

CHAPTER 4 THE RIGHT TO DEVELOPMENT IN THE AFRICAN HUMAN RIGHTS SYSTEM

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4.1 Introduction

The chapter examines the following question: What is the place of the RTD in the African human rights system?

As mentioned in chapter 2,⁷⁷³ of this work, ‘the African human rights system’ should be understood broadly. It comprises ‘the regional’ AU based system, the ‘subregional’ system

⁷⁷³ Section 2.2.

and even the national law with its case law. Provisions of this system will be looked at to the extent that they are useful in examining the RTD in the African law.

This chapter sets the stage for the analysis of the RTD within the NEPAD framework in the next chapter. In doing so, it looks at the RTD where NEPAD belongs, within the African human rights system. The chapter is divided in five parts including this introduction.

The second part sketches the substantives provisions of the RTD in the African human rights architecture; the third one focuses on national provisions of Cameroon, Uganda, Malawi, Ethiopia and South Africa while analysing the role of duty bearers; the fourth one looks at the African Commission jurisprudence on the RTD, and the fifth and final section provides concluding remarks.

4.2 Substantive provisions on the RTD in the African human rights system

This section focuses on the substantive provisions on the RTD in the ACHPR, the Protocol on the rights of Women, the African Children Charter and the 1993 SADC Treaty.

4.2.1 The RTD in the ACHPR

As already observed in the introduction, article 22 of the ACHPR reads:

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

The first paragraph clearly underlines that the RTD is made of economic, social and cultural rights as well as freedoms (civil and political rights). In fact, here the multifaceted character of the right is highlighted. During one of the meetings of African Heads of State on the *travaux préparatoires* of the ACHPR, Senghor the former president of Senegal highlighted the need to include the RTD in the future African Convention because it entails all economic,

social and cultural rights, without neglecting civil and political rights.⁷⁷⁴ Furthermore, it could be argued that this view was incorporated in the ACHPR in these terms:⁷⁷⁵

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.

As far as the beneficiary is concerned, the ACHPR presents the RTD as a collective right, as ‘peoples’ rights’. However, the concept of peoples’ and the RTD is problematic, hence the need to give more attention to its significance. In clarifying the concept of people, the section will also assess the right to self-determination which is directly linked to the concept of people as well as to the RTD.

The concept of people grounded in the UN Charter⁷⁷⁶ and in the African philosophy claiming that a person is not perceived as an isolated human being, but as part of a community, as ‘an integral member of a group animated by a spirit of solidarity’,⁷⁷⁷ and as a result individual rights could be clarified and validated only by the rights of the community.⁷⁷⁸ Following this reasoning, peoples’ rights were enshrined in the African instrument from articles 19 to 24: Right of people to equality,⁷⁷⁹ to existence and self-determination,⁷⁸⁰ to dispose freely of

⁷⁷⁴ Address delivered by Leopold Sedar Senghor, President of the Republic of Senegal, OAU DOC CAB/LEG/67/5.

⁷⁷⁵ The ACHPR, preamble, para 7.

⁷⁷⁶ The first sentence of the Preamble reads: ‘We the people of the United Nations...’

⁷⁷⁷ Okere ‘The protection of human rights in Africa and the African Charter on Human and Peoples’ Rights: Comparative analysis with the European and American System’ (1984) 6 *Human Rights Quarterly* 148 as quoted by R Kiwanuka ‘The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights (1988) 82 *The American Journal of International Law* 82.

⁷⁷⁸ Kiwanuka (1988) 82.

⁷⁷⁹ ACHPR art 19.

wealth and natural resources,⁷⁸¹ to economic, social and cultural development,⁷⁸² national and international security⁷⁸³ and to a general satisfactory environment.⁷⁸⁴

The striking feature here is that the ACHPR does not define the concept and it is argued that this was done deliberately in order to avoid disagreement.⁷⁸⁵ However, it could be argued that this voluntary omission creates more problems than it solves because as will be shown in the following lines, an undefined ‘peoples’ is misleading from various angles.

The UN Educational, Scientific and Cultural Organisation (UNESCO) Meeting of Experts on the study of the rights of peoples, held in Paris in 1989, defined peoples for purposes of peoples’ rights in international law, as a group of individual human beings who enjoy some or all of the following common characteristics: a) a common historical tradition, b) racial or ethnic identity; c) cultural homogeneity, d) linguistic unity, e) religion or ideology affinity; f) territorial connection; and g) a common economic life.⁷⁸⁶ A people should have a peculiar or ‘distinct character’.⁷⁸⁷ In this regard, Brownlie is of the view that

⁷⁸⁰ Art 20.

⁷⁸¹ Art 21.

⁷⁸² Art 22.

⁷⁸³ Art 23.

⁷⁸⁴ Art 24.

⁷⁸⁵ Report of the Draft African Charter presented by the Secretary-General at the 37th ordinary session of the OAU Council of Minister, Kenya, 15-21 June 1981, OAU Doc CM/1149 (XXXVII), Annex II: Rapporteur’s Report OAU Doc CAB/LEG/67/Draft.Rept (II) Rev.4 (Rapporteur’s Report), also Vieljoen (2007) 243.

⁷⁸⁶ UNESCO ‘New reflections on the concepts of peoples’ rights’ (1990) 11 (3-4) *Human Rights Law Journal* (pages 441, 446).

⁷⁸⁷ I Brownlie ‘The right of people in modern international law’ (1995) 9 *Bulletin of Association of Legal Philosophy* 108, 110.

[T]he concept of distinct character depends on a number of criteria which may appear in combination. Race or nationality is one of the more important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominance.⁷⁸⁸

However, in the ACHPR, there is no specific criterion to identify people or peoples. In fact, the doctrine is always trying to interpret the provisions related to ‘peoples’. Article 19 of the ACHPR reads: ‘All peoples shall be equal: they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another’.

Here ‘people’ is subject to various interpretations: It includes minorities within the state, or the entire population of a state,⁷⁸⁹ where no group prevails or discriminates against another.⁷⁹⁰ In this case, ‘people’ applies to all collective rights in the ACHPR.⁷⁹¹ It also implies the protection of minorities against both internal and external form of colonialism;⁷⁹² internally, against the state which could be understood as the right to internal self-determination from and indigenous peoples’ rights perspective.⁷⁹³ This also goes hand in hand with article 20 of the ACHPR which provides for the right of existence and the right to self-determination of all peoples.⁷⁹⁴ Indeed the concept of ‘people’ is vague, unclear and keeps changing, hence the

⁷⁸⁸ Brownlie (1993) 108-110. For more on the clarification of ‘peoples,’ see The Universal Declaration of the Rights of peoples, Algiers, 4 July 1976; also Cassese A. and Jouve E. (eds) *Pour un droit des peuples Essai sur la Declaration d’Alger* (1978).

⁷⁸⁹ P Kunig ‘The role of ‘peoples’ Rights in the African Charter of Human and Peoples’ Rights’ in Ginther K. & W Benedek (eds) *New perspectives and conceptions of international law: An Afro-European dialogue* (1983) 169.

⁷⁹⁰ Ougergouz *La Charte Africaine des Droits de l’Homme et des Peuples: Historique, portee juridique et contribution a la protection international des droits de l’homme en Afrique* (1993) 140.

⁷⁹¹ Ougergouz (1993) 140.

⁷⁹² R Kiwanuka (1988) 93.

⁷⁹³ UN General Assembly (GA) Res of 13 September 2007, art 3; also Viljoen (2007) 46.

⁷⁹⁴ More light will be shed on the concept of peoples’ rights in the ACHPR under the section allocated to the *endorois* case (‘The right to self-determination and natural resources’).

correctness of Ougergouz's argument in which he claims that the concept of 'people in the African Charter is a Chameleon-like concept'.⁷⁹⁵

This vagueness does not assist in claiming the RTD as the state, duty bearer can easily twist the concept into whatever can enable it to forgo its responsibilities. For instance, if 'people' is taken to mean the state itself, it is almost impossible for the state to claim a right against itself, but only against the international community as several African countries would like to do.

Nevertheless, saying the RTD is a peoples' right does not negate the fact that it is also an individual right. In this regard, M'baye argues that 'development is a right for all [individuals and people]'.⁷⁹⁶ In fact, he points out that associating the RTD with collective rights is a 'hasty conclusion' which he opposes.⁷⁹⁷ This view is supported by virally who argues that the RTD is a human and a right of people; an individual and collective right.⁷⁹⁸ In the same vein, Benedek argues that in the ACHPR he finds evidence of the individual RTD.⁷⁹⁹ In the same perspective, Ouguergouz rightly argues that

[t]he right to development inevitably has an individual dimension, yet this stems rather from the purpose of the right rather than from the way it is exercised. Failing any proof of the contrary, the view enshrined in the Charter is firmly directed towards the ultimate goal of the full development of the human person. To deny this would be to fail to recognise that each type of rights, individual rights and

⁷⁹⁵ F Ougergouz *African Charter on human and peoples' rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 204 & 211.

⁷⁹⁶ M'baye (1972) 515.

⁷⁹⁷ K M'baye 'Le droit au developpement en droit international' in Makarczk J (ed) *Essays in International law in honour of Judge Manfred Lachs* (1984) 173.

⁷⁹⁸ Ouguergouz (2003) 299.

⁷⁹⁹ W Benedek 'peoples' rights and individuals' duties as special features of the African Charter on Human and Peoples' Rights' in Kunig, P; Benedek, W & Mahalu CR (eds) *Regional protection of human rights by international law: The emerging African system – Documents and three introductory essays* (1985) 77-78.

rights of peoples, in its way strive towards the same goal: respect for human dignity in its two expressions – that of human beings and of human communities.⁸⁰⁰

The second paragraph of the article under study clearly identifies states as the duty bearers of the right. They shall act ‘individually or collectively, to ensure the exercise of the right to development’. While acting individually, the state takes action in the line of the Maastricht Guidelines studied earlier.⁸⁰¹ It must act to promote, respect and protect the RTD. This will be further addressed in the subsequent section dealing with the implementation of the right in African countries.

