

CHAPTER 1 INTRODUCTION

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

1.1 Background to the study

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

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

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

¹ The UN Charter, art 3.

² Universal Declaration, art 28.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ World Bank Report, 2005.

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

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

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

¹³ UNAIDS 2007.

¹⁴ OECD 2007.

¹⁵ U N A/RES/55/2.

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

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

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

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

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

²¹ UN doc A/45/427 of 22 August 1990.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁹ AU Constitutive Act, Preamble, para 10.

³⁰ Art 3(g).

³¹ Art 3(h).

³² Art 4(c).

³³ Art 4(m).

³⁴ Art 4(l).

³⁵ Art 4(n).

³⁶ Art 4(p).

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

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

1.2 Thesis statement

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

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

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

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

1.3 Research questions

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

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

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

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

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

1.4 Objectives of the study

This study seeks to:

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

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

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

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

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

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

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

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

1.5 Literature review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁸ On file with author.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁵ M Evans & R Murray (2008).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷³ Rukato (2010).

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

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

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

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

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

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

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

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

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

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

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

1.6 Research methodology

⁸¹ Mbazira (2004).

⁸² Baimu (2002) 312.

⁸³ Mbazira (2004) 4.

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

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

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

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

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

⁸⁶ Landsburg (2008) 208.

⁸⁷ Landsburg (2008) 207.

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

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

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

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

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

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

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

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

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

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

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

1.7 Limitations of the study

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

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

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

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

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

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

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

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

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

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

1.8 Scope of the study

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

1.9 Overview of chapters

This study will be divided into eight chapters:

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

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

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

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

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

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

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

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

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

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

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