title while the TEC has been renamed the Treaty on the Functioning of the Union. The two treaties make up the Lisbon Treaty. 'The TFEU forms the detailed basis of EU law, by setting out the scope of the EU's authority to legislate and the principles of law in those areas where EU law operates.' See https://en.wikipedia.org/wiki/Treaty_on_the_Functioning_of_the_European_Union and http://uk.practicallaw.com/2-107-6192?service=ld

110 Article 2(1) TFEU which says thus: 'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts of the Union.'

111 BV Vooren & RA Wessel *EU External Relations Law: text, cases and materials* (2014) Cambridge University Press 101.

exclusivity;' since the EU principal law states that some policy areas are to be exercised wholly by the EU.[112]

Secondly, is the exclusivity that comes from the implementation of internal EU measures. The Member States are excluded from adopting rules, which affect EU internal measures; this is called conditional exclusivity or pre-emption, because the Treaties and the Court of Justice of the European Union (CJEU) case law lay out a number of conditions for the Member States to lose their competence to act.[113]

The third sub-categories where the EU possesses exclusive powers can occur when it is absolutely necessary to achieve EU treaty objectives, without there being internal EU measures. 'This is a small sub-category of conditional exclusivity called exclusivity through necessity.'[114]

Article 3 of the TFEU catalogues the areas in which the EU only can legislate and adopt binding acts. The EU has exclusive competence in the following areas:

- customs union;
- the establishing of competition rules necessary for the functioning of the internal market;
- monetary policy for euro area countries;
- conservation of marine biological resources under the common fisheries policy; and
- common commercial policy;

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.[115]

All of the above listed EU exclusive competences have significant external scope (for example, the EU negotiates economic agreements with most countries or blocks of countries on behalf of the Member States).

The second key class of EU competences is the 'shared' competences; this term covers a number of circumstances where both the EU and its Member States can both act externally in the same policy

112 As above.
113 As above.
114 As above.
115 Article 3(1) and (2) of the TFEU.

area.[116] Article 4 of the TFEU provides a catalogue of areas where the EU and EU Member States shear competence thus:

> 1. The Union shall share competence with the Member States where the Treaties confer on it a competence, which does not relate to the areas referred to in Articles 3 and 6.
> 2. Shared competence between the Union and the Member States applies in the following principal areas:
> (a) internal market;
> (b) social policy, for the aspects defined in this Treaty;
> (c) economic, social and territorial cohesion;
> (d) agriculture and fisheries, excluding the conservation of marine biological resources;
> (e) environment;
> (f) consumer protection;
> (g) transport;
> (h) trans-European networks;
> (i) energy;
> (j) area of freedom, security and justice;
> (k) common safety concerns in public health matters, for the aspects defined in this Treaty.
> 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
> 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

The shared competence can be used in different ways,[117] for example, where Member States action is not allowed if the EU applies the competence. An example is in the area of civil aviation where Member States are only allowed to conclude agreements with a third country where the EU has not concluded its own agreement with the country in question.[118] Shared competences can also apply in cases where the EU has fully deployed a policy, but this does not exclude the Member States from taking action in the same area.[119]

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116 Vooren & Wessel (n 111 above) 102.

117 See Article 2(2) which provides that: 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their competence again to the extent that the Union has decided to cease exercising its competence.'

118 Vooren and Wessel (n 111 above) 102.

119 See Article 4(4) of the TFEU which provides that: 'In the areas of development cooperation and humanitarian aid,

Both the EU and its Member States can deploy full policies in third countries without one limiting the other, for example, in the area of education, while the EU pursues educational programme such as the Erasmus Mundus programme, the Member States can also pursue their own education policy with third countries.[120] Another way in which shared competence can apply is in the case of minimum EU standard, where Member States can adopt more stringent measures, where the EU has adopted minimum harmonization such as in the case of social policy.[121]

The third key class of EU competences is the supporting competences. In this case, the EU can only get involved to support and complement the action of its Member States. Areas in which supporting competences relate to can be found under Article 6 of the TFEU thus:

> The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
>
> (a) protection and improvement of human health;
>
> (b) industry;
>
> (c) culture;
>
> (d) tourism;
>
> (e) education, vocational training, youth and sport;
>
> (f) civil protection;
>
> (g) administrative cooperation.

5.4 THE EUROPEAN UNION'S EXTRATERRITORIAL HUMAN RIGHTS OBLIGATION IN THIRD COUNTRIES

Human rights obligations that apply to the external actions of the EU with third countries can be inferred from the provisions under the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), and the EU Charter on Fundamental Rights and Freedoms (EU Charter).

5.4.1 Extraterritorial human rights obligation under the Treaty on European Union

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the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.'

120 Vooren and Wessel (n 111 above) 102.

121 As above.

Articles 3(5) and 21 of the TEU provide human rights extra-territorial obligations that are binding on the EU. Article 3(5) of the TEU provides that: 'in its relations with the wider world, the Union shall uphold and promote its values … including respect for the principles of the United Nations Charter.' The values of the Union according to Article 2 include respect for human rights. While urging the EU to 'uphold and promote' its 'values' when having dealings with the 'wider world', the TEU used the word 'shall', showing that it intended to create an obligation which is to 'uphold' and 'promote' its 'values'.[122] Additionally, the EU shall 'uphold and promote' other values such as 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights…'[123]. Note that the additional values include the 'sustainable development of the Earth'. The word 'Earth' may imply that upholding and promoting its values will not be restricted to the EU alone but the whole world, giving it an extraterritorial scope.

Article 21(1) of the TEU provides that the international actions of the EU 'shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world.' These principles according to Article 21(1) are 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms … and respect for the principles of the United Nations Charter and international law.'

Additional obligation can be found in the words of Article 21(2), which provides that: 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations.' The reason being to 'safeguard its values, fundamental interests, security, independence and integrity; consolidate and support democracy, the rule of law, human rights and the principles of international law….' The requirement for the EU to 'work for a high degree of cooperation' points to the duty of cooperation which is crucial to the application of extraterritorial obligations relating to economic, social and cultural rights.

Article 21(3) further states that the EU 'shall respect the principles and pursue the objectives set out in 1 and 2 in the development and implementation of the different areas of the Union's external action.' Article 21(3) seems to have defined the obligatory nature of Articles 21(1) by saying that the EU 'shall respect' the principles mentioned in Article 21(1) instead of to 'be guided by' them. Additionally, the expression

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122 L Bartels 'A model Human Rights clause for the EU's International trade agreements' (2014) *German Institute for Human Rights* 15.

123 Article 3(5) of the TEU.

'external action' can be interpreted as EU's internal actions that could have external effects, thereby conferring a duty on the EU to respect extraterritorial human rights while formulating its internal policies.

Cannizzaro[124] argues that the effect of the provisions of Article 3(5) and 21 of the TEU is limited. He thinks that the provisions may not provide adequate legal foundation for EU's extraterritorial human rights obligation. His argument is based on the overarching principle of State sovereignty. He stated that the principle of State sovereignty prevents undue interference by a state on another State However, Cannizzaro ignored the use of the phrase 'respect for human rights' in Articles 3(5) and 21(3) of the TEU. Article 3(5) of the TEU enjoins the EU to uphold its values while dealing with other States. The EU's values, according to Article 2 include 'respect for human rights.' Likewise, Article 21(3) further states that the EU 'shall respect the principles and pursue the objectives set out in 1 and 2.' The principles and objectives include the universality and indivisibility of human rights. Respect for human rights is the least type of human rights obligation;[125] it implies a negative obligation of refraining from conducts that can affect or disturb the enjoyment of rights of individuals[126] and these Articles do not necessarily require the EU to pursue these values and objectives in third countries, doing so may result to interference in the affairs of third countries. In terms of the EU's relations with the wider world, the TEU seems to impose the minimum obligation on the EU not to take actions that would impinge on the rights of anyone abroad. This will include that the EU should refrain from trade policies that could infringe on human rights in developing countries.

5.4.2 Extraterritorial human rights obligation under the Treaty on the Functioning of the European Union

Under part five of the Treaty on the Functioning of the European Union (TFEU) with the heading, 'the Union's external action,' there are more provisions guiding the EU's external actions. Article 205 requires the EU to be 'guided by the principles' contained in 'Chapter 1 of Title V of the Treaty on European Union.' Similarly, Article 207 also request that the EU's external actions regarding 'common commercial policy' (CCP) be conducted in the framework of the 'principles and objectives' in Article 21(1) TEU. In

124 E Cannizzaro 'The EU's human rights obligations in relation to policies with extraterritorial effects: A reply to Lorand Bartels' (2015) 25 *The European Journal of International Law* 1098.

125 Bartels (n 118 above) 17.

126 TS Bulto 'Patching the 'legal black hole': the extraterritorial reach of states' human rights duties in the African human rights System' (2011) 27 *South African Journal on Human Rights* 90.

other words, the EU's trading policy should be tailored in a way that will not obstruct the enjoyment of human rights.

The CCP has been characterised by the goal of liberalization of international trade. As indicated in Article 206 TFEU, 'the Union shall contribute, in the common interest … the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. However, the Lisbon Treaty also places the CCP under that part of the EU's external action to which the general provisions of Article 21(2) TEU apply.[127] EU's trade policy shall therefore be guided by much broader objectives than merely liberalizing trade and investment. The EU will aim to combine achieving economic interests, human rights, political values and other tenets in its trade relations, without showing any prioritization amongst these objectives.

5.4.3 Extraterritorial human rights obligation under the EU Charter

The Charter of Fundamental Rights of the European Union was proclaimed in 2000 by the EU and came into force in 2009 when the TEU entered into force. In Article 6(1) of the TEU, The EU Charter is recognized as having equal value as the EU treaties and the EU is required to recognize the 'rights, freedoms and principles' provided in it. The Charter, contrasting to the ECHR does not provide territorial or jurisdictional conditions and one may wonder if the 'rights, freedoms and principles' contained in it applies to the EU's extraterritorial acts. In Kessing's opinion,[128] the EU Charter has no universal scope. He argues that the EU Charter 'is not a generally applicable human rights convention,' relying on Article 51(1)&(2)[129] in the EU Charter, he maintained that the EU Charter only applies to EU institutions and member States when implementing Union law and not to EU's extraterritorial acts. However, Bartels believes that there are certain signs that the EU Charter may apply to the EU's extraterritorial acts.[130] For example, the European Commission (EC) and the Common Foreign and Security Policy[131] (CFSP) High

127 See Article 21(2).

128 See V Kessing 'Legal factors' in Lassen (ed), 'Report on factors which enable or hinder the protection of human rights' 2014 *Fostering Human Rights among European Policies, Work Package* No. 2 – Deliverable No. 2.1, 44-46.

129 Article 51(1)&(2) states: '1. the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

130 Bartels (n 122 above) 19.

131 The CFSP is the established foreign policy of the EU which concerns mostly defence diplomacy and security. It also

Representative in a joint statement urged the EU to observe the rights laid down in the Charter in addition to the rights enshrined in the ECHR.[132] Likewise, in their resolution on the creation of the European External Action Service (EEAS), the European Parliament made a similar statement saying: 'the EEAS must guarantee full application of the Charter of Fundamental Rights in all aspects of the Union's external actions.'[133] It therefore means that the rights, freedoms and principles' provided in the EU Charter also applies to its external relations.

Recall that Article 3(5) of the TEU enjoins the EU to uphold its values while dealing with other States. The EU's values, according to Article 2 include respect for human rights. Respect for human rights is the least type of human rights obligation;[134] it implies a negative obligation of refraining from conducts that can affect or disturb the enjoyment of rights of individuals.[135] In terms of the EU's relations with the wider world, the TEU seems to impose the minimum obligation on the EU not to take actions that would impinge on the rights of anyone abroad. This will include that the EU should refrain from trade policies that could infringe on human rights in developing countries as implied by Article 207 of the TFEU.

Although, the wordings in the provisions under the TEU, the TFEU, and the EU Charter consistently uses the word to 'respect for human rights' there could be the inference that it requires the EU to fulfil or facilitate human rights in third countries. Under the Maastricht Principles obligation to fulfil, 'all States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially.' This includes the obligation to take steps separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of human rights including in matters relating to bilateral and multilateral trade. This could be achieved through application and regular review of multilateral and bi-lateral agreements with the aim of ensuring that they meet human right standards.

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deals with some areas of the EU's external relations such as Trade and Commercial Policy and funding to third countries.

132 European Commission and High Representative of the European Union for Foreign Affairs and Security Policy Communication on Human Rights and Democracy at the Heart of EU External Action – Towards and More Effective Approach, COM 886 2011 7. See also Hervey, 'The Right to Health in European Union Law' in TK Hervey and J Kenner (eds), *'Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective'* (2003) Hart Publishing 212.

133 European Parliament resolution on the institutional aspects of setting up the European External Action Service 2010 OJC/265E.

134 Bartels (n 122 above) 17.

135 Bulto (n 126 above) 90.

5.5 APPLICATION OF EU EXTRATERRITORIAL HUMAN RIGHTS OBLIGATION IN SUB-SAHARAN AFRICA

The promotion and protection of human rights is a priority in the EU's relations with sub-Saharan African countries.[136] Consequently, the EU thoroughly addresses matters concerning human rights in most bilateral relations with sub-Saharan Africa at all points and will speak against any endeavor to weaken respect for human rights and democracy in sub-Saharan Africa.[137] Since the Maastricht Treaty the EU has shown its commitment to promoting human rights beyond its borders in its human rights discourse.[138] The EU's commitment to promoting democracy and fundamental rights is part of the social, political and economic changes that the countries of Central and Eastern Europe implemented prior to EU accession in 2004.[139]

The EU has employed some tools to promote human rights in sub-Saharan Africa. They are:

5.5.1 The European Union's trade relations with sub-Saharan Africa

The EU uses its trade relations with sub-Saharan Africa as a tool for promoting and respecting human rights, for example, through the Essential Elements Clause (which will be discussed in detail in the next chapter) in the Cotonou Agreement. It came into force in April 2003 and has been revised in 2005 and 2010 in accordance with the revision clause in Article 95 of the Agreement to revise it every five years. Article 9 of the Agreement provides a clause for 'Essential elements regarding human rights, democratic principles and the rule of law, and fundamental element regarding good governance.' It made 'respect for human rights, democratic principles, good governance and the rule of law' as the pillar of the partnership.[140]

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136 EU Strategic Framework and Action Plan on Human Rights and Democracy, Council of the European Union (2012) 11855/12 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 8 October 2015).

137 For example, on the controversial bid by President Blaise Compaoré of Burkina Faso to change the Constitution in 2014 so that he could run for a third term, the EU issued a statement on 30 October 2014 saying: 'We are following very closely the ongoing events in Burkina Faso. The European Union is very concerned about the current situation' and 'calls upon all parties to refrain from the use of violence and engage rapidly in a constructive dialogue. The European Union stands ready to step in to facilitate this process' see http://eeas.europa.eu/archives/ashton/media/statements/docs/2014/141030_01_en.pdf (accessed 8 October 2015).

138 E Szyszczak & A Cygan *Understanding EU Law* (2008) Sweet & Maxwell 337 – 338.

139 As above.

140 See Article 9(2) of the Cotonou Agreement 2010 revised.

The Cotonou Agreement contains a non-execution clause under Article 96. It lays down procedures that will be activated when a party believes that the other party has failed to comply with the essential elements of the agreement.[141] The parties must explore every likely option for discussion under Article 8,[142] 'except in cases of special urgency, prior to commencement of the consultations.'[143] If after dialogue a party thinks that the other party did not accomplish an obligation in the essential element clause, 'it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.' If the consultation fails or is refused, appropriate measures may be taken which may include suspension of aids or the Agreement. What constitute 'appropriate measures' is not spelt out in the Agreement but the measure should not subject the people to undue hardship, for that reason, a party can suspend aid to the government while aid to NGOs as well as humanitarian aid can remain and the measures (suspension of aid to the government) revoked as soon as the violation of the essential element ceases.[144] It should be noted that the Cotonou Agreement recommends that suspension should be a last resort,[145] the dialogue and consultations procedure under Cotonou Agreement is more highlighted than under other human rights clauses, thus placing the taking of appropriate action at the end of the procedure and suspension as the last action except in cases of 'special urgency'. The meaning of 'special urgency' is explained in Article 96(2)(b) of the Agreement as 'exceptional cases of particularly serious and flagrant violations of one of the essential elements that require an immediate action.'

For example, after the coup that ousted President Ange-Félix Patassé of Central African Republic in 2003 led by forces of General François Bozizé and various human rights violations that followed it, the EU condemned the coup and invited the Central African Republic for consultation.[146] The consultation did not lead to a satisfying solution and the EU thereafter embarked on some appropriate measures, which included suspension of economic support until a clear electoral plan is put in place.[147]

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141 The essential elements according to Article 9 are human rights, democratic principles and the rule of law.

142 The condition for having a dialogue among the parties was in the Cotonou Agreement that came into force in 2000, however, the connection between Article 96 and Article 8 was further strengthened in the 2005 and 2010 reviewed Cotonou Agreement.

143 Article 96(1)(b) the Cotonou agreement (2010) revised.

144 As above Article 96(1)(a).

145 As above Article 96(1)(c).

146 L Mbangu 'Recent cases of Article 96 consultations' (2005) Discussion paper no. 64c, *European Center for Development Policy Management* 9.

147 As above.

In 2013 President Bozizé was ousted in another coup by a coalition of rebel groups named Seleka, mostly northern Muslims, with Michel Djotodia, as the coup leader who later became the interim president.[148] Although Djotodia dissolved the Seleka, ex-Seleka fighters continued attacks on Christian communities, which were countered by Christian anti-Balaka.[149] This resulted to an unprecedented humanitarian crisis with over one million internally displaced persons and rampant abuse of human rights. The EU strongly condemned the coup and expressed deep concern on the deterioration of the humanitarian situation in the country and expressed their desire to hold those responsible for human rights abuses accountable for their actions.[150] The EU also called on the parties to respect the Libreville Agreement and on the Economic Community of Central African States and the AU to immediately engage the parties to subdue the present crisis.[151]

Furthermore, in 2013 the EU contributed over €76 million to assistance in the humanitarian crisis in Central African Republic and a further €45 million in January 2014, and additional €23 million in development funds.[152] The EU, in January 2014, also approved the deployment of a 500-600 troop EU Force (EUFOR) operation in the Central African Republic for six months to help secure the Bangui area with the view of handing over to the AU.[153]

In 2002 the EU, in compliance with the provisions of Article 96 of the Cotonou Agreement, began consultations with the ACP side concerning the situation in Zimbabwe.[154] This was as a result of the poor human rights situation in Zimbabwe. From 2000 to 2002 there was prevailing violence, intimidation of the judiciary, restrictions to the right to freedom of expression, harassment of the opposition, particularly

148 European Parliament Research Service, 'Crisis in Central African Republic: The EU Response' http://epthinktank.eu/2014/02/02/crisis-in-central-african-republic-the-eu-response/ (accessed 1 September 2015).