Though the duty of the state at national level is clear, acting ‘collectively’ to ensure the RTD implies acting through international co-operation. In this regard, the co-operation should take place amongst African states that are parties to the ACHPR. According to article 26 of the Vienna Convention on the Law of Treaties, the *pacta sunt servanda* must be respected by state parties to treaties; in other words, a treaty is binding only on its parties. Before the codification of this rule in 1969, it was emphasised by the Permanent Court of International Justice (PCIJ) in its 1928 consultative opinion through the *Dantzig* case.⁸⁰² The Court said that an international law agreement was binding only on parties to the agreement unless the parties had expressed their will or intention to do otherwise.

This rule of international law can constrain African state’s ability to provide the RTD because most of them are cash trapped and cannot assist each other financially and turn to the wealthy countries or IFIs that are not parties to the ACHPR. The wealthy countries and IFIs can only assist as they please, on the ground of charity, or humanitarian assistance discussed earlier. In fact, this concern will be further analysed when addressing the role of partnership in NEPAD’s attempts to realise the RTD.⁸⁰³

⁸⁰⁰ Ouguergouz (2003) 306.

⁸⁰¹ Section 3.4.1.1 discussing the state as the duty-bearer of the RTD, page 90.

⁸⁰² *Jurisdiction of the Court of Dantzig* case, consultative opinion 1928, PCIJ. Ser B, No 15.

⁸⁰³ Chapter 7 of this study.

4.2.2 The RTD in the Protocol to the ACHPR on the Rights of Women in Africa

In addressing one of the shortcomings of the ACHPR, which did not expressly cater for women's rights, the Protocol on the Rights of Women was adopted in Maputo, Mozambique on 11 July 2003, and entered into force on 25 November 2005. It protects women's rights in general. But interestingly, it addresses women's rights to sustainable development in its article 19, which calls upon states parties to mainstream gender in national development planning. Accordingly, women should be involved at all levels of development endeavours;⁸⁰⁴ women's right to land,⁸⁰⁵ to credit, and other resources should be promoted to enhance women's quality of life.⁸⁰⁶ In addition, women should be protected against the negative effects of globalization in order to ensure their right to sustainable development.⁸⁰⁷

Furthermore, article 10 (3) of the same instrument urges state parties that generally allocate more money to military expenditure to shift the focus and allocate more money for women's development. Indeed, the allocation of more resources to women's education, training and empowerment in general can only enhance women's RTD. In this context, the duty bearer of the right is the state and the beneficiaries are women. The Protocol on the Rights of Women specifically underlines what the duty bearer should do to ensure women's rights to sustainable development. In fact, the state should adopt gender responsive legislations to ensure women's right to sustainable development.

4.2.3 The RTD in the African Charter on the Rights and Welfare of the Child

Article 5 of the African Children's Charter provides for the right to 'survival and development' of the child. Accordingly, the state, the duty bearer, shall amongst others ensure

⁸⁰⁴ Art 19(b).

⁸⁰⁵ Art 19(c); also 2001 SADC Treaty, art 5(1) (j).

⁸⁰⁶ Art 19(d).

⁸⁰⁷ Art 19(f).

the ‘development’⁸⁰⁸ of the child who is the beneficiary of the right. In this context, it could be argued that the state shall take appropriate measures to ensure that the child’s right to food, healthcare, education among others are respected. The achievement of these rights to the benefit of the child will lead to his or her survival and development.

4.2.4 The RTD in RECs: The 1993 SADC Treaty

The Treaty of the Southern African Development Community (SADC) was adopted in 1992 and entered into force in 1993. Even though this particular instrument does not have a specific provision on the RTD, amongst others, some of its objectives are to realise development and achieve economic growth, alleviate poverty, improve the quality of life in SADC and support the socially disadvantaged.⁸⁰⁹ In addition, its 2001 amendment clearly highlights that ‘poverty eradication’ should be at the centre of all SADC actions and programmes. Following this logic, its 2003 Summit adopted a Charter of Fundamental Social Rights in SADC with the main objective of improving people’s standards of living. In the same vein, the SADC Protocol on Gender and Development was adopted in 2008. In substance, the content of this protocol is similar to article 19 of the Protocol on the rights of women discussed earlier, though there is no specific provision on women’s RTD. Nevertheless, it can be argued that the RTD is secured in various projects of regional integration because it is ‘a conglomerate consisting of numerous rights to basic necessities of life’⁸¹⁰ which informed the creation of regional economic communities.

In sum, this is an overview of the RTD concept in the AU human rights based system including the SADC sub-region. The next section will focus on the RTD in national law while studying *inter alia* the role of the state, primary duty bearer of the RTD.

4.3 The RTD in African national laws – Case studies

⁸⁰⁸ African Children’s Charter, art 5 (2).

⁸⁰⁹ Art 5 of the SADC Treaty. For more on ensuring social security or human welfare in SADC, see B Jordaan, E Kalula & E Strydom (eds) *Understanding Social Security Law* (2009) 45-53.

⁸¹⁰ Viljoen (2007) 496.

This section examines the duty bearer's obligations while focusing on the RTD at national levels. Whereas various African countries' constitutions provide for development,⁸¹¹ Cameroon, Ethiopia, Malawi and Uganda specifically provided for the RTD in their constitutions. These constitutions will be the focus of the study when examining the role of African states in the realisation of the RTD because they expressly provide for the right. Though the South African Constitution does not mention development, it is known as the most progressive constitution in Africa⁸¹² and provides an interesting case study with several cases law and will therefore be also looked at.

It is important to recall the second paragraph of article 22 of the ACHPR calling upon states to act individually and collectively to secure the RTD. As mentioned earlier, the state is the primary duty bearer of the right at national level. This section assesses to what extent African states listed above comply with the law of development of the African human rights system.

4.3.1 Cameroon

Paragraph 3 of the Preamble of the 1996 Cameroonian Constitution recognises the RTD in these terms:

[We are] resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.

⁸¹¹ Angola (art 200), Benin (art 9), Burkina Faso (art 14), Burundi (arts 52,56), Cape Verde (art 40), Central African Republic (art 2), Chad (art 19), Congo (art 7), Cote d'Ivoire (art 7), Democratic Republic of Congo (arts 16,58), Equatorial Guinea (art 13), Gabon (art 1), Ghana (art 37(2)(a) of the Derivative Principles of State Policy), Guinea (art 6), Liberia (art 7 of the Principles of National Policy), Madagascar (art 17), Niger (art 14), Senegal (art 7), Tanzania (art 9(1)(i) of the Fundamental Objectives and Directives of State Policy) and Togo (art 12); also C Heyns & W Kaguongo 'Constitutional Human Rights Law in Africa' (2006) 22 *South African Journal on Human Rights* 673.

⁸¹² J C Mubangizi *The protection of human rights in South Africa: A legal and practical Guide* (2004) 71.

According to this provision, Cameroon recognises itself as the duty bearer of the RTD and counts on its natural resources to deliver its people from the claws of poverty. It also highlights that all Cameroonians without discrimination will enjoy the right.

However, it also highlights the role of international co-operation, by declaring its readiness to work with other states with due respect to the principle of sovereignty in view of achieving the RTD. By the look of things, in providing for the RTD, Cameroon was inspired by the 1986 UNDRTD⁸¹³ and the ACHPR which highlights the role of the state and international community in providing the RTD without discrimination.

Though the RTD is included in the preambular paragraph, it is justiciable because article 65 of the Cameroonian Constitution underlines that ‘the Preamble shall be part and parcel of this Constitution’.⁸¹⁴ The government of Cameroon takes the RTD very seriously. This was highlighted by President Biya’s speech at the UN in 2001. He questioned ‘how can we speak of human rights without the right to development?’⁸¹⁵

Nevertheless, in its Periodic Reports on its implementation of the ACHPR’s provisions presented at the 31st Ordinary Session of the African Commission in 2002, Cameroon did not present measures undertaken to protect the RTD. In fact, the Report does not even mention the right in question. This gap shows that national governments or Heads of State and ministries of foreign affairs of numerous countries send their representatives to the Human Rights Council and the General Assembly to vote for the RTD resolutions and support the notion in speeches, whereas at national level nothing is done to for its implementation.

⁸¹³ See art 1(2), 2(3), 3 to list some of them.

⁸¹⁴ More analysis on the implementation of the RTD in Cameroon will be provided in chapter 6 of this research which focuses on the prospects of the RTD in Africa.

⁸¹⁵ ‘Biya emphasises on the right to development as the main human right’ *Afrol News* 8 September 2000, available at http://www.afrol.com/NEWS/cam007_biya_millennium.htm (accessed 18 December 2008).

Interestingly, in its Concluding Observations on the Report,⁸¹⁶ except from observing that ‘poverty hinders the implementation of human rights in Cameroon’,⁸¹⁷ the African Commission did not address the issues or rather overlooked the lack of Report on article 22 of the ACHPR. There was no recommendation whatsoever on the question. Such reporting and monitoring mistakes do not enhance the prospects of realisation of the RTD in Africa and in Cameroon in particular.

4.3.2 Uganda

The 1995 Ugandan Constitution recognises the RTD. In the draft constitution, the RTD was a significant part of chapter 3. However, in the final constitution, the RTD finds its place in the midst of the National Objectives and Directive Principles of State Policy as objective number nine which reads: ‘The right to development’ and provides that ‘in order to facilitate rapid and equitable development, the State shall encourage private initiative and self-reliance’. In addition, objective number ten calls upon the state to undertake needed measures to involve the people in the formulation and implementation of development plans and programmes which affect them. In addition, the principles stress the role of the state in development.

Nevertheless, locating the RTD in the National Objectives and Directive Principles of State policy casts serious doubt on the justiciability of the provisions. Putting the RTD away from chapter 4 of the Constitution which deals with the Bill of Rights evidences that the drafters had no intention to ensure its justiciability.

However, the amendment of the 1995 Constitution through its article 8 (a) 1 turned the RTD into a justiciable right. It states that ‘Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of State policy’.⁸¹⁸ It can be argued that the RTD is now part of the Ugandan Bill of Rights as

⁸¹⁶ Presented at the 39th Ordinary Session of the African Commission on Human and Peoples’ Rights held in Banjul, Gambia from 11 to 25 May 2005.

⁸¹⁷ Para 12 of the Concluding Observations.

⁸¹⁸ 1995 Constitution of Uganda as amended in February 2006.

provided by chapter 4 of the Constitution. Meanwhile, it is important to note that reporting under article 62 of the ACHPR⁸¹⁹ the Uganda Report does not mention what is done to operationalise article 22 of the African instrument dealing with the right under study.⁸²⁰

4.3.3 Malawi

Section 30 of chapter 4 of the 1994 Malawian Constitution reads:

1. All persons and people shall have a right to development and therefore to enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
2. The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
3. The state shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.
4. The state has the responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

From this section, different features of the RTD can be drawn: Just like in the first article of the UNDRTD, the RTD is an individual and collective right to be enjoyed without discrimination in Malawi. The content of the right, enjoyment of ‘economic, social, cultural and political development’ is also similar to the content at regional as well international levels.

In Malawi, the RTD is justiciable and the state is clearly the primary entity responsible to deliver its people from poverty. In enjoying the RTD, not only should the vulnerable people

⁸¹⁹ Art 62 of the ACHPR ‘Each State Party shall undertake to submit every two years from the date the present Charter comes into force, a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter’.

⁸²⁰ 39th Ordinary Session of the African Commission on Human and Peoples’ Rights, Banjul, The Gambia, May 2006.

not be forgotten, they should be given special attention. In fact, the RTD provision in the Malawian Constitution sounds like article 8(1) of the UNDRTD which highlights the most important role of the state in providing the RTD. It can be argued that Malawi incorporates international and regional instruments pertaining to the RTD into its municipal law

However, the November 2008 human development statistics in Malawi is far from being encouraging. Infant mortality rate is 90.55 deaths /1000 live births, life expectancy 43.45 years, 900 000 people living with HIV and AIDS, the risk to suffer and die from food and water borne diseases is very high, the literacy rate is only 62,7% and the population below poverty line is 53%.⁸²¹ Notwithstanding section 13(e) of the Malawi Constitution calling upon the state to promote the welfare of its citizens through policies and legislation, poverty is a reality in the country where ‘rural standards of living is a key indicator of the success of Government policies’.⁸²² This indicator is clearly in line with the Preamble of the UNDRTD which views development as⁸²³

[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 distribution of benefits therefrom.

Rural Malawians are however, forgotten.⁸²⁴ During their research on the ‘Right to Development, the Quality of Rural Life, Legislation and the Performance of State Duties’ in rural Malawi, Kamchedzera and Banda observed that rural dwellers were not in the agenda of the state. In fact, during the sum up and feedback session of the discussions, a village

⁸²¹ November 2008 CIA, The World Fact Book, Malawi available at <https://www.cia.gov/library/publications/the-world-fact-book/geos/mi.html> (accessed 15 November 2008).

⁸²² Art 13(e) of the Malawian Constitution.

⁸²³ UNDRTD, Preamble para 2.

⁸²⁴ G Kamchedzera and C U Banda ‘The Right to development, the quality of rural life, and the Performance of legislative duties during Malawi’s first five years of multiparty politics’. A paper based on research on the right to development, the quality of rural life, legislation and the performance of state duties; Research dissemination seminar number law/2001/2002/001, Faculty of Law, University of Malawi.

representative said:⁸²⁵

I would like to thank you on behalf of this village. I would like you to know that under the previous regime, we expected nothing and we received nothing in this village. With the new Government, we again expected nothing and we have received nothing. When we saw you enter our village, we expected nothing and we do not think you will give us anything once you return to where you have come from. Why then should I thank you? Because we think that by taking the effort to come here and discuss issues with us, you probably think that we too are people just like you.

Indeed, this statement confirms that rural folks are less than human beings in Malawi and have no rights including the RTD. As a result, even as the mean household size is the same for both urban and rural areas, at 4.3, the dependency ratio is 1.1 in rural areas compared to 0.8.⁸²⁶ The net primary school enrolment rate is 83.4 % in urban areas but 77% in rural areas.⁸²⁷ Even though mean distances to school are shorter in rural areas, 3.4 km compared to 3.7 km in urban areas, rural children take more time to get to school because of the lack of means of transport.⁸²⁸ In rural areas, children take 27.5 minutes to travel to school compared to 23 minutes in urban areas. About 5.9% of the rural folks spend less than Kwachas 50 per month.⁸²⁹ In the urban areas, poor people represent only 0.1%.⁸³⁰ Though this statistics were released by the Malawian National Statistical Office, back in 2000, the level of poverty in the country remains appalling as demonstrated by the November 2008 CIA World-Fact Book statistics.⁸³¹ Malawi should take its responsibility and comply with its national Constitution in

⁸²⁵ Kamchedzera & Banda (2001/2002) 13.

⁸²⁶ Kamchedzera & Banda (2001/2002) 16.

⁸²⁷ Kamchedzera & Banda (2001/2002) 16.

⁸²⁸ Kamchedzera & Banda (2001/2002) 17.

⁸²⁹ Kamchedzera & Banda (2001/2002) 17.

⁸³⁰ Kamchedzera & Banda (2001/2002) 17.

⁸³¹ See November 2009 CIA, The World Fact Book, Malawi available at <https://www.cia.gov/library/publications/the-world-fact-book/geos/mi.html> (accessed 15 November 2008).

general and the provision on the RTD in particular. It should take all necessary measures to address well-being in the entire country.

4.3.4 Ethiopia

In its chapter 3 on Fundamental Rights and Freedoms, the 1994 Ethiopian Constitution provides for the RTD in its article 43 which reads:

The Right to Development

1. The right of the peoples of Ethiopia collectively, or the nations, nationalities and peoples in Ethiopia, individually, to improve their standard of living and to sustainable development is guaranteed.
2. Citizens shall have the right to participate in national development, and in particular, to demand that their opinions be heard on matters of policies and of projects pertaining to the community of which they are members.
3. International agreements entered into or relations formed by the State shall be such as to guarantee the right to the sustainable development of Ethiopia.
4. The main objectives of development activities shall be the citizens' development and the fulfillment of their basic needs.

Similar to the Malawian Constitution, the Ethiopian one secures a justiciable RTD in its text. The Ethiopian text addresses all the elements of the RTD as included in the 1986 UNDRTD and the 1993 Vienna Declaration. The individual and collective aspect of the right are mentioned,⁸³² the right to participation is raised,⁸³³ the international community's duties through international agreements signed by Ethiopia are referred to,⁸³⁴ and finally the fact that the whole process of development conducted by the state should aim to ensure basic needs or human dignity is highlighted.⁸³⁵ The reality is that, just like Malawi, Ethiopia is one of the poorest countries on earth.

⁸³² 1994 Ethiopian Constitution, art 43(1).

⁸³³ 1994 Ethiopian Constitution, art 43(1), art 4(2).

⁸³⁴ 1994 Ethiopian Constitution, art 43(1), art 43(3).

⁸³⁵ 1994 Ethiopian Constitution, art 43(1), art 43(4).

Nonetheless, not only is the RTD enforceable in Ethiopia, the country's Report to African Commission clearly exposes measures taken to implement the right at a local level. For instance,

[u]nder article 89.5 [of the Ethiopian Constitution] the Government has the duty to hold, on behalf of the people, land and other natural resources and to deploy them for their common benefit and development; the Government shall at all times promote the participation of the people in the formulation of national development policies and programmes. It shall also have the duty to support the initiatives of the people in their development endeavors.⁸³⁶

Accordingly, realising the RTD in Ethiopia is all about enhancing the standards of living for all through the use of resources, the participation of people in development policies under the support of the state which is in the driving seat. In fact, in reporting to the African Commission on article 22, Ethiopia mostly highlighted constitutional provisions protecting the RTD, though these provisions are yet to materialise on the ground. Furthermore, the measures taken to implement the constitutional provisions are underlined in the Report. This situation and the widespread poverty in Ethiopia raise questions on what is done to address poverty and implement the constitutional provisions on the RTD. It is not enough to recognise the RTD in a constitution and go to bed. Action needs to be taken to actualise and render the constitution useful. States should comply with their obligations to take appropriate measures at local as well as global to better its people's life.⁸³⁷

4.3.5 South Africa

Though the South African 1996 Constitution does not mention the RTD as a human right, its chapter two or Bill of Rights guaranteeing socio-economic rights comprises the protection of the RTD as will be shown below.

⁸³⁶ Ethiopia combined Report (initial and four periodic reports) to the African Commission on Human and Peoples' Rights, para 423.

⁸³⁷ UNDRTD, art 8(1).

The legislature, the Human Rights Commission,⁸³⁸ the Commission for Gender Equality, the Public Protector,⁸³⁹ the Auditor-General⁸⁴⁰ and the courts ensure that the RTD is respected. Despite the fact that these institutions do not address the RTD *per se*, they protect socio-economic rights which are the correlative rights to the RTD. The South African Chief Justice Pius Langa stresses that at national level there cannot be development if socio economic rights are not realised.⁸⁴¹ The First Periodic Report of South Africa to the African Commission at its 38th Ordinary Session clarifies:⁸⁴²

Although the Constitution does not provide for the right to development, this right is implied since the Constitution provides social, economic and cultural rights, including political rights, which are features of the right to development defined in article 1 of the UN Declaration as comprehensive economic, social, cultural and political processes which aim at the constant improvement of the well-being of the entire population and of all individuals, in which human rights and fundamental freedoms can be realised. The above mentioned rights enshrined in the Constitution provide a framework for comprehensive economic, social, cultural and political processes aimed at constant improvement of the well-being of the entire population and all individuals, in which human rights and fundamental freedoms can be realised.