149 As above.

150 Statement by EU High Representative Catherine Ashton on the situation in the Central African Republic March 25 2015, http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/136506.pdf (accessed September 1 2015). See also European Parliament resolution of 12 December 2013 on the situation in the Central African Republic (2013/2980(RSP).

151 As above.

152 European Parliament Research Service, 'Crisis in Central African Republic: The EU Response' http://epthinktank.eu/2014/02/02/crisis-in-central-african-republic-the-eu-response/ (accessed 1 September 2015).

153 As above.

154 Consultations with the ACP side concerning Zimbabwe pursuant to Article 96 of the Cotonou Agreement, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/DOC.69086.pdf (accessed 2 September 2015).

before the 2002 presidential elections.[155] Following the consultations the EU decided to take appropriate measures against Zimbabwe including the suspension of the ACP-EC Partnership Agreement, the suspension of projects and budgetary support, and the signature of the 9th EDF National Indicative Programme, which did not affect assistances to humanitarian operations.[156]

On 9 March, Itai Dzamara, a Zimbabwean journalist, political activist and leader of the Occupy Africa Unity Square, a campaign against the government of President Robert Mugabe, was abducted by unidentified five men believed to be State security forces in an unmarked vehicle and has not been seen or heard from since then.[157] The EU delegation in agreement with the EU Heads of Mission in Zimbabwe issued a statement on 9 September 2015 expressing deep concern about the little or no progress in this case and emphasised that 'it is the responsibility of the Zimbabwean authorities to ensure that justice is served.'[158]

In their resolution on Zimbabwe, the EU also strongly condemned the continuous violation of human rights, comprising 'political intimidation, harassment and arbitrary arrest of human rights activists,' the forced disappearance of human rights defender Itai Dzamara and asked for his immediate and unconditional release and advised the government of Zimbabwe to restore the rule of law, democracy and respect for human rights and to 'take all necessary measures to find Mr. Dzamara and bring all those responsible to justice.'[159]

Following the Darfur crisis and the worsening situation of human rights in Sudan, the EU, in a declaration condemned the attacks by the Janjaweed militias on villages and centres for the Internally Displaced

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155 As above.

156 Proposal for a COUNCIL DECISION on adapting and extending the period of application of the appropriate measures first established by Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement /* COM/2012/026 final - 2012/0012 (NLE) */ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012PC0026 (accessed 2 September 2015).

157 Zimbabwe: Where is Itai Dzamara? http://www.dailymaverick.co.za/article/2015-09-11-zimbabwe-where-is-itai-dzamara/#.ViAdu0qwGBY (accessed 12 October 2015).

158 Local EU Statement on the abduction of Itai Dzamara, http://eeas.europa.eu/delegations/zimbabwe/documents/press_corner/news/2015/20150910-local-eu-statement-on-the-abduction-of-itai-dzamara_en.pdf (accessed 12 October 2015).

159 European Parliament resolution on Zimbabwe, the case of human rights defender Itai Dzamara (2015/2710(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-20150474&language=EN (accessed 12 October 2015).

Persons (IDPs), and called on the Sudanese government to stop the carnages.[160] The EU, in a declaration, supported the decision of the International Criminal Court's arrest warrant against Sudan's President Omar Hassan Al-Bashir concerning his suspected involvement in crimes against humanity and war crimes in Darfur.[161] The EU reiterated its unrelenting obligation towards Sudanese citizens and calls on all parties to increase their determinations in in search of a long-lasting political resolution to the war in Darfur.[162]

After the arrest of Pastor Yat Michael of the South Sudan Presbyterian Evangelical Church on 21 December 2014, by the NISS and detained indefinitely at the high security Kober Prison in Khartoum after conducting a church session for condemned the sale of the church property and the treatment of the Christians in Sudan and the arrest of Pastor Peter Yen for protesting the arrest of Pastor Micheal. The European Parliament condemned the arrest and called on the Sudanese government to ensure their unconditional release and pay compensation to the victims.[163]

H.E. Ambassador Maurizio Enrico Serra, Permanent Representative of Italy to the United Nations Office in Geneva, reiterated EU's concern for the human rights situation in Sudan in the European Union's Statement on human rights at the 27th session of the Human Rights Council in Geneva on 16 September 2014. He pointed out that there are substantial humanitarian and human rights abuses of the people of Sudan which include 'gender-based violence, extrajudicial killing of protesters, continued use of arbitrary detention and torture, restrictions on the media and violations of the right to freedom of religion or belief.' He further stated that 'we therefore support the establishment of an effective mechanism to monitor and report on the human rights situation in Sudan.'[164] The EU called for accountability for perpetrators of such acts, extension of the independent expert's mandate who will assess, verify, and report on the situation of human rights. The Independent Expert in his report recommended for the provision of adequate technical

160 Declaration by the president on behalf of the European union on the situation in Darfur (Sudan) 6750/04, P 26/04, Brussels, February 25, 2004.

161 Declaration by the Presidency on behalf of the European Union following the ICC decision concerning the arrest warrant for President Al-Bashir, 7200/1/09 REV 1 (Presse 55), Brussels, 6 March 2009, http://europa.eu/rapid/press-release_PESC-09-29_en.htm (accessed 4 September 2015)

162 As above.

163 European Parliament resolution on situation of two Christian pastors in Sudan (2015/2766(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B8-2015-0715+0+DOC+XML+V0//EN&language=en (accessed 13 October 2015).

164 See 'UN Human Rights Council calls on Sudan for independent inquiry' https://www.dabangasudan.org/en/all news/article/un-human-rights-council-calls-on-sudan-for-independent-inquiry (accessed 18 May 2018).

assistance and capacity building to the Sudanese government by the international community, civil society organisations and international humanitarian agencies working in the country.[165]

In March 2011, following a military mutiny in Guinea-Bissau in April 2010, the EU opened article 96 consultations with the country.[166] The government of Guinea-Bissau responded positively which the EU noted. However, A *coup d'état* in April 2012 meant that the situation did not improve and the EU stopped providing support directly to the government.[167] As a result, Guinea-Bissau took a major step towards restoring democracy and constitutional order by conducting free, peaceful and credible legislative and presidential elections in 2014, which was considered by the EU and international observers as free and credible. This led to the withdrawal of the appropriate measures under article 96 initiated by the EU in 2011.[168]

These examples show that the EU has used the features in trade agreements to respect and protect human rights extraterritorially. The goal of the procedures outlined under Article 96 is to return to a normal relationship between the parties. If no agreement is reached, it gives the party, which initiated the process, the legal basis for suspending the Cotonou Agreement and leverage to take measures regarding cooperation projects and development assistance. Article 96 does not specify exactly what action should be taken if no agreement is reached at the end of the process, it merely refers to 'appropriate measures', thus leaving the door open to relatively serious sanctions that can take wide-ranging forms and be adapted to different situations. Accordingly, Article 96 therefore allows officials substantial liberty. Therefore, once the EU invokes Article 96, it stirs controversy; the African governments sometimes feel they will be introduced into an unspecified yet unavoidable process, which they cannot oppose.

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165 See 'UN Expert's human rights report on Sudan; EU extremely concerned' http://www.sorrisoperilsudan.it/index.php/en/cosa-facciamo-2/advocacy/entry/973-un-expert-s-human-rights report-on-sudan-eu-'extremely-concerned' (accessed 18 May 2018).

166 P Dunay et al., 'The role of human rights in the EU's external action in the Eastern Partnership, the Southern Neighbourhood and in Sub-Saharan Africa', (2016) FRAME Deliverable 6.3, https://doi.org/20.500.11825/113 (accessed 17 May 2017) 275.

167 As above.

168 As above.

5.5.2 Human rights dialogues with sub-Saharan Africa countries

The EU engages in human rights dialogues with the sub-Saharan Africa countries in accordance with the guidelines on human rights dialogues with third countries adopted in 2001,[169] as well as the political dialogue under Article 8 of the Cotonou Agreement. The dialogue with third countries is a EU's instrument for implementing its external policy on human rights. It discusses questions of mutual interest and enhances cooperation on human rights as well as to register EU's concern at the human rights situation in the sub-Saharan Africa country concerned and attempts to improve the human rights situation in that country. The agenda for the dialogues would include 'the signing, ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms' among others.[170] Under Article 8 of the Cotonou Agreement a regular, comprehensive and deep political dialogue is outlined. The dialogue covers all aims and objectives contained in the Cotonou Agreement including *inter alia*, child labour, or any type of discrimination, and shall also include a consistent assessment of the progresses in the area of respect for human rights, democratic principles, the rule of law and good governance. An example of the human rights dialogue is the AU-EU human rights dialogue, which originated from the 2007 Joint Africa-EU Strategy.[171] It focuses on general human rights issues, for example, the death penalty, women's rights and the migrant's rights.[172] Another human rights dialogue exist within the Morocco-EU Association Agreement signed in 1996, it is held on different levels, including ministerial, senior and expert levels.[173] The dialogues between 2006 and 2014 offer a comprehensive view of the situation in Morocco. It shows that, generally, Morocco has become more progressive towards human rights issues and is moving towards strengthening its democratic institutions.[174] Similarly, political dialogue has been on going between the EU and ECOWAS where the parties dialogue on a range of issues such as political and institutional developments, peace, security and stability, good governance, rule of law and consolidation of democratic structures, and Country-specific situations of peace and security.[175]

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169 EU guidelines on human rights dialogues with third countries, http://eeas.europa.eu/human_rights/guidelines/dialogues/docs/16526_08_en.pdf (accessed 11 October 2015).

170 As above.

171 Human rights concepts in EU Human Rights Dialogues, FRAME Work Package No. 3 – Deliverable No. 5, 59.

172 As above.

173 As above 46.

174 As above.

175 https://eeas.europa.eu/sites/eeas/files/19th_eu-ecowas_political_dialogue_meeting_at_ministerial_level.pdf.

5.5.3 Funding for human rights and democracy projects

The EU provides financial assistance for projects that supports human rights protection in sub-Saharan Africa through its European Instrument for Democracy and Human Rights (EIDHR)[176] and European Development Fund (EDF). The EIDHR was established in 1994 and further reviewed in 2006[177] with the aim of supporting and promoting democracy and human rights in non-EU countries including the sub-Saharan Africa. Its budget of €1.104 million for the period 2007-2013 was expended largely on supporting activities such as global campaigns against the death penalty, the rehabilitation of torture victims' and support for free media organisations.[178]

The EDF was established by the Cotonou Agreement, which provides resources for the development cooperation.[179] The EU Member States fund the EDF every five years; a specific committee with its own financial rules manages it. We are currently in the 11th EDF which runs between 2014 and 2020, with funds amounting to €30.5 billion.[180]

5.5.4 The European Union's contributions to sub-Saharan African countries capacity to develop human rights values

The EU and the AU have sustained an annual interchange since 2008 known as Human Rights Dialogue aimed at finding areas of joint cooperation and bringing members of the dialogue up to date on regional initiatives.[181] The Human Rights Dialogue has identified some areas for further cooperation some of which are: freedom of association and assembly; abolition of the death penalty and children affected by armed conflict.[182]

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176 See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 27 August 2015).

177 What is The European Instrument for Democracy and Human Rights, http://avrupa.info.tr/eu-and-civil-society/what-is-the-european-instrument-for-democracy-and-human-rights-eidhr.html (accessed 10 October 2015).

178 European Instrument for Democracy & Human Rights, http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/european-instrument-for-democracy-human-rights/ (accessed 10 October 2015).

179 See Financial Protocol, Annex I of the Cotonou Agreement revised 2010, par. 2.

180 See European Development Fund (EDF) http://eurlex.europa.eu/legalcontent/EN/TXT/?uri=URISERV:r12102 (accessed 2 October 2015).

181 The Africa-EU Partnership 2 UNIONS, 1 VISION, http://www.africa-eu-partnership.org/areas-cooperation/democratic-governance-and-human-rights/achievements-and-milestones (accessed 4 September 2015).

182 As above.

The Office of the Legal Counsel (OLC) – an office that provides legal advice to the Commission, receives financial aid from the EU to support the ratification of the AU legal instruments. With regards to this the OLC in 2011 organized workshops and conferences on the process of ratifying AU legal instruments for the sub-Saharan African countries.[183]

The EU has supported the sub-Saharan African countries in the area of strengthening their electoral process by providing Election Observation Missions as well as providing support to reinforce the ability of the AU's Democracy and Electoral Assistance Unit by providing financial support to recruit staff members to ensure free and fair elections.[184]

The EU also supports the African Peer Review Mechanism (APRM) - a self-monitoring mechanism of the African nations that came into existence in 2003, aimed at encouraging the adoption of policies, and practices that lead to political decisions – by contributing €2 million since 2009 through the United Nations Development Programme (UNDP) managed Trust Fund supporting the APRM Secretariat.[185]

In 2010 Human Rights Dialogue created the Africa-EU Platform for Dialogue on Governance and Human Rights to help enhance dialogue on Democratic Governance and Human Rights, aimed at promoting human rights and democratic values and strengthening cooperation in this area for concrete improvements in the lives of the citizens of the sub-Saharan African nations among others.[186] The Platform has formulated recommendations that have been incorporated into political process relating to freedom of expression.[187]

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183 The Africa-EU Partnership 2 UNIONS, 1 VISION, summit edition 2014, http://www.africa-eu partnership.org/sites/default/files/documents/jaes_summit_edition2014_en_electronic_final.pdf (accessed 8 September 2015) 16.

184 As above.

185 As above.

186 Africa-EU partnership, achievements and milestones, http://www.africa-eu-partnership.org/areas-cooperation/democratic-governance-and-human-rights/achievements-and-milestones (accessed 8 September 2015).

187 As above.

5.6 DOES THE EU HAVE EXTRATERRITORIAL HUMAN RIGHTS OBLIGATIONS REGARDING RTD?

Having established that the TEU and the TFEU imposes the least (that is to respect) extra-territorial human rights obligation on EU, which is to refrain from any act that could impede human rights in third countries, the next question is whether the EU has the extraterritorial human rights obligation regarding RTD. In chapter two of this thesis, it was pointed out that although the RTD is a controversial right under international law, the RTD is binding under the African human rights system. The EU recognises the RTD as a right. For example, the EU delegation to the United Nations at the 2005 world summit reiterated their commitment to the realisation of the RTD. Similarly, in the EU contribution on the RTD to the United Nations in April 2012, the EU delegates maintained that the RTD need the full realisation of all Human Rights, including civil, political, economic, social and cultural rights, and they welcomed the report of the HLTF on the RTD.

One could argue that, based on the principle of the universality, indivisibility and interconnectivity of human rights and the fact that Article 21(1) of the TEU provides that the international actions of the EU 'shall be guided by the principles which have inspired its own creation', among the principle being the universality and indivisibility of human rights, the EU could be bound by the DRTD. But it is important to note that the 1993 Vienna declaration where a consensus on this principle was reached is not a treaty and does not have a binding force.

Moreover, the provisions of the 1969 Vienna Convention on the Law of Treaties in Article 26 entreating State parties to respect the doctrine of *pacta sunt servanda* meaning that only parties to a treaty are bound by it, could place an obstacle.

Although the EU is not a party to the RTD neither is it a party to any international treaty except the UN Convention on the Rights of People with Disabilities (UNCRPD) which it ratified in 2011, the DRTD is one of the human rights documents that contain rights which the EU has the minimum extraterritorial obligation to respect in compliance within Article 2 of TEU, which requires the EU to respect human rights when having dealings with the 'wider world'

Furthermore, as earlier indicated in chapter two above, it was shown that other instruments under international human rights law such as the ICESCR and ICCPR can be interpreted as giving rise to obligations on States equivalent to those that is contained in the DRTD which is binding on all Member

States including all the EU Member States who are also parties to the ICESCR and ICCPR. The Committee on Economic, Social and Cultural Rights (CESCR) has noted 'that nearly all of the substantive articles 1–15 of the [ICESCR] touch upon the substance of the right to development, most notably Article 11 on the right to an adequate living standard'.[188] From the CESCR observation, all of the obligations imposed by the ICESCR and ICCPR on States and the international community apply to all measures associated with implementing the RTD. Although not all the component of the RTD is adequately present in the ICESCR and ICCPR, for example, the effects of globalisation and the increasing rise of powerful non-State actors, such as international organisations and transnational corporations on RTD are not captured in the two International Covenants. States are increasingly finding difficulties in protecting the human rights of their citizens (for example right to participate) because of the decision-making power and influence of other powerful States, intergovernmental organisations and transnational corporations.[189] All the current members of the EU are State parties to the two International Covenants and are therefore bound by them. As earlier stated, Member States are asked to take steps 'individually and through international…co-operation.' The expression 'through international…co-operation' suggests that a State's action to respect the rights can both be exercised by an individual State or by a number of States acting cooperatively, for example the EU. Since the EU represents the interest of all twenty-eight members, its actions must be reflective of the member's human rights obligation regarding the two International Covenants. The EU's legislation and actions has to be made compatible with the International Covenants. The EU is obliged to respect, protect and fulfil the human rights enshrined in them. This is in compliance with Article 6 (3) of the TEU, which provides:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The International Covenants is part of the constitutional traditions common to the Member States of the EU and constitutes general principles of the EU's law. Moreover, as an IGO, the EU is subject to

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188 Committee on Economic, Social, and Cultural Rights, Submission in Follow-up to Human Rights Council Resolution 25/15 'The e Right to Development', www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForceWrittenContributions.aspx. (accessed 22 May, 2017).

189 A Vandenbogaerde 'the right to development in international human rights law: a call for its Dissolution' (2013) 31 *Netherlands Quarterly of Human Rights* 204.

international law, this notion is generally accepted in the decisions of international judicial bodies.[190] Wellens notes that:

> it would be incorrect to assume that the conduct of international organisations escapes the governance of the international political and legal order altogether… There is a growing awareness they have to account for their acts, actions and omissions.[191]

This position guarantees that States are not able to avoid their obligations under international law just by conducting their businesses through IGOs. To think otherwise would render international law needless.

Recall also that it was shown in Chapter two (2.7) of this research that the RTD is established under international customary law as a source of international law, which creates international legal obligations. The EU is expected to respect international human rights obligations under treaties or customary international law. In *Air Transport Association of America*, the CJEU said this:

> Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.[192]

The EU is required to 'contribute to the strict observance … of international law'; however, the meaning is not clear. But at the very least it will include refraining from acts that will violate international laws. In the next section, the trade policy of the EU towards Africa and its impact on RTD will be examined.

5.7 CONCLUSION

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190 ECJ, Case C–286/90, Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp. [1992] ECR I–6019, para. 9; Case C–162/96, A. Racke [1998] ECR I–3655, para. 45; International Court of Justice, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, [1980] ICJ Rep 73, at 89–90.

191 K Wellens 'Remedies against International Organisations' (2002) *Cambridge studies in international and comparative law* Cambridge University Press 1.

192 Case C–366/10, *Air Transport Association of America* [2011] ECR I-13755 par 101 and 123, cited in Bartels L 'The EU's human rights obligations in relation to policies with extraterritorial effects' (2014) 25 European Journal of International Law.