⁸³⁸ Sec 184(3) of the South African Constitution empowers the Human Rights Commission to demand from all organs of the State ‘information on the measures taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment’.

⁸³⁹ Established under Sec 182 of South African Constitution, the Public Protector has the power to ‘investigate any conduct in state affairs or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice’.

⁸⁴⁰ Sec 188(1) of the Constitution empowers the Auditor-General to: ‘audit and report on the accounts, financial statements and financial management of :

- a) all national and provincial state departments and administration;
- b) all municipalities; and
- c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General’.

⁸⁴¹ Justice Pius N Langa ‘Human rights, the rule of law, and the right to development’ speech presented at the Birchwood Conference Center in Johannesburg, 24 November 2006 (on file with author).

⁸⁴² First Periodic Report of South Africa to the African Commission, para 325.

In other words, elements of the RTD as defined by international and regional instruments are part and parcels of the Constitution. More importantly, aware that the achievement of the right is a continuing process,⁸⁴³ the government undertook various measures for its achievement: Legislation and Policy,⁸⁴⁴ Peoples Housing Process Policy,⁸⁴⁵ National Savings Programme,⁸⁴⁶ Policy on Joint Ventures,⁸⁴⁷ Housing Consumer Protection Measures Act, 1998 (Act of 1998),⁸⁴⁸ The Rental Housing Act of 1999,⁸⁴⁹ the Local Government: Municipal System Act of 2000⁸⁵⁰ and numerous case law discussed below show South African's commitment to the RTD. The South African Report to the African Commission clearly identifies measures taken to realise the RTD.

In response, the African Commission was only concerned by the lack of participation of states, institutions and of civil society in the preparation of the report.⁸⁵¹ In fact, it can be argued that the African Commission has no problem with South Africa's commitment to the RTD, except that there is a need to involve the civil society and other stakeholders on human rights in the preparation of the Report.⁸⁵²

⁸⁴³ First Periodic Report of South Africa to the African Commission, para 325.

⁸⁴⁴ First Periodic Report of South Africa to the African Commission, para 326.

⁸⁴⁵ First Periodic Report of South Africa to the African Commission, para 327.

⁸⁴⁶ First Periodic Report of South Africa to the African Commission, para 327.

⁸⁴⁷ First Periodic Report of South Africa to the African Commission, para 328.

⁸⁴⁸ First Periodic Report of South Africa to the African Commission, para 329.

⁸⁴⁹ First Periodic Report of South Africa to the African Commission, para 330.

⁸⁵⁰ First Periodic Report of South Africa to the African Commission, para 331.

⁸⁵¹ 38th Ordinary Session of the African Commission, Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa; para 16.

⁸⁵² Recommendation of the African Commission, para 26.

Notwithstanding the positive Report to the African Commission, the protection of socio-economic rights and the RTD in South Africa are hampered by the fact that socio-economic rights are subjected to progressive realisation, or the requirement that the government must only act according to the availability of financial resources.⁸⁵³ This condition gives room for the state to justify its inability or unwillingness to achieve socio-economic rights and protect the RTD.

Nevertheless, as correctly observed by Marks and Andreassen ‘progressive realisation’ does not allow the state to neglect the protection of socio-economic rights.⁸⁵⁴ On the contrary, the notion of ‘progressive realisation must be seen in the light of the overall objective of the Covenant [on Economic Social and Cultural Rights], which is to establish clear obligations for state parties to move as expeditiously as possible to realise these rights’.⁸⁵⁵

Nonetheless, in ensuring the justiciability of socio-economic rights, the South African example should be followed by other countries in Africa. The country has been taken to court for not delivering houses⁸⁵⁶ and not protecting the right to health.⁸⁵⁷ In the case of *Government of Republic of South Africa and Others v Grootboom and Others*,⁸⁵⁸ where a poor community, living in huts had been evicted from a privately owned property after having

⁸⁵³ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); 1997 12 BCLR 1696 (CC).) Also *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)* (No 2) 2002 5 SA 721 (CC).

⁸⁵⁴ S Marks and B Andreassen ‘Introduction’ in Marks & Andreassen (eds) *Development as a human right. Legal, political and economic dimensions* (2006) xvi.

⁸⁵⁵ Marks and Andreassen (2006) xvi; also Committee on ESCR, General Comment No 3 (1990) on the nature of state obligations under art 2 (1) of the ICESCR.

⁸⁵⁶ *Government of Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

⁸⁵⁷ *Minister of Health and Others v Treatment Action Campaign and Others (TAC case)* (No 2) 2002 5 SA 721 (CC).

⁸⁵⁸ The *Grootboom* case 2000 11 BCLR 1169 (CC).

applied for low-cost housing to the government, the Constitutional Court of South Africa held that

[t]here can be no doubt that human dignity, freedom and equality; the foundational values of our society are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in chapter 2 [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁸⁵⁹

Based on article 26 of the Constitution, the Constitutional Court made it compulsory to the government to deliver housing to the poor. The South African Government was obliged to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the said right. The *Grootboom* case shows the importance of socio-economic rights and the right of access to housing in particular in the realisation of the RTD in South Africa.

In another South African case, *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (*TAC* case),⁸⁶⁰ the Treatment Action Campaign challenged the South African Government's policy in terms of which an antiretroviral drug, Nevirapine, was made available only in certain research sites within the public health sector for the purposes of testing the efficacy of the programme to prevent mother-to-child transmission of HIV and AIDS. The Constitutional Court declared that section 27(1) and (2) of the South African Constitution required the government to devise and implement within its available resources a comprehensive and coordinated programme to realise progressively the right of pregnant women and their newborn children to have access to health services to combat mother-to-

⁸⁵⁹ The *Grootboom* case 2000 11 BCLR 1169 (CC), para 23.

⁸⁶⁰ The *TAC* case. For more on this case, see M Heywood 'preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the *Treatment Action Campaign* case against the Minister of Health' (2003) 19 *South African Journal of Human Rights* 278. See also E Baimu 'The government's obligation to provide anti-retroviral to HIV-positive pregnant women in an African human rights context: The South African Nevirapine case' (2003) 3 *African Human Rights Law Journal* 160. See also D M Chirwa 'The right to health in international law: Its implications for the obligation of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 541.

child transmission of the disease.⁸⁶¹ The Court ordered the South African Government to immediately remove the barriers that hinder the distribution of Nevirapine in public hospitals for the sake of protecting mother- to-child transmission of the disease. The distribution was not supposed to consider suitability of a medical site or other such factors. In this way, the Court played an important role in the promotion of development based on socio-economic rights in general and the right to health in particular.

The South African jurisprudence further shows that the RTD goes beyond socio-economic rights and civil and political rights and includes other branches of law such as environmental law that can ensure the protection of human well-being. In this regard, the South African Constitutional Court handed down a very important judgment on 7 June 2007. In the *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,⁸⁶² the Court highlighted the importance of protecting the environment, and linked its protection to the fulfillment of other human rights under the Constitution and to the protection of the right to life itself. In addition, the case provides more clarification on the RTD.

The question before the Court was to know whether the environmental authorities considered and evaluated the social and economic impact of the proposed filling station on existing ones and how an additional filling station would affect the environment.⁸⁶³ In answering this

⁸⁶¹ Section 27 of the South African Constitution provides as follows:

27. (1) Everyone has the right to have access to
 - a. health care services, including reproductive health care; sufficient food and water; and
 - b. social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

⁸⁶² *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* Case No. CCT67/06. See also *Fuel Retailers Association of South Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 2 SA 163 (SCA).

⁸⁶³ *Fuel Retailer* case, para 91.

question, the Constitutional Court provided more information on the content of the RTD. Even though the case does not address the RTD *per se*, it demonstrates the connection between the well-being of human beings (which is the main concern of the RTD) with the protection of the environment.⁸⁶⁴ Justice Ngcobo emphasises this link by quoting the report of the World Commission on Environment and Development, which reads:⁸⁶⁵

Environment stresses and patterns of economic development are linked one to another. Thus agricultural policies may lie at the root of land, water and forest degradation. Energy policies may lie at the root of land, water, and forest degradation. Energy policies are associated with the global greenhouse effect, with acidification, and with deforestation for fuelwood in many developing nations. These stresses all threaten economic development. Thus economics and ecology must be completely integrated in decision making and lawmaking processes not just to protect the environment, but also to protect and promote development. Economy is not just about the production of wealth, and ecology is not about the protection of nature; they are both relevant for improving the lot of humankind.

The link between the RTD and environmental concerns is explained by the Rio Declaration through its principles 3 and 4. Principle 3 provides that ‘the Right to Development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’ while Principle 4 provides that environmental protection is fundamental to achieving sustainable development. Therefore, Boyle and Frestone correctly observe that the core element of the concept of sustainable development is the inclusion of both developmental and environmental protection,⁸⁶⁶ or what Justice Ngcobo calls ‘the principle of integration of environment protection and socio-economic development’.⁸⁶⁷

The discussion above focuses on the implementation of the RTD at the national level where the government is the primary duty bearer of the RTD. It is responsible for the creation of the

⁸⁶⁴ *Fuel Retailer case*, para 44.

⁸⁶⁵ *Fuel Retailer case*, para 44; also General Assembly 42nd Session: Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report) at http://www.un.org/esa/sustdev/documents/docs_key_conferences.htm (accessed 9 March 2008).

⁸⁶⁶ *Fuel Retailers case*, para 50.

⁸⁶⁷ *Fuel Retailers case*, para 50.

climate needed to operationalise the right in question. This can be done through the establishment of democratic institutions, respect for the rule of law, good governance and appropriate poverty alleviation policies.

Though as a result of bad governance, several African states do not take appropriate measures to ensure the RTD, where the latter is comprised in their law. The first step towards improving the situation is to domesticate the ACHPR as well as its Protocol on Women's rights. In other words, before looking outwards for assistance, African governments must first look inwards. They should create a stable legal framework, informed by supreme national constitutions and establish good governance before turning to development partners. In this perspective, Mbazira argues that Africa should begin to get rid of its problems by utilising the locally available resources and avoid relying on external solutions.⁸⁶⁸

In sum, the four African countries discussed above recognise or strive to insert the RTD in their national legal systems. This should be followed by other African countries (parties to the ACHPR) that have the obligation to domesticate article 22 of the ACHPR.

4.4 The jurisprudence of the African Commission on the RTD

This section will focus on four communications: the *Bakweri Land Claims Committee v Cameroon*⁸⁶⁹ (*Bakweri case*), the first ever inter-state complaint brought before the African Commission, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*.⁸⁷⁰ *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*⁸⁷¹ (*Endorois case*) and *SERAC v Nigeria*⁸⁷² (*SERAC case*) where the African Commission failed to take a strong stand on the RTD.⁸⁷³

⁸⁶⁸ Mbazira (2004) 47.

⁸⁶⁹ *Bakweri Land Claims Committee v Cameroon*, Communication No 260/2002, AHRLR (2004) 43.

⁸⁷⁰ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

⁸⁷¹ Communication 276/2003.

⁸⁷² *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, the Gambia, and www.achpr.org.

4.4.1 *The Bakweri Land Claims Committee v Cameroon*⁸⁷⁴

In the *Bakweri* case, the complainants submitted a communication to the African Commission to claim their historic lands which were held by non-native people. They grounded their communication on the violation of their right to have their cause heard,⁸⁷⁵ their rights to property,⁸⁷⁶ wealth and natural resources⁸⁷⁷ as well as the violation of their RTD.⁸⁷⁸ Unfortunately, this case did not go beyond the admissibility phase because local remedies were not exhausted by the applicants.⁸⁷⁹ Hence, it did not bring any significant development on the RTD at the African Commission. However, the RTD was on the table; in other words, the RTD is well written in the African law.

4.4.2 *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*⁸⁸⁰

⁸⁷³ It is worth to note that apart from observing that the right to food (violated by the defendant) is implicit in several provisions of the ACHPR such as art 4 on right to life, art 16 on right to health article 22 on the RTD, the African Commission doesn't find a violation of the RTD per se in this case. (see *SERAC & Another v Nigeria* para 64).

⁸⁷⁴ *Bakweri Land Claims Committee case v Cameroon*, Communication No 260/2002, AHRLR (2004) 43.

⁸⁷⁵ Art 7(1)(a) of the ACHPR.

⁸⁷⁶ Art 14 of the ACHPR.

⁸⁷⁷ Art 21 of the ACHPR.

⁸⁷⁸ Art 22 of the ACHPR.

⁸⁷⁹ Art 50 of the ACHPR reads: 'The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the commission that the procedure of achieving these remedies would be unduly prolonged'.

⁸⁸⁰ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda* Annex IV, 20th Annual Activity Report of the African Commission, 111.

Unlike the *Bakweri* case, which did not see its completion, the *Democratic Republic of Congo (DRC)* case is a good development on the RTD. Here are the facts: On 9 March 1999, in the first interstate communication filed before the African Commission the DRC lodged a complaint against Burundi, Rwanda and Uganda; the DRC alleged that it was the victim of a military assault by Burundi, Rwanda and Uganda that had invaded its border provinces in the eastern part of the country and committing mass violations of human rights and international law. These violations comprise the mass killing of civilians and the invasion of a hydroelectric dam. The attack on the hydroelectric dam yielded the interruption of electricity supply to homes, schools and hospitals which resulted to the deaths of patients relying on life support systems.

The DRC also claimed that the respondent states were responsible for human rights violation such as rape, mass looting of civilian property and natural resources as well as the forced movement of populations from the region into ‘concentration camps’ in Rwanda in order to create a Tutsi land.

In term of law, the complainant argued that not only the respondents’ actions violated articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 and 23 of the ACHPR, they also encroach upon international law with special attention to the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949 and its additional protocol 1, the UN Charter and the UN Declaration on Friendly Relations Between Nations.

Burundi refused to take part in the proceedings, Rwanda refused to take part in the proceedings beyond admissibility stage and though Uganda denied the allegations against it, the African Commission found for the applicant. In fact, bound by article 23 of the ACHPR, the African Commission had to uphold international law and had to draw inspiration from international law as provided by articles 61 and 62 of the ACHPR in making its decision. The respondents were found guilty of violation of the alleged provisions of international law and the ACHPR.

More importantly on the RTD, the African Commission found for the applicant on two grounds: first, it found the dumping and mass burial of victims of massacres and killings

orchestrated against the people of the Eastern Province of the DRC particularly appalling and made a pronouncement on the RTD in these words:⁸⁸¹

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

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

Second, the African Commission sees a direct link between the right to wealth and national resources and the RTD. It also links the right to wealth and natural resources to the ability of states to fulfill their individual and collective obligations to achieve the RTD (article 22(2) of the ACHPR). In this regard, the African Commission argues 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.

Put differently, in the *DRC* case unlike in the *SERAC* case, the realisation of the RTD is linked to the realisation of the right to wealth and natural resources. This approach which takes into account the interconnectedness of human right should be welcomed because, as demonstrated earlier, the RTD is a multifaceted human right and should be addressed as such.

⁸⁸¹ Communication 227/99, *Democratic Republic of the Congo v Burundi, Rwanda, and Uganda*, para 87.

4.4.3 *Centre for Minority Rights Development (CEMIRIDE) (on behalf of the Endorois) v Kenya*⁸⁸²

At its 46th Ordinary Session, the African Commission⁸⁸³ delivered a historical decision through the *Endorois* case. This communication is important and unique, because, for the first time, the African Commission was able to deal in a substantive and groundbreaking way with the alleged violation of the RTD. Here are the facts:⁸⁸⁴

On 22 May 2003, the complaint was lodged by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions on behalf of the Endorois community. The complainants claimed the eviction of the Endorois (a pastoralist group) from their ancestral land at Lake Bogoria in central Kenya in the 1970s, to set up a national game reserve and tourist facilities. The communication dealt with several alleged human rights violations of the Endorois community.

According to the complainants, the eviction was a violation of the Endorois peoples' human rights resulting from the displacement from their ancestral lands (upon which their sustainable way of life was based) without adequate compensation. In addition, the lost of their land yielded the interruption of their pastoral activity and the infringement of their rights to practice their religions and culture as well as their 'overall process of development'.⁸⁸⁵ Furthermore, the complainants alleged that the Endorois people were dispossessed from their land, their property without having a say and that all decisions affecting their land were taken without their effective participation and complained that this was a violation of their RTD.

⁸⁸² Communication 276/2003.

⁸⁸³ Held in Banjul, The Gambia from 11 – 25 November 2009.

⁸⁸⁴ Communication no 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

⁸⁸⁵ Communication no 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, para 1

The case reached the African Commission after Kenyan courts' failure to remedy the injustice. In terms of the ACHPR, these allegations encompass the violation of articles 8,⁸⁸⁶ 14,⁸⁸⁷ 17,⁸⁸⁸ 21⁸⁸⁹ and 22⁸⁹⁰ of the ACHPR by the Republic of Kenya.⁸⁹¹ Nevertheless, though other rights involved are not less important, the analysis of this decision will be centred on the claims pertaining to the RTD which is at the heart of the thesis.

In claiming their RTD, the complainants founded their arguments on three main grounds:

- The violation of their right to participation in decisions affecting their land and development and
- The violation of their right to self-determination and natural resources attached to their right to be a distinct 'people'.

a- The right to participation in decision affecting their land and development

The complainants claimed that they did not take part or participate in the development process and that the well-being of their community was neglected by the Kenyan government.⁸⁹² They argued that their consent was not required and clearly indicated that an appropriate consent 'requires at minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process with an effective opportunity to

⁸⁸⁶ Freedom of conscience and religion.

⁸⁸⁷ Right to property.

⁸⁸⁸ Right to culture.

⁸⁸⁹ Rights to free disposition of natural resources.

⁸⁹⁰ RTD.

⁸⁹¹ See Communication 276/2003, para 22.

⁸⁹² Communication 276/2003, para 125.

participate individually or collective'.⁸⁹³ In other words, the Endorois people stressed the violation of their right to participation in issues affecting their communities and even their life because they had no say when their land was taken away from them.

In reaction to these allegations, the Kenyan government disagreed and observed that the right to participation of all is ensured through a democratic process informed by free and fair election involving representatives.⁸⁹⁴ In this dispute, the African Commission was called upon to make a decision on the right to participation and its impact on the realisation of the RTD.

The right to participation or the right not to be excluded is secured in several human rights instruments. The ICCPR caters for the right to participation in these terms:⁸⁹⁵

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It could be argued that this provision caters for the right to participation of indigenous people under the concept of ethnic or linguistic minorities.

The right to participation is also located in the 1986 UNDRTD, which sees the human being at the centre of development and should therefore be the 'participant and beneficiary',⁸⁹⁶ or rather the alpha and omega, of development. Furthermore, not only should individuals and groups participate in development,⁸⁹⁷ their participation should 'be active, free and meaningful' and they should also benefit from the result of development.⁸⁹⁸

⁸⁹³ Communication 276/2003, para 133; also *Mary and Carrie Dann v USA* (2002), para 136.

⁸⁹⁴ Communication 276/2003 Para 270.

⁸⁹⁵ ICCPR, art 27.

⁸⁹⁶ UNDRTD, art 2(1).

⁸⁹⁷ UNDRTD, art 2(2).

⁸⁹⁸ UNDRTD, art 2(3).