This chapter pointed to the important structures and nature of the EU's architecture and the main institutional actors in this area. It began with the unusual nature of the EU and then turned to its historical evolution. The EU is not a State nor is it a classic international organisation, it is a unique kind of international organisation possessing a legal personality, which is distinct from that of its Member States. The EU enjoys legal personality and competence to act as a legal person in external relations. Its competence is governed by the principle of conferral provided under Article 5 of the TEU. The EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights with the aim to promote peace, its values and the well-being of its peoples. The TFEU is the body of law that governs EU external relations and actions in the world both internally and externally.

Human rights obligations that apply to the external actions of the EU can be found in the TEU, the TFEU, and the EU Charter. The TEU urges the EU to uphold and promote its values, including respect for the principles of the United Nations Charter when dealing with the wider world. Furthermore, the TFEU directs that the EU's trading policy should be designed in a way that will not impede the enjoyment of human rights. Therefore, the EU treaties impose on the EU the minimum extra-territorial obligation to respect human rights including RTD, which is recognised globally, and binding in Africa. This chapter has shown that the human rights dialogues, funding for human rights and democracy projects and capacity to develop human rights values are all examples of the different ways which the EU promote human rights overseas.

CHAPTER SIX

THE ECONOMIC PARTNERSHIP AGREEMENTS AND ITS EFFECT ON THE RIGHT TO DEVELOPMENT IN SUB-SAHARAN AFRICA

6.1 INTRODUCTION

The preceding chapter examined the EU's structure, nature and competence as well as its human rights policies especially with sub-Saharan Africa. The tools and instrument employed by the EU to promote human rights and EU's contributions to sub-Saharan African countries capacity to develop human rights values was also considered. It also examined the basis for EU extra-territorial human rights obligation and found that the TEU, TFEU and the EU Charter impose the minimum obligation to respect human rights when dealing with third countries. This chapter will look at the potential application of EU's human right obligation with third countries in trade relations with sub-Saharan Africa and will attempt to answer the question, to what extent are the EPAs reflective of the EU's extra-territorial human rights obligations regarding RTD?

This chapter will first consider the narratives on trade and development. Trade is closely associated with development, it supports developing countries to grow and helps to eradicate extreme poverty. This chapter will briefly consider the WTO and its mandate, which includes creating a trade environment more conducive for developing countries. Finally, it will examine the EPA's effect on RTD in sub-Saharan Africa.

6.2 INTERNATIONAL TRADE

International trade is the exchange of goods or services between countries. It encourages competition and more competitive pricing in the market. As a result, products become more affordable for the consumer and more available globally. International trade affects the economy of the world as dictated by supply and demand.[1]

[1] GV VIjayasrI 'The importance of international trade in the world' (2013) 2 *International Journal of Marketing, Financial Services & Management Research* 112.

The industrial revolution heralded the development of modern international trade as we know it today just as other categories of the modern world economy.[2] The industrial revolution heralded massive technological developments in transportation and communications such as steamships, railroads, telegraphs, automobiles, airplanes, and much more, which gradually cut down the cost of moving goods, capital and movement of people around the world. The industrial revolution is an important force that has shaped international trade since the early 1800s.[3] For more than 200 years, the growth in international trade has added to the development of the world economy, the increase in investment and technology and the growth of international specialization.[4] Whereas technological and structural dynamisms contribute to the growth of international trade, political dynamisms also play a crucial role. The First World War doused the liberal economic order and the widespread international trade in the 1800s thereby putting the first period of international trade under pressure.[5]

A notable impact of the First World War was the changing government's roles on economics. The war led to States involvement in world economies.[6] After the First World War, national governments were pressured to continue to manage economies so as to arouse employment, reconstruction and better social justice, which often were opposed to the call for international economic cooperation. In addition to the economic challenges, there also existed financial challenges prompting countries to re-impose trade barriers and other restrictions to cut down imports and improve their balance of payments.[7] Consequently, protectionism, new trade barriers and economic nationalism increased leading to the 'collapse of the value of international trade by two-thirds between 1929 and 1934 and ultimately contributed to the chain of events that led to the great depression.'[8]

As was commonly acknowledged at the time, one cause of that great depression was the beggar-thy-neighbour policies that countries pursued.[9] This policy is an attempt to tackle a country's problems such as balance of trade, inflation, and unemployment by practices that tends to worsen the economic interest

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2 World trade report 2013 'Trends in international trade' https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf (accessed 28 August 2017) 46.

3 As above.

4 As above.

5 As above, 51.

6 As above.

7 As above.

8 As above.

9 ES Joseph 'Biggar-thyself versus beggar-thy-neighbor policies: the dangers of intellectual incoherence in addressing the global financial crises (1999) 66 *Southern Economic Journal* 5.

of its trading partners. It usually takes the form of restricting imports by quotas or by raising tariffs, currency devaluation that makes imports more expensive and exports cheaper, or currency appreciation that reduces domestic inflation but makes its product more expensive in the importing countries.

Many countries throughout history have used beggar-thy-neighbour policies. This policy was prevalent during the Great Depression of the 1930s, when countries anxiously attempted to prevent their domestic industries from dying.[10] Following the World War II, Japan introduced a model of economic development that tilted toward protecting its local industries from foreign competition until they were ready to compete with foreign industries.[11] Similarly, Post-Cold War China followed this model by introducing policies to minimize foreign influence on local producers.[12] With the advent of economic globalization in the 1990s, beggar-thy-neighbour policies lost much of their appeal. Although some countries still use such policies so as to realise economic gains at the expense of their neighbours, some of those gains are exhausted when their neighbours react by implementing similar policies.

International trade, in many ways has gone through a process of re-globalization since the Second World War, restarting and considerably fast-tracking the integration path that was unexpectedly de-railed by the First World War and the economic and political pandemonium that followed.[13] Certainly, the world economy experienced faster growth after the Second World War than it did before the First World War, introducing a 'golden age' of extraordinary prosperity.[14] Though, there is a factor that contributed to the difference between the first and the second age of globalization. While the version before the First World War was complemented by only elementary efforts at international economic cooperation, the version after the Second World War was complemented by clear design and built on a foundation of new multilateral economic institutions known collectively as the Bretton Woods system comprising the international Monetary Fund (IMF), the World Bank and the General Agreement on Tariffs and Trade (GATT).[15]

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10 See https://www.britannica.com/topic/beggar-thy-neighbor-policy (accessed 28 August 2017)
11 As above.
12 As above.
13 World trade report 2013 (n 2 above) 52.
14 As above.
15 As above.

6.3 THE FRAMEWORK OF INTERNATIONAL TRADE LAW

Essential to international trade is the legal and institutional framework within which the administration of international trade is being conducted.[16] International trade has been in existence since the creation of the first political units in Asia and North Africa.[17] As stated earlier, after World War I, international economic relations collapsed due to the lack of an organised coordination of economic policies. The legal dimensions of the framework are expressed in international economic law and institutional structures, the General Agreement on Tariffs and Trade (GATT)[18] and the World Trade Organisation (WTO).[19] GATT is a set of multilateral trade agreements that has been in effect since 1948 aimed at eliminating or reducing quotas and tariff duties among the contracting countries.[20] GATT exists as the foundation of the WTO.[21] The existing WTO agreements are the inheritance of obligations that nations have freely negotiated with each other under GATT in the decades since 1947.[22] WTO is the single universal international organisation that deals with the rules of trade between countries. Central to it are the WTO agreements, its objective is to guarantee that trade flows efficiently, liberally and with certainty as possible.[23]

The GATT held eight rounds of talks that addressed numerous trade concerns and determined international trade disputes.[24] The last GATT round of talk – the Uruguay Round - ended on 15 December 1993 after

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16 D Shelton 'Protecting human rights in a globalized world' (2002) 25 Boston College International & Comparative Law Review .

17 A Djazayeri 'Main features of world trade law with special focus on the TBT Agreement A guideline' (2012) *Physikalisch-Technische Bundesanstalt* 6.

18 The GATT is a multilateral agreement regulating trade among its members which became law on 1 January, 1948. According to its preamble, the purpose of the GATT is the 'substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis.'

19 The WTO which came into being on 1 January, 1995 implements the agreement reached in GATT, provides a medium for negotiating more cutbacks of trade barriers and for settling policy disputes as well as enforcing trade rules. See https://law.duke.edu/lib/researchguides/gatt/ (accessed June 3, 2017).

20 See GATT, Its Purpose, History, with Pros and Cons https://www.thebalance.com/gatt-purpose-history proscons3305578 (accessed 15 July 2018).

21 As above.

22 The WTO and GATT: A Principled History https://www.brookings.edu/wp content/uploads/2016/07/selfenforcingtrade_chapter.pdf (accessed 15 July 2018).

23 See The WTO https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 15 July 2018).

24 The GATT held eight rounds of talks from April 1947 to September 1986; each one of them had its own noteworthy accomplishments. The first round was in Geneva with 23 countries participating. The main focus during this round was tariffs. Following this round tax concession affecting billions in trade was established. The second round was held in Annecy, France, in April 1949. Again Tariffs was the main focus, and 13 countries were involved. Following this round, 5,000 more tax concessions were exchanged between countries. The third round of GATT was in April 1949, in Torquay, England, involving 38 countries. Almost 9,000 tariff concessions were agreed upon, reducing many tax levels by up to 25%. Geneva once again played host to the fourth round of GATT in January 1956, which for the

seven years of negotiations. Following the Uruguay Round, an agreement was reached among 117 countries to reduce trade barriers and to create more wide-ranging and enforceable world trade rules.[25] The agreement reached in the Uruguay Round - Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (MTN) - was signed in April 1994.[26] Article 1 of the MTN established the WTO with the aim of providing 'the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments.'[27]

Following the Uruguay Round and after the creation of the WTO, another round of talks, called the Doha Round, commenced in November 2001. Its objective was to lower trade barriers among all members of WTO, and thus facilitate increased global trade, especially, to improve the economic growth of developing States. The Doha Round was dedicated to dropping or eliminating subsidies for developed States' agricultural industries.[28] This would allow developing countries to effectively export food produce, which is, among others, their primary product for export. The developing nations would in turn open up

first time included Japan along with 25 other countries. Following the fourth round a $2.5 billion reduction in tariffs across the globe. Again, in September 1960, Geneva hosted the fifth round of GATT in which 26 countries participated. The fifth round resulting in the elimination of an additional $4.9 billion in global tariffs. Four years later, in 1964, 62 countries assembled in Geneva for the sixth round of GATT resulting to about $40 billion of tariff concessions as well as significant discussions concerning the restriction of predatory pricing policies known as dumping. In 1972, in Tokyo where the seventh round of GATT was held, 102 countries achieved $300 billion in worldwide tariff reductions. The eighth round of GATT was held in Uruguay in 1986. The agenda included more topics beyond tariffs; they are intellectual property, agriculture and dispute settlement. The eighth round of GATT led to the creation of the WTO. See http://www.investopedia.com/terms/g/gatt.asp (accessed 3 June, 2017).

25 See 'What is the 'General Agreement On Tariffs And Trade - GATT'?' http://www.investopedia.com/terms/g/gatt.asp (accessed 3 June, 2017).

26 As above.

27 Article 2 of the MTN

28 Each year, the U.S. Federal government subsidizes a wide range of economic activities it wants to promote, such as Cash subsidies; tax concessions and exemptions, credits or deferrals; assumption of risk, such as loan guarantees; Government procurement policies that give more than the free-market price; and stock purchases that keep the company's stock price higher than market levels. These are all considered subsidies because they reduce the cost of doing business and guaranteed farmers a high enough price to remain profitable. This gives them more competitive edge over its counterparts at the international market especially from the developing world. See https://www.thebalance.com/government-subsidies-definition-farm-oil-export-etc-3305788 (accessed 7 June 2017).

their market to services, especially banking services.[29] This would provide new markets to the developed countries' service industries and also modernize this aspect for the developing countries.[30]

However, years after, the Doha Round is effectively in a deep coma or dead.[31] From the beginning, there was no doubt from the point of view of economic experts,[32] that a successful Doha Round would have resulted in considerable economic benefits especially to the developing countries considering that most of its objective was to encourage the growth of trade in developing countries.[33] The Doha Round had some aims favourable to the plight of the developing countries such as more market access on agricultural produce by eliminating export subsidies, cutting distorting domestic support and dealing with non-trade concerns for example, food security and rural development.[34] The elimination of tariffs, which comprise the removal of high tariffs, tariff peaks and tariff increase ('higher tariffs protecting processing, lower

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29 The agreement negotiated many main points, which can be grouped into the following categories. '(1) Agriculture – Reduce subsidies to 2.5% of the value of production for developed countries. That would only be 6.7% for developing countries. Reduce tariffs on food imports. End subsidies for exports; (2) non-agricultural market access - Reduce tariffs for non-food imports; (3) Services - Clarify rules and regulations on foreign-provided services. Developed countries want to export financial services, telecoms, energy services, and express delivery and distribution services. Developing countries want to export tourism, healthcare, and professional service. Countries can decide which services they want to allow. They can also decide whether to allow foreign ownership; (4) Rules - Tighten the rules on anti-dumping. Strengthen prohibitions against launching subsidies to retaliate against another country's subsidies. Focus on commercial vessels, regional aircraft, large civil aircraft, and cotton. Reduce fishery subsidies to cut down on overfishing; (5) Intellectual property - Create a register to control country-of-origin for wine and liquor. Protect product names, such as Champagne, Tequila or Roquefort, that are only authentic if they come from that region. Inventors must reveal the country of origin for any genetic material used; (6) Trade and environment - Coordinate trade rules with other agreements to protect natural resources in developing countries; (7) Trade facilitation - Clarify and improve custom fees, documentation, and regulations. That will cut bureaucracy and corruption in customs procedures. That became an important feature of the Trans-Pacific Partnership; (8) Special and differential treatment - Give special treatment to help developing countries. That includes longer time periods for implementing agreements. It requires that all WTO countries safeguard the trade interests of developing countries. It also provides financial support to developing countries to build the infrastructure needed to handle disputes and implement technical standards; (9) Dispute settlement - Install recommendations to better settle trade disputes and (10) E-commerce - Countries won't impose customs duties or taxes on internet products or services.' See https://www.thebalance.com/what-is-the doha-round-of-trade-talks-3306365 (accessed 7 June 2017).

30 See 'The Doha round of trade talks: the real reason why it failed' https://www.thebalance.com/what-is-the-doha round-of-trade-talks-3306365 (accessed 7 June 2017).

31 DA Gantz *Liberalizing International Trade after Doha Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (2013) 1.

32 See Doha Development Agenda and Aid for Trade an International Monetary Fund and the World Bank report (2005) 2 – 7. A EU study published in 2011 shows significant economic benefits from a Doha deal amount to an increase of world export of $359 billion on an annual basis from libralisation of industrial goods, agriculture and services. See http://trade.ec.europa.eu/doclib/press/index.cfm?id=749

33 As above, 30.

34 See 'Doha Round: what are they negotiating?' https://www.wto.org/english/tratop_e/dda_e/update_e.htm (accessed October 7, 2017).

tariffs on raw materials') and non-tariff barriers, particularly on products of export interest to developing countries.[35] Improving disciplines under the Anti-Dumping and Subsidies agreements, and to develop WTO controls on fisheries subsidies, in view of how important this sector is to the developing countries.[36]

Evidently, the structure of international trade law was shaped principally to function on the economic model and is characterized by an obligation to open markets and trade liberalization. However, it generally did not contemplate other principles of international society, such as human rights and environmental protection.[37] The Uruguay Round agreements that ended with the creation of the WTO extended the reach of the structure of international trade law to include trade-related aspect of intellectual property,[38] trade in services,[39] and trade-related investment measures.[40] Certainly, there are also some reflections of human rights within the international trade legal framework and policies. For example, States are allowed to ban the importation of products manufactured from prison labor.[41]

Additionally, Article XX (a) of GATT allows trade measures necessary to protect public morals. And Article XX (b) of GATT permits measures necessary to protect human, animal or plant life or health. The provision under Article XX of GATT is limited by its opening statement requiring 'that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail.'

GATT's most important principle was that of non-discrimination and reciprocity, where Member States opened their markets equally to one another.[42] As personified in the Most-Favoured Nation clauses (MFN), this means that once a nation and its trading partner had agreed on a tariff reduction, that tariff reduction would automatically be extended to all other GATT member States.[43] MFN is one of the

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35 As above.

36 As above.

37 Shelton (n 16 above).

38 *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994.

39 *See* General Agreement on Trade in Services, Apr. 15, 1994.

40 *See* Agreement on Trade-Related Investment Measures, Apr. 15, 1994.

41 Article XX (e) General Agreement on Tariffs and Trade July 1986. Which states 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … (e) relating to the products of prison labor.'

42 See the preamble of General Agreement on Tariffs and Trade July 1986.

43 See Article 1 of General Agreement on Tariffs and Trade July 1986. 'According to the most-favoured-nation principle, any trade and financial advantages granted by one contracting party to another have to be granted to all member states, immediately and unconditionally (i.e. without asking for reciprocity). This means that customs

principles of the GATT. Under the MFN clauses, if GATT Member State A agrees in negotiations with a third country, which need not be a GATT Member State, to reduce the tariff on product Y to ten per-cent, this similar tariff rate must also apply to all other GATT Member States as well.[44] In other words, if a GATT Member State gives favourable treatment to one State concerning a particular matter, it must treat all Members equally concerning the same matter. It should be noted that MFN is also a priority in the General Agreement on Trade in Services (GATS) under Article 2[45] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under Article 4.[46]

The origin of the MFN clause can be traced back to the twelfth century when Emperor Frederick II of the Roman Empire signed a treaty granting concessions to the citizens of Marseille that had previously only been available to citizens of Pisa.[47] It was more often applied in lots of treaties during the eighteenth and nineteenth centuries.[48] The early MFN clauses were to some degree extensive, they applied to a broad of issues including 'rights, privileges, immunities and exceptions' concerning trade, commerce and navigation, or to 'duties and prohibitions' concerning vessels, importation or exportation of goods, as

tariffs or other fees charged by one country for the import or export of like products have to be identical for all contracting parties.' See Djazayeri (n 17 above).

44 See 'Most-favoured-nation treatment principle overview of rules' http://www.meti.go.jp/english/report/downloadfiles/gCT0212e.pdf 215 (accessed 7 September 2017).

45 Which states 'With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.'

46 Which also states 'With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.'

47 T Cole 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2012) 33(3) *MichiganJournalofInternationalLaw* 544.

48 See 'Most-Favoured- Nation Treatment' UNCTAD Series on Issues in International Investment Agreements II (2010) United Nations Conference on Trade and Development 9. http://unctad.org/en/Docs/diaeia20101_en.pdf (accessed 27 September 2017).

demonstrated by the Treaty of Amity and Commerce between the United States and France (1778) under Article 3(d) which states:

> The Subjects of the most Christian King shall pay in the Port Havens, Roads, Countries, Lands, Cities or Towns, of the United States or any of them, no other or greater Duties or Imposts of what Nature so ever they may be, or by what Name so ever called, than those which the Nations most favoured are or shall be obliged to pay; and they shall enjoy all the Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce, whether in passing from one Port in the said States to another, or in going to and from the same, from and to any Part of the World, which the said Nations do or shall enjoy.

During the twelfth century, the MFN clauses were most times conditional or reciprocal, which means that the concessions by one State were dependent on the beneficiary State granting the same concessions.[49] However, inspired by new efforts of multilateralism, after the World War II, the unconditional approach to MFN clauses rejuvenated in the GATT of 1947, when unconditional MFN treatment became the mainstay of the multilateral trading system.[50]

MFN clauses is considered to have some benefits which includes that it allows, particularly, smaller nations to participate in the advantages that bigger nations often grant to each other, which otherwise, the smaller nations would ordinarily not be influential enough to negotiate on their own.[51] MFN also has internal benefits. It simplifies the rules and makes them more transparent when a nation has one set of tariffs for all nations. Ideally, if MFN status is conferred to all nations, it will eliminate the need to establish complicated and administratively costly rules of origin to decide which country a product must be attributed to for customs purposes. Furthermore, MFN restrains nations from obtaining protectionist measures. For example, country A that produces yoghourt may not be able to lobby for high tariffs on yoghourt to stop cheap imports from developing country B, since the higher tariffs would apply to all nation, the interests of A's primary ally C who is lobbying for higher tariffs might get weakened. Finally, as MFN clauses encourage non-discrimination among nations, they also tend to encourage the objective of free trade generally.[52]

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49 Cole (n 47 above) 545.

50 As above 15.

51 See https://en.wikipedia.org/wiki/Most_favoured_nation (accessed 17 September 2017).

52 As above.

Further, GATT principles are the principle of reciprocity[53] and the principles of liberalization and transparency.[54] However, these principles are subject to exceptions and restrictions. One of the exceptions is made in favour of the developing countries.[55] The Member States shall ignore the principle of reciprocity when negotiating with developing countries.[56] This is in compliance with the principle of solidarity that requires members to take into account the economic interests of other countries, especially developing countries.[57] This concession comes under the Enabling Clause, which mostly permits its developed members to grant trade preferences to developing countries.[58] The Enabling Clause, which is officially called the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries',[59] was adopted in 1979 under GATT and allows developed nations who are WTO member States to provide differential and more favourable treatment to developing countries.[60] The Enabling Clause is the GATT/WTO legal basis for the Generalized System of Preferences (GSP).[61] The GSP provides a leeway for developed countries to provide non-reciprocal preferential treatment to developing countries, for example, low import duties on goods imported from developing countries.[62] Its objective is to encourage the developed member States of GATT to give more

53 'The principle of reciprocity states that a country which takes new steps towards liberalization is in turn granted equivalent privileges by the other WTO member states. Thus, the negotiations have to be conducted according to the principle of reciprocity.' See Djazayeri (n 17 above).

54 'Customs tariffs are not prohibited, but they have to be transparent and shall be removed by way of multilateral negotiations. The customs tariffs of the individual countries are listed. Afterwards, they cannot be raised unilaterally.' See Djazayeri (n 17 above).

55 See generally Articles XIV and XX of General Agreement on Tariffs and Trade July 1986.

56 See Djazayeri (n 17 above) 14.

57 See Article XII(3)(c)(i) General Agreement on Tariffs and Trade July 1986.

58 See Djazayeri (n 17 above) 14.

59 Decision of 28 November 1979 (L/4903)

60 See 'Main legal provisions' https://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm (accessed 7 October 2017).

61 See Paragraphs 1 and 2 of the Decision of 28 November 1979 (L/4903), which provides in part: '1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2. The provisions of paragraph 1 apply to the following: a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences, b) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT; c) Regional or global arrangements entered into amongst less developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.'

62 As above.

market accesses to the product originating from the developing country, thereby stimulation economic growth and promoting the trade development. The enabling clause is therefore, a special exceptional rule. Like almost all developed countries, the EU grants special trade preference to developing countries by way of a GSP (GSP will be discussed latter in this chapter in section 6.6.2).[63]

6.4 INTERNATIONAL TRADE IN SUB-SAHARAN AFRICA

Africa plays a minimal role in the world trade.[64] Out of Africa's share of the 2.4 percent of global exports, sub-Saharan Africa account for just 1.7 percent.[65] Nevertheless for the sub-Saharan Africa countries, world trade in fact plays a major role in their economies. In various parts of sub-Saharan Africa, international trade represents more than 50 percent of gross domestic product (GDP).[66] This implies that most sub-Saharan Africa countries depend on imports, although not sufficiently balanced by equivalent exports.[67] In 'Mozambique for example, trade represents 96 percent of GDP and exports only 26 percent, for Rwanda the figures are 45 percent to 15 percent, Kenya 50 percent to 16 percent.'[68] The position is more balanced in South Africa with 64 percent to 31 percent.[69] Two-thirds of sub-Saharan Africa's imports are finished products, while exports to the rest of the world remain dominated by raw materials; mostly fuels, ores and metals, and agricultural products.[70] Sub-Saharan Africa's GDP growth dropped to its lowest level in more than 20 years, from 5.1 percent in 2014 to 3.4 percent in 2015 and further down

63 For the purpose of granting GSP treatment, it is the developed nations that decide if a country is developing. See report of the Special Group of the Organization for Economic Co-operation and Development (OECD) on Trade with Developing Countries, UNCTAD Document TD/56, 5, which says 'individual developed countries might, however, decline to accord special tariff treatment to a particular country claiming developing status on grounds which they hold to be compelling. Such ab initio exclusion of a particular country would not be based on competitive considerations'.

64 E Schmieg 'Africa's Position in Global Trade- Free Trade Agreements, WTO and Regional Integration' https://www.swpberlin.org/fileadmin/contents/products/projektpapiere/AfricasPositioninGlbalTrade.pdf (accessed 28 March 2017) 1.

65 As above.

66 As above. 'The GDP is one of the primary indicators used to gauge the health of a country's economy. It represents the total dollar value of all goods and services produced over a specific time period; you can think of it as the size of the economy.' See https://www.google.com.ng/?gfe_rd=cr&ei=Oz8pWbWbIeaE8Qfjs6noCg#q=gdp (accessed 27 May 2017).

67 Schmieg (n 64 above).

68 As above.

69 As above.

70 As above.

to 1.5 percent in 2016.[71] This economic condition was due to the crash in commodity prices, for example oil and natural resources since mid-2014 to which most sub-Saharan African economies depend greatly for exports.[72]

The EU still is the biggest single trading partner for Africa.[73] It accounted for over 30% of Africa's global trade in 2015 this however is down from 40% in 2000. Between 2000 and 2015 trade between Africa and Asia grew up to 25%.[74] At the level of individual countries in Africa, China and India are the first and second largest trading partners in 2015 growing from the eighth and ninth largest trading partners in 2000.[75] The United States and France was the number one and second trading nations at the level of individual countries in Africa in 2000 but are now fourth and third, respectively. The major US imports from Africa are oil and commodities, for example, precious stones, cocoa and ores. However, the increased production of oil and gas in the US has seen its imports from Africa continued a downward trend from USD 98 billion in 2010 to USD 22 billion in 2016.[76]

6.5 TRADE LIBERALIZATION IN SUB-SAHARAN AFRICA: DOES ONE SIZE FIT ALL?

As stated above, trade liberalization is a characteristic of the GATT/WTO. It features in most international trade agreements. Trade liberalization is the elimination or reduction of barriers on the exchange of goods and services between nations and it encourages free trade.[77] The removal of barriers includes obstacles such as duties and surcharges, and non-tariff barriers, such as licensing rules, quotas and other barriers.

Trade liberalization is generally believed to be part of the key driving force behind globalisation.[78] Increased movement of goods and services between countries borders is seen as the most visible feature

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71 See World Bank Report 'Economic Growth in Africa is on the Upswing Following a Sharp Slowdown' (April 2017) http://www.worldbank.org/en/news/press-release/2017/04/19/economic-growth-in-africa-is-on-the-upswing-following-a-sharp-slowdown (assessed 29 May 2017).

72 As above.

73 See 'Trade policies and regional integration in Africa' (2017) African Economic Outlook 76.

74 As above.

75 As above.

76 As above.

77 See 'Global Trade Liberalization and the Developing Countries' https://www.imf.org/external/np/exr/ib/2001/110801.htm (accessed 6 June 2017).

78 United Nations Conference on Trade and Development Globalization for Development: The International Trade Perspective (2008) https://unctad.org/en/Docs/ditc20071_en.pdf 92 (accessed 16 November 2018).

of the growing integration of the global economy in recent times.[79] Yet, trade liberalization is as well one of the most contentious part of globalisation.[80] Critics think that trade liberalization can result in exploitation of workers, de-industrialization, loss of jobs as cheaper goods flood the market and marginalization in developing countries as they cannot effectively compete against more established economies or nations; increasing poverty and global inequality; and degradation of the environment.[81] This view has spread even though the basic tenet of mainstream economic analysis is that the benefits of free trade are improved allocation of resources 'and consequent gains in productive efficiency and economic growth.'[82]

The process of the trade reform and subsequent introduction of trade liberalization in sub-Saharan Africa started with the introduction of the Structural Adjustment Programmes (SAPs) of the World Bank and the International Monetary Fund (IMF) in the early 1980s.[83] Trade liberalization was a major element under the SAPs policy, which the World Bank and the IMF wanted the developing countries to implement. Under the SAPs policy, sub-Saharan Africa countries ware inhibited from getting new loans from the IMF and the World Bank through the conditionality of implementing trade liberalization.[84] The IMF and the World Bank held the view that trade liberalization will activate the process of industrialization and the improvement of institutional and human capacities that are vital for economic development.[85]

6.5.1 Effect of trade liberalization in sub-Saharan Africa

Generally, the reduction or removal of trade barriers such as import duties, export duties, quota arrangements and other restrictions is considered by economic experts to stimulate the growth of exports and imports, increased employment, and faster progress in reducing poverty (although there is no record of any African country that have success story based on this model as will be shown in section 6.12

79 E Lee 'Trade Liberalization and Employment' (2005) United Nations Department of Economic and Social Affairs Working Paper No. 5 ST/ESA/2005/DWP/5 1.

80 As above.

81 As above.

82 As above.

83 SM Shafaeddin 'Trade liberalization and economic reform in developing countries: structural change or de-industrialization? (2005) *discussion paper United Nations Conference on Trade and Development* 3.

84 AA Hussien, S Ahmed & M Yousaf ' The impact of trade liberalization on trade share and per capita GDP: evidence from sub-Saharan Africa' (2012) 3i3 *International Journal of Economics and Research* 44.

85 As above.

below).[86] However, others maintain the exact opposite.[87] Advocates of trade liberalization assert that a nation possessing sufficient resources to produce particular goods also possess the competitive advantage to specialize in the production of these goods and be the one to supply to other nations at a lower cost. In response, another nation with specialization on other products or services can also cash in on this principle and trade with the nation with the specialization it does not have, this profits both trading nations.[88] Advocates of trade liberalization also maintain that citizens have the opportunity to choose from many of the imported products and services coming from other countries devoid of tariffs or other trading barriers, with no or partial barriers, products are obtainable at reduced prices which consumers can take advantage of.[89] Furthermore, it creates employment opportunities. As pointed out by the advocates of trade liberalization, demand for goods and services will increase as market expands globally, consequently, more jobs are available for the people in the exporting country.[90] Advocates claim that the economies of the trading nations will grow since they specialize in products in which they have materials abundantly. They can increase productivity and there will be productive competition and they will be able to import products at lower cost, which is good for the economies of these nations.[91] According to Tupy,[92] trade liberalization within sub-Saharan Africa nations could increase trade within them by 54 percent and could account for over 36 percent of all the welfare benefits that they stand to gain as a result of global trade liberalization.

On the other hand, some argue that trade liberalization often benefits the developed countries more than the developing nations especially the sub-Saharan Africa nations. Trade liberalization could be harmful to the sub-Saharan Africa economies that cannot compete favourably under free trade. The infant industries in the sub-Saharan Africa countries need trade protection to help their economies diversify and

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86 See generally R Faini 'Trade Liberalization in a Globalizing World' Discussion Paper No. 1406 November 2004, Forschungsinstitut zur Zukunft der Arbeit Institute for the Study of Labor and O Licandro AN Ruiz 'Trade Liberalization, Competition and Growth' (2010) *Barcelona Economics Working Paper Series Working Paper* nº 436.

87 L Kassim ' The Impact of Trade Liberalization on Export Growth and Import Growth in Sub-Saharan Africa' in M Ncube, I Faye & A Verdier-Chouchane '*Regional Integration and Trade in Africa'* (2015) Palgrave Macmillan 48. See also N McCulloch 'The Basic Links Among Trade, Growth, and Poverty' in The Impact of Trade Liberalization on Poverty Summary of Proceedings from a Conference held on April 15, 2005 https://www.wilsoncenter.org/sites/default/files/ImpactofTrade_low.pdf (accessed 16 November 2018) 13.

88 J Drozdz & A Miškinis 'Benefits and threats of free trade' (2011) 2 *Ekonomia Economics* 42.

89 As above 43.

90 As above.

91 As above.

92 M Tupy 'Trade Liberalization and Poverty Reduction in Sub-Saharan Africa' *Policy Analysis No. 557 December 6, 2005 CATO institute* 1.

to develop new industries.[93] Trade liberalization could also lead to greater exploitation of the environment in sub-Saharan Africa countries. Trading toxic waste to sub-Saharan Africa countries can be common since they have lower environmental laws.[94] Furthermore, trade liberalization increases the dependence of sub-Saharan Africa countries on other developed countries for certain essential products such as food and raw materials, such dependence can be damaging especially during wartime, sanctions or severance of ties as can be presently seen between Qatar and its neighbours, Saudi Arabia and UAE, which have severed ties with Qatar and on whom Qatar depends on for food,[95] and in some African countries such as Libya and Zimbabwe. As shown by Kassim, trade liberalization in Sub-Saharan Africa has led to a faster growth of imports than exports, which implies dependence on developed countries.[96] Opponents of trade liberalization also say that as competition increases some businesses might close down or decide to do business elsewhere, as a result, workers will be displaced, there will be job losses and workers may be paid lower wages.[97]

In a submission at the WTO in its 11 April 2003 Addendum,[98] the US stated that, tariffs constitute an important source of revenue for many governments in developing countries and the removal of tariffs could affect their fiscal stability.[99] Therefore, trade liberalization will eventually result in reduced tax revenue and hence, will raise difficult fiscal issues.[100]

According to the African Trade Policy Centre,[101] trade taxes are a major source of government revenue in sub-Saharan Africa:

> Taxes on international trade are important in Africa because when tax administration is inefficient, governments tend to concentrate on easy to collect taxes such as trade taxes. In Africa as a whole, international trade taxes generated on average 28.2 per cent of total current revenues over the last decade; for Sub-Saharan Africa, the share goes up to 30.5

93 http://www.economicshelp.org/blog/glossary/trade-liberalisation/ (accessed 14 June 2017).
94 As above.
95 http://www.preservearticles.com/201012291888/disadvantages-of-free-trade.html (accessed 14 June 2017).
96 See generally, Kassim (n 87 above).
97 https://greengarageblog.org/12-important-pros-and-cons-of-free-trade (accessed 14 June 2017).
98 World Trade Organization ' Market Access for Non-Agricultural Products Revenue Implications of Trade Liberalization' (2003) TN/MA/W/18/Add.2. Communication from the United States Addendum.
99 As above 1.
100 As above.
101 See generally, African Trade Policy Centre (2004). 'Fiscal Implications of Trade Liberalisation on African Countries' ATPC Work in Progress No.5 http://repository.uneca.org/bitstream/handle/10855/5551/Bib-39542.pdf?sequence=1 (accessed 14 June 2017).

> per cent. This compares to 0.8 per cent for high-income Organisation for Economic Cooperation and Development (OECD) countries, 18.42 per cent for lower medium-income countries, and 22.5 per cent for low-income countries.

Trade liberalization thus leads to a steady drop in the revenue from trade taxes. A study by Urama *et al*[102] found that in spite of all the highlighted gains from trade liberalization, if the ACP countries should cut their tariff on import from EU, 'it will have potential revenue and competition effect'. According to them this may not be in favour of the ACP countries.[103]

In a similar study, after investigating the impact of trade liberalization on tax structure of 97 developing countries including sub-Saharan Africa countries, for the period 1993-2012, Mohammad *et al*[104] found that reduction on tariff rates seem to have an effect on tax structure in these countries.[105] They conclude that:

> It should be noted that because trade liberalization may apply in many forms, its effects differ greatly in feature of liberalization. Trade liberalization in the form of tariff reduction changes the tax composition of developing countries by moving away from international trade taxation and compensating the loss of trade taxes by expanding more taxes from income and domestic goods and services taxes.

In Kasim's opinion,[106] governments could be required to slash public spending in significant areas such as infrastructure, education and health if the implementation of trade liberalization policies reduces total tax revenue. According to Kasim, the steady drop in public spending could impede long- term economic growth and further contribute to internal social problems such as civil protests and riots.[107]

In terms of the effect of trade liberalization on industrialization, Shafaeddin[108] said historical proof on the performance of successful early and late industrializers does not support the trade liberalization hypothesis.[109] He maintained that they had all gone through an infant industry phase in which the

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102 Urama et al, Lost Revenue Due to Trade Liberalization: Can Nigeria recover her own?' (2012) 4 European Journal of Business and Management.

103 As above 135.

104 K Mohammad et al 'The Impact of Trade Liberalization on Tax Structure in Developing Countries' a paper presented at the 1st International Conference on Applied Economics and Business, ICAEB 2015.

105 As above, 281.

106 Kassim (n 87 above).

107 As above.

108 M Shafaeddin 'Trade Liberalization, Industrialization and Development: Experience of recent decades' Keynote speech delivered at the Fourth ACDC (Annual Conference on Development and Change), University of Witwatersrand, Johannesburg, South Africa, April 2010, http://www.networkideas.org/featart/aug2010/Mehdi_Shafaeddin.pdf (accessed 21 June 2017).