Similar to the instruments mentioned above, the Rio Declaration,⁸⁹⁹ the 1990 African Charter for Popular Participation in Development and Transformation,⁹⁰⁰ the ACHPR⁹⁰¹ and the Declaration on the Rights of Indigenous People⁹⁰² also provide for the right to participation. From the reading of these instruments, the participation could be defined as:⁹⁰³

A process by which the government and civil society open dialogue, establish partnerships, share information and otherwise interact to design, implement and evaluate development policies, project and programs...that requires the involvement and commitment of all interested parties, including, among others, the poor and traditionally marginalized groups, especially racial and ethnic minorities.

According to this definition, all the stakeholders of development including ‘traditionally and marginalised groups especially racial and ethnic minorities’ shall be involved in the development process. The African Commission’s pronouncement on the right to participation was heard when in the *SERAC* case the commission noted that the Ogoni people were marginalised by the government while dealing with the Dutch oil company, Shell. (To be discussed shortly).

In the *Endorois* case, the African Commission found that the consultations undertaken with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission’s benchmark of

⁸⁹⁹ Adopted at the Rio Conference on Environment and Development in Rio de Janeiro, Brazil, 3-4 June 1992, para 21 and 22 clearly underline the right to participation of indigenous people in development.

⁹⁰⁰ Adopted at the International Conference on Popular Participation in Development and Transformation in Arusha, Tanzania ; UN doc. E/ECA/CM.16/11,1990. Addis Ababa, UN Economic Commission for Africa.

⁹⁰¹ Art 13.

⁹⁰² UN Res GA/10612 of 13 September 2007, art 11 and 12 for example.

⁹⁰³ This definition is the fruit of the 1996 Santa Cruz Summit on Sustainable Development. It was subsequently adopted by the Inter-American Council for Development in 2000; also K Mynnti ‘The right of indigenous peoples to participate in development projects’ in M Scheinen & M Suksi (eds) *Human Rights in Development Year Book 2002- Empowerment, participation, accountability and non-discrimination: Operationalising a human rights based approach to development* (2005) 235.

consultations in a form appropriate to the circumstance. The African Commission observed that ‘community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve’,⁹⁰⁴ hence its decision to urge the state to warrant the rights to effective participation of Endorois in development issues.

In calling upon the state to ensure an ‘active, free and meaningful participation in development’,⁹⁰⁵ by the beneficiaries of development, it could be argued that the African Commission underscored the point that even if the beneficiaries ignore their right to participate, they should be educated and informed timeously to ensure their inclusion in development projects.

This position of the African Commission is conducive to the realisation of human rights and the RTD in particular, because as noted through the Maastricht guidelines,⁹⁰⁶ the state has the obligation to promote, protect and fulfil human rights, and therefore should take all necessary measures to involve the beneficiaries of rights in the process of development. Thus, the correctness of the African Commission’s statement:

The State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties.⁹⁰⁷

State’s compliance with this prescription will definitely be a good step towards ensuring the RTD.

b - The right to self-determination and natural resources and the right to be a distinct people

⁹⁰⁴ Para 281.

⁹⁰⁵ UNDRTD, art 2(3).

⁹⁰⁶ The Maastricht principles describe the duty of the state in terms of human rights realisation. Accordingly, the state has the duty to promote, respect and fulfilled human rights. Sees section 3.4.1.1 of this thesis.

⁹⁰⁷ Communication 276/2003, para 289.

In claiming their RTD, the complainants underlined that their eviction from their land negated their right to self-determination over their land and their natural resources. In other terms, their territorial and economic self-determination were violated;⁹⁰⁸ in this instance, the complainants combined the right to self-determination (art 20 of the ACHPR) and the right to natural resources (article 21 of the ACHPR) to claim their RTD. They also argued that encroachment upon these two rights abolished their choices and capabilities in terms of ‘liberty in their action’,⁹⁰⁹ and therefore hinders their RTD. They also contended that the eviction demolished their way of life, sources of income and as a result, hindered their ability to pay their taxes which led to the impounding of their cattle by the government.⁹¹⁰

In response to these allegations, Kenya argued that the complainants’ contention was untrue as a tax is charged in income and that if the Endorois had no income, there were not taxed at all.⁹¹¹ In resolving this question, the African Commission had to address the right to territorial and economic self-determination as an important element of the RTD.

As mentioned earlier, the right to self-determination is secured in the provision of the ICESCR and the ICCPR in their common article 1(1), in the ACHPR,⁹¹² in the Vienna Declaration,⁹¹³ the CERDS,⁹¹⁴ and the UNESCO Convention on the Protection and Promotion

⁹⁰⁸ Communication 276/2003, para 129.

⁹⁰⁹ Communication 276/2003, para 128.

⁹¹⁰ Communication 276/2003, para 126.

⁹¹¹ Communication 276/2003, para 273.

⁹¹² Art 20.

⁹¹³ Vienna Declaration, part 1, para 2; also art 4 of the NIEO Declaration, 26 (k) and 14 (e) of Copenhagen Declaration.

⁹¹⁴ Art 2 ‘Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities’.

of the Diversity of Cultural Expressions⁹¹⁵ as well as the UN Declaration on the Rights of Indigenous Peoples.⁹¹⁶ These instruments provide for national self-determination in the realisation of development with an authoritative language. In general, they give instructions to states by using ‘shall’ in various instances; the state ‘shall’ take steps to...⁹¹⁷ For most of these instruments, self-determination is a group right or ‘peoples’ right’. It seems that in the international arena, self-determination refers to sovereign entities like states.

However, back in 1999, in its Concluding Observation on Canada, the Human Rights Committee recognised that numerous ‘peoples’ may exist within a state.⁹¹⁸ It stated that

[t]he right to self-determination requires, *inter alia* that all people must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee recommends that decisive and urgent action be taken towards the full implementation of the recommendations on land and resource allocation. [Recommendations made by the Royal Commission on aboriginal Peoples in view to protect indigenous peoples’ rights in Canada].⁹¹⁹

Similarly, the Committee on Human Rights used common article 1 on self-determination to protect indigenous peoples’ rights within the confine of countries like Mexico,⁹²⁰ Norway,⁹²¹ Australia,⁹²² amongst others.

⁹¹⁵ Art 2 (2).

⁹¹⁶ Art 3.

⁹¹⁷ Art 5 UNDRTD for example, also CERDS, art 1 (3) The States Parties to the present Covenant, ..., shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁹¹⁸ Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8.

⁹¹⁹ Concluding Observation on Canada, UN Doc. CCPR/C/79/Add.105 (1999), para 8.

⁹²⁰ Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999).

⁹²¹ Concluding Observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999).

⁹²² Concluding Observations on Australia, UN Doc. CCPR/CO/69/AUS (2000).

However, emphasising the need to use an interconnectedness approach to human rights interpretation, Scheinin observes that the interdependence-based interpretation of the ICCPR's provisions reveals that article 1 and article 27⁹²³ are linked. Following this approach, article 27 on minority rights reveals that self-determination is also an individual human right.⁹²⁴ In *Makuika et al v New Zealand*,⁹²⁵ which dealt with national fisheries settlement in New Zealand and the share of the indigenous peoples known as Maori, the Human Rights Committee realised that minorities rights included in article 27 incorporate various elements of self-determination as provided for by article 1 of the Covenant.

Beside the Human Rights Committee's Concluding Observations which view peoples' rights to self-determination within the boundaries of a state as a reality, the only international instrument which provides clearly for self-determination of 'people' in a midst of a state is the 2007 UN Declaration on the Rights of Indigenous Peoples. It reads in articles 3, 6 and 23 respectively:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic social and cultural development

'Every indigenous individual has the right to a nationality' and finally:

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 determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programme through their own institutions.

⁹²³ Art 27 of the ICCPR reads: 'In those States in which ethnic, religious or linguistic minorities exist, person belonging to such minorities shall not be denied the right, in community with the other members of their groups, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

⁹²⁴ M Scheinin 'Advocating the right to development through complaint procedures under human rights treaties' in Andreassen & Marks (2006) 276.

⁹²⁵ Communication No 547/1993 *Makuika et al v New Zealand* (27 October 2000). See 2000 Report of the Human Rights Committee, vol. II, UN Doc. A/56/40 (vol. II), 11-29.

These articles not only shed more light on the legal source of the RTD, they also showcase that the right to self-determination can be enjoyed by groups within the confine of a state. The last quote above actually emphasises the right to participation and administration of social programmes aiming at the realisation of socio-economic rights. Again, the composite aspect of the RTD appears. The right to participation or civil and political rights associated with economic, social and cultural rights result in a right called RTD. More importantly, the right to self-determination of an indigenous individual does not deprive him or her of his or her nationality. His or her right to self-determination is actually to be exercised within his or her country of origin.

The right to self-determination of people under colonial rule is at the centre of the Copenhagen Declaration.⁹²⁶ In the same vein, article 20 of the ACHPR reads:

- (1) All people shall have the 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.
- (2) Colonised or oppressed peoples shall have the right to free themselves from the bond of domination by resorting to any means recognized by the international community.
- (3) All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

According to this provision, all people shall enjoy the right to self-determination. People here might include sovereign states or groups within a state. In any case, the article is self explanatory; colonised peoples are also entitled to self-determination. This underscores the colonial domination of Africa and the need for freedom from colonial power. From a decolonisation perspective, self-determination is the national sense of self-esteem without which all societies cannot be developed because they will have no say in their

⁹²⁶ Art 26(k) reads: ‘...Reaffirm the right of self-determination of all peoples, in particular of peoples under colonial or other forms of alien domination or foreign occupation, and the importance of the effective realization of this right, as enunciated, *inter alia*, in the Vienna Declaration’.

relationships.⁹²⁷ It is based on the assertion that all people have an equal right to liberty, to free themselves from any foreign intrusion, to choose their own regime and fight for their freedom, and to benefit from other people's help in their fight if it is necessary.⁹²⁸

More importantly, article 20(2) underlines the right to self-determination of 'oppressed people'. This provision also empowers peoples or groups inside a sovereign state to claim their rights to secede if they are oppressed. This is very much in line with the UN Declaration on the Right of Indigenous Peoples. In this perspective, the African Commission protected the right to self-determination and to natural resources of the Ogoni people through *SERAC V Nigeria*⁹²⁹ discussed elsewhere in this thesis.