109 As above 7.

government intervened through every means, directly and indirectly, to encourage them to grow, after their industries matured, the industrial countries began to liberalize selectively and gradually.[110] In light of Shafaeddin's assertion, asking the sub-Saharan African countries where most of their industries is still at the infant phase to liberalize will have a negative effect on them. A typical example is the effect of trade liberalization on the textile industries in the sub-Saharan African countries. In a study by Olayiwola and Rutaihwa,[111] they maintained that trade liberalization increased the incidence of poverty, unemployment, job security, and social inequalities in Tanzania.[112] The Tanzanian government's decision to liberalise trade and investment policies saw a number of problems in the textile industries. Many industries were closed down in the 1980s, as they could not withstand competition from imported textiles resulting to a reduction of a number of textile firms from 35 in the 1980s to 2 in 1996.[113] Similarly, Gatawa, Aliyu and Musa[114] studied the impact of trade liberalization on Nigerian textile industries and found that trade liberalization had a negative significant impact on textile output in Nigeria. The story of the impact of trade liberalization in Zambia is no different as indicated in a report by Seshamani.[115] While Seshamani acknowledged trade liberalization as a good policy that has been adopted worldwide, he does not support the manner in which it was hastily implemented in Zambia. He concludes that:

> Our findings suggest that generally speaking most closures of our local industries appear to have been caused by opening up of the markets to international imports and also by the stiff domestic competition promoted by trade liberalisation. Consequently, redundancies emanating from liquidations and privatization of parastatal companies contributed to the deterioration in the living standards of the people. As earlier alluded to trade liberalization aimed at creating a competitive and productive economy, which would be driven by private sector initiative with a view to enhance living standards for Zambians. Contrary of these expectations the stakeholders' general view is that since the advent of trade liberalisation the Zambian economy has been characterized by increased hardships among the poor, destruction of infrastructure and hence the environment. The number of firms have been closed is higher than that of the ones that have come on board. Thus, the rate of unemployment has increased resulting in the general decline in the purchasing power of the people. The income gap between the rich and the poor has widened resulting in increased

110 As above.

111 WK Olayiwola and JL Rutaihwa 'Trade Liberalization and Employment Performance of Textile and Clothing Industry in Tanzania' (2010) *International Business Research* Vol. 3, No. 3 Published by Canadian Center of Science and Education.

112 As above 47.

113 As above.

114 NM Gatawa, CU Aliyu and S Musa 'impact of globalisation on textile industries: a case study of some Nigerian industries in Kano metropolis' (2013) 9 *European Scientific Journal* No.2.

115 V Seshamani 'Trade liberalization and its impacts: Zambia case studies' http://www.cutscitee.org/tdp/pdf/case_study-trade_liberalization_and_its_impacts-zambia.pdf (accessed 22 June 2014).

inequality and marginalization of the poor. In summary, poverty has actually increased as opposed to the expected benefits of trade liberalisation.[116]

6.6 THE EPA BETWEEN EU AND ACP: A SNAPSHOT

The EU has advanced a range of mechanisms to protect human rights in trade policy with other States, some of which could be found in multilateral and bilateral trade agreements. The trade-human right connection was emphasised in 2010 in a communication from the European Commission to the European Parliament, the Council of Europe, the European Economic and Social Committee and the Committee of the Regions on Trade, Growth and World Affairs, when the Commission said that EU's goal is to motivate its allies to respect and promote human rights, through trade.[117] One of the areas of EU's relations with Africa is in the area of trade, for decades there has been trade relations between the EU and ACP countries aimed at promoting trade between the parties, sustain growth and reduce poverty. The trade relations are also aimed 'to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS'[118] as well as help ACP countries integrate into the world economy and share in the opportunities offered by globalization.

6.6.1 The Lomé Convention

As noted in chapter one, trade relationship between the EU and ACP countries started in February 1975 when the first Lomé Convention (Lomé I) came into force.[119] The Lomé Conventions covered trade, industrial, financial and technical cooperation. In the word of some commentators, Lomé Conventions 'remained the most far-reaching, elaborate, and complex North-South contractual agreement among its contemporaries.'[120]

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116 As above 14.

117 Communication from the commission to the European Parliament, the council, the European economic and social Committee and the committee of the regions. COM (2010) 612 Trade, Growth and World Affairs.

118 Article 46 of the Cotonou Agreement (2010). (Intellectual property is beyond the scope of this study).

119 Although, cooperation between the European Union (at that time European Community) and Africa, the Caribbean and the Pacific countries (then not yet ACP Group) started in 1957 with the signing of the Treaty of Rome, which gives commercial advantages and financial aid to African the Caribbean and the Pacific countries. The Treaty provided for the creation of European Development Funds (EDFs), aimed at giving technical and financial aid to African countries still colonised at that time. See http://ec.europa.eu/europeaid/where/acp/overview/lome-convention/index_en.htm (accessed 5th June 2014).

120 G Faber 'The Lomé Conventions and the causes of economic growth' (2004) 2. 5th SUSTRA Workshop on

A unique feature of the Lomé Conventions was the non-reciprocal preference for most exports from ACP countries to the then European Economic Community (EEC). This meant that ACP nations could levy any tariffs they desired on EU goods entering into ACP nations without EU applying duties or any restrictions on over 90 percent of goods and merchandise coming from the ACP countries into the EU. The overall evolution of ACP-E.C. trade from 1976 to 1992 showed annual growth in export from ACP countries of 2.8%, In 1992 the European Community imported 17.95 billion Euro in goods and services from the ACP States.[121] When reviewing ACP export performance to the then E.C. market, it is clear that terms of trade would have been much worse without the Lomé regime, this advantage impacted on the RTD of the African people.

ACP countries thus had considerable advantages in trading with the EU. Another characteristic of the Lomé Conventions was the provision of economic assistance to the ACP countries through the European Development Fund (EDF). The EDF manages and disburse funds based on 'need', defined by, per capita income and other criteria.[122] The Conventions also provided two commodity insurance schemes, namely, the Stabilization of Exports (STABEX) in Lomé I and the System of Minerals (SYSMIN) in Lomé II, for ACP countries that were dependent on agricultural and minerals exports. The insurance schemes were designed to help alleviate the economic and budgetary impacts of shortfalls in export revenues from agriculture and minerals.[123]

The Lomé Convention introduced 'respect for human rights, democratic principles and the rule of law' for the first time in the revised Lomé IV in 1995 as essential elements of the Convention.[124] It also provided the non-execution clause in Article 366a which provides that a party can invite another party for discussions if that party thinks that there has been a breach in the fulfilment of the essential elements contained in Article 5, 'with a view to assessing the situation in detail and, if necessary, remedying it.' It further provides that where the discussions fail, the party who initiated the discussions may take necessary steps, 'including, where necessary, the partial or full suspension of application of this Convention to the

European Governance and European Opinions on Trade and Sustainable Development, IFRI, Paris June 3 and 4, 2004. http://www.agromontpellier.fr/sustra/research_themes/ue_governance /papers/Faber.pdf. See also Anne-Marie Mouradian 'The Lomé Convention under threat' http://mondediplo.com/1998/06/08lome.

121 C Cosgrove 'Has The Lomé Convention Failed ACP Trade?' (1994) 48 *Journal of International Affairs* 226 – 227.

122 Faber (n 121 above) 2.

123 As above.

124. Lome Convention IV revised (1995) Article 5.

Party concerned.'[125] The non-execution clause was put into practice, as earlier stated when the democratic principles were disregarded in Niger Republic by a coup d'état in 1996. The EU suspended financial cooperation for six months after which they returned to constitutional order.[126]

6.6.2 General System of Preferences

The EU has also engaged other schemes to provide preferential access for the ACP to the EU market for the economic growth of the poorest countries, for example, the General System of Preferences (GSP), General System of Preferences + (GSP+) and the Everything But Arms (EBA).

The GSP was proposed at the first meeting of the United Nations Conference on Trade and Development (UNCTAD) with a view to supporting the developing nations in their exports and development efforts.[127] The core aims of granting trade preferences to developing countries is to improve their export incomes, promote industrialization, and encourage the diversification of their economies.[128] GSP does not impose any legal obligation on GATT member nations to extend such trade preferences, developed countries can provide trade preferences for developing countries, but they are not legally bound to do so.[129] Consequently, they can continue to grant trade preferences under the GSP unilaterally to developing nations or change and even withdraw it completely without violating GATT/WTO rules.[130]

The GSP scheme has been applied by the EU since 1971 and has been revised from time to time to mirror progressions in global trade. The current changes were made on 31 October 2012 and took effect on 1 January 2014.[131] The GSP is a unilateral measure by the EU aimed at assisting the developing countries integrate into the international markets by reducing duties on their exports to the EU market. This measure does not require reciprocity by the developing countries.[132]

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125 As above Article 366a(3).

126 H Cuyckens 'Human Rights Clauses in Agreements between the community and third countries the case of the Cotonou Agreement' (2010) *Institute for international law working paper* no. 147 68.

127 See http://industry.govmu.org/English//DOCUMENTS/THE%20GENERALIZED%20SYSTEM%20OF%20PREFERENCES.PDF (accessed 23 January 2015).

128 As above.

129 As above.

130 As above.

131 European Commission 'Revised EU trade scheme to help developing countries applies on 1 January 2014' http://europa.eu/rapid/press-release_MEMO-13-1187_en.htm (accessed 23 January 2015).

132 As above.

The GSP+ is a part of the reviewed GSP that provides additional trade incentives to developing countries already profiting from GSP and who ratify and shows a sincere commitment to implementing 'core international conventions on human and labour rights, sustainable development and good governance.'[133] The GSP+ provides a strong motivation for the developing countries to protect core labour rights and good governance that it entered into force on 1 January 2014. It offers additional tariff reductions or full removal of tariffs for basically the same product categories covered by GSP.[134]

EBA is also part of the EU's GSP initiated to grant duty-free and quota-free to the Least Developed Countries (LCD) on all their exports into the EU except arms. The EBA initiative came into force on 5 March 2001.[135] Most of the countries that benefit from EBA are from sub-Saharan African countries.[136] All nations recognized by the UN as LDCs benefit from the EBA. Thus, EBA preferences are no longer required when nations effectively progress up on the development ladder and are no longer considered LCDs by the UN.[137] According to a study by Cernat et al,[138] the biggest gains are noted for sub-Saharan African countries and the EU sugar market is the single major significant source of change.[139] 'The effects on the EU itself are minimal, as the increased market access for LDCs comes mostly at the expense of other preference-receiving countries, although the changes are modest.'[140]

In 1995, the United States (US) government (including other developing countries from Asia and South America who are not members of the ACP) petitioned the WTO to investigate whether the Lomé conventions had violated WTO rules. The WTO ruled in 1996 that agreements between the EU and ACP were certainly not compatible with WTO regulations.[141] The incompatibility is as a result of EU discriminating against her other trading partners, by exempting ACP nations exports to the EU from taxes while exports of other WTO State members into the EU were subjected to the tariffs. WTO rules GATT

133 As above.

134 European Commission '10 countries to benefit from EU preferential trade scheme GSP+ as of 1 January 2014' http://trade.ec.europa.eu/doclib/press/index.cfm?id=1006 (accessed 23 January 2015).

135 European Commission 'Everything But Arms (EBA) – Who benefits?' http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150983.pdf (accessed 23 January 2015).

136 As above.

137 As above.

138 Cernat et al 'The EU's Everything But Arms Initiative and the Least-developed Countries' Discussion Paper No. 2003/47, UNU World Institute for Development Economics Research.

139 As above.

140 As above.

141 The Cotonou Agreement selected issues, effects and implications for Caribbean economies. *www.cepal.org/publicaciones/xml/1/23581/L.66.pdf* p22. (accessed 20 June 2014).

(Article XXIV) allows this type of preference when both parties or regional blocs go into a Free Trade Agreement, or under a GSP arrangement.[142] This means that the trade cooperation between the ACP and EU must be reciprocal, a situation that will impact on the RTD of the ACP country. A new EPA has to be designed to be compatible with WTO rules. The Lomé Conventions were replaced with the Cotonou Convention on February 2000 when it came into effect.

The Cotonou Agreement will establish EPAs between the EU and the ACP countries making it possible to have a new trading system based on reciprocal preferences. Based on this, in 2001 the WTO granted a waiver to the EU to carry on providing unilateral preferences to the ACP countries up to January 2008.[143] When it became obvious that the EU and all ACP countries may not come to an agreement on full EPAs by the end of 2007 the EU and the various ACP regions began negotiating interim EPAs in 2002 with the different African regions, which were concluded in 2007.[144]

Only eighteen African countries signed an interim EPA by the end of 2007 while only Eastern African Community (EAC) signed the interim EPA as a bloc.[145] About 28 other African countries did not initial the interim EPA by 2007. Some among them[146] are considered as LDCs, whom the EU offers Everything But Arms. Non LDCs who did not initial the interim EPA do not have Duty Free status, but trade with the EU under the GSP trade scheme where the EU offers them limited preferential access to Europe's markets with few products qualifying for this scheme. Some of the countries that fail to sign an EPA may no longer

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142 See http://www.eac.int/trade/index.php?option=com_content&id=121&Itemid=105.

143 L Fontagne et al; ' An Impact Study of the EU-ACP Economic Partnership Agreements (EPAs) in the Six ACP Regions' (2008) Commission of the European Union - Directorate General for Trade 4 http://ssrn.com/abstract=1194965 (accessed 15 January 2015).

144 S Bilal & C Stevens (eds) 'The Interim Economic Partnership Agreements between the EU and African States' (2009) *Policy management report 17 European Center for Development Policy Management* http://ecdpm.org/wp-content/uploads/2013/11/PMR-17-Interim-Economic-Partnership-Agreement-Between-EU-Africa-2009.pdf 15 (accessed 15 January 2015). See also S Karingi & L Deotti 'Interim Economic Partnership Agreements Point to the Classic Regional Trade Agreement after all: Should African Countries really be worried?' (2009) *African Trade Policy Center Work in Progress No. 75 Economic Commission for Africa 13* http://www.uneca.org/sites/defult/files/publications/75.pdf (accessed 15 January 2015).

145 Acord 'Update on Africa-EU EPA negotiations' policy briefing paper no. 5 (2008) http://www.acordinternational.org/silo/files/update-on-africa--eu-epa-negotiations.pdf (accessed 17 May 2015); see also I Ramdoo 'ECOWAS and SADC Economic Partnership Agreements: A Comparative Analysis' (2014) Discussion Paper no. 165 *European Centre for Development Policy Management 7.*

146 They are, Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Togo, Uganda, Tanzania and Zambia.

be able to fall back onto the new proposed GSP because they are classified as upper middle income countries.[147]

6.6.3 The Cotonou Convention

The Cotonou Convention contains human rights clause(s) (essential elements)[148] under Article 9(1)(2)(3) and (4) which recognises the human person as the centre for which development will be directed. This involves 'respect for and promotion of all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance.'[149] While referring to their international obligations and commitments regarding respect for human rights, the parties acknowledged the relatedness, indivisibility and universality of human rights and 'undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural.'[150]

The essential element of the Cotonou Convention highlights the fact that development, which is the main purpose of the agreement, involves respect of and promotion of all human rights. The essential elements more precisely define one of the objectives and principles of cooperation. Therefore, the EU adopted this clause in the Cotonou Convention in compliance with international treaty law and to move towards a formulation, which would give it the leeway to suspend its obligations under international agreements and take other appropriate measures.[151]

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147 Economic Partnership Agreement – Still pushing the wrong deal for Africa? http://www.stopepa.de/img/EPAs_Briefing.pdf (accessed 28 March 2018).

148 A lot of bilateral treaties with the EU contain human rights clauses, usually under the part titled 'essential elements' and that the agreement may be suspended if that essential element is violated in the non-execution clause. For example Art. 2 of the EU–Iraq Partnership and Cooperation Agreement.

149 The Cotonou agreement (2010) revised Article 9(1).

150 As above Article 9(2).

151 According to the Commission, such clauses as the essential element would present several advantages:
'- it makes human rights the subject of common interest, part of the dialogue between the parties and an instrument for the implementation of positive measures, on a par with the other key provisions;
- it enables the parties, where necessary, to take restrictive measures in proportion to the gravity of the offence […]. In the spirit of a positive approach, it is important that such measures should not only be based on objective and fair criteria, but they should also be adapted to the variety of situations that can arise, the aim being to keep a dialogue going; In the selection and implementation of these measures it is crucial that the population should not be penalized for the behavior of its government;
- it allows the parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a "material breach" of the agreement in line with the Vienna Convention ; constituting grounds for suspending the application of the agreement in whole or in part in line with the procedural conditions

Article 9 aimed at ensuring that the parties, referring particularly to economic and social rights as well as civil and political rights, should respect the human rights obligations that have been in existence. Article 9 also introduced another concept – 'fundamental elements', and considered good governance as a fundamental element of the agreement which 'underpins the ACP-EU Partnership.'[152] It is not quite clear what is the difference but according to Cuyckens, it is believed it could be a way of finding the middle ground due to the fact that the ACP countries could not accept good governance as part of the essential element of the agreement. However, in practice, apart from the expressions there is no other difference.[153]

As stated earlier, the Cotonou Partnership Agreement provides for the protection of human rights. However, despite the human rights clause in the EPAs there are fears that it could violate the RTD of the African peoples.[154] In the opinion of Ukaoha – a member of the Nigerian negotiating team to the EPA – the EPA in its current form (with establishing free trade area and reciprocity) 'would lead to de-industrialisation, exposure to undue competition, loss of jobs and revenue, capital flight, increase in poverty and in some way, loss of sovereignty and disintegration of the region.'[155] In compliance with the WTO rules, the Cotonou Agreement provided in Article 36(1) that the parties will 'take necessary measures to ensure the conclusion of new WTO-compatible Economic Partnership Agreements, removing progressively barriers to trade between them…' According to Busse and Grobmann, African countries that accept the new EPAs will have to establish a free trade area with the EU, thereby, opening their local markets for the importation of most products from the EU.[156]

Although the ACP countries under the Cotonou Agreements are also eligible to trade with the EU under the EU's GSP scheme, the Cotonou Agreement creates more favourable trading conditions for the ACP countries, covering a broader range of products, offering broader tariff cuts and more favourable rules of

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laid down in Article 65. The main condition involves allowing a period of three months between notification and suspension proper, except in "cases of special urgency", plus an additional period of race if an amicable solution is being sought. See European Commission 'Communication on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries', Brussels 23 May 1995, COM(95)216 final, 7-8.'

152 The Cotonou agreement (2010) revised Article 9(3).

153 Cuyckens (n 127 above) 36.

154 M Busse & H Grobmann 'Assessing the Impact of ACP/EU Economic Partnership Agreement on West African Countries' (2004), *HWWA DISCUSSION PAPER 294 Hamburgisches Welt-Wirtschafts-Archive (HWWA) Hamburg Institute of International Economics 2004.*4-12. See African Trade Policy Centre (n 101 above), Urama et al, (n 102 above) and Mohammad (n 105 above).

155 F Alli 'The real dangers of EPA to ECOWAS – Ukaoha' Vanguard-May 29, 2015 http://www.vanguardngr.com/2015/05/the-real-dangers-of-epa-to-ecowas-ukaoha/ (accessed 30 May 2015).

156 As above 1.

origin.[157] Under the Cotonou Agreement the EU provides for duty and quota-free access for all ACP goods except arms but under the GSP scheme preferences is granted for most agricultural products only in the form of tariff reductions.[158] Thus, the Cotonou Agreement offers better market access to ACP countries to the protected EU agricultural market for sensitive products than it does under the GSP scheme.