Unfortunately, the practice of the right to self-determination does not always comply with the law. Nmehielle argues that, 'African States have individually and under the auspices of the OAU [now AU], taken the position that self-determination does not apply outside the colonial context, because such post-colonial application of the concept will undermine African unity'.⁹³⁰ This policy was also observed during the Biafra struggle when the late Julius Nyerere, former President of Tanzania opposed Biafra's attempt to secede from Nigeria on the ground that it was an attempt to destroy African unity.⁹³¹ Similarly, emperor Selassie of Ethiopia acting as head of the Consultative Committee on the Nigeria-Biafra crisis was of the opinion that national unity of individual African states was a key factor in uniting the continent and therefore the territorial integrity of OAU member states was not negotiable.⁹³²

⁹²⁷ F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights in Africa* (2004) 387; C Heyns 'The African regional human rights system: The African Charter' 108 (2004) *Pennsylvania State Law Review* 691-692.

⁹²⁸ Viljoen (2004) 387.

⁹²⁹ *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, the Gambia, and www.achpr.org.

⁹³⁰ V O Nmehielle *The African human rights system, Its law, practice, and institutions*. (2001)143.

⁹³¹ Nmehielle (2001) 143.

⁹³² Nmehielle (2001) 143.

The refusal to apply the provision on self-determination to groups within Africa was also applied by the ICJ in the case between *Burkina Faso and Mali*.⁹³³ The ICJ declared as follows:

The maintenance of territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by the peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice.

In the same vein, in the *Katangese* case⁹³⁴ where the Katangese Peoples Congress requested that the African Commission recognise the peoples' right of the 'Katangese people' to independence, thus allowing them to split from the state of Zaire, the African Commission refused to recognise them as a 'people' and held that it had an obligation to uphold the territorial integrity and sovereignty of all member states of the OAU and those state parties to the African Charter.⁹³⁵ The African Commission also held that:

In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by article 13(1) of the African Charter, the African Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.⁹³⁶

Through the same communication, the African Commission clarifies that self-determination may be exercised through

⁹³³ *Burkina Faso v Republic Mali*, ICJ (22 December 1986) ICJ Reports 554, 566-567.

⁹³⁴ *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). For more on this case, and self-determination, also see M Hansungule 'Substantive complaint handling manual for the Ethiopian Human Rights Commission', paper prepared for the Ethiopian Human Rights Commission (on file with author)

⁹³⁵ The *Katangese* case, para 5.

⁹³⁶ The *Katangese* case, para 6.

[i]ndependence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.⁹³⁷

Surprisingly, applicants for self-determination did not claim their RTD which is connected to self-determination. They could have based their claim on article 22 of the ACHPR as well.

Another instance where the African Commission was called upon to clarify the right to self-determination was the *Gambian Coup* case.⁹³⁸ In this case, a *coup d'état* was planned by a military force, which later came into power by force; the African Commission held that the military *coup d'état* was a grave violation of the right of the Gambian people to freely choose their government as entrenched in article 20(1) of the African Charter.⁹³⁹ It was the violation of the right to vote of Gambians which amounts to the violation of their right to self-determination.

As noted above, the rationale behind the refusal of right to self-determination at national level has to do with African unity which was fundamental for the decolonisation of the continent.

However, such policy seems to be very detrimental for the protection of indigenous peoples' rights in general and their RTD in particular. In Namibia as in many parts of the world, indigenous peoples are discriminated against; they have no rights to land, access to justice, culture, education, and healthcare.⁹⁴⁰ In fact, they are oppressed and should be given a right to claim their self-determination not in theory, but in practice because their RTD is at stake. The successful protection of their RTD calls for the implementation of a right to self-

⁹³⁷ The *Katangese* case, para 4.

⁹³⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

⁹³⁹ The *Jawara* case, para 73.

⁹⁴⁰ SA Djoyou Kamga 'Promotion of indigenous and tribal peoples' rights through the implementation of the principles of ILO Convention No.169 and the African Charter on Human and Peoples' Rights: Namibia desk review 5. ILO Project prepared under the auspices of the Centre for Human Rights, University of Pretoria.

determination involving external as well as internal self-determination.⁹⁴¹ In other words, externally, a group should be free to set up its own political institutions, to have its own economic resources, and to be in charge of its culture;⁹⁴² internally, a group should not have its freedoms taken by other groups, states or by an oppressor.⁹⁴³

In the present case (*Endorois*), the African Commission underlined freedom of choice as a core element of the RTD as highlighted by Sengupta the Independent Expert on the RTD.⁹⁴⁴ Accordingly, people should be given the choice to develop their potentials and this cannot be done without territorial and economic self-determination. Development should be understood in terms of freedom where people are free to choose their way of life. In this context, ‘freedom is the primary end and the principal means of development’.⁹⁴⁵ Therefore, without freedom, development and the RTD becomes a pipe dream, hence the correctness of the African Commission’s decision in ruling that the eviction of the Endorois people hinders their right to self-determination and reduced their freedom of action to empower themselves. It could be argued that the African Commission’s decision was a good move towards the ‘legal empowerment of the poor’.⁹⁴⁶ In other words, this decision set a precedent that will inspire and allow the poor to claim their human rights.

In reaching its decision, the African Commission was not only guided by the Report produced by the UN Working Group on Indigenous Populations requiring that ‘indigenous peoples are

⁹⁴¹ L B Sohn ‘The new international law: Protection of the rights of individuals rather than states’ (1982) 32 *American University Law Review* 1, 50.

⁹⁴² Sohn (1982) 50.

⁹⁴³ Sohn (1982) 50.

⁹⁴⁴ A Sengupta ‘The right to development as a human right’ Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), page 8, available at http://www.hsph.harvard.edu/xfbcenter/working_papers.htm 2000 (accessed 30 June 2008).

⁹⁴⁵ A, Sen *Development as freedom* (1999) 35, also H J Steiner *et al International human rights in context law, politics, morals – Text and materials* (2007) 1434.

⁹⁴⁶ D Banik ‘Introduction’ in D Banik (ed) *Rights and legal empowerment in eradicating poverty* (2008) 1.

not coerced, pressured or intimidated in their choices of development’,⁹⁴⁷ but also by the decision of the court in the *Yakye Axa community* case⁹⁴⁸ where it was argued that the

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

In other words, the mere fact that the Endorois people were removed from their land and deprived of their self-determination hindered their ability to realise their RTD. It is observed that the concept of ‘peoples’ and self-determination are linked. Unlike in its previous decision where the African Commission were silent on the issue, it elaborated extensively and clearly defined ‘peoples’.⁹⁴⁹ Relying on the Report of the Working Group on Indigenous Peoples,⁹⁵⁰ the Commission highlighted the identification criteria of indigenous people to be:

- ‘a) the occupation and use of a specific territory;
- b) the voluntary perpetuation of cultural distinctiveness;
- c) self-identification as a distinct collectivity, as well as recognition by other groups;
- and
- d) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination’⁹⁵¹

The Commission went on to identify the Endorois as specific group in these words:

The alleged violation of the African Charter by the respondent state are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands,

⁹⁴⁷ Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4 (2004), para. 14 (a).

⁹⁴⁸ *Indigenous Community Yakye Axa v Paraguay* 17 June 2005, Inter American Court of Human Rights.

⁹⁴⁹ Para 156 -157 of the decision.

⁹⁵⁰ Report of the Working Group, ‘ Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities submitted in accordance with ‘Resolution on the Rights of Indigenous Populations/Communities in Africa adopted by the African Commission on Human and Peoples’ Rights at its 28th ordinary session (Published by IWGIA, 2005), see Chapter 4.

⁹⁵¹ Endorois case, par. 150.

cultural patterns, social institution and religious systems. The African Commission therefore accepts that self-identification for the Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.⁹⁵²

Through this case, unlike in the previous ones, the African Commission explained the notion of ‘peoples’ and its new approach was vital in finding the violation of the RTD by Kenya. In addition, the Commission did not submit the realisation of the right of to the availability of resources as it was the case in the *SERAC* case in addressing socio-economic rights. It applied the principle of immediate realisation secured in the ACHPR.

c – The impacts of the Endoris decision

Amongst others, the African Commission urged the Government of Kenya to recognise the RTD of the Endorois people, pay them ‘adequate compensation for all the loss suffered, pay [them] royalties from existing economic activities and ensure that they benefit from employment possibilities within the Reserve’ and involve them in the implementation of this ruling.

This decision is a very good move towards the protection of indigenous peoples’ rights in general, and in ‘making the law work for everyone’;⁹⁵³ it is also a defining moment towards the implementation of the RTD. Human Rights Watch observes: ‘[I]t is the first time that any international tribunal has found a violation of the RTD’.⁹⁵⁴

Through this decision, unlike in the *SERAC* case to be discussed shortly, the African Commission seized the opportunity to clarify the substance of the RTD. It clearly stated the ‘constitutive and instrumental’⁹⁵⁵ features (including the concept of ‘peoples’) of the right. In other words, it is a

⁹⁵² Para 157 of the decision.

⁹⁵³ A Sengupta ‘The political economy of legal empowerment of the poor’ in D Banik (eds) *Rights and legal empowerment in eradicating poverty* 2008 (31).

⁹⁵⁴ Human Rights Watch ‘Kenya: Landmark Ruling on Indigenous Land Rights African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development’ at http://www.witness.org/index.php?option=com_content&task=view&id=1015&Itemid=168 and <http://www.hrw.org/africa/kenya> (accessed 10 March 2010).

⁹⁵⁵ Communication 276/2003, para 277.

process or a tool through which all human rights are realised in order to reach the end product which is the RTD.