Note that currently no African region has fully implemented the EPA as a group. For the EPA to be fully implemented in any of the regions, all the Member States must sign and ratify the Agreement since they each maintain a single customs territory. Presently this has not been achieved mostly due to the concerns expressed by some African States and civil societies and the effect it has on human rights especially the RTD.

6.7 THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES – EUROPEAN UNION ECONOMIC PARTNERSHIP AGREEMENT

In 2014 all the 16 West African countries alongside Mauritania, which left Economic Community of West African States (ECOWAS) in 2002 [159] and the EU concluded the negotiations, and initialed an EPA pending its adaption by the various individual West African countries.[160] The EPA between the EU and West Africa has its foundations in the Cotonou Agreement. The agreement brings together not only the 16 countries of the region but also their two regional organisations - the ECOWAS and the West African Economic and Monetary Union (UEMOA).

The objectives of this Agreement according to Article 1 of the EPA includes: (a) to create an economic and trade partnership that will realize sustained economic growth that creates employment, eradicate poverty, improve living standards, diversify economies and 'raise real income and output in a way that is compatible with the needs of the West African region while taking account of the Parties' different levels of economic development;' (b) to foster economic cooperation, regional integration and good economic

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157 VC LaForce 'A comparison between the Cotonou Agreement and the EU Generalized System of Preferences The case of sugar (2013) 12 (1) *Journal of International Trade Law and Policy* 43.

158 As above.

159 Made up of Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea Bissau, Ivory Coast, Liberia, Mauritania, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

160 See http://ec.europa.eu/trade/policy/countries-and-regions/regions/west-africa/ (accessed 26 June 2017).

governance in ECOWAS; (c) to expand intra-regional trade in ECOWAS and (d) to strengthen the EU – ECOWAS economic and trade relations based on between the WTO obligations.

Article 2 of the ECOWAS – EU EPA reiterates that the 'EPA is based on the principles and essential points of the Cotonou Agreement, as set out in Articles 2, 9, 19 and 35 of the said Agreement.' Note that Article 9 of the Cotonou Agreement centres on the essential elements regarding 'human rights, democratic principles and the rule of law, and fundamental element regarding good governance', which underpin the ACP-EU Partnership.

The Agreement takes into account the current differences in the development level of the two regions. While the EU opens its market completely from the day it comes into effect, West Africa will eliminate import tariffs over a 20-year transition period.[161] In order to help West African economies prepare to take advantage of the EPA the EU will provide financial assistance to the region, which will be used to support trade, agriculture, infrastructure, energy and capacity building for developing civil society.[162]

The Agreement does not allow the introduction of new duties, charges or taxes on exports, 'nor shall those currently applied in trade between the Parties be increased from the date of entry into force of this Agreement.'[163] Goods originating from one of the ACP RECs State members shall be subjected to customs duties only once at the port of entry on the territory of that State members after which it may move freely in the territory of the other ACP RECs State members without being subject to additional customs duties.[164] This means if goods enter the West African countries from Ghana, it can move throughout the other countries without additional duties, potentially undermining those countries within the West African States who do not want to accept the EPA (for example, Nigeria). Although the West African countries are given five years starting from the date of entry into force of the Agreement in which to set up a free movement system.[165]

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161 See Article 10 of the ECOWAS – EU EPA. See also Economic Partnership Agreement with West Africa - Facts and figures - http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152694.pdf (accessed 27 June 2017).

162 http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152694.pdf (accessed 27 June 2017).

163 See Article 13(1) of the ECOWAS – EU EPA.

164 See Article 14(1) of the ECOWAS – EU EPA.

165 See Article 14(2) of the ECOWAS – EU EPA.

To encourage regional integration in the West African region, the Parties, in Article 42 'agree to push forward customs reforms, in particular the harmonisation of procedures and regulation in order to facilitate trade in the West African region.' These reforms shall be based on:

> (a) the international instruments and standards in force in customs and trade areas, including the essential elements of the International Convention on the Simplification and Harmonisation of Customs Procedures of 1973 (revised Kyoto Convention), the WCO Framework of Standards to Secure and Facilitate Global Trade, the WCO Customs Data Model and the International Convention on the Harmonised Commodity Description and Coding System of 1983;
> (b) the use of a single administrative document or of an electronic equivalent in order to make import and export customs declarations;
> (c) regulations to avoid unnecessary and discriminatory measures for economic operations, protect against fraud and provide additional facilities for operators displaying a high level of compliance with customs legislation…[166]

The Agreement is subject to review every five years from the date of its entry into force in terms of Article 111 by the Joint Council of the West Africa – European Union EPA that shall be responsible for supervising the implementation of the Agreement.

6.7.1 The negotiation structures and processes of the ECOWAS-EU EPA

The ECOWAS-EU EPA negotiations started in October 2003 during a meeting of Ministers of Trade on the Economic Partnership Agreement between West Africa and the European Community in Accra (Ghana), eventually, in August 2004, a joint roadmap of negotiation was adopted.[167] Accordingly, the European Commission was to negotiate on behalf of the EU whereas a constituted Regional Negotiating Committee (RNC) was to negotiate on behalf of ECOWAS. This negotiation was to be piloted at three levels: the level of Chief Negotiators, a Senior Officials level, and at a Technical Experts level.[168]

The top level of the negotiation comprised team of Chief Negotiators - the ECOWAS Executive Secretary and the President of the UEMOA Commission led the process on the ECOWAS side. ECOWAS Trade

166 See Article 38(1) of the ECOWAS – EU EPA.

167 MAJ Nyomak-Obimpeh 'Explaining the Outcomes of Negotiations of Economic Partnership Agreements between the European Union and the African, Caribbean and Pacific Regional Economic Communities *Comparing EU CARIFORUM and EU-ECOWAS EPAs'* (2016) Unpublished doctoral thesis presented to the Faculty of Economic and Social Sciences of the University of Cologne 150.

168 See 'Overview of the regional EPA negotiations West Africa-EU Economic Partnership Agreement (2006) http://ecdpm.org/wp-content/uploads/2013/11/IB-14B-Overview-Regional-EPANegotiations-West-Africa_EU-EPA 2006.pdf (accessed 9 April 2018).

Ministers and Chairman of ECOWAS Ministers of Trade provided support.[169] Furthermore, each of the ECOWAS Member States provided three persons to be part of the delegation of the Chief Negotiators. While the European Commissioner for Trade represented the EU flank at this level.[170]

The second level of the negotiation structure consisted of a group of Senior Executives who constituted a delegation of 'Regional Negotiating Committee headed by ECOWAS Deputy Executive Secretary for Policy Harmonization and UEMOA Commissioner for Tax, Customs and Trade Policy.'[171]

The third level of the negotiation structure consisted of a group of Technical Experts headed by ECOWAS Commission's Director of Trade and the Director of Trade of the UEMOA Commission and other members of the RNC delegation. While the departments of trade, development and other relevant departments of the European Commission represented the EU at this level.[172]

Adding to the three prescribed levels mentioned above is the 'Contact Group' that offered secretarial services for the negotiations. The 'Contact Group' comprised of representatives of the UEMOA Commission, the ECOWAS Secretariat and European Commission.[173] This group was responsible for supervising the handling of the impact studies recommended by the various technical groups, and the exchange of information on the negotiation issues such as tariff, and non-tariff measures.[174]

Furthermore, in the ECOWAS-EU EPA negotiation, active participation and engagement of the private sector and Civil Society Organisations (CSO) were allowed. The role of non-State stakeholders is duly recognized in the participatory approach agreed upon for the conduct of negotiations.[175] The negotiation document provided that non-State stakeholders should be involved at every stage of the negotiations, for example, in the sustainable impact assessment of development (SIA) commissioned by the EC, and also in meetings at the regional and national levels.[176] The participation of non-State stakeholders and CSO in all the regional EPA negotiating structures and processes, as well as their involvement in impact

169 Nyomak-Obimpeh (n 168 above) 153.
170 As above.
171 As above.
172 As above.
173 As above.
174 As above.
175 As above 154.
176 As above.

assessments and in EPA meetings within the EU and in West Africa, was to guarantee that their concerns would be considered during the negotiations.[177]

However, despite these assurances of active participation and engagement of the private sector and Civil Society Organisations (CSO) many non-State stakeholders at the domestic and regional level remained detached from the EPA negotiations due to low availability of information.[178] While international and regional transnational actor's networks lobbied against signing an agreement, non-State stakeholders in ECOWAS complained that not enough impact studies were available.[179] The non-State stakeholders assert that ECOWAS Secretariat mostly led the negotiations with the EU, as noted in the African Trade Policy Centre 2007 review, which states:

> One can note the lack of involvement of all the national stakeholders (Administration, Private Sector and Civil society) although they are involved in the process. They rely solely on the ECOWAS Secretariat and the UEMOA Commission for handling all the issues related to the EPA including needs assessment.[180]

The lack of full participation of the non-State stakeholders means that the process of the ECOWAS-EU negotiation did not meet one of the elements of RTD, which is participation as discussed under 2.6.1 above.

6.8 THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY – EUROPEAN UNION ECONOMIC PARTNERSHIP AGREEMENT

Just as the ECOWAS region, the Southern African Development Community (SADC) region[181] has also concluded an EPA with the EU on 10 June 2016 and similar to the ECOWAS – EU EPA, the objectives include:

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177 As above.

178 C Weinhard & A Moerland '(Mis) Perceptions in Two- and Three-Level Games: Detachment in Economic Partnership Agreement Negotiations' (2017) *Journal of Common Market Studies* https://onlinelibrary.wiley.com/doi/epdf/10.1111/jcms.12642 (accessed 9 April 2018).

179 As above.

180 EPA Negotiations: African Countries Continental Review (2007) African Trade Policy Centre, Work in progress no. 64, 52.

181 Comprising of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Mozambique, the Republic of

(a) contribute to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement;

(b) promote regional integration, economic cooperation and good governance to establish and implement an effective, predictable and transparent regional regulatory framework for trade and investment between the Parties and among the SADC EPA States;

(c) promote the gradual integration of the SADC EPA States into the world economy in conformity with their political choices and development priorities;

(d) improve the SADC EPA States' capacity in trade policy and trade-related issues;

(e) support the conditions for increasing investment and private sector initiatives and enhancing supply capacity, competitiveness and economic growth in the SADC EPA States; and

(f) strengthen the existing relations between the Parties on the basis of solidarity and mutual interest. To this end, consistent with WTO obligations, this Agreement shall enhance commercial and economic relations, consolidate the implementation of the Protocol on Trade in the Southern African Development Community (SADC) Region, signed on 24 August 1996 ('SADC Protocol on Trade') and the SACU Agreement, support a new trading dynamic between the Parties by means of the progressive, asymmetrical liberalisation of trade between them and reinforce, broaden and deepen cooperation in all areas relevant to trade.[182]

The SADC – EU EPA, which is set out to build on the achievements of the Cotonou Agreement, is also based on the Essential and Fundamental Elements, as set out in Articles 9 of the Cotonou Agreement.[183] The Agreement goes further than just recalling this principle. It reiterates that under the current Cotonou Agreement appropriate measures can be applied if a Party fails to fulfil its obligations in respect of these fundamental principles, which may include suspension of trade benefits.[184]

Article 20 of the SADC – EU EPA establishes a free trade area between the Parties, in compliance with Article XXIV GATT 1994 and shall respect the principle of asymmetry,[185] 'commensurate to the specific

Namibia, the Republic of South Africa, and the Kingdom of Swaziland. The other six members of the SADC region – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe – are negotiating EPAs with the EU as part of other regional groups, namely Central Africa or Eastern and Southern Africa.

182 See Article 1 of the SADC – EU EPA.

183 See Article 2 of the SADC – EU EPA.

184 See Article 86 of the SADC – EU EPA.

185 The principle of asymmetry acknowledges that not all countries stand equal, able to trade and exchange goods on equal terms to the common benefits of their citizens. This is different from lack of reciprocity in the Lome agreement where the EU granted the ACP countries some privilege and advantage of not imposing tariffs on goods coming from the ACP countries, as do the ACP countries on EU goods.

needs and capacity constraints of the SADC – EU EPA States, in terms of levels and timing for commitments under this Agreement.'[186] Under the SADC – EU EPA, the EU will guarantee some of the Parties - Botswana, Lesotho, Mozambique, Namibia, and Swaziland 100% free access to its market. The EU has also fully or partially removed customs duties on 98.7% of imports coming from South Africa.[187] However, the SADC States do not have to reciprocate in like manner. Rather, they can retain tariffs on products sensitive to international competition; this is known as asymmetric liberalization.[188] Accordingly the Southern African Customs Union (SACU) eliminates customs duties on only about '86%' of imports from the EU and Mozambique only '74%'.[189]

In the Agreement, regional integration is acknowledged as an integral element of the partnership and an influential instrument to realise the objectives of the Agreement.[190] The Parties reaffirm the significance of regional integration among the SADC countries to achieve greater economic opportunities and enhanced political stability, and they support the integration processes based on the SACU Agreement and the SADC Treaty.[191]

Similar to the ECOWAS – EU EPA, the Parties to the SADC – EU EPA approve to review the Agreement completely no less than five years after it enters into 'force in light of further developments in international economic relations and in the light of the expiration of the Cotonou Agreement'.[192]

6.8.1 The negotiation structures and processes of the Southern African Development Community – European Union Economic Partnership Agreement

The SADC-EU EPA negotiation also took place at three levels: the ministerial level, the level of the senior officials and Brussels based ambassadors, and the level of the SADC Trade Negotiating Forum (TNF), where officials from trade and industry departments, non-state actors and the private sector are

186 See Article 20(2) of the SADC – EU EPA.
187 See Economic Partnership Agreement (EPA) between the European Union and the Southern African Development Community (SADC) EPA Group http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152818.pdf (accessed 4 July 2017).
188 As above.
189 As above.
190 See Article 3 of the SADC – EU EPA.
191 As above.
192 See Article 116 of the SADC – EU EPA.

represented.[193] Leading the negotiation on behalf of the SADC at the ministerial level was Botswana's Minister of Trade and Industry who was nominated by the SADC. At the senior official level, a chief negotiator led the negotiations, and Brussels-based ambassadors negotiated under the coordination of the Botswana Ambassador in Brussels. At the technical level, the EPA Unit of the SADC Secretariat, led by the chief negotiator coordinated and supported the TNF.[194] However, in a conference titled 'Challenges of the SADC EPA negotiations' hosted in Brussels by the European Centre for Development Policy Management (ECDPM), the South African Institute of International Affairs (SAIIA) and the Regional Trade Facilitation Programme (RTFP) in June 2007, most of the participants pointed out that at the time the negotiations were being carried out by government officials no substantial input from non-state actors.[195] The Cotonou Agreement calls for the inclusion of non-state actors in the negotiations.[196] The active involvement by non-state actors and other stakeholders will be helpful in monitoring both the negative effects and the positive consequences of the EPA and ensure full participation of the peoples. This is crucial since most of the poor in Africa live in rural areas and rely on agricultural products for their income, jobs and livelihoods and especially since they do not have the power to lobby and effectively impact on the negotiations. The representation of these marginalised groups will ensure their full participation and RTD. However, this was not aptly manifested in the SADC-EU EPA.

6.9 ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EUROPEAN UNION AND CENTRAL AFRICAN REGION

As stated earlier above, the Central African countries with the exception of Congo (Brazzaville), Cameroon and Gabon are mostly LDCs; they can access the EU market freely under the EBA system. However, in 2007 Cameroon concluded negotiations on an interim EPA with the EU, which was approved by the European Parliament in June 2013 and ratified by Cameroon in July 2014.[197] Gabon and Congo (Brazzaville) have not yet signed an EPA. Congo trades with the EU under GSP while Gabon is no longer

193 In Brief 'Overview of the regional EPA negotiations, SADC-EU Economic Partnership Agreement' (2006) http://ecdpm.org/wpcontent/uploads/2013/11/IB-14F-OverviewRegional-EPA-Negotiations-SADC-EUEPA-2006.pdf (accessed 4 July 2017) 3.

194 As above.

195 T Bertelsmann-Scott 'Challenges of the SADC EPA Negotiations A Conference Report' *South African Institute of International Affairs* http://www.saiia.org.za/images/upload/euaf_260607_epa_conference_report.pdf 10.

196 See Article 4 of the Cotonou Agreement 2010.

197 http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/ (accessed 15 January 2018).

eligible for the new GSP scheme as of 1 January 2014.[198] Similar to other regions EPAs, the ongoing negotiations for an EPA between the EU and Central Africa include areas such as cooperation on technical barriers to trade, services and investment, sustainable development, competition and trade facilitation.[199]

The Central Africa-EU EPA negotiations also took place at three levels: the political level, the senior officials' level and the technical experts level.[200] The political level was composed of the trade ministers of the Central African Economic and Monetary Community (CEMAC) and of Sao Tome and Principe. The trade ministers of CEMAC supervise, monitor the functioning of the negotiating structure on behalf of the region, as well as approve the results of the negotiations and provides tactical direction.[201] At the senior officials' level, the *Comité des Négociateurs* led the negotiations, which was chaired by the Executive Secretary of CEMAC and vice-chaired by the Assistant General Secretary of Economic Community of Central African States (ECCAS).[202] The technical experts level assisted the *Comité des Négociateurs*, which was chaired by the directors in charge of trade of CEMAC and ECCAS.[203]

6.10 ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND EASTERN AND SOUTHERN AFRICA REGION

The Eastern and Southern Africa (ESA) EPA region are yet to conclude an EPA with the EU as a bloc, The EU is currently negotiating an Economic Partnership Agreement with Djibouti, Eritrea, Ethiopia and Sudan, Malawi, Zambia and Zimbabwe, Comoros, Mauritius, Madagascar and the Seychelles. However, Madagascar, Mauritius, Seychelles and Zimbabwe who are member state of ESA signed an interim EPA in August 2009, which has been provisionally applied since 14 May 2012. The Agreement includes the elimination of duties and quotas for goods and services coming from these countries.[204] The EPA also 'covers rules of origin, fisheries, trade defense, development cooperation provisions and mechanisms for

198 As above. Gabon is no longer eligible because of the new GSP scheme and rules, which exempts countries, which have been listed by the World Bank as high or upper middle-income economies. Gabon is an upper middle-income economy.

199 As above.

200 In Brief 'Overview of the regional EPA negotiations, Cental Africa-EU Economic Partnership Agreement' (2006) http://ecdpm.org/wp-content/uploads/2013/11/IB-14A Overview-Regional-EPA-Negotiations-Central-Africa-EU-EPA-2006.pdf (accessed 11 April 2018) 3.

201 As above.

202 As above.

203 As above.

204 http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/ (accessed 15 January 2018).

settling disputes'.[205] Development cooperation is essential to the realization of RTD, it provide assistance to poor and less developed countries by promoting their long-term social and economic human development, ensuring peace and security in the developing countries. Development cooperation is crucial to development progress. It is the world's attempt to work together to achieve commonly held ambitions, and to support those parts of the world that need special assistance. Development cooperation is key to development progress, It brings the world together to work towards achieve commonly held ambitions of supporting the poor nations that need special assistance and thus realise their RTD.

The ESA-EU negotiation was conducted at two levels: the ministerial level and the ambassadorial/senior official level.[206] The ESA region designated six Brussels-based ambassadors and ministers to head the negotiation in the areas of development issues, market access, agriculture, fisheries, trade in services and other trade- related issues.[207] The lead spokespersons at the ministerial level and the lead spokespersons at the ambassadorial level, select a chairperson from among them, every six months, on a rotational basis, to be the overall spokesperson for the region during a joint negotiating meeting with the EU. The ESA States established a National Development and Trade Policy Forum (NDTPF) involving representatives of the public and private sectors and other non- state actors. The NDTPF was given the responsibility to determine national positions for each area of negotiation. The country representatives in the Regional Negotiating Forum (RNF) can then rely on these positions to prepare the overall ESA negotiating position.[208]

6.11 ECONOMIC PARTNERSHIP AGREEMENT BETWEEN EU AND EASTERN AFRICAN COMMUNITY REGION

The EAC EPA group, consisting of Kenya, Uganda, Tanzania, Burundi, South Sudan and Rwanda signed an interim EPA in 2007 and commenced negotiation on a comprehensive EPA. This comprehensive EPA was concluded on 16 October 2014. However, only Kenya and Rwanda have signed the EPA in 2016.[209]

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205 As above.

206 In Brief 'Overview of the regional EPA negotiations, ESA-EU Economic Partnership Agreement' (2006) http://ecdpm.org/wpcontent/uploads/2013/11/IB-14E Overview Regional-EPA-Negotiations-ESA-EU-EPA-2006.pdf (accessed 11 April 2018) 3.

207 As above.

208 As above.

209 http://www.theeastafrican.co.ke/news/Kenya-and-Rwanda-sign-EPA-deal-with-Europe/2558-3365428 9s4hdv/index.html (accessed 15 January 2018).

Like the EPAs in other regions, the agreement covers trade in goods and development cooperation, fisheries and bans unjustified or discriminatory restrictions on imports and exports.

The EAC Member States EPA negotiations under different configurations presented a challenge to the region since they were bound by the EAC Customs Union Protocol and the EAC Customs Union management Act to sign EPAs as one customs territory.[210] To tackle this problem, the EAC Ministers of Trade encouraged the EAC Member States to harmonize their EPA position and collaboration with the ESA to ensure that positions being sought at EAC were in agreement with Common Market for Eastern and Southern Africa (COMESA) and SADC regional integration processes.[211]

The EAC-EU negotiation includes the EAC ministers of trade, EAC senior officials (permanent secretaries in the trade ministries) and the National Development and Trade Policy Forum (NDTPF) - a forum that deals with agriculture, trade, investment, services among others, and consisting of representatives from the public and private sector organisations and the civil society organisations.[212] While on the EU side negotiations are led by the spokesperson who is either a commissioner-director general trade or a director general of trade.[213] The NDTPF's role is to prepare negotiating positions on all facets of the EPA negotiations. Each representative of the EAC Member States then used these positions in the EAC EPA Experts Committee meetings in preparation of the EAC position for negotiation with the EU.[214]

The EAC-EU negotiation took place at two levels – Ministerial and Senior Officials levels.[215] On the EAC's side, Lead Minister at Ministerial level (the country providing the current Chair of the EAC provides the Lead Minister) led negotiations at the Ministerial level and Lead Senior Official (the country providing current chair of the EAC provides lead Senior Official – Permanent Secretary) led negotiations at the Senior Officials levels. While on the EU side, Lead spokesperson (Commissioner for Trade) led

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210 State Department for Trade EAC-EU Economic Partnership Agreements (EPAs) Policy Brief On Background to EPAs; Why Kenya needed to conclude EPAs with the EU; Current Status of EAC-EU EPA (2017), http://www.trade.go.ke/sites/default/files/Brief%20on%20EPA%20for%20the%20SDT%20Webs_te%20%2016062017_0.pdf (accessed 11 April 2018) 4.

211 As above.

212 As above.

213 As above.

214 As above.

215 As above.

negotiations at the Ministerial level and Senior Official (DG Trade) led negotiations at the Senior Officials levels.[216]

Although the EU stressed the importance of civil society organization in all the negotiation process of the Central African, ESA and EAC regional groups, many NGOs raised fears regarding the lack of participation of civil society (including farmers unions). Three concerns appear to be more pronounced in this respect.[217] The first concern is that many civil society bodies in ESA lack some capacity, similarly, the COMESA secretariat lack financial and human capacity especially as they are dealing with experienced EU trade negotiators. Clearly, the negotiations are taken place between parties with huge disparities in terms of political and economic power.[218] Secondly, the parliaments of the ESA Member States do not seem to be very engaged or well informed about the EPA, they often are not aware of the relevant issues. Lastly, concerns are being raised on the farmer groups and farmers unions lack of active participation in the negotiation process just as almost all NGOs, as a result the awareness and information level of farmers' unions are very low.[219]

To exemplify these concerns, the Kenya Small Scale Farmers Forum (KSSFF) brought a petition before the High Court of Kenya at Nairobi[220] claiming, among others, that the process of the EPA negotiations was in breach of the States obligation under international law by failing to involve them in the negotiations.[221] In paragraph 24 of the Petition, they complain that:

> Contrary to the declared principles and basis for negotiations the EPA process has been solely driven by the Government of Kenya with selective and discriminative admission of participants, thereby excluding the Petitioners or their representatives from participation in the negotiations.[222]

The petition also highlighted several issues that Kenya had not complied with in the conclusion of the EPA. These included, among others, 'equal and effective participation of women and the involvement of

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216 As above.

217 T Seimet 'Economic Partnership Agreement: Consequences for Eastern and Southern Africa with special regard to Food Security' Deutsches Institut für Entwicklungspolitik gGmbH https://www.diegdi.de/uploads/media/Economic_Partnership_Agreements.pdf (accessed 11 April 2018) 19.

218 As above.

219 As above.

220 Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others [2013] eKLR.

221 As above, par. 18.

222 As above.

non-state actors.'[223] In its ruling, the High Court 'direct the Respondents in consultation with the Petitioners within Thirty days to establish a mechanism for involving stakeholders including the Petitioners in the on-going EPA negotiations.'[224] Noting that 'international instruments recognize the general right to political participation'[225] and pointing that 'the right to public participation is broad and open- textured and requires a State party to provide for the modalities of such participation in legislative or constitutional provisions.'[226]

From these it can be concluded that there was no proper representation and participation of all the stakeholders including women, marginalized and minority groups, civil societies, NGOs and other non-state actors in the EPA negotiations thus a violation of their RTD.

6.12 POTENTIAL EFFECT OF THE ECONOMIC PARTNERSHIP AGREEMENTs ON RIGHT TO DEVELOPMENT

There has been a degree of doubt and concern expressed by the African States, multinational aid, CSOs and other charitable organisations as to the potential of the EPAs. Representatives of African countries have over and over again stated that the EPA is not in the development interest of Africa.[227] The dominant concerns of the African countries is dual: one of the concern is that the EPAs is in favour of the exportation of raw materials from African countries whereas it opens the markets in the African countries to high-value- added EU goods, which will suppress the capacity of African nations to grow their individual value-adding processing and manufacturing industries; and secondly, that by doing away with duties on these imports, the African States will be dispossessed of a vital source of income for government expenditure on developmental projects such as health, education and infrastructure.[228] This will obstruct the enjoyment of the RTD guaranteed under Article 22 of the African Charter. As will be seen from other assessments

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223 As above, par. 19.

224 As above, par. 73.

225 As above, par. 44.

226 As above, par. 45.

227 M Brown 'Economic Partnership Agreements' (2012) 8 & 9. *Advocate for International Development Lawyers Eradicating Poverty* http://a4id.org/sites/default/files/user/Economic%20Partnership%20Agreements.pdf (accessed 29 June 2014).

228 Some studies and reports have pointed to this fact. See generally: International Federation on Human Rights (2007) Position paper Economic Partnership Agreements (EPA) and Human Rights; African Trade Policy Centre (2005) Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements Work in Progress No. 10.

later in this section, many African nations rely on duties on imports for revenue needed for developmental projects.

Although, in a report funded by the EU, the EU thinks that it will expand trade opportunities, increase the effectiveness of tax collection, increase regional integration and encourage private sector development.[229] Concerning the loss of tax revenue caused by the EPA, the EU report says it will 'be offset by new revenue sources.' What constitute new revenue sources is not clear from the report, but it may consist of other form of tax such as income and corporate taxes. Furthermore, to compensate for tax revenue losses there should be improved management of public revenue and expenditure through 'the enhancement of the domestic tax take, optimising the collection system, and fighting against customs and port fraud.'[230] The report also states that the EPA will 'promote investment… and improve the business environment.'[231] But to achieve these it 'will require good economic governance, improved competitiveness and improved attractiveness to capital.'[232] Despite the positive effect highlighted by the EU report above, African States have expressed concern as to the potential effects of the EPA. At the Lisbon summit, held in Portugal in December 2007, the African Heads of State and Government reiterated that 'EPAs should be able to bring about development in Africa as well as strengthen regional integration initiatives; so far the agreements have not achieved this.'[233] In a Conference of Ministers of Trade, in Kigali in November 2010, the African Union issued a declaration regarding EPA negotiations, calling on the EU to provide more funds to address EPA related loss of revenue and capacity building.[234]

Representatives of African countries have consistently stated that the EPAs are not in the development interest of the African peoples. Dr. James Ndahiro, Rwanda's representative to the East African Legislature said: 'we are concerned that the outstanding issues, if not resolved and if included in the EPA framework, will bind the EAC to poor trading terms'.[235] According to Professor Chukwuma Soludo, former governor of the Central Bank of Nigeria, 'despite…the reported public protests in 20 countries against the raw deal, it seems all but certain to be rammed through'. He further said that: 'in private

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229 EU report 'Identification and definition of indicators – proposal for the operational arrangements of the Competitiveness Observatory in the context of the EPA between the European Union and West Africa' (2016). http://trade.ec.europa.eu/doclib/docs/2017/february/tradoc_155302.pdf (accessed 4 July 2017).

230 As above 12.

231 As above 15.

232 As above.

233 Brown (n 228 above).

234 As above 8 & 9.

235 Economic Partnership Agreements (2012) 2.

whisperings, not many Africans or policymakers are happy with the deal, but there is a certain sense of helplessness'.[236] In the opinion of Onkundi Mwencha, the Deputy Chairperson of the African Union (AU) Commission, 'our advantage is regional integration', he maintained that EPA cannot help us to integrate our markets, rather it will stall us, and 'I don't think the EPA is a priority for Africa'.[237] True to Mwencha's opinion, some African States do not regard the EPA as a priority; this is evident in the slow response to signing the EPAs by the African States.

Karingi *et al*[238] looked at the economic and social bearings of the trade liberalization features of the anticipated EPAs between the EU and African countries. They provide an appraisal of the probable consequences of EPAs creating FTAs between the EU and the various African Regional Economic Communities. They addressed questions such as 'how will an EPA that includes reciprocal market access agreements between the EU and Africa impact on African countries' GDPs, levels of employment and other macroeconomic aggregates?' And 'What sectors in Africa are most likely to lose and what sectors gain with EPAs?' Etc. They conclude that complete reciprocity could be very expensive for Africa.

Keck and Piermartini made a similar study,[239] they analysed the impact of the creation of an FTA between the EU and the Southern African Development Community (SADC). They investigated a lot of problems, specifically the following two crucial subjects: First, they assessed the impact of an FTA between the EU and SADC countries on SADC State members including under a full liberalization and partial exclusions in agriculture. Secondly, they examine whether SADC countries should concurrently go on with further intra-SADC liberalization. Their analysis not only pays attention on the consequences in terms of well-being and real GDP growth, but also emphasise redistribution effects and cost of adjustments. The study looks at resource reallocation across sectors, differences in the wage of factors of production and variations in trade patterns. They find that major growth impacts should not be expected from liberalization between the EU and SADC because of the small share of SADC (which consist of developing and least-developed countries such as Lesotho and Mozambique) in the EU's overall trade with the SADC GDP barely rising

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236 As above.

237 As above.

238 S Karingi et al 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' (2005) *African Trade Policy Centre Work in Progress* No. 10.6.

239 A Keck & R Piermartini 'The Economic Impact of EPAs in SADC Countries' (2005) Staff Working Paper ERSD-2005-04 World Trade Organization Economic Research and Statistics Division http://econpapers.repec.org/paper/esswpaper/id_3a2.htm (accessed 21 December 2014).

by 0.01 per cent. Zouhon-Bi and Nielsen[240] evaluate the fiscal revenue effects of an EPA between ECOWAS and the EU. Zouhon-Bi and Nielsen carried out an empirical analysis study, which shows that the effect of executing EPA on fiscal revenue for certain ECOWAS states will be substantial. They find that goods imported from the EU will increase by almost 10.5 percent in Senegal and with 11.5 percent in Nigeria if free trade is implemented. In case of total government income, they find that income loss would be biggest in Cape Verde at about 15.8 percent and Senegal at about 10.4 percent, this is because these countries imports largely from the EU and depends highly on income generated from tariffs on importation. Other states that could also be considerably affected include Ghana, whose government income is likely to drop by 7.1 percent and Nigeria who will lose an estimated amount of only 2.4 percent of government income. As regards GDP, they find that tariff income losses sum up to '1.0 percent of GDP in Nigeria, 1.7 percent in Ghana, 2.0 percent in Senegal and 3.6 percent in Cape Verde.'

These concerns arise because the EPA is not addressing the major challenges facing the African peoples. Many African peoples face high unemployment as a result of weak productive capacity and food insecurity because of lack of growth in the area of agricultural production and infrastructure. Benjamin W. Mkapa the former president of Tanzania points out that:[241] 'We cannot continue to export a narrow range of largely primary products and import a broad range of finished goods on our way to development. The hard work of industrialization and food production must be done.'

According to the Human Development Index of the United Nation Development Program (UNDP), the EU is one of the richest regions with a very high level of human development.[242] The African countries have much lower level of development and weaker economies than the EU. The EPA threatens the African countries' development and the RTD of its people because of the difference of the level of economic development between EU and the African states. Certainly, such weak economies in most African countries face serious competition from the industrialized EU. If these weak economies that are already incapacitated by poverty collapse and their per capita incomes further decrease, it will threaten the RTD of millions in the continent of Africa.[243] In addition, there are no sufficient protections for workers who

240 SG Zouhon-Bi & L Nielsen 'The Economic Community of West African States Fiscal Revenue Implications of the Prospective Economic Partnership Agreement with the European Union' (2007) *World Bank Policy Research Working Paper* 4266, June 2007.

241 As above.

242 Position paper International Federation for Human Rights (2007) 4 & 5.

243 As above.

are affected by restructuring in industries as a result of liberalization, and in case of inactivity, there is no established social security system.[244]

Similarly in a report titled 'Analysis of the Impact of the EAC-EU Economic Partnership Agreement on the EAC Economies' The United Nations Economic Commission for Africa (UNECA) warns against signing an EPA with the EU, arguing that 'it will neither spur economic growth nor bring wealth to the region's citizens.'[245] The UNECA reports that if the EPA is signed, 'local industries will struggle to withstand competitive pressures from EU firms, while the region will be stuck in its position as a low value-added commodity exporter.'[246]

Some African countries may reform their tax regimes to compensate for the loss of customs duties, and may heavily tax domestic actors (VAT, income tax or corporate tax) to recover the lost import tax revenue. This will have grave consequences on companies' competitiveness and people's purchasing power. This, in addition to the decrease of customs revenues in the after effects of market liberalization will lead to a tremendous fall in the African countries' budgets.[247] This may severely reduce their ability to finance public policies such as education, health and housing due to decreasing incomes and thus infringe upon the peoples' RTD, guaranteed by article 22 of the African Charter.

As pointed out in section 6.7 above, the EPA negotiation processes lacks the full participation of stakeholders including women, marginalized and minority groups, civil societies, NGOs and other non-state actors. The negotiation process does not fulfil an element of the RTD – participation, therefore, in violation of the peoples RTD.

As alluded earlier, RTD is binding under the African human rights system, and the State parties have the obligation to ensure the enjoyment of RTD to their citizens as well as desist from any action that will impede the enjoyment of RTD, this includes abstaining from entering into trade agreements that will impede the realisation of RTD and where necessary ensure the full participation of the peoples in the

244 As above.

245 http://www.theeastafrican.co.ke/business/UNECA-warns-region-against-signing-trade-deal-with-EU-/2560 3899102-khlebgz/index.html (accessed 15 February 2018).

246 As above.

247 As above.

process before the conclusion of an agreement. African countries must let their negotiating partners be aware of their RTD obligations to their citizens and this fact must be on the negotiating table.

6.12.1 Effect of World Trade Organization rules on EU's human rights obligations

Although one may argue that the EU is restricted by the WTO rules, can the WTO rules obliterate the human rights obligations of the EU? The WTO is not an agency of the UN therefore, may not be subjected to the human rights provisions of the UN Charter. Article 3(2) of Understanding on Rules and Procedures Governing the Settlement of Disputes provides that: 'The members recognize that it serves to…clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.' It should be call to mind that WTO members are responsible for the consequences of their trade actions on human rights. Therefore, States members of WTO should realise that trade relations have to raise standard of living among the parties, given consideration to inequality in the level of economic development and concerns of the parties.[248] In Article 20 WTO Agreement on Agriculture, the WTO pinpoints that in the course of trade liberalization, 'non-trade concerns' is given due consideration. These non-trade concerns are, among other things, the protection of human rights, such as the right to sufficient food, clothing and shelter, the freedom from hunger and the constant enhancement of living conditions contained in Article 11 of ICESCR. In their presentation to the WTO, Mauritius guaranteed that the wording of the agreement establishing WTO was 'carefully drafted so as to avoid countries having to make commitments which would contradict their obligations under other multilateral frameworks.'[249]

The Human Rights Council in 2011 unanimously adopted the UN's Guiding Principles on Business and Human Rights (Guiding Principles) where it demanded that States must design their trade and economic policy such that it will regularly protect human rights and to take necessary actions to investigate and punish as well as prevent human rights violations that resulted from economic action.[250] The UK, for example, has developed a National Action Plan to implement the Guiding Principle. The action plan

248 F Coomans 'Application of the International Convention on Economic, Social and Cultural Rights in the framework of International organizations' (2007) 11 Max Planck Yearbook of United Nations Law 14.