The *Endorois* decision is very interesting in clarifying the substance of the RTD. In *William Courson v Zimbabwe*,⁹⁵⁶ the complainant submitted a communication against Zimbabwe concerning the legal status of homosexuals since homosexuality was outlawed by the Zimbabwean legislation. Among others, the complainant claimed that the criminalisation of homosexuality in Zimbabwe was a violation of the right to economic, social and cultural development with due regard to their identity as a people and their equal enjoyment of the common heritage of mankind as provided by article 22 of the ACHPR. Nevertheless, the human rights discourse could not benefit from this case because the petition was withdrawn.⁹⁵⁷

However, the complainant could have benefited from a claim based on the right not to be discriminated against,⁹⁵⁸ (if they suffered discrimination on the ground of their sexual orientations) and not on the RTD which is a multifaceted human right. Nevertheless, Ankuma notes that the *Courson* case is recorded as a communication where the RTD was an issue in the African human rights system.⁹⁵⁹

Another positive benefit of the *Endorois* decision is that the African Commission clearly underlines the holistic character of the RTD which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices.⁹⁶⁰ The African Commission's ruling is important as it calls upon state parties to the ACHPR to

⁹⁵⁶ Communication 136/94 *William A Courson v Zimbabwe*; for more on this communication, see Ankuma (1996) 166.

⁹⁵⁷ Communication 136/94 *William A Courson v Zimbabwe*, para 3.

⁹⁵⁸ ACHPR, art 2.

⁹⁵⁹ E A Ankuma (1996) 'The African Commission on Human and Peoples Rights: Practice and Procedures' 166.

⁹⁶⁰ Communication 276/2003, para 277.

respect human rights in general; in fact, this decision ‘spells the beginning of a brighter future’⁹⁶¹ for the realisation of the RTD, even though the implementation of this decision remains to be seen.

4.4.4 *SERAC v Nigeria*⁹⁶²

This case illustrates the failure of the African Commission to fully address the issues pertaining to the RTD, but to the right to wealth and natural resources,⁹⁶³ amongst others. Nevertheless, this case is interesting in this discussion as it shows how though empowered by article 60⁹⁶⁴ of the ACHPR, the African Commission failed to interpret the law and to define the scope and content of the RTD.

As a matter of fact, two non-governmental organisations (NGOs) brought suit before the African Commission against Nigeria for claims based on the violation of the right not to be discriminated against (article 2 of the Charter), the right to life (article 4), property (article 14), health (article 16), a family, wealth and natural resources (article 21) and to satisfactory environment (article 24). Among others, the Ogoni people did not participate in the conclusion of the contracts (depriving them of their land and natural resources) between the Nigerian government and Shell Company, they were not given a share of the profits from the exploitation of their land, and were displaced from their ancestral land without compensation

⁹⁶¹ Human Rights Watch ‘Kenya: Landmark Ruling on Indigenous Land Rights African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development’ at http://www.witness.org/index.php?option=com_content&task=view&id=1015&Itemid=168 and <http://www.hrw.org/africa/kenya> (accessed 10 March 2010).

⁹⁶² *SERAC & Another v Nigeria*, ACHPR, 2001, Banjul, The Gambia, and www.achpr.org.

⁹⁶³ Art 21 of the ACHPR.

⁹⁶⁴ Art 60 reads: ‘The Commission shall draw inspiration from international law on human and peoples’ rights, particularly from the provisions of various African instruments on human and peoples’ rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

and as a result they claimed their right to wealth and natural resources. The NGOs challenged the agreements the Nigerian government had entered into for the exploration and mining of oil in Ogoni land without considering the interests of the Ogoni people. The interests that were ignored included participation of the local community during the conclusion of the contracts, the local people not being given a share of the profits from the exploitation of their land, and their displacement from their ancestral land without compensation in order to clear the way for mining activity. It was also claimed that the oil production was responsible for the environmental degradation and bad health stemming from the contamination of the environment in the Ogoni community. The exploitation disposed toxic wastes into the environment and local waterways in violation of applicable international environmental standards. The resulting contamination of water, soil and air had serious health impacts, including skin infections, gastro-intestinal and respiratory ailments, and increased risk of cancers, neurological and reproductive problems.

In this case, the African Commission failed to clarify the content of the RTD. Though it was of the view that the RTD was violated, it did not pronounce such violation in its final decision. In fact, it referred to the violation of the RTD while emphasising the violation of ‘the right to food implicit’ in several violated provisions.⁹⁶⁵ The Commission affirmed that:

The Communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (article 4), the right to health, and the right to economic, social and cultural development (article 22). By its violation of these rights, the Nigerian government trampled upon not only the explicitly protected rights, but also upon the right to food implicitly guaranteed.⁹⁶⁶

The African Commission missed the opportunity to provide a dynamic reading of the law to clarify the scope and protect the RTD. All provisions of the ACHPR in which the right to food is implicit could have been read together to do so. Furthermore, the African Commission argued in paragraph 56 of its decision that article 21 of the ACHPR was intended to provide for ‘cooperative economic development’ on the continent. In other words, under article 21 of the ACHPR, the African Commission clearly endorsed the ‘participatory development

⁹⁶⁵ Para 64 of the decision.

⁹⁶⁶ Para 64 of the decision.

imperative'⁹⁶⁷ which could have been read under article 22 as well. Though the case does not address the RTD directly, in reaching its decision, the African Commission was inclined to protect the rights to health,⁹⁶⁸ to environment,⁹⁶⁹ of all people to freely dispose of their wealth and natural resources in their own interest.⁹⁷⁰ In addition, the African Commission found the violation of the right to food which is implicit in the RTD violated,⁹⁷¹ but not acknowledged by the Commission in its final decision. A better reading of the ACHPR could have been useful in protecting the RTD especially if one is to consider Okafor's view that in addressing the RTD, 'one must take account of the interconnectedness and seamlessness of the rights contained in the African Charter'.⁹⁷² Nonetheless, the African Commission clearly avoided making a pronouncement on the RTD, which was violated and was the base for the violation of the right to food. The reading of the right to food into the content of the RTD (that was violated) should have assisted the Commission in taking a strong stand on the RTD. This is disquieting because in the same case, the African Commission found the violation of the right to shelter (which is not provided for in the Charter) through the combination of the protection of the right to health, property and family.⁹⁷³ The same approach could have been used to find the violation of the RTD and not the right to food, given that the RTD is provided for.

In terms of legal regime, the Commission submits socio economic rights (elements of the RTD) to progressive realisation based on the availability of resources, whereas the ACHPR subscribes for immediate realisation. It could however, be argued that the African Commission is empowered⁹⁷⁴ to use international law including the General Comments of the

⁹⁶⁷ O C Okafor "“Righting” the right to development: A socio-legal analysis of article 22 of the African Charter of Human and Peoples' Rights' in S Marks (ed) *Implementing the right to development – The role of international law* (2008) 55.

⁹⁶⁸ Art 16 of the ACHPR.

⁹⁶⁹ Art 24 of the ACHPR.

⁹⁷⁰ Art 21 of the ACHPR.

⁹⁷¹ SERAC Case, para 64.

⁹⁷² O C Okafor (2008) 55.

⁹⁷³ SERAC case, para 60.

⁹⁷⁴ Art 61 of the ACHPR.

Committee on Economic Social and Cultural Rights in reaching its decision. Nevertheless, this approach worked because Nigeria is a party to the ICESCR. Olowu questioned: ‘would there have been credible and justifiable basis for the Commission to apply the same approach were it to involve a state that is not party to ICESCR [International covenant on Economic Social and Cultural Rights]?’⁹⁷⁵ Such an approach would not have worked for countries like Botswana, Mozambique, or Comoros that are not party to the ICESCR. Hence, the Commission has to reconsider its approach in order to set a common standard on economic social and cultural rights on the continent.⁹⁷⁶

The other problem with this decision is the silence of the African Commission on the question of ‘peoples’ in article 21 of the ACHPR.⁹⁷⁷ The RTD is a group or peoples’ rights, but no clarification of the concept is given. In fact, on this issue, the African Commission seems to follow the trend set in its precedent where it avoided pronouncing on the right of people to self-determination.⁹⁷⁸ This led Olowu to argue that the African Commission ‘chose to play the ostrich game’ on the issues of ‘peoples’.⁹⁷⁹ In avoiding the concepts of ‘peoples’, the African Commission confused the Niger Delta with ‘Ogoniland’ and failed to investigate whether the ‘Ogoni communities’ could qualify as a specific group to be identified as ‘peoples’⁹⁸⁰ who could be right holders of the RTD. Fortunately, as highlighted earlier, this had been corrected through the *Endorois* decision.

4.5 Concluding remarks

The aim of this chapter was to assess to what extent the RTD is a reality in the African human rights system. It was found that the RTD is enshrined in the African human rights system including national laws.

⁹⁷⁵ D Olowu *An integrative rights-based approach to human development in Africa* (2009) 154.

⁹⁷⁶ D Olowu (2009) 154.

⁹⁷⁷ D Olowu (2009) 155.

⁹⁷⁸ See the *Katangese Peoples’ Congress v Zaire* (2000), AHLR 72 (ACHPR 1995).

⁹⁷⁹ Olowu (2009) 155.

⁹⁸⁰ D Olowu (2009) 155.

The chapter also found that the African Commission was approached with claims pertaining to the RTD in the *Bakweri Land Claims* case, failed to make a clear pronouncement on the right in the *SERAC* case, but could express itself on it through the first ever inter-state communication where the Democratic Republic of the Congo complained against Burundi, Rwanda and Uganda, and more importantly in the *Endorois* case.

Overall, the chapter shows that the RTD is not an alien concept to the African human rights architecture. Having established the existence of the RTD in the African legal framework, the next three chapters of this work will examine to what extent NEPAD/APRM can enhance the achievement of the right on the African continent.