249 WTO Doc. G/AG/NG/W/36/Rev.1, 9 November 2000, 45, para. 17 (document presented by Mauritius).

250 Principle 1 of the UN's Guiding Principles on Business and Human Rights 2011

represents the UK's commitment to protect human rights by helping UK companies recognize and promote human rights.[251]

Under principle 1 of the Guiding Principles States have an obligation to ensure that business enterprises respect human rights. The Guiding Principles declare that 'States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.' It should be noted here that the use of the term territory and/or jurisdiction in the Guiding Principles clearly does not restrict it to the national territories but also defines the extra-territorial application of the Principles. The Guiding Principles describe the obligation of States as including 'taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.' Evidently, the Guiding Principles propose due diligence as a means for States to ensure that business enterprises (including TNCs) respect human rights within their territory and/or jurisdiction.

The Guiding Principles explicitly define human rights due diligence under principle 17 as follows:

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, and tracking responses as well as communicating how impacts are addressed. Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
>
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
>
> (c) Should be on-going, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve;

The Guiding Principles draws on the obligation of States to control the actions of private groups or individuals, including TNCs to ensure that they respect human rights within a State's territory and/or jurisdiction. States generally have the obligation to prevent the occurrence of human rights abuse and if

[251] See https://www.gov.uk/government/news/uk-first-to-launch-action-plan-on-business-and-human-rights (accessed 14 November 2018).

prevention fails, remedy such abuses that result from the conduct of TNCs.[252] States obligation to protect requires that they take all reasonable steps to prevent the occurrence of a human rights abuse. The responsibility of TNCs to respect human rights includes acting with due diligence in order to avoid human rights abuse. States are required to ensure that this responsibility is complied with by TNCs.[253]

Having demonstrated in Chapter five of this research that the TEU and the TFEU imposes the least (which is to respect human rights) extra-territorial human rights obligation on the EU, which is to desist from any act that could obstruct human rights (and by extension the RTD) in third countries, and having established in this chapter that the EPAs between the sub-Saharan Africa and EU have the potential of impeding the enjoyment of the RTD of the African peoples, it can be said that the EPAs is not reflective of the EU's extra-territorial human rights obligations regarding RTD.

As noted earlier, the Cotonou Agreement only integrates human rights as an essential element of the EU-African trade relationship. The Agreement mainly confines the scope of human rights to political dialogue and to consultations and suspension of part of the agreement where dialogue and consultations fails. Although Article 34 of the Cotonou Agreement urges the parties to put into consideration the relevant development levels of the parties, the Agreement could have damaging effects for the RTD of a considerable number of African people. As stated earlier, the needed tax regime reforms to compensate for loss of revenue which otherwise would have come from duties in the aftermath of market liberalization will result to huge fall in the African countries' budgets and their ability to finance public policies may drop intensely. The formal and informal sectors may also face competition from multinationals that can negotiate favourable conditions for their businesses and who may threaten not to invest or to move their investments if they do not get better conditions. Furthermore, governments might have to decide on either abandoning the funding of social policies such as education and health due to decreasing incomes, or finding it difficult to attract foreign investors if investors find conditions unacceptable compared to those proposed by other countries. These significant changes in the budgetary structures may infringe upon the countries' right to RTD.

The EU did not take this into consideration in view of their extra-territorial human rights obligations regarding RTD, although the EU has declared monetary assistance so as to offset the loss of public

252 O de Schutter et al 'Human rights due diligence: the role of States' (2012) http://corporatejustice.org/hrdd role-of-states-3-dec-2012.pdf (accessed 21 November 2017) 14.

253 As above.

incomes through the European Development Fund (EDF), this seems to be insufficient[254] and inefficient. According to Gavas,[255] accessing the fund is too rigid and has more cumbersome procedures; moreover, the 10th EDF programming cycle was not adequately flexible to respond quickly to new crises and unforeseen events like floods and conflicts. Furthermore, the EDF's funds disbursement is slow and lacks effective financial management, accountability, supervisory and control systems.[256] The EDF programs are implemented in and by sub-Saharan African States in which internal control systems are generally weak without effective monitoring by the EU,[257] the EU should hold States with weak internal control systems accountable by making sure subsequent EDF programs are based on proper accountability of previous ones. National Authorising Officers in most of these African States lack the capacity and are weak in the establishment and application of financial procedures and controls. There is also difficulty of performing verifications as many of the project sites are in remotes areas. Performing verification is also difficult with the existence of conflicts in certain regions.[258]

6.13 CONCLUSION

In this Chapter, it has been demonstrated that international trade can play important role in the development of sub-Saharan Africa and ultimately the realisation of RTD. However, the potential development benefits that sub-Saharan Africa countries can achieve from international trade are not fully exploited owing to weak policy and weak institutions. The sub-Saharan Africa countries have concluded negotiation on an EPA with the EU, which has been regarded as an agreement oriented towards development. However, the trade agreement is a source of great concern to most Africans. This is because it sustains exporting raw materials from sub-Saharan Africa to EU while it allows high-value-added goods from EU to freely access the African markets thus negatively affecting the infant industries in Africa as well as killing the startup companies. The Agreement also eliminates tariffs on these high-value-added goods from the EU, which will deny the African states much needed revenue for government expenditure on developmental projects such as health, education and infrastructure. These concerns relate to the

254 International federation for human rights Position Paper, 'Economic Partnership Agreements (EPA) and Human Rights' June 2007, 5.

255 M Gavas 'Reviewing the evidence: how well does the European Development Fund perform?' (2012) https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8218.pdf (accessed 6 June 2018) 16, 18.

256 As above.

257 As above

258 As above.

realistion of RTD in these regions. The EU can leverage its extraterritorial human rights obligation under the TEU to promote the realisation of the RTD in Africa through trade relations that take into consideration the concerns expressed by most Africans.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

This thesis sets out to examine the EU's prospect of leveraging its extraterritorial human rights obligation under the TEU to promote the realisation of the RTD in the sub-Saharan Africa through trade. In order to develop and provide answers, a number of questions were addressed. The core research question is: Has the EU leveraged its extra-territorial human rights obligations, if any, to promote realisation of RTD through its trade relations with sub-Saharan Africa? In attempting to develop and answer the core research question, a number of other questions were addressed. They are:

1. What is the nature of RTD globally?
2. What is the nature of RTD under the African human rights system?
3. What is the nature of extra-territorial human rights obligation?
4. What is the legal basis for EU's extraterritorial human rights obligations?
5. What is the effect of the EU-sub-Saharan Africa EPA on RTD and how can the EU respect RTD in the sub-Saharan Africa?

This chapter aims at presenting the findings of this research and providing recommendations.

7.2 SUMMARY OF FINDINGS

From the beginning of this research, the study clarifies the rational for seeking the realisation of RTD through trade. Despite the fact that the African Charter guarantees the RTD, realising it has been elusive. There is the need to examine the EPAs with the EU for pitfalls that will impede the realisation of the RTD.

In terms of theoretical framework, this study adopts a normative development approach; in this approach, development is considered to be about people instead of increase in GDP, accumulation of capital or industrial growth. The strategy under this approach is 'Basic Needs' with the following goals: aggregate the poor's wages via 'labour-intensive production', poverty reduction through encouraging public services, and promoting general participation in development process. This study also describes the

modern notion of human rights and analyses some efforts by philosophers to provide logical explanations for such rights. It sets out what human rights are and provides an overview of different approaches to explaining the foundations of human rights. This study also reflects on the concept and different meanings of development and takes a look at the historical view, nature and content of the RTD, the legal basis for the RTD and the implementation and monitoring mechanism of the RTD. This study provides a lot of findings on the nature of RTD. First, on the issue of development, this study finds that economic development and human development are interrelated and the two must be present to drive development.

Furthermore, this study finds that the RTD is inalienable as well as a complex human right that comprises Civil and Political Rights as well as Economic Social and Cultural Rights and is well established under the African human rights system. This study underlines the vital place of the right to participate, right to self-determination, international cooperation as core content and nature of RTD and stresses the principle of universality, interdependency and indivisibility of human rights elements of the RTD. This study also identifies the RTD duty bearers as individuals, States and the international community as well as everyone who is able to help. While individuals have a duty towards the community, to respect human rights of others and to promote 'political, social and economic order for development,' the State has the duty to create the conditions necessary for and ensuring the realisation of RTD and the international community to cooperate with one another in ensuring and removing impediments to RTD. Regarding the holders of RTD, this study shows that both individuals and peoples are the holders of RTD. This study however, rejects the notion that States are also holders of the RTD. The DRTD is not asking States to claim RTD from another State but rather that States should take collective actions. The international community takes collective action. The international community refers to all countries when they come together to act as a group such as the UN, EU or the AU.

The RTD is a UN General Assembly Resolution with a clear and unambiguous intention of the General Assembly, which is to declare a binding RTD. On the implementation of the RTD, the UN Commission on Human Rights established a working group to clarify the RTD and its effect and report on the obstacle to the implementation of the RTD. The working group recommended the integration of RTD in the policies of international financial institutions, for example, the World Bank and the International Monetary Fund. An independent expert was also appointed to assist the Working Group who wrote six reports on the RTD, which has clarified the nature and scope of the RTD. The independent expert's reports typify RTD as a right that links the gap between ICCPR and ICESCR. The Commission on Human Rights also established

the High-Level Task Force on the implementation of the RTD to help in accomplishing the mandate of the Working Group on the RTD. The High-Level Task Force role is to offer the required expertise to the Working Group so that it can provide suitable recommendations to the different players for the implementation of the RTD. In the High-Level Task Force 2010 report, it was pointed out that the attainment of Millennium Development Goals is critical to the implementation and realisation of the RTD. The EU welcomes the report of the High-Level Task Force and notes some impediments to the realisation of the RTD underlined by the High-Level Task Force.

This study shows that the traditional view that human rights only apply territorially has been increasingly challenged. In reality, it is clear that States and other actors have the ability to impact human rights outside their territory. Economic globalisation has underscored socio-economic inequalities across the world, and the increased power and impact of corporations, international organisations and other non-State actors constitutes a major challenge to human rights law. This study clearly indicates that the jurisdiction clause in most human rights treaties is not restricted to the national territories but also defines the extra-territorial application of the treaty in question. In *Al-Skeini v United Kingdom*, the ECtHR noted that 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1' of the ECHR. The ECtHR used two models to define situations when the jurisdiction of a Contracting State would extend extra-territorially, the 'State agent authority' and 'effective control of an area' models. In applying the 'State agent authority' model the ECtHR noted that 'the acts of diplomatic and consular agents, who are present on foreign territory, may amount to an exercise of jurisdiction when these agents exert authority and control over others'. In applying the 'effective control of an area' model, the ECtHR noted that jurisdiction under Article 1 could apply extra-territorially 'when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory'.

This study finds noticeable dispositions in the jurisprudence of the African Charter as well as in the African Commission's rulings regarding the extra-territorial scope of the Charter. In the African Commission General Comment on the right to life adopted during the 57th ordinary session of the African Commission on human and peoples' rights in November 2015. The General Comment layout the African Charter Member States' extra-territorial obligations concerning the right to life when it said: 'A State shall respect the right to life of individuals outside its territory.' Similarly, The African Commission has been presented with the prospects of deliberating on allegation of human rights violations by some African

States on another States' territory. In *D. R. Congo v. Burundi, Rwanda and Uganda* the Commission funds the Respondents guilty of extra-territorial human rights violations.

In considering the legal basis for EU's extra-territorial human rights obligations this study finds that the EU has legal personality and act within the competence provided under the Lisbon Treaty (the TEU and the TFEU). Furthermore, the EU has only the competences conferred on it by the Treaty's principle of conferral. EU's extra-territorial human rights obligations can be inferred from the provisions under the TEU, the TFEU, and the EU Charter. Article 3(5) of the TEU urges the EU to promote its values including human rights when dealing with the wider world. Article 21(1) of the TEU further requires that the EU's actions be guided by democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms. Similarly, Article 205 of the TFEU requires the EU to be guided by the principles contained in Chapter 1 of Title V of the TEU. Article 207 also request that the EU's external actions regarding common commercial policy be conducted in the framework of the principles and objectives under Article 21(1) TEU. This implies that the EU's trading policy should be designed in a way that will promote the enjoyment of human rights.

This study shows that the EU has leveraged its extra-territorial human rights obligations to prioritize the promotion and protection of human rights in its relations with sub-Saharan African countries. Some of the tools the EU uses to promote human rights in sub-Saharan Africa include trade where it uses some clauses such as Essential Elements Clause in the Cotonou Agreement to promote and protect human rights in sub-Saharan Africa. Under the Essential Elements Clause of the Cotonou Agreement, the parties are urged to respect the human rights obligations that have been in existence particularly economic and social rights as well as civil and political rights. The Cotonou Agreement also laid down procedures that will be activated when a party contemplates that another party has failed to comply with the essential elements of the agreement, which includes suspending aid after exploring every likely option for discussion.

Human rights dialogues with the sub-Saharan African countries, is another tool used by the EU to promote human rights in sub-Saharan Africa. The dialogue is EU's instrument for implementing its external policy on human rights. It discusses questions of mutual interest and enhancing cooperation on human rights as well as registers EU's concern at the human rights situation in the sub-Saharan African country concerned and attempts to improve the human rights situation in that country. Although, the dialogue is introduced by the EU to registers its concern at the human rights situation in the sub-Saharan African countries who are likely to violate rights, the African countries can also use the dialogue to do the same on EU.

Furthermore, the EU provides financial assistance for projects that promotes human rights protection in sub-Saharan Africa (such as global campaigns against the death penalty, the rehabilitation of torture victims' support for free media organisations) through its EIDHR and EDF. Currently, we are in the 11th EDF, which runs between 2014 and 2020 with funds amounting to €30.5 billion. This study shows that although the EU is not bound by the RTD under the African Charter since she is not a party to it, likewise, the EU is not a party to the two Covenants and therefore not bound by the Covenants but has leverage its extra-territorial human rights obligations to respect the rights protected under the Covenants in sub-Saharan Africa. The EU can also leverage its extra-territorial human rights obligations to respect the RTD of the sub-Saharan African peoples by ensuring full participation of the relevant stakeholders and other representatives of the people through the provision of financial and technical assistance to CSOs and other non-State actors where they lack such, as well as ensuring that the sub-Saharan African States obligation of facilitating public involvement and participation in public governance is upheld by the African States.

This study has shown that one of the reasons for the great depression, which culminated in World War II was the beggar-thy-neighbour policies that countries pursued. This policy restricts imports by quotas or by raising tariffs, currency devaluation that makes imports more expensive and exports cheaper, or currency appreciation that reduces domestic inflation but makes its product more expensive in the importing country. However, with the dawn of economic globalization the beggar-thy-neighbour policies lost much of its appeal, ushering in the current multilateral trading system expressed in international economic law and institutional structures, for example, the GATT and the WTO. GATT and WTO's most important principle is that of non-discrimination and reciprocity, where Member States opened its markets equally to one another as embodied in the most-favoured nation clauses meaning that once a nation and its trading partner had agreed on a tariff reduction, that tariff reduction would automatically extended to all other GATT Member States. However, the Enabling Clause, which is officially called the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, permits developed Members State to give differential and more favourable treatment to developing countries through the GSP. Nonetheless, Africa plays a minimal role in the world trade.

This study highlights the EPA between EU and ACP, which started with the Lomé Convention (Lomé I) in 1975 followed by the II, III and IV Lomé Conventions, which entered into force in 1980, 1985, 1990, respectively. One of the important features of the Lomé Conventions was the non-reciprocal preference for most exports from ACP countries to the then EEC. This meant that ACP countries could levy any

duties they wished on EU goods coming into ACP countries without EU doing the same on more than 90 percent of goods from ACP countries entering EU, thereby giving the ACP countries a significant advantage while trading with the EU. However, following protest from other WTO Member States who are not party to the Lomé Conventions on the grounds that it violates WTO rules, the EU and ACP countries commenced another WTO compliant EPA named Cotonou Convention. In compliance with the WTO rules, the Cotonou Agreement provided in Article 36(1) that the parties would take necessary measures to ensure the conclusion of new WTO-compatible EPA, removing progressively barriers to trade between them. Most sub-Saharan African regions have signed the Cotonou Agreement including ECOWAS, Central Africa, EAC, ESA and SADC regions. The common features in all the EPAs between the EU and the various African regions is the gradual elimination of duties and quotas over a period of years on the part of the African regions thereby allowing the EU to freely access their market.

African states have expressed concern as to the potential effects of the EPA. These concerns arise because the EPA is not addressing the major challenges facing the African peoples. Many African peoples face high unemployment as a result of weak productive capacity and food insecurity because of lack of growth in the area of agricultural production and infrastructure. The EPAs is in favour of the exportation of raw materials from sub-Saharan African countries whereas it opens the markets in the sub-Saharan African countries to high-value- added EU goods, which will subdue the capacity of sub-Saharan African countries to grow their individual value-adding processing and manufacturing industries. Furthermore, by eliminating duties, the sub-Saharan African countries will be deprived of a vital source of income for government expenditure on developmental projects such as health, education and infrastructure. This will obstruct the enjoyment of the RTD guaranteed under Article 22 of the African Charter. Most of all, the EPA negotiation process is not inclusive, it lacks the proper participation of stakeholders, which is one of the elements of the RTD.

7.3 RECOMMENDATIONS

A number of recommendations arise from this study. Some of these recommendations are for the EPA negotiators (both the EU and sub-Saharan African negotiators) as well as States; those that warrant particular attention are presented below.

All the relevant players, for example, the EU, regional economic communities must ensure efficient and

significant participation. The negotiating process must be inclusive, participatory and consultative with all relevant stakeholders, including civil society groups, agricultural producer and farming associations, chambers of commerce and industry, professional associations, standard-setting bodies, parliaments and parliamentarians, the media, as well as NGOs, marginalised groups and academia at the national, sub-regional and continental levels. This will guarantee that an extensive range of opinions and observations are taken into consideration before concluding the EPA agreement.

The RTD is guaranteed under the African human right system and is the duty of the African States to create the conditions necessary for the realisation of the RTD; this includes refraining from entering into multilateral or bilateral agreement that will impede its realisation. This should be at the back of their minds when negotiating the EPA. The RTD is established under international customary law and is one of the human rights the EU must respect when dealing with the wider world. Having established that the EU have extra-territorial human right obligation, the EU must leverage this obligation to help realise the RTD in sub-Saharan Africa by ensuring proper participation by all relevant stakeholders in the trade negotiations and that all human rights concerns are given due consideration.

The EPA will contribute to the loss of revenues, especially for sub-Saharan African countries that heavily depend on trade tariffs on imports as a source of government revenue. Considering that governments have obligations to muster resources for human rights purposes especially RTD such as education, infrastructure and social protection, the full extent of consequences of tariff loss must be deliberated with utmost care. This is important since this study has shown that sub-Saharan African countries have found it challenging to replace tariffs with revenue from domestic sources.

Since economic development is a dynamic process the sub-Saharan African countries must be careful not to lose or limit their policy space for the future. They must reject EPA provisions that could undercut the capacity for them to implement measures to ensure the RTD of their citizens, for example, to establish a free trade area.

To help compensate those who will be badly affected by the EPA, negotiators should create a compensatory fund, different from the EDF, to provide short-term financial support and medium-term training, to help transition to new undertakings and areas that will create employment and development.

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